

**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	
August 14, 2015	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 132

**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

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**MOTION RECORD**

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Date: August 14, 2015

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**TAB 1**

**COMPETITION TRIBUNAL**

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**NOTICE OF MOTION**

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**TAKE NOTICE THAT** Rakuten Kobo Inc. ("**Kobo**") will make a motion to the Competition Tribunal ("**Tribunal**") as directed on July 21, 2015 by the Tribunal. Kobo requests that the motion be heard in writing.

**THE MOTION IS FOR:**

1. 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 the June 18, 2015 judgment of the Federal Court of Appeal and, in the event leave is granted, pending the resolution of the appeal;
2. An Order granting Kobo its costs of this motion; and
3. Such further and other relief as this Honourable Tribunal may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

**A. Overview**

4. Kobo is seeking leave from the Supreme Court of Canada ("**SCC**") to appeal a decision of the Federal Court of Appeal ("**FCA**") on a reference ("**Reference**") brought by the Commissioner of Competition ("**Commissioner**"). The Commissioner brought his Reference in the context of Kobo's application pursuant to s. 106(2) of the *Competition Act* ("**Act**") to challenge a consent agreement ("**Consent Agreement**") entered into by the Commissioner and the respondent publishers ("**106(2) Application**").
5. If Kobo's 106(2) Application proceeds without suspension and leave to appeal is granted by the SCC and the SCC in any way alters the interpretation of s. 106(2), the steps taken in the 106(2) Application will have been wasted and may have to be repeated. The costs, time, and judicial resources that Kobo, the Commissioner, the respondent publishers and the Tribunal will have expended will not be recovered in the event any steps need to be repeated.
6. Further, if the 106(2) Application proceeds on the narrow scope of review set out by the Tribunal and Kobo fails to have the Consent Agreement rescinded, Kobo will suffer irreparable harm before the disposition of its appeal to the SCC. The prospect of harm

has been found as a fact based on evidence that was reviewed and accepted by the Tribunal.

7. In contrast, the Commissioner has adduced no evidence of harm to competition or consumers if the 106(2) Application process is suspended and no evidence that his investigation has been hindered by the continued stay of the Consent Agreement or the suspension of the process. In fact, the Commissioner has admitted that the Consent Agreement does not meet the requirements of the Act and that he is prepared to consent to have it rescinded.

## **B. Procedural Background**

8. On February 7, 2014, the Commissioner filed and registered the Consent Agreement with the respondent publishers.
9. On February 21, 2014, Kobo filed the 106(2) Application, seeking to have the Tribunal rescind or vary the Consent Agreement. 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.
10. On March 18, 2014, the Tribunal granted a stay of the implementation of the Consent Agreement pending determination of Kobo's 106(2) Application.
11. On March 27, 2014, the Tribunal released its reasons. The Tribunal found that Kobo would be irreparably harmed by the implementation of the Consent Agreement.
12. 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?".
13. 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, the Reference process was inappropriate. Kobo argued, in part, that the Reference would delay the hearing of the 106(2) Application. The Commissioner called this argument speculative.



14. On May 14, 2014, the Tribunal released scheduling orders and reasons regarding the 106(2) Application and the Reference proceedings. The reasons noted that “the nature of 106(2) proceedings will be informed by the outcome of Kobo’s Motion to Strike and the outcome of the Reference, if it proceeds. In consequence of those decisions, the deadlines set out below may be altered.”
15. 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. On June 10, 2014, the Tribunal dismissed Kobo’s motion to strike the Reference.
17. 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. On September 8, 2014, the Tribunal released its reasons for order and order on the Reference.
19. On September 17, 2014, Kobo filed its Notice of Appeal of the Tribunal’s Reference decision to the Federal Court of Appeal.
20. On November 24, 2014, the Tribunal held a case management conference to discuss the scheduling of the 106(2) Application. 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. Given this development, the case management conference was put over to December 22, 2014.
21. 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. The respondent publishers’ counsel indicated that the publishers did 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.

22. 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*”;
  - (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”; and
  - (c) “If 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”.
23. There was no appeal of the above order.
24. On June 18, 2015, the FCA dismissed Kobo’s appeal of the Reference decision and upheld the September 8, 2014 decision of the Tribunal.
25. On July 7, 2015, Kobo advised the respondents that it intended to seek leave to appeal the decision of the FCA to the SCC (“**Leave Application**”).
26. On July 21, 2015, the Tribunal held a case management conference. The Commissioner’s counsel confirmed that the Commissioner would not consent to the continued suspension of the 106(2) Application proceedings pending determination of Kobo’s Leave Application and, if granted leave, the appeal. The Commissioner’s counsel argued that Kobo should make a formal motion for suspension of the 106(2) Application proceedings. Kobo and the respondent publishers argued that a motion for suspension was unnecessary, in part, because the reasoning from Justice Rennie’s December 22, 2014 order continued to apply with equal force with respect to Kobo’s proposed appeal to the SCC.
27. On July 21, 2015, the Tribunal directed that Kobo bring a motion for the suspension of the 106(2) Application proceedings. A scheduling order was released on July 31, 2015.
28. On August 13, 2015, Kobo filed its Leave Application, over a month prior to its deadline, in an effort to expedite the matter. The Leave Application has yet to be assigned to a leave panel.

**C. The Interests of Justice Favour Suspending the 106(2) Application**

29. It is in the interests of justice to continue the suspension of the s. 106 Application proceedings pending determination of the Leave Application, and, if the Leave Application is successful, pending the determination of Kobo's appeal.

**(i) Kobo's Leave Application Raises Serious Issues**

30. Kobo's Leave Application raises a serious question of public importance: Is a directly affected person restricted under s. 106(2) of the *Competition Act* to only challenging the formalities of a consent agreement?

31. This question is of public importance because if the Reference decision is allowed to stand, directly affected third parties who have been sideswiped by a consent agreement will have no ability to challenge the substance of a consent agreement pursuant to s. 106(2), even where, as here, the consent agreement will cause that third party irreparable harm. The Commissioner's power thus is effectively left unchecked. Not only is this contrary to the intention of Parliament, it will render s. 106(2) purposeless.

**(ii) Leave and Timing**

32. The SCC's decisions on leave applications are rendered approximately three to four months after the leave application is filed; Kobo therefore anticipates the decision on its Leave Application will be released around November 2015. Kobo filed its Leave Application over a month prior to its deadline in an effort to expedite the matter.

**(iii) Judicial Resources and the Parties' Resources**

33. Depending on the resolution of this matter before the SCC, the nature of the 106(2) Application proceedings may change.

34. Kobo, the Commissioner, and the responding publishers will have to expend significant resources to prepare for the 106(2) Application hearing.

35. The May 14, 2014 scheduling order contemplated the pre-hearing steps taking place over a period of nine months. Such steps include, among others, the Commissioner's and publishers' responses to the 106(2) Application; Kobo's reply; motions for leave to intervene; affidavits of documents; motions arising from affidavits of documents and/or

productions and/or in respect of the scope of examinations for discovery; additional productions; examinations for discovery; witness statements and expert reports; and motions related to the evidence.

36. Most (if not all) of the foregoing steps will be necessary, even if the matter proceeds on the interpretation rendered in the Reference. Although that interpretation narrows the scope of the applicable inquiry, the Tribunal specifically stated that Kobo is permitted to pursue part of the factual challenge that it seeks to pursue.
37. If leave to appeal is granted by the SCC and the SCC in any way alters the interpretation of s. 106(2), the foregoing steps will have been wasted and may have to be repeated. Any change in s. 106(2)'s interpretation could alter the pleadings and the relevant issues, which in turn affect the scope of productions and discoveries. The costs, time, and judicial resources that Kobo, the Commissioner, the consenting publishers and the Tribunal will have expended will not be recoverable.

**(iv) Kobo Will Suffer Irreparable Harm if the Consent Agreement is Implemented before the SCC Appeal is Determined**

38. The Tribunal found, in its March 27, 2014 reasons for order that Kobo will suffer irreparable harm if the Consent Agreement is implemented. The Tribunal's finding was based on affidavit evidence from Michael Tamblyn, Kobo's President and Chief Content Officer, who was cross examined on his affidavit, including on the topic of irreparable harm. The evidence included the Commissioner's press release; letters of termination/amendment that Kobo received from respondent publishers following registration of the Consent Agreement; evidence of Kobo's experience in the United States following implementation of settlement agreements there; and Kobo's internal business and financial forecasts.
39. Without the requested suspension, Kobo's 106(2) Application will be determined on the narrow scope of review set out in the Reference decision. It is inevitable that the 106(2) Application hearing would take place before the SCC hearing, if the SCC grants leave.
40. If the 106(2) Application proceeds on the narrow scope of review and Kobo fails to have the Consent Agreement rescinded, the irreparable harm that the Tribunal has found Kobo will suffer will occur before the disposition of its appeal to the SCC. If Kobo is

successful before the SCC, not only would there be a need to revisit the entire 106(2) Application, but also, in the interim, Kobo would have suffered irreparable harm.

**(v) To Date in these Proceedings, the Commissioner Has Adduced No Evidence of Harm to Competition, Consumers, or the Commissioner**

41. The recitals to the Consent Agreement do not state that the Commissioner has concluded that the alleged anticompetitive behaviour he was investigating has resulted in a substantial lessening or prevention of competition. Nor has he identified what the alleged anticompetitive conspiracy was, who was a party to it and what it allegedly contemplated. The Commissioner has adduced no evidence of harm to competition or consumers if the Consent Agreement is varied or rescinded.
42. If leave to appeal is granted by the SCC but the SCC upholds the FCA's decision, or if leave to appeal is not granted by the SCC, the attendant delay will not harm competition, consumers or the Commissioner.
43. The Commissioner has adduced no evidence of harm to competition or consumers if the 106(2) Application process is suspended. In fact, the Commissioner has admitted that the Consent Agreement does not meet the requirements of the Act and that he is prepared to consent to have it rescinded. There can be no harm to competition or consumers in the continued stay of a Consent Agreement that the Commissioner admits is invalid.
44. Further, the Commissioner has adduced no evidence that his investigation has been in any way hindered by the continued stay of the Consent Agreement or that it will be hindered by the requested suspension. To the contrary, the Commissioner's investigation of the E-books industry in Canada has continued apace since the stay was ordered, with the Commissioner obtaining s. 11 orders against several parties, including Kobo, Indigo Books & Music Inc., and Apple Inc.

**(vi) The Balance of Convenience Favours Granting the Suspension**

45. The balance of convenience favours granting a suspension. There is no prejudice to the Commissioner if the suspension is ordered. There can be no urgency in light of the Commissioner's admission that the Consent Agreement is invalid and ought to be rescinded.

46. Having to redo steps in the litigation, including potentially having to re-plead the entire case, risks posing great inconvenience to the six parties to these proceedings.
47. The *Competition Act*, RSC 1985 c C-34, as amended, including section 1.1.
48. The *Competition Tribunal Act*, RSC 1985, c 19 (2<sup>nd</sup> Supp), as amended, including section 9(2).
49. The *Competition Tribunal Rules*, SOR/2008-141, including sections 2(1), 82-88, and 139.
50. The *Federal Court Rules*, SOR/98-106, including rules 372 and 398.
51. Such further and other grounds as counsel may advise and the Tribunal may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:**

1. The Affidavit of Anna Kusmider, sworn August 14, 2015; and
2. Such further evidence as counsel may advise and the Tribunal may permit.

**DATED AT** Toronto this 14th day of August, 2015.



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**TAB 2**

File No. CT-2014-002

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**AFFIDAVIT OF ANNA KUSMIDER**

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**Lawyers for the Applicant**

I, **ANNA KUSMIDER**, of the Town of Oakville in the Province of Ontario, MAKE OATH AND SAY:


1. I am a legal assistant at WeirFoulds LLP, lawyers for the Applicant, Rakuten Kobo Inc. ("**Kobo**"), and as such have knowledge of the matters herein deposed.
2. This affidavit is sworn in support of a motion being brought by Kobo to suspend the proceedings in its application pursuant to s. 106(2) of the Competition Act ("**Act**") pending the determination of Kobo's application for leave to appeal a decision of the Federal Court of Appeal ("**FCA**") to the Supreme Court of Canada ("**SCC**") ("**Leave Application**"). A copy of Kobo's argument filed with its Leave Application on August 13, 2015 is attached hereto as **Exhibit "A"**.
3. On February 7, 2014, the Commissioner of Competition ("**Commissioner**") filed and registered with the Competition Tribunal ("**Tribunal**") a consent agreement entered into with the respondent E-book publishers ("**Consent Agreement**"). A copy of the Consent Agreement is attached hereto as **Exhibit "B"**.
4. On February 21, 2014, Kobo filed an application pursuant to s. 106(2) of the Act, seeking to have the Consent Agreement rescinded or varied ("**106(2) Application**"). A copy of Kobo's notice of application in the 106(2) Application is attached hereto as **Exhibit "C"**.
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 ("**Stay Motion**"). A copy of Kobo's notice of motion dated February 21, 2014 is attached hereto as **Exhibit "D"**.
6. A printout from the Tribunal's Case Details website in this matter is attached hereto as **Exhibit "E"**.
7. A copy of the March 18, 2014 Tribunal order granting a stay of the implementation of the Consent Agreement pending determination of Kobo's 106(2) Application is attached hereto as **Exhibit "F"**.
8. A copy of the Tribunal's March 27, 2014 reasons is attached hereto as **Exhibit "G"**. At paragraphs 25-41, the Tribunal found that Kobo will suffer irreparable harm if the Consent Agreement is implemented. The Tribunal's finding was based on affidavit

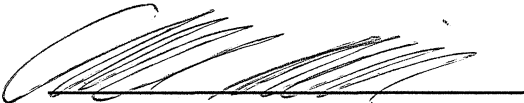
evidence from Michael Tamblyn, Kobo's Chief Content Officer (now President and Chief Content Officer). Mr. Tamblyn was cross-examined on his affidavit (see para. 34). The evidence included the Commissioner's press release; letters of termination/amendment that Kobo received from two of the respondent publishers following registration of the Consent Agreement; evidence of Kobo's experience in the United States following implementation of settlement agreements there; and Kobo's internal business and financial forecasts.

9. On April 15, 2014, the Commissioner brought a reference to the Tribunal, 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?" ("**Reference**"). A copy of the Commissioner's notice of Reference is attached hereto as **Exhibit "H"**.
10. On April 29, 2014, Kobo brought a motion to strike the notice of Reference, on the grounds that the Reference question was inappropriate (at paras. 4-11) and, in the circumstances, the Reference process was inappropriate (at paras. 12-19). A copy of Kobo's notice of motion to strike the notice of Reference is attached hereto as **Exhibit "I"**.
11. A copy of the Commissioner's response to Kobo's motion to strike the notice of Reference is attached hereto as **Exhibit "J"**. The Commissioner stated at paragraph 20 that Kobo's claim that the Reference would delay the 106(2) Application was "speculative".
12. A copy of the Tribunal's May 14, 2014 scheduling order regarding the 106(2) Application is attached hereto as **Exhibit "K"**.
13. A copy of the Tribunal's May 14, 2014 scheduling order regarding the Reference is attached hereto as **Exhibit "L"**.
14. A copy of the Tribunal's August 20, 2014 direction providing that the deadlines established in the scheduling order of May 14, 2014 were suspended is attached hereto as **Exhibit "M"**.

15. A copy of the Tribunal's September 8, 2014 reasons for order and order on the Reference is attached hereto as **Exhibit "N"**.
16. A copy of Kobo's September 17, 2014 Notice of Appeal of the Tribunal's Reference decision to the FCA is attached hereto as **Exhibit "O"**.
17. A copy of the transcript of a November 24, 2014 case management conference is attached hereto as **Exhibit "P"**. At page 5, John Syme states that the Commissioner is prepared to consent to the relief sought in Kobo's 106(2) Application.
18. A copy of an e-mail dated December 19, 2014 from John Syme to the Tribunal, Kobo, and the respondents, indicating that the Commissioner is prepared to consent to rescission of the Consent Agreement, is attached hereto as **Exhibit "Q"**.
19. A copy of the transcript of a December 22, 2014 case management conference is attached hereto as **Exhibit "R"**. At pages 5-7, John Syme indicates that the Commissioner is prepared to consent to the rescission of the Consent Agreement, and that the Commissioner's counsel believes rescission of the Consent Agreement is inevitable.
20. A copy of the Tribunal's December 22, 2014 order continuing the suspension of the 106(2) Application proceedings pending the determination by the FCA of Kobo's appeal is attached hereto as **Exhibit "S"**.
21. A copy of the FCA's June 18, 2015 judgment and reasons dismissing Kobo's appeal of the Reference decision and upholding the September 8, 2014 decision of the Tribunal is attached hereto as **Exhibit "T"**.
22. A copy of a letter from Nikiforos Iatrou to the Tribunal Registrar and the Respondents dated July 7, 2015, advising the Respondents that Kobo intended to seek leave to appeal the decision of the FCA to the Supreme Court of Canada ("**SCC**") ("**Leave Application**") is attached hereto as **Exhibit "U"**.
23. A copy of the transcript of a case management conference held on July 21, 2015 is attached hereto as **Exhibit "V"**.

**SWORN before me** at the City of Toronto this 14th day of August, 2015.

  
Commissioner for Taking Affidavits

  
(Signature of Deponent)

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**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

- 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

---

**AFFIDAVIT OF ANNA KUSMIDER**

---

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**TAB A**

This is **Exhibit "A"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

File No.

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

B E T W E E N:

**RAKUTEN KOBO INC.**

Applicant  
(Appellant)

- 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  
(Respondents)

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## PART I ~ STATEMENT OF FACTS

### OVERVIEW

1. This case raises for the first time the scope of the right under s. 106(2) of the *Competition Act* (“**Act**”)<sup>1</sup> of a “person directly affected” to challenge a consent agreement because its terms “could not be the subject of an order of the Tribunal.”
2. The Commissioner of Competition (“**Commissioner**”) who proposed s. 106(2) to Parliament said the subsection was meant to protect directly affected third parties who were “sideswiped” by a consent agreement. In this case, Rakuten Kobo Inc. (“**Kobo**”) has not only been sideswiped, the Competition Tribunal (“**Tribunal**”) has issued an interim stay of the implementation of the consent agreement, finding as a fact that Kobo will be irreparably harmed if the consent agreement is implemented.
3. Registration of consent agreements under s. 105 of the Act is automatic upon filing. Once registered, a consent agreement has all the force of a court order, no matter whom it affects. Section 106(2) is the only protection the Act affords as a check on the Commissioner’s significant power to enter into such consent agreements (“**s. 106(2) Protection**”).
4. The decisions below nullify the s. 106(2) Protection. They create a purely formalistic review process that the Commissioner can circumvent with some careful drafting. Parliament did not intend to enact a protection that could be sidestepped so

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<sup>1</sup> *Competition Act*, R.S.C., 1985, c. C-34 [**Act**].

easily. It intended to confer a meaningful right on directly affected third parties. The decisions below fail to give effect to this intention.

5. The Commissioner has called the Tribunal's decision "important" and "a significant development".<sup>2</sup> This appeal raises an issue of public importance because s. 106(2) applies to consent agreements entered into in a host of circumstances, including mergers, abuses of dominance, refusals to deal and civil conspiracies. The interpretation below has generated significant commentary from the competition bar, with some commentators saying that it provides a "roadmap for the Commissioner in drafting consent agreements", while others note that the decision leaves room for Kobo (and by extension future directly affected third parties) to prevail only on "technicalities".

6. Other members of the bar have written that Parliament, in enacting s. 106(2), meant to confer a meaningful right for directly affected third parties, allowing them to challenge the factual underpinnings and substantive effect of consent agreements. Kobo agrees. It is a matter of public importance to ensure that the s. 106(2) Protection not be interpreted in a way that allows the Tribunal to consider only technicalities or mere formalities.

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<sup>2</sup> John Pecman, "The Competition Bureau: A Year of Internal Reform and Accomplishments" (Remarks delivered at the 2015 Competition Law Spring Forum, Toronto, 9 June 2015), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03956.html>>, Tab 18; John Pecman (Remarks delivered at the CBA Competition Law Fall Conference, Ottawa Convention Centre, 18 September 2014), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03815.html>>, Tab 19.

## FACTS

### ***Background***

7. In the decisions below,<sup>3</sup> the Federal Court of Appeal upheld the Tribunal on a Reference brought by the Commissioner under s. 124.2(2) of the Act. The Reference was brought in the course of an application by Kobo, under s. 106(2) of the Act, to have a consent agreement entered into by the Respondents varied or rescinded.

### ***The Consent Agreement Process***

8. Canada's competition law consists of a bifurcated model with separate statutory bodies for enforcement and adjudication: the Competition Bureau ("**Bureau**"), headed by the Commissioner, and the Tribunal, respectively. The Commissioner has broad powers under the Act.<sup>4</sup>

9. The Commissioner may settle cases with parties he is investigating by entering into "consent agreements" that are registered with the Tribunal. Consent agreements are a possibility in relation to all reviewable practices and mergers, and can therefore impact a wide variety of civil conduct contemplated by the Act.

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<sup>3</sup> *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 14, [Tab 3 \[Reference Decision\]](#); *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2015 FCA 149, [Tab 4 \[FCA\]](#).

<sup>4</sup> Recent changes to Canada's competition landscape, both procedural and substantive, have increased the Commissioner's powers. The Commissioner is responsible for the administration and enforcement of the Act, which includes criminal and civil provisions aimed at preventing a wide range of anti-competitive practices in the marketplace. The key provisions of the Act relate to ensuring truth in advertising, investigating conspiracies, preventing abuse of market power and reviewing mergers. The Commissioner's broad powers extend to every industry in Canada. He can cause an inquiry to be made "into all such matters as the Commissioner considers necessary to inquire into with the view of determining facts." It is the Commissioner who decides which sections of the Act should be the basis of the inquiry, the overall scope of the inquiry, what enforcement proceedings should occur as a result of the inquiry and, to an increasing extent, the terms of resolution, if any, that may be required at the conclusion of the inquiry. New amendments were made to the Act in 2009 to, among other things, increase penalties for anti-competitive conduct and grant new tools of investigation and enforcement to the Commissioner. Since then, the Commissioner has significantly increased enforcement activity.

10. The Tribunal does not scrutinize the registration of consent agreements. It has no power to refuse an initial filing of a consent agreement, even if such an agreement is clearly baseless or beyond the Commissioner's purview. The registration process is governed by s. 105 of the Act:

**Consent agreement**

**105.** (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.

**Terms of consent agreement**

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

**Registration**

(3) The consent agreement may be filed with the Tribunal for immediate registration.

**Effect of registration**

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

11. A consent agreement, once registered with the Tribunal, therefore immediately acquires the force of law. Absent a s. 106(2) challenge, the Commissioner thus becomes enforcer and adjudicator: he investigates, negotiates, and decides what remedies he is willing to accept from parties seeking to avoid litigating against him. As is discussed below, this is problematic when his consent agreements harm third parties. While such harm may be tolerable where there exists a basis for the consent agreement, the harm is unacceptable where there is no such basis. Section 106(2) was enacted to protect against the latter scenario.

12. The s. 106(2) Protection is meant to ensure that consent agreements are not based on terms that "could not be the subject of an order of the Tribunal". Other than

s. 106(1), which allows a *party* to the consent agreement to later seek rescission or variation if the circumstances that led to the consent agreement have changed, s. 106(2) stands as the sole avenue for a consent agreement to be subjected to any form of Tribunal scrutiny. It permits *third parties*, if they are directly affected by a consent agreement, to apply to the Tribunal for its variation or rescission:

**Directly affected persons**

106(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement 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.

13. At issue in the decisions below was the meaning of the concluding words of this section: “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.” This is a case of first impression, as these words had not been interpreted prior to this case.

***Kobo’s s. 106(2) Application***

14. In February 2014, the Commissioner and a number of E-book publishers (Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital Inc., HarperCollins Canada Limited, Holtzbrinck Publishers, LLC and Simon & Schuster Canada, A Division of CBS Canada Holdings Co.; collectively, the “**Consenting Publishers**”) entered into a consent agreement (the “**Consent Agreement**”). Soon thereafter, Kobo, an E-book retailer who was not a party to the Consent Agreement, brought an application pursuant to s. 106(2) to rescind or vary the Consent Agreement.<sup>5</sup>

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<sup>5</sup> Notice of Application of Kobo Inc. (Public Version) (filed 21 February 2014), Tab 6.

15. In its application, Kobo alleges: **(1)** that the Consent Agreement was deficient on its face in that it failed to identify the parties to any alleged conspiracy or any specific violations of the Act; and **(2)** that there had been no violation of the Act by the Consenting Publishers at all, a fact that Kobo seeks to prove with evidence it has in its possession and that it cited in its stay application material, described below.

### ***Kobo's Successful Stay Application***

16. Kobo sought a stay of the implementation of the Consent Agreement pending the determination of its s. 106(2) application. It adduced evidence of irreparable harm and evidence showing why there was no violation of the Act. The Tribunal granted Kobo's request. It concluded that Kobo had raised a serious issue to be tried, that Kobo would be irreparably harmed if the Consent Agreement were implemented, and that the balance of convenience favoured Kobo. The Tribunal noted Kobo's position that the Consent Agreement has no financial impact on the Consenting Publishers, the ostensible wrongdoers, but imposes significant financial consequences on Kobo, a third party that had no role in the negotiation of the Consent Agreement.<sup>6</sup> The Commissioner did not appeal the Tribunal's stay decision.

### ***The Commissioner Brings a Reference***

17. Following the issuance of the stay, but before filing his response to Kobo's s. 106(2) application, the Commissioner brought a Reference to the Tribunal pursuant to s. 124.2(2) of the Act, requesting an answer to the following question:

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<sup>6</sup> *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 2, Tab 7 at paras. 16-18, 23-29, 35, 39, 40-41, 48-49 [**Stay Decision**].

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?<sup>7</sup>

18. The Commissioner argued for what amounts to a surface-level review of consent agreements: if the operative terms of the consent agreement are of the *type* that the Tribunal could order, then it meets the Act's requirements.<sup>8</sup>

19. In contrast, Kobo argued that in a s. 106(2) application, the Tribunal is not limited to reviewing a consent agreement to ensure it meets basic formalities.<sup>9</sup> Rather, the Tribunal may also consider facts and evidence regarding the alleged violations of the Act that the consent agreement is meant to address, in order to ensure that there is a basis for a consent agreement that harms a third party.<sup>10</sup>

20. For example, if the consent agreement alleges a conspiracy amongst competitors, the Tribunal may receive evidence about whom the conspiracy was between, what they were alleged to have agreed to, and facts proving or disproving the existence of a conspiracy. In Kobo's view, if there is no conspiracy, there is no basis for a consent agreement. The Commissioner argued that so long as the consent agreement alleges a conspiracy, there could be no review of facts underpinning the consent agreement.<sup>11</sup>

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<sup>7</sup> Notice of Reference of the Commissioner of Competition (filed 15 April 2014), Tab 9 at p. 2.

<sup>8</sup> Reference Decision, *supra* note 3, Tab 3 at paras. 23-25 (Reasons).

<sup>9</sup> *Ibid*, Tab 3 at paras. 26-28 (Reasons).

<sup>10</sup> Kobo agrees that a review of a consent agreement's basic formalities is also a legitimate line of attack. Since the release of the Reference Decision, the Commissioner has conceded that the Consent Agreement will not survive even this formalistic review, and as such he has stated that he is willing to consent to Kobo's request for rescission. The Consenting Publishers, however, are not prepared to agree to this. See e.g., Transcript of Case Management Conference before The Honourable Mr. Justice Donald J. Rennie (22 December 2014), Comp. Trib. 2014-002, Tab 10 at pp. 5-7, 9-10 [CMC Transcript].

<sup>11</sup> Reference Decision, *supra* note 3, Tab 3 at para. 24.



### ***The Tribunal's Reference Decision***

21. For the most part, the Tribunal sided with the Commissioner. Its order (the “**Reference Decision**”) answered the second part of the Reference question – 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? – as follows:

[2] The words of subsection 106 quoted immediately above [“the terms could not be the subject of an order of the Tribunal”] mean “terms that are not within the scope of the type of order(s) that the Tribunal has the jurisdiction to make against the person described in subsection 105(1) of the Act, pursuant to the provisions of the reviewable trade practice(s) in the Act that are referenced in the consent agreement.”<sup>12</sup>

22. In its Order, the Tribunal answered the first part of the Reference question – What is the nature and scope of the Tribunal’s jurisdiction under subsection 106(2)? – as follows:

[3] In addition to assessing whether the terms of a consent agreement could not be the subject of an order of the Tribunal, as described above, the Tribunal may assess whether the consent agreement (a) identifies each of the substantive elements of the reviewable trade practice in question; and (b) contains either (i) an explicit agreement between the Commissioner and the respondent(s) 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 respondent(s) that they do not contest that conclusion.

[4] The Tribunal may also assess whether one or more of the terms of a consent agreement are unenforceable or would lead to no enforceable obligation, for example, because they are too vague.

[5] The Tribunal may vary or set aside a consent agreement where it makes an affirmative determination with respect to the matters described in paragraphs 2 and 4 of this Order, or a negative determination in respect of a matter described in paragraph 3 of this Order.

[6] For greater certainty, the scope of the Tribunal’s jurisdiction under subsection 106(2) does not extend to beyond what is described above, to assessing whether one or more of the substantive elements of a reviewable

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<sup>12</sup> *Ibid.*, Tab 3 at para. 2 (Order).

trade practice have in fact been met, or that a defence or exception set forth in the Act is applicable.<sup>13</sup>

23. In reasons that accompanied the above orders, the Tribunal applied its answer to the Reference question to Kobo's s. 106(2) application:

[5] Accordingly, in these proceedings, it is open to Kobo Inc. ("Kobo") to attempt to establish (i) that one or more of the terms of the consent agreement that is the subject of this proceeding are not within the scope of the type of order(s) that the Tribunal is permitted to issue pursuant to section 90.1 of the Act; (ii) that one or both of the conditions described in paragraph 3(ii)(a) and (b) above have not been satisfied; and/or (iii) that one or more of the terms of the consent agreement is unenforceable or would establish no enforceable obligation, for example because they are vague or ambiguous. If Kobo wishes to adduce factual evidence to establish any of these things, it may do so.

[6] However, it is not open to Kobo to attempt to establish, whether by factual evidence or otherwise, that one or more of the substantive elements set forth in section 90.1 of the Act are not met, including whether there is an agreement or arrangement – whether existing or proposed – between persons two or more of whom are competitors. Disputes with respect to these and other substantive elements, such as whether an agreement is likely to prevent or lessen competition substantially, are beyond the scope of subsection 106(2).<sup>14</sup>

24. In other words, the Tribunal held that Kobo could seek to have the Consent Agreement varied or rescinded on the basis of any deficiencies that are apparent on the face of the Consent Agreement, including its recitals.<sup>15</sup> However, Kobo could not pursue its argument that, because there exists no factual basis for the Consent Agreement, the Commissioner exceeded his jurisdiction in entering into the Consent Agreement.

25. The Federal Court of Appeal dismissed Kobo's appeal, largely for the same reasons as those of the Tribunal.<sup>16</sup>

<sup>13</sup> *Ibid.*, Tab 3 at paras. 3-6 (Order).

<sup>14</sup> *Ibid.*, Tab 3 at paras. 5-6 (Reasons).

<sup>15</sup> *Ibid.*, Tab 3 at paras. 91-92 (Reasons).

<sup>16</sup> FCA, *supra* note 3, Tab 4.

## PART II ~ QUESTION IN ISSUE

26. This case raises the following question of public importance: Is a directly affected person restricted under s. 106(2) of the *Competition Act* to only challenging the formalities of a consent agreement?

27. This question is of public importance. If the decisions below are allowed to stand, directly affected third parties who have been sideswiped by a consent agreement will have no ability to challenge the substance of a consent agreement pursuant to s. 106(2), even where, as here, the consent agreement will cause that third party irreparable harm. The Commissioner's power is effectively left unchecked. Not only is this contrary to the intention of Parliament, it will render s. 106(2) purposeless. If the Court does not intervene in this case, it will not have the opportunity to do so in the future because any incentives for future s. 106(2) applications will vanish.

## PART III ~ ARGUMENT

**Summary:** This case will determine whether s. 106(2) of the *Competition Act* confers a meaningful right to directly affected third parties to challenge a consent agreement, or whether s. 106(2) only permits a surface-level review.

28. The interpretation arrived at in the hearings below is overly formalistic. It allows no avenue to correct abuse of power or obvious error. Even where the facts would definitively show that the Commissioner had no basis to enter into a consent agreement, so long as the consent agreement and its recitals are carefully drafted, it will be immune from review under the Act.

29. The Tribunal accepted that the words of s. 106(2) were ambiguous,<sup>17</sup> but failed to apply properly the tenets of purposive analysis in order to resolve that ambiguity.

30. The modern principle of statutory interpretation emphasizes the importance of purposive analysis in statutory interpretation. *Sullivan on the Construction of Statutes* articulates the following three propositions of the purposive analysis:

- (1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
- (2) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning.
- (3) Insofar as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.<sup>18</sup>

31. The Tribunal and the Federal Court of Appeal analyzed the Reference question through the lens of the purpose of the Act *generally* and the purpose of the consent agreement process *as a whole*. Kobo agrees that those are important considerations. What the Tribunal and Federal Court of Appeal failed to do adequately, however, is consider the purpose of the *specific subsection* they were interpreting, s. 106(2), to determine how that subsection's purpose (referred to by Professor Sullivan as the "secondary purpose") qualified the purpose of the overall amendments.<sup>19</sup> As Professor Sullivan writes, purposive analysis "ensures that the legislature's purposes –

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<sup>17</sup> Reference Decision, *supra* note 3, Tab 3 at para. 121 (Reasons).

<sup>18</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis Canada, 2014), Tab 20 at p. 259.

<sup>19</sup> *Ibid.*, Tab 20 at p. 271.

including both the purpose of the Act as a whole and the purpose of the particular provision to be interpreted – are identified and taken into account in every case.”<sup>20</sup>

***Section 106(2) was Enacted when the Consent Agreement Regime was Overhauled in 2002***

32. The current consent agreement process dates back to 2001/2002. The settlement regime prior to these amendments required the Commissioner and private parties to obtain the approval of the Tribunal before a settlement could become an order. The onus at these hearings was on the Commissioner, who had to show that the proposed remedy would be effective.<sup>21</sup>

33. That consent order process caused delay and uncertainty. Parties had to file settlement documents with the Tribunal, wait for a notice to be published requesting comments and interventions, then proceed to a hearing. There was no way to predict the nature and substance of the comments and/or interventions that would be filed. The hearing would not be scheduled until after the periods for filing comments or intervention applications had expired, and there was uncertainty as to whether the Tribunal would grant the requested order, as it had the power to refuse to do so.<sup>22</sup>

34. The process was amended in 2001/2002 to address these concerns. The new process no longer required a hearing. A consent agreement, once registered with the Tribunal, was to automatically take effect. There was no requirement to publish

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<sup>20</sup> *Ibid.*, Tab 20 at p. 259 [emphasis added].

<sup>21</sup> See e.g., *Canada (Commissioner of Competition) v. Ultramar Ltd.*, [2000] CCTD No. 4 at paras. 30-33 (Comp. Trib.), Tab 11.

<sup>22</sup> See e.g., Mark J. Nicholson, Chris Hersh & Yana Ermak, “Challenges to Consent Agreements After Burns Lake” (Fall 2006) Can. Comp. Rec. 102, Tab 16 at pp. 105-106.

advance notice. Third parties had no right to make written submissions in advance of registration. The Tribunal's adjudicative role was removed.<sup>23</sup>

35. The amendments were proposed in Bill C-23. As originally proposed, Bill C-23 contemplated no role at all for third parties, whether before or after registration.<sup>24</sup> At Parliamentary hearings into Bill C-23, several witnesses testified that the proposed changes went too far and concentrated too much power in the hands of the Commissioner by entirely eliminating any role for third parties and the Tribunal.<sup>25</sup>

36. In response to these witnesses' concerns,<sup>26</sup> the Commissioner proposed two important amendments to Bill C-23. The first amended s. 105(2), which, as originally proposed, would permit a consent agreement to include terms "whether or not they could be imposed by the Tribunal." This was changed to the current language, which requires that consent agreements be based on terms that could be the subject of an order of the Tribunal. The second amendment was the creation and ultimate adoption of s. 106(2), in the same form as it exists today.<sup>27</sup>

37. The then-Commissioner made the following statement when explaining the rationale of the newly-proposed s. 106(2):

We are suggesting the consent decree, which would be something the commissioner agreed with the respondent. But it has to be something that

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<sup>23</sup> *Ibid.*, Tab 16 at pp. 105-107.

<sup>24</sup> Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 37th Parl., 2001 (first reading 4 April 2001), Tab 12.

<sup>25</sup> *House of Commons Debates (Standing Committee on Industry, Science and Technology)*, 37th Parl., 1st Sess., No. 38 (16 October 2001), Tab 14A at 0930 (Mr. George N. Addy); No. 41 (23 October 2001), Tab 14B at 0930 (Professor Thomas W. Ross); No. 48 (6 November 2001), Tab 14C at 0910 (Mr. Stanley Wong & Professor Michael J. Trebilcock) [**Debates**].

<sup>26</sup> Reference Decision, *supra* note 3, Tab 3 at paras. 55-56.

<sup>27</sup> Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 37th Parl., 2001 (as passed by the House of Commons 10 December 2001)

is within the four corners of the tribunal's authority. [...] Now if it affects a third party and somebody gets sideswiped by it whom we didn't think of – [...] that third party should have in our view a right to have a term rescinded of right, if we did something the tribunal couldn't have done.<sup>28</sup>

38. He also stated:

Basically, the commissioner can make a consent agreement with any party as long as it's consistent with the act. Anybody directly affected by that agreement who feels it's inconsistent with the act has 60 days to go to the tribunal and challenge the consent agreement.<sup>29</sup>

39. The then-Commissioner also agreed, in response to a question at committee, that s. 106(2) was meant to protect the "little guy" from the consent agreement process, if he could prove that he was affected by the consent agreement and that what the Commissioner did was outside the Act:

**Mr. Konrad von Finckenstein:** We start an action against the company. The company comes to us and says, why don't we settle this? We make a consent agreement, we draft it, we register it, and it becomes a judgment of the court. If somebody else is directly affected by that and says that we shouldn't have done it, that this was something the tribunal couldn't impose, they have 60 days to go to the tribunal to challenge the agreement.

**Mr. Chuck Strahl:** If you use the current sexy issue, which is airlines, let's suppose there were some sort of interim agreement agreed to between two parties, but somehow we'd forgotten to think of some little guy who's flying to Victoria from Abbotsford. If he feels that it's somehow compromising his future and contravenes the act, then could he apply under this grace period here, the 60-day period?

**Mr. Konrad von Finckenstein:** If he could prove that he's likely affected by it and that what we did was outside the act, yes indeed, he could do it.<sup>30</sup>

40. The purpose of enacting s. 106(2) was therefore to provide real protection to parties who were directly and adversely affected by a consent agreement. The then-

<sup>28</sup> *Debates, supra* note 25, No. 50 (7 November 2001), Tab 14D at 1720 (Konrad von Finckenstein).

<sup>29</sup> *Ibid.*, No. 60 (4 December 2001), Tab 14E at 1655 (Konrad von Finckenstein).

<sup>30</sup> *Ibid.*, No. 50 (7 November 2001), Tab 14D at 1720 (Konrad von Finckenstein).

Commissioner contemplated that this process could result in a contest of proof, allowing a party to show how it was sideswiped by the consent agreement and how the Commissioner was acting outside the scope of the Act.

41. This is precisely the situation that Kobo finds itself in, but rather than be permitted to advance evidence showing that the Commissioner has acted outside his authority, Kobo is being relegated to advancing only arguments about the wording of the Consent Agreement, not arguments of substance. As the Reference Decision states, “it is not open to Kobo to attempt to establish ... that one or more of the substantive elements set forth in section 90.1 of the Act are not met, including whether there is an agreement or arrangement ... between ... competitors.”<sup>31</sup>

42. In an article published in the *Canadian Competition Record* in 2006, Mark Nicholson, Chris Hersh and Yana Ermak anticipated the very issue that has arisen in this Reference. They address the argument that interpreting s. 106(2) in a way that allows third parties to challenge the substance of a consent agreement will defeat the overall goal of streamlining the settlement process. The authors reject this argument for three principal reasons, paraphrased as follows:

1. The vast majority of consent agreements will go unchallenged. The Bureau and parties to a consent agreement usually consult and engage with directly affected third parties so that their concerns are addressed prior to the registration of the consent agreement.
2. There are huge disincentives to challenging the substance of a consent agreement, including the high standard a third party must meet, the expense and time required to bring an application, and the potential liability for costs to the

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<sup>31</sup> Reference Decision, *supra* note 3, Tab 3 at para. 6 (Reasons).



Commissioner and the parties to the consent agreement if the third party is unsuccessful.

3. Because of the realities of the business environment, potential applicants will be unlikely to want to jeopardize their business relationships by challenging a consent agreement. Applications will likely be reserved only for those cases where third parties truly believe that the consent agreement raises serious issues.<sup>32</sup>

43. Kobo endorses the authors' assessment. Interpreting s. 106(2) in a manner that allows third parties to meaningfully challenge a consent agreement will not defeat the purpose of the amendments and open the floodgates to third-party challenges. Those third parties must meet a very high threshold test for standing to demonstrate they are "directly affected",<sup>33</sup> must embark on a time-consuming and expensive process within 60 days of registration, bear the onus of establishing the case on a balance of probabilities, and risk business relationships and having to pay costs.

44. The above disincentives were all built into the settlement process and will keep the number of challenges in check. But where a party is so harmed by what it sees as an invalid use of the Commissioner's powers, that party ought to be able to advance properly its case and not be limited to surface-level, formalistic arguments.

45. At the very least, s. 106(2) must allow the Tribunal to determine whether there is any factual basis for the consent agreement. Determining whether a consent agreement is "based on terms that could be the subject of an order" requires determining whether there is any basis in fact for the consent agreement. The interpretation arrived at below does not allow for even that minimal level of review.

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<sup>32</sup> Nicholson, Hersh & Ermak, *supra* note 22, Tab 16 at pp. 109-10.

<sup>33</sup> *Ibid.*, Tab 16 at p. 104.

46. The error in the decisions below was to over-emphasize the purpose of related sections at the expense of the purpose of s. 106(2) itself. Kobo agrees that the goal of the new settlement regime was to streamline matters. But the goal of s. 106(2) in particular was to ensure that in streamlining the process, the Commissioner could not act beyond his statutory authority. The decisions below give effect to the first goal, but not the second, contrary to the tenets of purposive analysis.<sup>34</sup> In so doing, they defeat Parliament's intention and the then-Commissioner's stated rationale for proposing the s. 106(2) Protection.

47. Rather than protecting third parties, the Reference Decision has the potential to create incentives for parties to settle with the Commissioner if, in so doing, they arrive at a resolution that does not harm them but harms other participants in the market.

48. Parliament did not intend to insulate consent agreements from review by the insertion of a few simple words into recitals.<sup>35</sup> For example, in the Consent Agreement at issue, the Commissioner only "alleges" a violation of s. 90.1 of the Act. The Tribunal's interpretation would suggest this is inadequate, but that the Commissioner need do no more than change the word to "conclude" there was a violation. This is too formalistic; if a directly affected third party can prove there was no violation, it should not matter what word the Commissioner used in the recitals of the Consent Agreement. A simple word

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<sup>34</sup> Sullivan, *supra* note 18, Tab 20 at p. 271.

<sup>35</sup> Nicholson, Hersh & Ermak, *supra* note 22, Tab 16 at p. 108.

change should not validate an otherwise invalid use of the Commissioner's consent agreement power.

49. If a third party is prevented from proving that the elements of the reviewable practice have not been established, or at a minimum, that there is an absence of at least some basis for the consent agreement, then s. 106(2) affords no meaningful protection.

As Nicholson, Hersh and Ermak state:

By limiting the scope of challenges to jurisdictional matters ... the Commissioner essentially would, for all practical purposes, eliminate third party challenges to consent agreements. ...[I]t is reasonable to assume that Parliament's intention was to confer a new right. In this context, the right to challenge is only meaningful if it includes the ability to challenge both the factual underpinnings and substantive effect of consent agreements.<sup>36</sup>

***Only Opportunity for Section 106(2) to be Interpreted***

50. This is the first time the substantive scope of s. 106(2) has been determined. The issue of the limits on the Commissioner's power will not be raised again if the decisions below are allowed to stand. The narrow grounds of challenge available to a third party would not justify future s. 106(2) applications.

51. The Commissioner has acknowledged that the Consent Agreement does not even meet the low threshold required by the decisions below. In his view, it is inevitable that it will be rescinded.<sup>37</sup> Once rescinded, it may be open to him to obtain a new consent agreement that meets the formalistic criteria of the decisions below, effectively inoculating it (and every other consent agreement after it) from s. 106(2)

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<sup>36</sup> *Ibid.*, Tab 16 at p. 109.

<sup>37</sup> CMC Transcript, *supra* note 10, Tab 10 at p. 7.

review. As McMillian LLP's Competition Bulletin put it, the Tribunal's interpretation provides a "roadmap for the Commissioner in drafting consent agreements."<sup>38</sup> Blakes' Bulletin states that the "Tribunal has given significant deference to the Commissioner."<sup>39</sup> As long as the Commissioner follows the mechanical exercise of drafting with an eye to the formalities, his consent agreements will be forever immune from Tribunal oversight.

### ***The Consequences for Kobo and Similarly-Situated Parties***

52. The ramifications of the Tribunal and Federal Court of Appeal's decisions are not theoretical – they have significant consequences for Kobo in this case.

53. The Tribunal has found, in the Stay Decision, that Kobo will suffer irreparable harm if the Consent Agreement is implemented.<sup>40</sup> The Commissioner did not appeal. The Consent Agreement has financial consequences for Kobo, a directly affected third party, but none for the Consenting Publishers, the supposed targets.

54. As still another competition update put it:

The [Tribunal] decision is fatal to Kobo's main contention, which is that there was in fact no agreement between the ebook publishers. This attacks the factual basis underlying the consent agreement, which the Tribunal has now said Kobo cannot do.

...

However, because the decision clarifies the formal requirements for consent agreements, Kobo could succeed on its contention that the Commissioner did not allege or identify the existence of an agreement between competitors...

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<sup>38</sup> Martin G. Masse & Joshua Chad, "Reading Between the Lines: Kobo's Challenge to the E-Books Consent Agreement" (October 2014), *McMillan*, online: <<http://www.mcmillan.ca/Reading-Between-The-Lines-Kobos-Challenge-to-the-E-Books-Consent-Agreement>>, Tab 17.

<sup>39</sup> Blakes LLP, "Competition Bureau Outlines International Merger Priorities and Tribunal Clarifies Third-Party Challenge Rights" (12 September 2014), online: <<http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=2000>>, Tab 15.

<sup>40</sup> Stay Decision, *supra* note 6, Tab 7 at paras. 35, 39-40.

...

The Tribunal held that consent agreements must identify the substantive elements of the relevant provision of the Competition Act. The recitals to the consent agreement...[are missing] one of the required elements under section 90.1, namely that the agreement or arrangement be between competitors.

...

If Kobo wins based on this technicality, however, it is unlikely to achieve more than a pyrrhic victory. If the consent agreement is vacated on this ground, the Commissioner and the ebooks publishers will presumably enter into a new one that contains the required recitals.<sup>41</sup>

55. The foregoing illustrates the importance of correcting the interpretations below. If a s. 106(2) victory is pyrrhic and can be nullified with wordsmithing, it is clear that the s. 106(2) Protection affords third parties no protection at all.

#### **PART IV ~ SUBMISSIONS RESPECTING COSTS**

56. The Applicant submits that costs throughout should follow the event.

#### **PART V ~ ORDER SOUGHT**

57. The Applicant respectfully requests an Order granting leave to appeal from the judgment of the Federal Court of Appeal dated June 18, 2015, with costs.

#### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at the City of Toronto in the Province of Ontario, this 13th day of August 2015.

**SIGNED BY:**

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Nikiforos Iatrou

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<sup>41</sup> W. Michael G. Osborne, "Third Parties Cannot Challenge Merits of Competition Settlements" (25 September 2014), *The Litigator*, online: <<http://www.thelitigator.ca/2014/09/third-parties-cannot-challenge-merits-of-competition-settlements/>>, Tab 21.

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## PART VI ~ TABLE OF AUTHORITIES

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D. No. 50 (7 November 2001) (Mr. Konrad von Finckenstein). paras. 37, 39

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## PART VII ~ STATUTES

### Statutes Relevant to Judgment

#### **Competition Act, R.S.C., 1985, c. C-34**

##### **Purpose of Act**

**1.1** The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

##### ***Agreements or Arrangements that Prevent or Lessen Competition Substantially***

##### **Order**

**90.1** (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

(a) prohibiting any person — whether or not a party to the agreement or

##### **Objet**

**1.1** La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

##### ***Accords ou arrangements empêchant ou diminuant sensiblement la concurrence***

##### **Ordonnance**

**90.1** (1) Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :

a) interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout acte au titre de l'accord ou de l'arrangement;

arrangement — from doing anything under the agreement or arrangement; or

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

### **Factors to be considered**

(2) In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;

(b) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;

(c) any barriers to entry into the market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry;

(d) any effect of the agreement or arrangement on the barriers referred to in paragraph (c);

(e) the extent to which effective competition remains or would remain in the market;

(f) any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or

b) enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

### **Facteurs à considérer**

(2) Pour décider s'il arrive à la conclusion visée au paragraphe (1), le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties à l'accord ou à l'arrangement;

b) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties à l'accord ou à l'arrangement;

c) les entraves à l'accès à ce marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès;

d) les effets de l'accord ou de l'arrangement sur les entraves visées à l'alinéa c);

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans ce marché;

f) le fait que l'accord ou l'arrangement a entraîné la disparition d'un concurrent dynamique et efficace ou qu'il entraînera ou pourrait entraîner une telle disparition;

g) la nature et la portée des changements et des innovations dans tout marché pertinent;

arrangement will or would result in the removal of such a competitor;

(g) the nature and extent of change and innovation in any relevant market; and

(h) any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

### **Evidence**

(3) For the purpose of subsections (1) and (2), the Tribunal shall not make the finding solely on the basis of evidence of concentration or market share.

### **Exception where gains in efficiency**

(4) The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

### **Restriction**

(5) For the purposes of subsection (4), the Tribunal shall not find that the agreement or arrangement has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

### **Factors to be considered**

(6) In deciding whether the agreement or arrangement is likely to bring about the gains in efficiency described in subsection (4), the Tribunal shall consider whether such gains will result in

h) tout autre facteur pertinent à l'égard de la concurrence dans le marché qui est ou serait touché par l'accord ou l'arrangement.

### **Preuve**

(3) Pour l'application des paragraphes (1) et (2), le Tribunal ne peut fonder sa conclusion uniquement sur des constatations relatives à la concentration ou à la part de marché.

### **Exception dans les cas de gains en efficacité**

(4) Le Tribunal ne rend pas l'ordonnance prévue au paragraphe (1) dans les cas où il conclut que l'accord ou l'arrangement a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficacité, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement de l'accord ou de l'arrangement et que ces gains n'auraient pas été réalisés si l'ordonnance avait été rendue ou ne le seraient vraisemblablement pas si l'ordonnance était rendue.

### **Restriction**

(5) Pour l'application du paragraphe (4), le Tribunal ne peut fonder uniquement sur une redistribution de revenu entre plusieurs personnes sa conclusion que l'accord ou l'arrangement a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficacité.

### **Facteurs pris en considération**

(6) Pour décider si l'accord ou l'arrangement aura vraisemblablement pour effet d'entraîner les gains en efficacité visés au paragraphe (4), le Tribunal examine si ces gains se traduiront, selon le cas :

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

### **Exception**

(7) Subsection (1) does not apply if the agreement or arrangement is entered into, or would be entered into, only by companies each of which is, in respect of every one of the others, an affiliate.

### **Exception**

(8) Subsection (1) does not apply if the agreement or arrangement relates only to the export of products from Canada, unless the agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) has prevented or lessened or is likely to prevent or lessen competition substantially in the supply of services that facilitate the export of products from Canada.

### **Exception**

(9) The Tribunal shall not make an order under subsection (1) in respect of

(a) an agreement or arrangement between federal financial institutions, as defined in subsection 49(3), in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

a) par une augmentation relativement importante de la valeur réelle des exportations;

b) par une substitution relativement importante de produits nationaux à des produits étrangers.

### **Exception**

(7) Le paragraphe (1) ne s'applique pas à l'accord ou à l'arrangement qui est intervenu ou interviendrait exclusivement entre des personnes morales qui sont chacune des affiliées de toutes les autres.

### **Exception**

(8) Le paragraphe (1) ne s'applique pas à l'accord ou à l'arrangement qui se rattache exclusivement à l'exportation de produits du Canada, sauf dans les cas suivants :

a) il a eu pour résultat ou aura vraisemblablement pour résultat une réduction ou une limitation de la valeur réelle des exportations d'un produit;

b) il a restreint ou restreindra vraisemblablement les possibilités pour une personne d'entrer dans le commerce d'exportation de produits du Canada ou de développer un tel commerce;

c) il a sensiblement empêché ou diminué la concurrence dans la fourniture de services visant à favoriser l'exportation de produits du Canada, ou aura vraisemblablement un tel effet.

### **Exception**

(9) Le Tribunal ne rend pas l'ordonnance prévue au paragraphe (1) en ce qui touche :

a) un accord ou un arrangement intervenu entre des institutions financières fédérales, au sens du paragraphe 49(3), à l'égard duquel le ministre des Finances certifie au commissaire le nom des parties et le fait

(ii) the Minister of Finance's request for or approval of the agreement or arrangement for the purposes of financial policy;

(b) an agreement or arrangement that constitutes a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's opinion that the merger is in the public interest, or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts; or

(c) an agreement or arrangement that constitutes a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* in respect of which the Minister of Transport has certified to the Commissioner the names of the parties to the agreement or arrangement.

#### **Where proceedings commenced under section 45, 49, 76, 79 or 92**

(10) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 79 or 92.

qu'il a été conclu à sa demande ou avec son autorisation pour les besoins de la politique financière;

b) un accord ou un arrangement constituant une fusion — réalisée ou proposée — aux termes de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés d'assurances* ou de la *Loi sur les sociétés de fiducie et de prêt*, et à l'égard duquel le ministre des Finances certifie au commissaire le nom des parties et le fait que cette fusion est dans l'intérêt public, ou qu'elle le serait compte tenu des conditions qui pourraient être imposées dans le cadre de ces lois;

c) un accord ou un arrangement constituant une fusion — réalisée ou proposée — agréée en vertu du paragraphe 53.2(7) de la *Loi sur les transports au Canada* et à l'égard duquel le ministre des Transports certifie au commissaire le nom des parties.

#### **Procédures en vertu des articles 45, 49, 76, 79 et 92**

(10) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 79 ou 92.

Définition de « concurrent »

(11) Au paragraphe (1), « concurrent » s'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard

### Definition of “competitor”

(11) In subsection (1), “competitor” includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

d’un produit en l’absence de l’accord ou de l’arrangement.

### Consent agreement

**105.** (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.

### Consentement

**105.** (1) Le commissaire et la personne à l’égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite de l’ordonnance provisoire prévue à l’article 103.3 — peuvent signer un consentement.

### Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

### Contenu du consentement

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par le Tribunal.

### Registration

(3) The consent agreement may be filed with the Tribunal for immediate registration.

### Dépôt et enregistrement

(3) Le consentement est déposé auprès du Tribunal qui est tenu de l’enregistrer immédiatement.

### Effect of registration

Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

### Effet de l’enregistrement

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu’une ordonnance du Tribunal, notamment quant à l’engagement des procédures.

### Rescission or variation of consent agreement or order

**106.** (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or a consent agreement

### Annulation ou modification du consentement ou de l’ordonnance

**106.** (1) Le Tribunal peut annuler ou modifier le consentement ou l’ordonnance visés à la présente partie, à l’exception de l’ordonnance rendue en vertu de l’article

under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

### **Directly affected persons**

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement 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.

103.3 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

### **Personnes directement touchées**

(2) Toute personne directement touchée par le consentement — à l'exclusion d'une partie à celui-ci — peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

File No.

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

**RAKUTEN KOBO INC.**

Applicant  
(Appellant)

- 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  
(Respondents)

**APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANT,  
RAKUTEN KOBO INC.**

Pursuant to Subsection 40(1) of the *Supreme Court Act* and  
Rule 25 of the Rules of the Supreme Court of Canada

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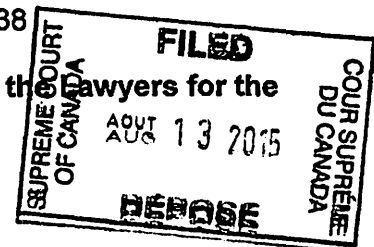
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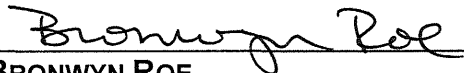
**Ottawa Agent for the  
Applicant**





**TAB B**

This is **Exhibit "B"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_

**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.

Docket No.: CT-2014-

**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*.

**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b>  CT-2014-001 February 7, 2014  Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 1

**THE COMMISSIONER OF COMPETITION****Applicant****- 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.****Respondents**


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**CONSENT AGREEMENT**


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**WHEREAS** pursuant to section 10 of the *Competition Act* (the “Act”), the Commissioner of Competition (the “Commissioner”) commenced an inquiry relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

**AND WHEREAS** the Commissioner alleges that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act;

**AND WHEREAS** the Commissioner and the Respondents have reached an agreement to resolve the Commissioner’s concerns regarding the Respondents’ alleged conduct;

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**AND WHEREAS** the Commissioner and the Respondents agree to the registration by the Commissioner of this Agreement with the Tribunal, pursuant to section 105 of the Act;

**AND WHEREAS IT IS AGREED AND UNDERSTOOD THAT** the Respondents do not accept or admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation or rescission, contest the Commissioner's allegations, and nothing in this Agreement will be taken as an admission or acceptance by the Respondents of any facts, liability, wrongdoing, submissions, legal argument or conclusions for any other purpose.

**NOW THEREFORE** the Parties agree as follows:

## **I. DEFINITIONS**

1. For the purposes of this Agreement, the following terms shall have the respective meanings set out below and any grammatical variations of those terms shall also have the corresponding meanings:
  - (a) **"Act"** means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
  - (b) **"Agency Agreement"** means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers in Canada through the E-book Retailer and the E-book Retailer is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books to consumers in Canada;
  - (c) **"Agreement"** means this Consent Agreement entered into by the Respondents and the Commissioner pursuant to section 105 of the Act;
  - (d) **"Commissioner"** means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;
  - (e) **"E-book"** means an electronically formatted book designed to be read on a computer, a handheld device or any other electronic device capable of visually displaying E-books. For the purposes of this Agreement, the term E-book does not include (i) an audio book, even if delivered and stored digitally; (ii) a standalone specialized software application or "app" sold through an "app store" rather than through an E-book store and not designed to be executed or read by or through a dedicated E-book reading device; (iii) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; (iv) the electronically formatted version of a book marketed for use primarily in connection with academic coursework; or (v) a magazine, journal or other periodic publication;

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- (f) **“E-book Publisher”** means any Person that, by virtue of a contract or other relationship with an E-book’s author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book within Canada to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in Canada. For the purposes of this Agreement, each Respondent is an E-book Publisher, and E-book Retailers are not E-book Publishers;
- (g) **“E-book Retailer”** means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in Canada or through which an E-book Publisher under an Agency Agreement Sells E-books to consumers in Canada. For the purposes of this Agreement, the Respondents and any Persons whose primary business is book publishing are not E-book Retailers;
- (h) **“Hachette”** means Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc., and (if any and wherever located) their Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (i) **“HarperCollins”** means HarperCollins Canada Limited and (if any and wherever located) its Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (j) **“including”** means “including, but not limited to” and **“include”** means “includes, but is not limited to”;
- (k) **“Macmillan”** means Holtzbrinck Publishers, LLC, doing business as Macmillan, and (if any and wherever located) its Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (l) **“Parties”** means the Commissioner and the Respondents;
- (m) **“Penguin”** means Penguin Group (USA), LLC, Pearson Canada Inc. and Penguin Canada Books Inc., and (if any and wherever located) their Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (n) **“Person”** means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental;
- (o) **“Price MFN”** means a term in an agreement between an E-book Publisher and an E-book Retailer for the Sale of E-books to consumers in Canada under which:

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- (i) the Retail Price at which an E-book Retailer, or an E-book Publisher under an Agency Agreement, Sells one or more E-books to consumers in Canada depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer, or the E-book Publisher under an Agency Agreement with any other E-book Retailer, Sells the same E-book(s) to consumers in Canada;
  - (ii) the Wholesale Price at which the E-book Publisher sells one or more E-books to an E-book Retailer for Sale to consumers in Canada depends in any way on the Wholesale Price at which the E-book Publisher sells the same E-book(s) to any other E-book Retailer for Sale to consumers in Canada; or
  - (iii) the revenue share or commission that an E-book Retailer receives from an E-book Publisher in connection with the Sale of one or more E-books to consumers in Canada depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers in Canada, or (b) the E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books to consumers in Canada. For the purposes of this Agreement, it will not constitute a Price MFN under subsection (iii) of this definition if a Respondent agrees, at the request of an E-book Retailer, to meet more favourable pricing, discounts or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional benefit, so long as that agreement is not or does not result from a pre-existing agreement that requires the Respondent to meet all requests by the E-book Retailer for more favourable pricing within the terms of the agreement;
- (p) **"Purchase"** means the acquisition by a consumer in Canada of one or more E-books as a result of a Sale;
  - (q) **"Respondents"** means Hachette, HarperCollins, Macmillan and Simon & Schuster collectively, and **"Respondent"** means any one of them. Where this Agreement imposes an obligation on a Respondent to engage in or refrain from engaging in certain conduct, that obligation shall apply to any joint venture or other business arrangement established by the Respondent and one or more other Respondents or by the Respondent and Penguin;
  - (r) **"Retail Price"** means the price at which an E-book Publisher under an Agency Agreement or an E-book Retailer Sells an E-book to a consumer in Canada;
  - (s) **"Sale"** or **"Sell"** means delivery of access to a consumer in Canada to read one or more E-books in exchange for payment. Delivery of access to an educational institution or a library is not a Sale.
  - (t) **"Simon & Schuster"** means Simon & Schuster Canada, a division of CBS Canada Holdings Co., and (if any and wherever located) its Subsidiaries,

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successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;

- (u) “**Subsidiary**” has the meaning as defined in subsection 2(3) of the Act;
- (v) “**Tribunal**” means the Competition Tribunal, as established by the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended; and
- (w) “**Wholesale Price**” means:
  - (i) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers in Canada; or
  - (ii) the Retail Price at which an E-book Publisher under an Agency Agreement Sells an E-book to consumers in Canada through an E-book Retailer minus the commission or other payment that the E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

## II. OBLIGATIONS OF THE RESPONDENTS

2. Subject to paragraph 5, the Respondents shall not, for the period commencing forty (40) days following the date of registration of this Agreement and ending 18 months thereafter, directly or indirectly:
  - (a) restrict, limit or impede an E-book Retailer’s ability to set, alter or reduce the Retail Price of any E-book for Sale to consumers in Canada or to offer price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more E-books; or
  - (b) enter into an agreement with any E-book Retailer that has the effect described in paragraph 2(a).
3. The Respondents shall not, for a period of four years and six months from the date of the registration of this Agreement, enter into any agreement with an E-book Retailer relating to the Sale of E-books to consumers in Canada that contains a Price MFN.
4. For each agreement between a Respondent and an E-book Retailer relating to the Sale of E-books to consumers in Canada in force at the date of registration of this Agreement that directly or indirectly:
  - (a) restricts, limits or impedes the E-book Retailer’s ability to set, alter or reduce the Retail Price of any E-book for Sale to consumers in Canada or to offer price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more E-books; or
  - (b) contains a Price MFN with respect to the Sale of E-books to consumers in Canada;

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the Respondent shall, as soon as permitted under the agreement, take steps required under the agreement to cause the agreement to be terminated and not renewed or extended. The Respondent may, in lieu of termination, satisfy its obligations under this paragraph 4 as follows:

- (c) with respect to any such agreement that contains a Price MFN with respect to the Sale of E-Books to consumers in Canada, by entering into an amendment to the agreement, effective no later than forty (40) days after the registration of this Agreement, either (i) making the agreement inapplicable to the Sale of E-books in Canada or (ii) removing the Price MFN; and
  - (d) with respect to any such agreement that does not contain a Price MFN, including as a result of an amendment entered into pursuant to subparagraph 4(c) above, by notifying the E-book Retailer within ten (10) days of the date of registration of this Agreement that during the period commencing forty (40) days after registration of this Agreement and ending 18 months thereafter, the Respondent will not enforce any term or terms in any agreement with an E-book Retailer that restrict, limit or impede an E-book Retailer's ability to set, alter or reduce the Retail Price of any E-book for Sale to consumers in Canada or to offer price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more E-books except to the extent permitted by paragraph 5 of this Agreement.
5. Notwithstanding paragraphs 2 and 4 of this Agreement, a Respondent may enter into agreements and amend agreements with E-book Retailers, and may enforce terms in agreements with E-book Retailers in force as of the date of registration of this Agreement, under which price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more of the Respondent's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to the Respondent's E-books) are restricted, provided that:
- (a) such restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers in Canada to Purchase the Respondent's E-books by an aggregate amount (the "Agreed Funds") equal to the total commissions the Respondent pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of the Respondent's E-books to consumers in Canada;
  - (b) the Respondent shall not restrict, limit or impede the E-book Retailer's use of the Agreed Funds to offer price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more of the Respondent's E-books; and
  - (c) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit or impede the E-book Retailer from engaging in any form of retail activity or promotion.
6. Nothing in this Agreement shall prohibit a Respondent from unilaterally compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.



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7. The Respondents shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that the Respondents are prohibited by paragraph 2 of this Agreement from restricting, limiting or impeding in any agreement with an E-book Retailer. After the expiration of the prohibitions in paragraph 2 of this Agreement, this paragraph 7 shall not prohibit a Respondent from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits or impedes the E-book Retailer from setting, altering or reducing the Retail Price of any of the Respondent's E-books for Sale to consumers in Canada or from offering price discounts or any other form of promotions to encourage consumers in Canada to Purchase any of the Respondent's E-books.
8. Each Respondent shall furnish to the Commissioner:
  - (a) within thirty (30) days from the date of the registration of this Agreement, one complete copy of each agreement, executed, renewed, amended or extended on or after 1 January 2012, between the Respondent and any E-book Retailer relating to the Sale of the Respondent's E-books to consumers in Canada (unless same has previously been provided); and
  - (b) thereafter, on a quarterly basis, any new agreement or amendment between the Respondent and any E-book Retailer relating to the Sale of the Respondent's E-books to consumers in Canada.
9. Unless otherwise provided herein or agreed to in writing by the Parties, the terms of this Agreement shall become effective on the date of registration of this Agreement and end four years and six months from the date of registration of this Agreement.

### III. GENERAL

10. The Recitals of this Agreement are integral to, and deemed to be a part of, this Agreement.
11. Unless the context otherwise requires, words importing the singular include the plural and vice versa, and words importing gender include all genders.
12. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, and all of which shall constitute one and the same Agreement.
13. The Commissioner shall file this Agreement with the Tribunal for registration in accordance with section 105 of the Act. The Respondents hereby consent to such registration.
14. The Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein.
15. If a Respondent becomes aware that there has been or likely has been a breach of any of the terms of this Agreement, the Respondent shall promptly notify the Commissioner thereof, and shall provide details sufficient to describe the nature and date of said breach.

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16. Computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21. For the purposes of this Agreement, the definition of “holiday” in the *Interpretation Act* shall be deemed to include Saturday.
17. Nothing in this Agreement precludes the Respondents or the Commissioner from bringing an application under section 106 of the Act (or successor or equivalent provision under the Act) to rescind or vary this Agreement. The Respondents do not accept or admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation or rescission, contest the Commissioner’s allegations that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act.
18. The Respondents attorn to the jurisdiction of the Tribunal for the purposes of the interpretation and enforcement of this Agreement and any proceeding initiated by the Commissioner or the Respondents to rescind or vary any of the provisions of this Agreement.
19. This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.
20. In the event of any discrepancy between the English language version of this Agreement and the French language version of this Agreement, the English language version of this Agreement shall prevail.
21. The headings in this Agreement are for convenience of reference only and shall not affect the construction or interpretation thereof.
22. In the event of a dispute as to the interpretation or application of this Agreement, either the Commissioner or the Respondents may apply to the Tribunal for an order interpreting any of the provisions of the Agreement.

#### IV. NOTICES

23. Notices and other communications required or permitted by the Commissioner or the Respondents pursuant to this Agreement shall be in writing, and shall be given to the Parties at the following addresses or facsimile numbers:

- (a) The Commissioner  
 Commissioner of Competition  
 Competition Bureau  
 Place du Portage, Phase I  
 50 Victoria Street  
 Gatineau, QC K1A 0C9  
 Telephone: (819) 997-3301  
 Facsimile: (819) 953-5013

With a copy to:

Executive Director and Senior General Counsel  
 Competition Bureau Legal Services  
 Department of Justice  
 Place du Portage, Phase I  
 50 Victoria Street  
 Gatineau, Québec K1A 0C9  
 Facsimile: (819) 953-9267

- (b) Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc.

Carol Ross  
 Executive Vice President, Business Affairs & General Counsel  
 Hachette Book Group, Inc.  
 237 Park Avenue  
 New York, NY 10017  
 Tel: 212-364-1510  
 Carol.ross@hbgusa.com

With a copy to:

Linda Plumpton  
 Torys LLP  
 79 Wellington St. W, 30th Floor  
 Box 270, TD South Tower  
 Toronto, Ontario M5K 1N2  
 Tel: 416-865-8193  
 Fax: 416-865-7380  
 lplumpton@torys.com

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(c) HarperCollins Canada Limited

Wayne Playter  
VP Finance  
HarperCollins Canada Limited  
1995 Markham Road  
Scarborough, Ontario  
M1B 5M8  
Wayne.Playter@HARPERCOLLINS.com

With a copy to:

Katherine L. Kay  
Stikeman Elliott LLP  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada  
M5L 1B9  
Tel. (416) 869-5507  
Fax. (416) 947-0866  
kkay@stikeman.com

(d) Holtzbrinck Publishers, LLC

Paul J. Sleven  
General Counsel  
175 Fifth Avenue  
New York, NY 10010  
Tel: 646-307-5202  
Fax: 212-529-0594  
paul.sleven@macmillan.com

With a copy to:

Randal Hughes  
Bennett Jones LLP  
3400 One First Canadian Place  
P.O. Box 130  
Toronto, Ontario M5X 1A4  
Tel: 416-777-7471  
Fax: 416-863-1716  
hughesr@bennettjones.com

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(e) Simon & Schuster Canada, a division of CBS Canada Holdings Co

David Hillman  
Executive Vice President & General Counsel  
Simon & Schuster Incorporated  
1230 Avenue of the Americas  
New York NY 10020  
United States of America  
David.Hillman@simonandschuster.com

With a copy to:

Peter Franklyn  
Osler, Hoskin & Harcourt LLP  
First Canadian Place  
100 King Street West  
Toronto, Ontario M5X 1B8  
pfranklyn@osler.com

Any Party hereto may from time to time change its address or facsimile number by giving notice to the other Parties hereto in accordance with the provisions of this paragraph 23. The Commissioner and the Respondents may also consent to accept notices or other communications required or permitted pursuant to this Agreement by electronic mail.

DATED this 6<sup>th</sup> day of February, 2014

[ORIGINAL SIGNED BY "John Pecman"]

John Pecman

Commissioner of Competition

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Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc.

[ORIGINAL SIGNED BY "Carol Ross"]

I/We have authority to bind the corporation  
Name: Carol Ross  
Title: Executive Vice President, Business Affairs & General Counsel Hachette Book Group, Inc

HarperCollins Canada Limited

[ORIGINAL SIGNED BY "Wayne Playter"]

I/We have authority to bind the corporation  
Name: Wayne Playter  
Title: VP Finance HarperCollins Canada Limited

Holtzbrinck Publishers, LLC

[ORIGINAL SIGNED BY "Paul J. Sleven"]

I/We have authority to bind the limited liability company  
Name: Paul J. Sleven  
Title: General Counsel


Simon & Schuster Canada, a division of CBS Canada Holdings Co

[ORIGINAL SIGNED BY "Kevin Hanson"]

I/We have authority to bind the corporation  
Name: Kevin Hanson  
Title: President of Simon & Schuster Canada (a division of CBS Canada Holdings Co)

**TAB C**

This is **Exhibit "C"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

A handwritten signature in cursive script, reading "Bronwyn Roe", is written over a horizontal line.

**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.



File No. CT-2014-

**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

- 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

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**NOTICE OF APPLICATION**

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**WEIRFOULDS LLP**

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

**Nikiforos Iatrou**  
**Mandy L. Seidenberg**  
**Bronwyn Roe**

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

Lawyers for the Applicant

**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**”);
- (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.

## SCHEDULE "A"

## STATEMENT OF GROUNDS AND MATERIAL FACTS

## PART 1 - THE APPLICATION IN A NUTSHELL

1. Two weeks ago, 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.

- (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).
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.
-

**PART 2 - FACTS****A. Nature of the Application**

5. Pursuant to s. 106(2) of the *Competition Act* (the “**Act**”), the Applicant, 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.<sup>1</sup> 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.

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

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**

- 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.



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.

- (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 within certain limits.

(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.

**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

- (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).

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 ]**

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 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 Agreements effectively impose a forty-day deadline on the 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. 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 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 ]

[ 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:

[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, 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.

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).

**PART 4 - ORDER SOUGHT**

58. The Applicant requests that the Tribunal rescind the Consent Agreement or, in the alternative, that the Tribunal vary the Consent Agreement.

59. The Applicant seeks its costs.

DATED at Toronto this 21<sup>st</sup> day of February, 2014.



---

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File No. CT-2014-

**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

- 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

---

**NOTICE OF APPLICATION**

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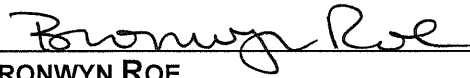
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**TAB D**

This is **Exhibit "D"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

A handwritten signature in cursive script that reads "Bronwyn Roe". The signature is written in black ink and is positioned above a horizontal line.

**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.



File No. CT-2014-

**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

---

**NOTICE OF MOTION**

---

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Lawyers for the Applicant

**TAKE NOTICE THAT** the Applicant will make a motion to the Competition Tribunal (“**Tribunal**”) on a date and time to be set by the Tribunal at Ottawa, Ontario.

**THE MOTION IS FOR:**

1. An Order staying the registration of the Consent Agreement between the Commissioner of Competition (“**Commissioner**”) and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (collectively, the “**Consenting Publishers**”) filed and registered with the Competition Tribunal on February 7, 2014 (“**Consent Agreement**”), under section 105 of the *Competition Act* pending the determination of the Moving Party’s Application under section 106 of the *Competition Act*; and
2. Such further and other final or interim orders as the Tribunal deems just.

**THE GROUNDS FOR THE MOTION ARE:**

**A. Kobo has Applied for Relief Pursuant to Section 106(2)**

3. Concurrent with the filing of this Notice of Motion, Kobo Inc. (“**Kobo**”) is filing an Application (“**Application**”) pursuant to s. 106(2) of the *Competition Act*, which states:

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement 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.

4. Pursuant to its Application, Kobo is asking the Tribunal to rescind or vary the Consent Agreement on the grounds as set out in its Statement of Grounds and Material Facts.

**B. The Application Raises Serious Issues**

5. The main question that must be answered on Kobo's Application is whether the Consent Agreement is based on terms that could be the subject of an order of the Tribunal and whether, if not, the Tribunal should rescind or vary the Consent Agreement.
6. This raises several sub-issues, most of which have never been addressed by the Tribunal. Those that have been considered have only been considered in one case, in an entirely different context (a merger). The sub-issues include the following:
  - (a) Can a Consent Agreement based on s. 90.1 be rescinded or varied on the basis that it fails to identify or allege an anticompetitive agreement or arrangement that could be the subject of a s. 90.1 order?
  - (b) Must or should the Commissioner include in its consent agreements sufficient detail of the alleged anticompetitive agreement or arrangement so as to permit the Tribunal to assess whether it would have the jurisdiction to make the orders contained in the Consent Agreement?
  - (c) Can an affected third party succeed in an application under s. 106(2) if it can prove that there is no arrangement or agreement that could form the basis of an order under s. 90.1?
  - (d) Can an affected third party succeed in an application under s. 106(2) if it can prove that the prohibition orders contained in the consent agreement do not relate to activity that is the result of an agreement or an arrangement between competitors?
  - (e) Is the Tribunal satisfied that the prohibition orders contained in the Consent Agreement relate to activity that resulted from an agreement or arrangement between competitors?
  - (f) Can a vertical agreement or arrangement (i.e., between a retailer and a publisher) be the subject of an order under s. 90.1?
  - (g) Can a horizontal agreement or arrangement that has been terminated or ended be the subject of an order under s. 90.1?
7. These issues, as further described in Kobo's Statement of Grounds and Material Facts, are serious issues to be tried in the Application.

**C. Kobo Will be Irreparably Harmed Absent a Stay**

8. Kobo's distribution agreements with the Consenting Publishers will be immediately affected by the Consent Agreement. If Kobo refuses to accede to the Consenting

Publishers' attempts to comply with the Consent Agreement and the Consenting Publishers terminate their agreements with Kobo, the effect on Kobo will be devastating. Conversely, if Kobo accepts the amendments, it will suffer significant unrecoverable losses.

9. The Consent Agreement will have an immediate and substantial impact on Kobo's business operations and competitiveness in the Canadian market. Given that the Consent Agreement mirrors similar settlements in the United States, the deleterious and prejudicial impact of those settlements can be looked to as a predictor of the harm Kobo would suffer if a stay is not granted.
10. The harm Kobo would suffer could not be remedied. There is no mechanism by which Kobo could recover its (significant) losses from the Commissioner, or any other source, if Kobo is ultimately successful in the Application.
11. Further, the harm to Kobo will be immediate. The Consent Agreement requires action by the Consenting Publishers within 40 days of its February 7, 2014 filing. Kobo has already received letters from Consenting Publishers seeking to implement the Consent Agreement. Irreparable injury to Kobo's financial and market positions will occur before the disposition of its Application.
12. In addition, the implementation of the Consent Agreement to eliminate certain terms of the contractual relationship between Kobo and the Consenting Publishers will result in immediate changes to the market landscape and accordingly will also result in an irreversible shift in expectations of consumers, which will prevent Kobo from reintroducing such contractual terms if it is successful on its Application.

**D. The Balance of Convenience Favours the Granting of a Stay**

13. The balance of convenience favours Kobo. The irreparable harm Kobo is poised to suffer if a stay is denied is far greater than any arguable harm to the market if a stay is granted.
14. The market itself may be harmed if a stay is not granted, as the experience in the United States has demonstrated that near-identical settlements in that jurisdiction have led to the exit of competitors from the market and the significant competitive diminishment of other competitors. If the Application is successful, and it is found that the Consent

Agreement should be varied or rescinded, such damage to the market would be irreversible.

15. In this case, the terms of the Consent Agreement are time-limited, especially with respect to the prohibition on Agency terms, which is ordered to last 18 months. By the time Kobo obtains a final determination of its Application, much of the 18-month timeframe will have expired. If a stay is not granted, the Application will effectively be rendered moot, and Kobo's rights as a directly affected party under s. 106(2) will be illusory.
16. Granting a stay preserves the status quo (pre-Consent Agreement) pending the determination of the Application. This is the same status quo that has prevailed for the past 18 months while the Commissioner has conducted his investigation.
17. If the Application is not successful, the stay will not harm consumers or frustrate the Commissioner's ability to implement the terms; it will only delay the implementation of the time-limited remedies for the period of time it takes to have the Application determined. The terms of the Consent Agreement, and the 18-month period it contemplates, would simply commence at a later date. As demonstrated by the 16-month implementation period of similar remedies in the United States, the objectives of the Consent Agreement are not prejudiced by delay.
18. The *Competition Act*, RSC 1985 c C-34, as amended, including sections 1.1, 90.1, 105 and 106.
19. The *Competition Tribunal Act*, RSC 1985, c 19 (2<sup>nd</sup> Supp), as amended, including section 8.
20. The *Competition Tribunal Rules*, SOR/2008-141.
21. The *Federal Court Rules*, SOR/98-106, including rules 372 and 398.
22. Such further and other grounds as counsel may advise and the Tribunal may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:**

1. The Affidavit of Michael Tamblyn, to be sworn.
2. The Consent Agreement.
3. Such further and other documents as counsel may advise and the Tribunal may admit.

**DATED AT** Toronto this 21<sup>st</sup> day of February, 2014.



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File No. CT-2014-

**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;

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**BETWEEN:**

**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

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**NOTICE OF MOTION**

---

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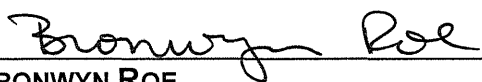
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# TAB E

This is **Exhibit "E"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.



**Case Details: CT-2014-002**

NOTE: Some of the documents on this web page have been provided by external sources and have been inserted, as received, in the language and format of record.

Questions or comments may be sent by e-mail to: [tribunal@ct-tc.gc.ca](mailto:tribunal@ct-tc.gc.ca)

**CT-2014-002 ( Kobo Inc. )**

**Proceeding 1**

**Kobo Inc. v. The Commissioner of Competition, Hachette Book Group Canada Ltd, Hachette Book Group, Inc., Hachette Digital, Inc., HarperCollins Canada Limited, Holtzbrinck Publishers, LLC, Simon & Schuster Canada, A division of CBS Canada Holdings Co.**

<b>Section(s):</b>	Section 106 (RS85) - Rescission or variation of consent agreement or order
<b>Filed on:</b>	2014-02-21
<b>Status:</b>	Ongoing

<b>Applicant(s):</b>	Kobo Inc.
<b>Respondent(s):</b>	The Commissioner of Competition Hachette Book Group Canada Ltd, Hachette Book Group, Inc., Hachette Digital, Inc. Harpercollins Canada Limited Holtzbrinck Publishers, LLC Simon & Schuster Canada, A division of CBS Canada Holdings Co.

**Case Documents**

**Pleading(s)**

#	Format	Title	Date
2	<a href="#">PDF</a>	Notice of Application	2014-02-21
49	<a href="#">PDF</a>	Reference record includes Memorandum of Argument	2014-04-15
53	<a href="#">PDF</a>	Motion Record to strike Notice of reference	2014-04-29
59	<a href="#">PDF</a>	Response to Motion to Strike the Notice of Reference	2014-05-09
64	<a href="#">PDF</a>	Memorandum of Argument regarding Motion to strike Notice of reference of Kobo Inc.	2014-05-16
66	<a href="#">PDF</a>	Memorandum of Fact and Law of the Commissioner regarding the Motion to strike Notice of reference	2014-05-23
69	<a href="#">PDF</a>	Memorandum of Argument of Kobo Inc. for Reference	2014-06-10
75	<a href="#">PDF</a>	Commissioner's Reply Memorandum for the Reference	2014-06-20

**Other(s)**

#	Format	Title	Date
4	<a href="#">PDF</a>	Motion Record of Kobo Inc.	2014-02-21
12	<a href="#">PDF</a>	Response to Motion by Commissioner of Competition	2014-03-03
13	<a href="#">PDF</a>	Affidavit of Hollie Felix	2014-03-03
14	<a href="#">PDF</a>	Letter of Kobo Inc.	2014-03-04
18	<a href="#">PDF</a>	Memorandum of Fact and Law of Kobo Inc.	2014-03-10
24	<a href="#">PDF</a>	Request for Leave to Intervene of Indigo Books & Music Inc.	2014-03-13
25	<a href="#">PDF</a>	Affidavit of Heather Reisman	2014-03-13
30	<a href="#">PDF</a>	Memorandum of Fact and Law of the Commissioner of Competition	2014-03-13
45	<a href="#">PDF</a>	Proposed Schedule and Letter for Reference Questions	2014-04-04
46	<a href="#">PDF</a>	Notice to Counsel regarding scheduling	2014-04-07

**Decision(s)**

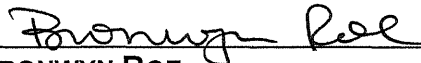
#	Format	Title	Date
34	<a href="#">PDF</a>	Order Granting the Applicant's Motion for a Stay	2014-03-18
41	<a href="#">PDF</a>	Reasons for Order Granting the Applicant's Motion for a Stay	2014-03-27
61	<a href="#">PDF</a>	Scheduling Order and Reasons for Order Regarding the Reference Proceeding	2014-05-14

62	<a href="#">PDF</a>	Scheduling Order and Reasons for Order Regarding the 106(2) Application	2014-05-14
68	<a href="#">PDF</a>	Order and Reasons (Motion to Strike)	2014-06-10
99	<a href="#">PDF</a>	Reasons for Order and Order	2014-09-08
113	<a href="#">PDF</a>	Order and Reasons following a Case Management Teleconference	2014-12-22
130	<a href="#">PDF</a>	Scheduling Order with Respect to the Applicant's Motion	2015-07-31

Date Modified: 2013-09-06

**TAB F**

This is **Exhibit "F"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.



Competition Tribunal



Tribunal de la Concurrence

Reference: *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 1

File No.: CT-2014-02

Registry Document No.: 034

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)

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)



Date of hearing: 20140317

Before Judicial Member: Rennie J. (Chairperson)

Date of Order: March 18, 2014

Order signed by: Mr. Justice Donald J. Rennie

**ORDER GRANTING THE APPLICANT'S MOTION FOR A STAY**

[1] **UPON** motion by Kobo Inc. (“Kobo”) for an order staying the registration of the Consent Agreement entered into by the Respondents filed and registered with the Competition Tribunal on February 7, 2014, pending the determination of Kobo’s application under section 106 of the *Competition Act*, R.S.C., 1985, c. C 34 as amended;

[2] **AND UPON** reviewing the materials filed by Kobo and the Commissioner of Competition (the “Commissioner”) in respect of Kobo’s motion and hearing the submissions of counsel for Kobo and the Commissioner on March 17, 2014;

[3] **AND WHEREAS** a decision on this matter is urgent as the 40-day period referred to in paragraph 2 of the Consent Agreement will expire on March 19, 2014;

[4] **AND WHEREAS** the Tribunal, for reasons to follow, finds that an Order granting a stay of the registration of the Consent Agreement should issue but that Kobo’s application should proceed swiftly;

**THE TRIBUNAL ORDERS THAT:**

[5] The registration of 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 with the Tribunal on February 7, 2014, is stayed pending the determination of Kobo’s application under section 106 of the *Competition Act*;

[6] The parties shall consult and, if a timetable is agreed to, file the proposed timetable setting out all pre-hearing steps, including any proposed preliminary legal questions and dates for hearing thereof, and a suggested start date and duration of the main hearing, no later than the close of the Registry on Thursday, March 20, 2014;

[7] If the parties cannot agree on a timetable, each party shall serve on the other parties a proposed timetable and file it by no later than the close of the Registry on Friday, March 21, 2014;

DATED at Ottawa, this 18th day of March, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

**APPEARANCES:**

For the applicant:

Kobo Inc.

Nikiforos Iatrou  
Mandy L. Seidenberg  
Bronwyn Roe

For the respondents:

Commissioner of Competition

Jonathan Chaplan  
Parul Shah  
Esther Rossman

Hachette Book Group Canada Ltd.,  
Hachette Book Group, Inc.,  
Hachette Digital, Inc.

James Gotowiec

HarperCollins Canada Limited

Katherine L. Kay

Holtzbrinck Publishers, LLC

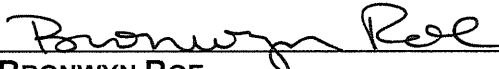
Emrys Davis

Simon & Schuster Canada, a division of CBS Canada Holdings Co.

Peter Franklyn

**TAB G**

This is **Exhibit "G"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015



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**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.

Competition Tribunal



Tribunal de la Concurrence

Reference: *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 2

File No.: CT-2014-02

Registry Document No.: 41

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)

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)



Date of hearing: 20140317

Before Judicial Member: Rennie J. (Chairperson)

Reasons for Order: March 27, 2014

Reasons signed by: Mr. Justice Donald J. Rennie

**REASONS FOR ORDER GRANTING THE APPLICANT'S MOTION FOR A STAY**

## I. INTRODUCTION

[1] Kobo Inc. (the “Applicant” or “Kobo”) brought a motion to stay the implementation of a consent agreement reached pursuant to section 105 of the *Competition Act*, RSC 1985, c C-34 (the “Act”), signed February 6, 2014 and registered February 7, 2014 (the “Consent Agreement”), between the Commissioner of Competition (the “Commissioner”) and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (collectively, the “Consenting Publishers”) on the basis that Kobo has filed an application under subsection 106(2) of the Act to rescind or vary the Consent Agreement.

[2] These reasons are further to my order of March 18, 2014 granting the stay sought by Kobo.

## II. BACKGROUND

[3] Kobo is an E-book retailer operating in Canada since February 2009. It is the largest E-book retailer in Canada.

[4] In the summer of 2012, the Commissioner commenced an investigation into the E-book industry in Canada. This investigation came on the heels of an investigation by the United States Department of Justice (“U.S. DOJ”) into the E-book market in the U.S., which resulted in settlement agreements between the U.S. DOJ and several U.S. publishers, some of which are the U.S. affiliates of the Consenting Publishers. In Canada, the Commissioner’s 18-month investigation culminated in the registration of the Consent Agreement on February 7, 2014.

[5] The Consent Agreement requires each Consenting Publisher to amend or terminate any contract it has with an E-book retailer that, directly or indirectly, restricts the E-book retailer’s ability to discount the price of E-books sold to consumers in Canada or that makes the retail price of an E-book sold by one retailer dependent on the retail price of the same E-book sold by another retailer (this latter type of clause is known as a “Price MFN clause”). The effective period of the Consent Agreement would commence forty (40) days following the date of its registration and last for eighteen (18) months. As the Consent Agreement was registered on February 7, 2014, its effective period is set to commence on March 19, 2014.

[6] Kobo’s contracts with each of the Consenting Publishers are “Agency Agreements”. Agency Agreements are typically agreements where the retailer is appointed as a non-exclusive agent for the marketing and delivery of E-books on the publisher’s behalf. The publisher sets the retail price, and the retailer receives a commission (usually 30%) for each E-book sold. It is apparent that some or all of Kobo’s Agency Agreements contain clauses that would be prohibited by the Consent Agreement.

[7] On February 21, 2014, Kobo brought an application to rescind or vary the Consent Agreement pursuant to subsection 106(2) of the Act, which provides that:

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement 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.

(2) Toute personne directement touchée par le consentement — à l'exclusion d'une partie à celui-ci — peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

[8] Subsection 106(2) was added to the Act as part of the 2002 amendments replacing the old consent order regime, wherein draft consent orders required the Tribunal's pre-approval, with the current consent agreement regime, which does not. The old regime was inefficient and ineffective, and Parliament intended for the amendments to create a more streamlined and timely process (*Burns Lake Native Development Corporation v Commissioner of Competition and West Fraser Timber Co Ltd*, 2006 Comp Trib 16, at para 26-32) [*Burns Lake*]).

[9] On February 21, 2014, Kobo also brought the present motion for an order staying the registration of the Consent Agreement pending the determination of its application under subsection 106(2). The motion was heard on March 17, 2014, and at the hearing, counsel for the Respondents took no position and made no submissions. The Consent Agreement provides that the Consenting Publishers will not, for the purposes of the agreement only, including execution, registration, enforcement, variation or rescission, contest the Commissioner's allegations that further to an agreement or arrangement, they have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act.

[10] On March 18, 2014, I granted Kobo's motion for an order staying the Consent Agreement and these are the reasons for that order.

### III. ISSUES & DISCUSSION

[11] A consent agreement, filed pursuant to section 105 of the Act, has, upon registration, the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal. Such a consent agreement is to be based on terms that could be the subject of an order of the Tribunal.

[12] The issue on this motion is whether the Tribunal should stay the implementation of the Consent Agreement pending the disposition of Kobo's subsection 106(2) application. The test



for stay was established by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at p 334 [*RJR-MacDonald*]:

- a) There is a serious issue to be tried;
- b) The applicant will suffer irreparable harm if the stay is not granted; and
- c) The balance of convenience favours granting the stay.

[13] I deal with each element of the test in turn.

**a. Serious issue to be tried**

[14] For the limited purposes of this stay motion, the Commissioner concedes that Kobo is a “person directly affected” within the meaning of subsection 106(2).

[15] Kobo argues that the legislative history of subsection 106(2) of the Act indicates that it was meant to operate as a meaningful “safety valve” on the Commissioner’s power to enter into consent agreements, and the serious issues it proposes must be looked at in that context.

[16] Kobo asserts that its application raises important unanswered questions about the Consent agreement and the operation of subsection 106(2). It contends that its application raises two serious triable issues. The basis for these serious issues is the fact that the Consent Agreement was reached notwithstanding that the Commissioner has failed to articulate the existence of an agreement or arrangement between the Consenting Publishers falling under section 90.1 of the Act (a “90.1 agreement”). Kobo argues that the fact that the Commissioner has not made allegations or proven the existence of a 90.1 agreement leads to the first serious issue, which is:

Does the Tribunal have jurisdiction to make any order under s. 90.1 in the absence of an existing or proposed agreement or arrangement among competitors (or even an allegation of such an agreement)?

[17] Kobo argues that the Tribunal lacks such jurisdiction. Its position, therefore, is that a consent agreement under section 105 purporting to defeat a 90.1 agreement must satisfy the substantive requirements of section 90.1. It argues against a narrow interpretation of subsection 106(2) wherein the Tribunal need only be satisfied that it has jurisdiction to make orders of the nature contemplated in a consent agreement. However, in the event that such a narrow interpretation is adopted, Kobo argues that a second serious issue nonetheless arises, which is:

Can the Tribunal make an order prohibiting a person from doing anything under a putative 90.1 agreement where it has not identified any terms of such an agreement or is not satisfied that such an agreement exists or is proposed?

[18] Kobo again argues that it cannot, as paragraph 90.1(1)(a) gives the Tribunal the power to prohibit a person from doing anything under a 90.1 agreement, a power that is impossible to exercise without actually identifying such an agreement. Although paragraph 90.1(1)(b) permits

a consent agreement to require a third party to “take any other action”, Kobo argues this still requires a determination that there has been a 90.1 agreement, and in any case that the Consent Agreement contains prohibitions, placing it firmly within the scope of paragraph 90.1(1)(a).

[19] Kobo further asserts that the Commissioner has in the past acknowledged the seriousness of a question similar to the ones it now proposes. In *Burns Lake*, the Tribunal answered two questions brought to it by the Commissioner on reference, but there was actually a third question that was initially raised by the Commissioner but later dropped. This question was: “In an application under subsection 106(2) of the Act to vary or rescind the terms of a consent agreement, is the Tribunal authorized, by the language “that the terms could not be the subject of an order of the Tribunal,” to engage in a *de novo* review of whether the merger or proposed merger is likely to substantially lessen or prevent competition?” (*Burns Lake Native Development Corporation v Commissioner of Competition and West Fraser Timber Co Ltd*, 2005 Comp Trib 19, at para 39, aff’d *Burns Lake Native Development Corporation v. Canada (Commissioner of Competition)*, 2006 FCA 97). In other words, it had to do with the Tribunal’s scope of review on a 106(2) application. This, Kobo argues, is analogous to the serious questions it now raises, and if it was serious enough to be considered on a reference by the Commissioner, it is serious enough to pass the low threshold of the *RJR-MacDonald* test.

[20] The Commissioner, on the other hand, contends that Kobo has failed to raise any serious issue because subsection 106(2) should be read restrictively, such that consent agreements under section 105 should not be tied to the substantive provisions of section 90.1. The Commissioner points out that under Rule 106(2) of the *Competition Tribunal Rules*, SOR/2008-141, there are only three statutory requirements for a valid consent agreement, namely that the consent agreement must set out:

- (a) the sections of the Act under which the agreement is made;
- (b) the name and address of each person in respect of whom the agreement is sought; and
- (c) the terms of the agreement.

[21] It is therefore not necessary, the Commissioner submits, for a consent agreement to provide any particulars that go beyond these three statutory requirements. As such, the Consent Agreement did not need to indicate the particulars of any existing or proposed 90.1 agreement that may have existed between the Consenting Publishers. Consent agreements are negotiations, and part of those negotiations may include what is not revealed to the public.

[22] Alternatively, the Commissioner argues that even if the Tribunal finds that a consent agreement must be substantively tied to and establish the elements of the alleged anti-competitive conduct, the consent agreement nonetheless accords with section 90.1 of the Act, as paragraph 90.1(1)(b) gives the Tribunal the power to prohibit a person, on consent of that person and the Commissioner, from taking “any other action”.

[23] The threshold for this element of the test is a low one, once the decision-maker is satisfied that the application is neither vexatious nor frivolous, he should proceed to consider the other elements (*RJR-MacDonald*, at p 337). In my view, there is no doubt that Kobo’s application raises serious issues related to the interpretation of subsection 106(2). The fact that

the Commissioner in *Burns Lake* had initially listed a virtually identical issue in the reference is a compelling point. The application also raises the bigger, underlying question of whether a consent agreement under section 105 of the Act that purports to defeat a 90.1 agreement requires the Commissioner to satisfy the substantive requirements of section 90.1, and if so, to what extent. This interplay of sections 90.1 and 105, and how it relates to applications under subsection 106(2), is an issue that has not been previously dealt with by the Tribunal, and is neither vexatious nor frivolous in nature. Indeed, the fact that Kobo and the Commissioner have each offered multiple possible theories of this interplay testifies to the fact that there is a serious issue to be determined.

[24] The first element of the *RJR-MacDonald* test is accordingly met.

**b. Irreparable harm**

[25] Kobo submits that it will suffer irreparable financial harm if this stay is not granted. It bases this harm on four sources of evidence:

- (i) the Commissioner’s press release of February 7, 2014 announcing the Consent Agreement (the “Press Release”) and a newspaper article dated March 13, 2014;
- (ii) two letters of termination/amendment that Kobo received from two of the four Consenting Publishers following registration of the Consent Agreement (the “Amendment Letters”);
- (iii) Kobo’s experience in the U.S. following implementation of settlement agreements there; and
- (iv) Kobo’s internal business forecasting.

[26] Kobo argues that it will be only E-book retailers like Kobo, not the Consenting Publishers, that will suffer financial loss due to the implementation of the Consent Agreement. This is demonstrated by the Press Release and especially by the Amendment Letters. The Amendment Letters unilaterally purport to transform the existing Agency Agreements into “Agency Lite” agreements, whereby pricing restrictions are lifted but the Consenting Publishers are still entitled to revenues of 70% of the retail price that they set. This means that Kobo alone would bear the cost of any discount they choose to offer on the retail price. Thus, Kobo asserts that the financial harm from the Consent Agreement will fall squarely on Kobo, and on other E-book retailers like it, and not on the Consenting Publishers.

[27] Based on its experience in the U.S. market following the implementation of similar settlement agreements there, Kobo has calculated that it will suffer substantial financial losses as a result. It maintains that the U.S. is an apt comparator market on which to base its forecasting. Kobo also provides internal financial forecasts predicting significant losses that would result from the implementation of the Consent Agreement, and argues that the assumptions made in those forecasts are fair, as explained in the affidavit of Michael Tamblyn, Kobo’s Chief Content Officer. Kobo also makes the point that it is the type and not the magnitude of harm that is relevant on a motion for stay, but nonetheless provides numbers to demonstrate that it has a clear evidentiary basis for its assertion of harm.

[28] Kobo submits that the time and money it would have to spend on switching to an Agency Lite model would also contribute to its harm.

[29] Finally, Kobo argues it would have no right to claim damages from the Commissioner, and this makes the harm it will suffer irreparable.

[30] The Commissioner argues that Kobo will not suffer financial harm because of its current financial position. Further, its evidence of financial loss is speculative, since its methodology for calculating losses incorporates many flawed assumptions and does not take into account all relevant economic factors. One of these flawed assumptions is that as the price of e-books would drop, Kobo's volume of sale would remain constant. The Commissioner submits that this is contrary to basic economic theory which recognizes that as the price drops, the volume of sales increases.

[31] The Commissioner also argues that any financial harm suffered by Kobo can be avoided because part of their projected losses results from the business strategy it has intentionally adopted. Such losses can also likely be remedied, as there is evidence that Kobo has been developing contingency plans to deal with the implementation of the Consent Agreement.

[32] From a policy perspective, the Commissioner urges the Tribunal not to accept financial harm as a valid basis for staying the registration of the Consent Agreement, as to do so would be wholly at odds with the purpose of the Act, which is to protect competition, not competitors. Any financial harm suffered by Kobo, the Commissioner argues, would not be caused by the Consent Agreement; rather, it would be caused by Kobo no longer being able to charge artificially-inflated, anti-competitive prices for its E-books. The Commissioner submits that this is not the type of "harm" that the Act should in any way protect.

[33] The Commissioner also presents a "floodgates" argument. He contends that if this stay is granted on the basis of this type of harm, it will undermine the consent agreement regime because future consent agreements will be subjected to stays, since third parties will almost invariably be affected financially by such agreements. This runs counter to the intention of Parliament in implementing a streamlined and proficient consent agreement regime.

[34] In reply to the Commissioner's allegation that its loss is speculative because of flawed assumptions, Kobo notes that the Commissioner only questioned Mr. Tamblyn on one assumption and not any of the others, and this failure to cross-examine shifts the burden to the Commissioner in demonstrating the assumptions were inappropriate pursuant to the Federal Court decision in *Effem Foods Ltd. v. H.J. Heinz Co. of Canada* (1997), 75 C.P.R. (3d) 331. Kobo further retorts that the Commissioner cannot assert that Kobo is benefiting from inflated prices for E-books when he has never alleged, let alone proven, that Kobo is or has ever been engaged in any kind of anti-competitive conduct.

[35] In my view, Kobo has established, on the balance of probabilities, that it will suffer irreparable harm if this stay is not granted. The profitability of Kobo's business has no bearing on whether it will suffer harm, and the jurisprudence recognizes that harm can occur to a

company whose path to profitability is blocked (*Danone Canada Inc v Canada (Attorney General)*, 2009 FC 44 at para 59, 343 FTR 17). I am also not convinced by the Commissioner's argument that Kobo's forecasting data are speculative. The Commissioner has adduced no evidence to challenge the soundness of Kobo's methodology. I therefore find that Kobo's financial projections are not merely speculative.

[36] I do not accept the Commissioner's assertion that Kobo's projected losses arise from the business strategy it has intentionally adopted and so are avoidable, as there is no evidence of this. The argument that any harm Kobo might suffer can be remedied since Kobo has contingency plans also fails. The fact that Kobo is prepared for the worst merely shows that it has prudent business sense.

[37] Further, I cannot accept the Commissioner's policy argument that the type of harm Kobo asserts cannot qualify as harm for the purposes of this stay because that would be contrary to the purposes of the Act. While a reduction in E-book prices may ostensibly be good for consumers, the Commissioner has provided no legal reason why financial loss on part of a retailer resulting from such price reductions cannot constitute harm for the purposes of the stay test.

[38] The Commissioner argues that recognizing this type of harm will open the floodgates, resulting in stays of future consent agreements as a matter of course. However, this is speculative, and ignores the fact that any future applicant must still prove that such harm will indeed result, as well as satisfy the other two elements of the *RJR-MacDonald* test. It also assumes, in so far as applications are made under subsection 106(2), that the tribunal will not manage them in a manner that respects a balance between the interest of the business community in certainty, the interest of the Commissioner in enforcement of the Act and those of others who are directly affected by the consent agreement.

[39] In conclusion, I am therefore satisfied that Kobo will suffer financial harm and that such harm is not speculative. In reaching this conclusion, it should be noted that the evidence of harm before the Tribunal is neither speculative nor comprised of mere assertions; rather the evidence is comprised of actual financial data, reasoned projections, and further validated by reference to the known experience in the U.S. market. The evidence before the Tribunal is markedly different than that before the Federal Court of Appeal in *Gateway City Church v. Canada (Minister of National Revenue)*, 2013 FCA 126, relied upon by the Commissioner.

[40] The harm would be irreparable. The Federal Court of Appeal has recognized that an applicant's inability to claim damages from the Commissioner in the event it is successful in its application contributes to the irreparable nature of the financial harm (*Tervita Corp v Canada (Commissioner of Competition)*, 2012 FCA 223 at para 15, 434 NR 159 [*Tervita*]; *Canada (Commissioner of Competition) v Canadian Waste Services Holdings Inc*, 2004 FCA 273 at para 18; *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 16, at para. 29).

[41] The second element of the *RJR-MacDonald* test is accordingly met.

**c. Balance of convenience**

[42] Kobo submits that the balance of convenience lies in its favour because the public will not be prejudiced by the issuance of the stay, but Kobo will be greatly prejudiced if the stay is not granted. In fact, Kobo argues that the public interest actually favours granting a stay.

[43] Kobo asserts that the public will not be prejudiced because the Consent Agreement does not impose a permanent ban on the clauses therein prohibited; it simply imposes an 18 month ban. The granting of the stay will therefore not make the Consent Agreement any less effective; it will simply be effective for a later set of customers. The fact that in the U.S., each settlement agreement was implemented approximately six months after it was filed and the implementation of the agreements spanned 16 months indicates that there is no urgency. Kobo therefore contends that it stands to reason that delay in implementing the Consent Agreement will not make its terms any less effective.

[44] On the other hand, Kobo argues that without a stay it will be severely prejudiced, because it is very likely that its application will become moot. Without the stay, there would be very little incentive for Kobo to continue its application, since even if Kobo were ultimately successful in its application, without staying the Consent Agreement, the damage will be done, the market will have shifted, and there would be no way for it to recoup its losses.

[45] Kobo submits that despite the fact that the Consent Agreement is the result of the actions of a government officer in the implementation of his statutory duties, the public interest does not weigh heavily in the Commissioner's favour because this is not a case where Kobo is asking for the suspension of a law or program. Rather, this stay is more akin to an exemption, in which the public interest weighs less heavily in favour of the government. Indeed, Kobo argues that the public interest favours granting the stay and hearing its 106(2) application on the merits, since the public deserves clarity, transparency and direction in the consent agreement process, which is currently lacking in light of the pending serious questions.

[46] Kobo finally contends that it has acted in a timely manner. Subsection 106(2) permits that an application may be brought within 60 days of the registration of a consent agreement, but Kobo brought its application within two weeks. Indeed, Kobo points out that the Consent Agreement is set to be implemented 40 days after registration, which is 20 days prior to the expiry of the 60 day period permitted to bring a 106(2) application under the Act. The implication is that the terms of the Consent Agreement frustrate or restrict Kobo's rights under section 106(2), and this should also favour granting a stay until Kobo's application can be decided on the merits.

[47] The Commissioner argues that the balance of convenience favours rejecting the stay because to do otherwise would frustrate the purpose of the Act in maintaining and encouraging competition in Canada. Without the implementation of the Consent Agreement, the public will continue to be deprived of the benefits of open price competition in the E-book market. The Commissioner submits that that public interest weighs heavily in his favour because this is a situation where a public officer is carrying out his statutory duties (*RJR-MacDonald*). The

Commissioner further argues that since Kobo's financial harm is speculative, there is no real prejudice to it should the Consent Agreement go forward.

[48] In my view, the balance of convenience favours granting the stay. While maintaining the *status quo* might have the effect of depriving consumers of lower E-book prices in the short term, not granting the stay will certainly have a profound impact on the usefulness of Kobo's application. In the event that Kobo is successful in its application and the Tribunal finds that the Consent Agreement ought to be rescinded or varied, Kobo would have already suffered loss and there would be no way to wind back the clock.

[49] I am also swayed by Kobo's argument that the public interest does not weigh heavily in favour of the Commissioner, because Kobo's application raises concerns that are in the public's interest to resolve. The Commissioner has not satisfied me that the potential of lower prices of E-books is such an urgent matter so as to outweigh the importance of resolving the questions raised by Kobo in its application. That lack of urgency is demonstrated by the fact that similar agreements in the U.S. were implemented in a staggered fashion over the course of 16 months. In my view, the best way to balance the competing public interests at stake here is to grant this stay and move Kobo's application along as expeditiously as possible. Justice Mainville adopted a similar approach in *Tervita* at para 19.

[50] Thus, the balance of convenience favours granting the stay.

[51] The third and final element of the *RJR-MacDonald* test is accordingly met. Kobo is therefore entitled to the stay that it seeks.

[52] These reasons are in support of the order dated March 18, 2014 granting the stay.

DATED at Ottawa, this 27th day of March, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

**APPEARANCES:**

For the applicant:

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Nikiforos Iatrou  
Mandy L. Seidenberg  
Bronwyn Roe

For the respondents:

Commissioner of Competition

Jonathan Chaplan  
Parul Shah  
Esther Rossman

Hachette Book Group Canada Ltd.,  
Hachette Book Group, Inc.,  
Hachette Digital, Inc.

James Gotowiec

HarperCollins Canada Limited

Katherine L. Kay

Holtzbrinck Publishers, LLC

Emrys Davis

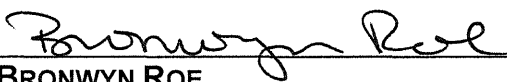
Simon & Schuster Canada, a division of CBS Canada Holdings Co.

Peter Franklyn



**TAB H**

This is **Exhibit "H"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

A handwritten signature in cursive script, reading "Bronwyn Roe", written over a horizontal line.

**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.

**Court File No. CT-2014-002**

**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 e-books in Canada;

**AND IN THE MATTER OF** the filing and registration of a consent agreement pursuant to section 105 of the 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**

**- 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**

---

**NOTICE OF REFERENCE**

---

**THE RESPONDENT**, the Commissioner of Competition will make a Reference pursuant to subsection 124.2(2) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") to the Competition Tribunal on June 25-26, 2014 at a time to be fixed by the Registrar, at 90 Sparks Street, Ottawa, Ontario.

**QUESTION OF LAW TO BE REFERRED TO THE TRIBUNAL**

1. 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?

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Reference:

1. such material as counsel may submit and the Competition Tribunal may permit.

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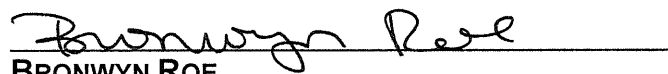
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**TAB I**

This is **Exhibit "I"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

A handwritten signature in cursive script, reading "Bronwyn Roe", is written over a horizontal line.

**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.



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:**

**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

---

**NOTICE OF MOTION TO STRIKE NOTICE OF REFERENCE**

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- 2 -

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Lawyers for the Applicant

**TAKE NOTICE THAT** the Applicant will make a motion to the Competition Tribunal (“**Tribunal**”) to be heard on June 25, 2014 by the Tribunal at Ottawa, Ontario.

**THE MOTION IS FOR:**

1. An Order striking out the Notice of Reference filed by the Commissioner of Competition (“**Commissioner**”);
2. In the alternative, an Order declining to hear the Reference; and
3. Such further and other final or interim orders as the Tribunal deems just.

**THE GROUNDS FOR THE MOTION ARE:**

1. The Tribunal has the power to strike a reference question as being inappropriate.
2. The Tribunal has the discretion to decline to hear a reference question where, although the question is appropriate, the reference process is inappropriate.
3. The question the Commissioner has advanced is inappropriate, as is the process in the circumstances of this case.

(i)

**The Question is Inappropriate**

4. The Reference question is two inappropriate questions compounded into one:
  - (a) what is the nature and scope of the Tribunal’s jurisdiction under subsection 106(2) of the Competition Act (“**Act**”)?
  - and
  - (b) what is the meaning of the words “the terms could not be the subject of an order of the Tribunal” (“**impugned language**”) in subsection 106(2) of the Act?
5. The first (sub)question is overly broad and academic in nature, and the Commissioner’s Reference Record does not propose to answer it. Accordingly, it ought to be struck.
6. The second (sub)question is inappropriate, in that it assumes that the impugned language lends itself to a single interpretation that can be applied in the same manner regardless of the facts underpinning a s. 106(2) application or the section in reference to which a consent agreement is filed.

7. Section 106(2) is meant to apply to all of Part VIII of the Act. Either the Tribunal needs to interpret it to have one universal meaning that can be applied to all of Part VIII or it needs to interpret it to have a variable meaning that will be applied flexibly, depending on the facts of each case and the section in relation to which the consent agreement is filed.
8. If the universal approach is correct, the interpretation advanced by the Commissioner is clearly wrong, as it would result in s. 106(2) having no application with respect to consent agreements filed in reference to alleged violations of sections 77<sup>1</sup> and 90.1 (more specifically for s. 90.1, it would have no application in reference to prohibition orders that are included in a consent agreement<sup>2</sup>).
9. Such a narrow universal interpretation would frustrate Parliament's intention to have a review process that would be applicable to all sections in Part VIII of the Act. It would violate the first rule of modern statutory interpretation, that the words of a statute must be read in their grammatical and ordinary sense harmoniously with the rest of the Act and Parliament's intentions.
10. If the variable approach is correct, the Commissioner's Reference question cannot be answered in the abstract: it needs to be answered in light of the allegations that underpin the s. 106(2) application and the allegations that form the basis of the consent agreement. In such circumstances, the Tribunal should decline to hear the Reference.
11. The Commissioner is wrong to state that "no facts are required" for the determination of the question. The interpretive exercise that the Commissioner seeks is more properly undertaken in the hearing of Kobo's Application, with the Tribunal having the benefit of the facts of the case and being able to consider how to apply s. 106(2) in respect of a consent agreement that contains prohibition clauses whose alleged basis is s. 90.1.

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<sup>1</sup> Under s. 77, the Tribunal can make any order it sees fit to overcome the effects of exclusive dealing or tied selling and to restore or stimulate competition in the market. On the Commissioner's interpretation of s. 106(2), the inclusion of any term in a s. 77 consent agreement, so long as it was defined enough to be enforceable, would be immune from Tribunal review under s. 106(2). This is absurd and renders s. 106(2) effectively inapplicable to s. 77. For s. 106(2) to have any meaning for reviews of s. 77 consent agreements, the Tribunal must be allowed to consider the facts that gave rise to the consent agreement.

<sup>2</sup> Under s. 90.1(1)(a), the Tribunal may make an order "prohibiting any person – whether or not a party to the agreement or arrangement – from doing anything under the agreement or arrangement". As Kobo stated in its Notice of Application, without the ability to probe into what the terms of the alleged agreement or arrangement are, the Tribunal is effectively foreclosed from performing any review under s. 106(2).

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(ii)

**The Process is Inappropriate**

12. Even if the question is appropriate and the section lends itself to a single, universal interpretation as advocated by the Commissioner, the reference process is still inappropriate on the facts of this case, as it ignores the Tribunal's order that Kobo's Application be determined "swiftly" and Parliament's intention that s. 106(2) applications be determined expeditiously. The Reference unnecessarily delays matters.
13. Bringing a reference in the middle of a live application serves to delay the hearing of the application. References should therefore only be used sparingly and where they will result in judicial economy and will obviate the need for a hearing on the merits.
14. Although the Commissioner has the power to bring a reference at any time, and although every competition law case in Canada tends to raise new and interesting questions about the application and interpretation of the Act, the Commissioner only uses the reference power when third parties seek relief, never on his own applications.
15. It is inappropriate to only bring references in the face of s. 106(2) applications, given Parliament's intention that s. 106(2) applications in particular be determined expeditiously. In this case, where the Tribunal has ordered Kobo's Application to proceed swiftly, it is especially inappropriate to delay responding to the Application by bringing a reference.
16. A reference is only appropriate in the course of a s. 106(2) application where, like in *Burns Lake*, the reference might result in the disposition of the s. 106(2) application, thus fulfilling rather than frustrating Parliament's intention. That is not the case here. The Reference will not obviate the need for Kobo's Application, even if the Commissioner is correct about the section's interpretation.
17. If the interpretation of s. 106(2) is determined by reference, a question of complex statutory interpretation will be answered in the abstract (and will still be up for debate when the time comes for the Tribunal to apply the interpretation during the course of the hearing). Because of the importance of this question – and because of the diametrically opposed interpretations that have arisen in this case to date – an appeal of the Tribunal's Reference decision is all but assured.

18. Based on the events in *Burns Lake* – the only case in which the Commissioner has exercised the s. 124.2(2) reference power, and which was appealed to the Federal Court of Appeal on procedural grounds – the hearing of the Reference and disposition of any appeals could delay the hearing of the Application by one year.<sup>3</sup> In *Burns Lake*, this was a worthwhile investment of time, as it obviated the need for the hearing of the s. 106(2) application. In this case, Kobo's Application will proceed, regardless of the answer to the Reference.
19. It is more appropriate and expeditious to address the interpretive issues within the context of Kobo's Application. This would also allow any appeals to benefit from the necessary factual context.
20. The *Competition Act*, RSC 1985 c C-34, as amended, including sections 77, 90.1, 106(2), and 124.2.
21. The *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), as amended.
22. The *Competition Tribunal Rules*, SOR/2008-141.
23. The *Federal Court Rules*, SOR/98-106.
24. Such further and other grounds as counsel may advise and the Tribunal may permit.

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<sup>3</sup> Affidavit of Chinda Kham, sworn April 29, 2014, Kobo's Motion Record, Tab 2.

**THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:**

1. The Affidavit of Chinda Kham sworn April 29, 2014;
2. The pleadings and proceedings herein; and
3. Such further and other documents as counsel may advise and the Tribunal may admit.

**DATED AT** Toronto this 29<sup>th</sup> day of April, 2014.




---

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**COMPETITION TRIBUNAL**

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**BETWEEN:**

**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.**

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**NOTICE OF MOTION TO STRIKE NOTICE OF REFERENCE**

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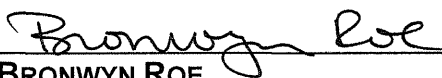
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**TAB J**

This is **Exhibit "J"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

A handwritten signature in cursive script that reads "Bronwyn Roe". The signature is written in black ink and is positioned above a solid horizontal line.

**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.

Court File No. CT-2014-002

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**BETWEEN:**

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- 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**

---

**RESPONSE OF THE COMMISSIONER OF COMPETITION  
(Motion to Strike Notice of Reference)**

---

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## OVERVIEW

1. The question the Commissioner of Competition (“**Commissioner**”) has referred to the Competition Tribunal (“**Tribunal**”) is proper. It is a pure question of law relating to the interpretation of a provision in Part VIII of the *Competition Act* (the “**Act**”) that falls squarely within subsection 124.2(2) of the Act. 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.
2. The use of the reference process is appropriate in this case. The Commissioner may refer a question of law to the Tribunal “at any time”. If the Tribunal agrees with the Commissioner’s interpretation of subsection 106(2) of the Act, the Commissioner’s reference (the “**Reference**”) will almost certainly obviate the need for further proceedings. Even if the Tribunal does not agree with the Commissioner’s interpretation, the Tribunal’s determination of the Reference question at the outset of this proceeding will clarify the scope of the case and guide the parties at each step going forward.
3. Kobo’s motion to strike should be dismissed, with costs.

**A. The Commissioner Refers a Proper Question**

4. The Commissioner has referred a proper question to the Tribunal under subsection 124.2(2) of the Act.
5. The question is a pure question of law relating to the interpretation of subsection 106(2) of the Act. The Commissioner asks the Tribunal to interpret 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 to determine the nature and scope of the Tribunal’s jurisdiction. The question is neither academic nor overly broad.
6. Rather, the question is a question of general application: it raises an overarching legal question regarding the Tribunal’s jurisdiction under subsection 106(2) of the Act that is relevant to this proceeding and all future subsection 106(2) proceedings. It also does not require a “factual foundation” for its determination.
7. The Tribunal’s determination of the Reference will resolve any uncertainty regarding the Tribunal’s jurisdiction under subsection 106(2) of the Act. The Reference is therefore to the benefit of the parties, the Tribunal, future litigants and the public at large.
8. In its motion, Kobo confuses the nature of the question that the Commissioner has referred to the Tribunal for determination. Kobo argues that the Tribunal must interpret subsection 106(2) of the Act flexibly, depending on the facts of

each case and the section in relation to which the consent agreement is filed, such that there is no legal standard that can be applied to all applications made under the provision. Kobo appears to argue, therefore, that the interpretation of subsection 106(2) is not a question of law, but a question of application or mixed law and fact. Kobo's position, if accepted, would be wholly inconsistent with established case law that defines what constitutes a "question of law", including *Burns Lake Native Development Corp. v. Canada (Commissioner of Competition)*, in which the Tribunal held, and the Federal Court of Appeal affirmed, that similar questions about the interpretation of subsection 106(2) were pure questions of law.<sup>1</sup>

9. Setting aside this confusion, it is clear that Kobo's real complaint is that it disagrees with the Commissioner's interpretation of subsection 106(2) of the Act and how that interpretation applies to the facts of this case.
  
10. As set out in the Commissioner's Reference Record, the Commissioner interprets the words "the terms could not be the subject of an order of the Tribunal" in subsection 106(2) of the Act to mean that the nature and scope of the Tribunal's jurisdiction to rescind or vary a consent agreement is limited to determining whether (i) the terms are terms that could be contained in an order issued by the Tribunal or (ii) the terms are so vague or ambiguous that they are unenforceable or would lead to "no enforceable obligation". The Tribunal's

<sup>1</sup> 2005 Comp. Trib. 19, Tab A, at paras. 28-29, affirmed 2006 FCA 97, Tab B at paras. 19-20.

jurisdiction under subsection 106(2) of the Act does not extend to a consideration of the facts.

11. The Commissioner submits that the foregoing interpretation applies to all consent agreements filed and registered under section 105 of the Act.
12. This interpretation of subsection 106(2) is consistent with Parliament's intention to streamline the process for all consent agreements filed and registered under section 105 of the Act and to make the process less costly and more certain for the parties to consent agreements. The Commissioner further argues that Kobo's interpretation would frustrate this purpose.
13. That the parties have conflicting interpretations of subsection 106(2) of the Act does not render the Reference question improper. Indeed, the purpose of the Reference is to resolve the conflict regarding the interpretation of subsection 106(2) of the Act for this proceeding and all future subsection 106(2) proceedings.
14. There is no basis for striking the Reference on the ground that the Commissioner has not referred a proper question to the Tribunal.

**B. The Reference Process is Appropriate**


15. The Act provides the Commissioner with the ability to, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Parts VII.1 to IX of the Act.
  
16. The Commissioner made the Reference so that an overarching question of law relating to the interpretation of subsection 124.2(2) of the Act can be determined expeditiously at the outset of this proceeding.
  
17. If the Tribunal agrees with the Commissioner that the scope of a subsection 106(2) proceeding is limited to considering whether the “terms” are terms that the Tribunal could not order, and does not include consideration of the facts of the “case”, then there will be no need for the proceeding to continue. This flows from the fact that Kobo has not alleged that the “terms” of the consent agreement are “terms” that could not be contained in a Tribunal order.
  
18. Even if the Tribunal does not accept the Commissioner’s interpretation of subsection 106(2) of the Act, the Reference will nonetheless clarify an overarching legal question in this proceeding. It will provide the parties with clear direction as to the nature and scope of the matter. Without that direction, the parties will embark on a proceeding with fundamentally differing views as to the scope of the proceeding and what arguments and evidence may be relevant. The Tribunal’s determination of the Reference will therefore be beneficial.

19. Kobo is not prejudiced by the Reference. The Tribunal has issued a stay of the consent agreement. Kobo's evidence in this proceeding demonstrates that pending the Tribunal's determination of Kobo's application, Kobo can continue to charge Canadian consumers higher prices for its e-books than would have been the case if the consent agreement was in force.
20. Further, Kobo's allegation that the Reference will delay this proceeding is hollow. If the Reference is heard after 25 June 2014, it would be the strike motion, not the Reference, that would have caused delay. To the extent that Kobo argues that the Reference will delay the proceeding because "an appeal of the Tribunal's Reference decision is all but assured", the claim is speculative. Further, it does not constitute a basis for striking the Reference.
21. The Reference is not clearly improper. Consequently, no basis exists for striking the Commissioner's Reference.
22. Kobo's motion to strike should be dismissed, with costs.

-10-

ALL OF WHICH IS RESPECTFULLY SUBMITTED

At Gatineau, Quebec on 9 May 2014.



---

**Department of Justice**  
**Competition Bureau Legal Services**  
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K1A 0C9

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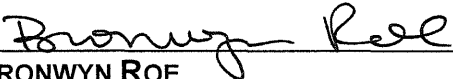
Esther Rossman (LSUC #54414R)  
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Counsel for the Respondent

**TAB K**



This is **Exhibit "K"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

Competition Tribunal



Tribunal de la Concurrence

Reference: *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 7

File No.: CT-2014-02

Registry Document No.: 62

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*.

B E T W E E N:

**Kobo Inc.**  
(applicant)

and

**The Commissioner of Competition,  
Hachette Book Group Canada Ltd.,  
Hachette Book Group, Inc.,  
Hachette Digital Inc.,  
HarperCollins Canada Limited,  
Holtzbrinck Publishers, LLC; and  
Simon & Schuster Canada, a division of CBS Canada Holdings Co.**  
(respondents)



Decided on the basis of the written record  
Before Judicial Member: Rennie J. (Chairperson)  
Date of Order and Reasons: May 14, 2014  
Order and Reasons signed by: Mr. Justice Donald J. Rennie

**SCHEDULING ORDER AND REASONS FOR ORDER  
REGARDING THE 106(2) APPLICATION**

[1] On March 18, 2014 the registration of the consent agreement in issue in this matter was stayed pending determination of Kobo's application under subsection 106(2) of the *Competition Act* (RSC, 1985, c C-34). Given the outstanding stay order, at the Case Management Conference of April 16, 2014, the Tribunal suggested a hearing date in the fall of 2014 for the application, and requested the parties provide an agreed upon schedule for the hearing of the application.

[2] The Tribunal has considered the draft consent schedule submitted by the parties on April 30, 2014 and correspondence from counsel for the Commissioner of May 12, 2014, in light of subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2<sup>nd</sup> Supp.) which provides that all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit. While the proposed schedule for hearing of the application cannot be characterized as aggressive, the parties are all represented by experienced counsel who have agreed to the timetable.

[3] The Tribunal notes that the nature of 106(2) proceedings will be informed by the outcome of Kobo's Motion to Strike and the outcome of the Reference, if it proceeds. In consequence of those decisions, the deadlines set out below may be altered. The Tribunal agrees with the joint request of the parties that the Motion to Strike be disposed of in writing.

**IN THIS CONTEXT, THE TRIBUNAL ORDERS THAT:**

**The 106(2) Application:**

[4] Given that the decision in the Reference, if it proceeds, would affect the form and content of the section 106(2) proceeding, it would be preferable that the parties have that decision prior to the commencement of proceedings. The schedule for the pre-hearing steps with respect to the main application shall therefore be as follows:

Friday, September 5, 2014	Commissioner to serve and file Response [and Motion to intervene of Indigo Books & Music Inc. deemed to have been filed].
Monday, September 15, 2014	Kobo to serve and file any Reply Deadline for the filing of motions for leave to intervene.
Monday, September 29, 2014	Deadline for the service and filing of response to the motions for leave to intervene filed.
Monday, September 29, 2014	Deadline for the service and filing of any replies of parties seeking leave to intervene [and deadline for cross-examinations on proposed interveners].
Week of October 6, 2014	Hearing of motions for leave to intervene.
Monday, October 27, 2014	Service of Affidavits of Documents and delivery of documents by all Parties.
Monday, November 17, 2014	Deadline for the filing of any motions arising from Affidavits of Documents and/or productions and/or in respect of the scope of examinations for discovery.
Date to be set as needed, during week of December 1, 2014	Hearing of any motions arising from Affidavits of Documents and/or productions and/or in respect of the scope of examinations for discovery.
Monday, December 15, 2014	Deadline for delivery of any additional productions resulting from any Affidavits of Documents/production motions.
January 12-16, 2015	Examinations for discovery according to a schedule to be settled between counsel.

Monday, January 26, 2015	Deadline for fulfilling answers to discovery undertakings.
Monday, February 2, 2015	Deadline for filing motions arising from answers to undertakings and refusals.
Date to be set as needed, during week of February 9, 2015	Hearing of motions arising from answers to undertakings and refusals.
Monday, February 23, 2015	Deadline for compliance with any order from motions.
March 3-4, 2015	Additional discovery, if any, based on answers to undertakings.
Tuesday, March 17, 2015	Kobo to serve documents relied upon, witness statements, and serve and file expert reports.
Friday, April 17, 2015	Commissioner to serve documents relied upon, witness statements, and serve and file expert reports.
Wednesday, April 22, 2015	Deadline for delivering any Requests for Admissions.
Friday, May 1, 2015	Commissioner to serve list of reply documents, witness statements, and serve and file reply expert reports.
Date to be set as needed, during week of May 4, 2015	Hearing of any motions related to the evidence.
Friday, May 8, 2015	Deadline to provide documents to the Tribunal for use at the hearing (e.g., Briefs of Authorities, witness statements, and Agreed Books of Documents).
Monday, May 11, 2015	Hearing of application to commence at 9:30 a.m. in the hearing room of the Competition Tribunal at 90 Sparks Street, Ottawa, Ontario.

DATED at Ottawa, this 14<sup>th</sup> day of May, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

**COUNSEL:**

For the applicant:

Kobo Inc.

Nikiforos Iatrou  
Mandy L. Seidenberg  
Bronwyn Roe

For the respondents:

Commissioner of Competition

Jonathan Chaplan  
John Syme  
Parul Shah  
Esther Rossman

Hachette Book Group Canada Ltd.,  
Hachette Book Group, Inc.,  
Hachette Digital, Inc.

James Gotowiec

HarperCollins Canada Limited

Katherine L. Kay

Holtzbrinck Publishers, LLC

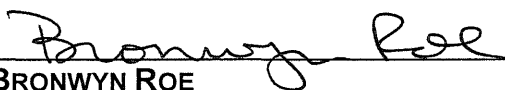
Emrys Davis

Simon & Schuster Canada, a division of CBS Canada Holdings Co.

Peter Franklyn

**TAB L**

This is **Exhibit "L"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015



---

**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.



Competition Tribunal



Tribunal de la Concurrence

Reference: *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 6

File No.: CT-2014-02

Registry Document No.: 61

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*.

B E T W E E N:

**Kobo Inc.**  
(applicant)

and

**The Commissioner of Competition,  
Hachette Book Group Canada Ltd.,  
Hachette Book Group, Inc.,  
Hachette Digital Inc.,  
HarperCollins Canada Limited,  
Holtzbrinck Publishers, LLC; and  
Simon & Schuster Canada, a division of CBS Canada Holdings Co.**  
(respondents)



Decided on the basis of the written record  
Before Judicial Member: Rennie J. (Chairperson)  
Date of Order and Reasons: May 14, 2014  
Order and Reasons signed by: Mr. Justice Donald J. Rennie

**SCHEDULING ORDER AND REASONS FOR ORDER  
REGARDING THE REFERENCE PROCEEDINGS**

[1] On March 18, 2014 the registration of the consent agreement in issue in this matter was stayed pending determination of Kobo's application under subsection 106(2) of the *Competition Act* (RSC, 1985, c C-34). Given the outstanding stay order, at the Case Management Conference of April 16, 2014, the Tribunal suggested a hearing date in the fall of 2014 for the application, and requested the parties provide an agreed upon schedule for the hearing of the application.

[2] The Tribunal has considered the draft consent schedule submitted by the parties on April 30, 2014 and correspondence from counsel for the Commissioner of May 12, 2014, in light of subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2<sup>nd</sup> Supp.) which provides that all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit. While the proposed schedule for hearing of the application cannot be characterized as aggressive, the parties are all represented by experienced counsel who have agreed to the timetable.

[3] The Tribunal notes that the nature of 106(2) proceedings will be informed by the outcome of Kobo's Motion to Strike and the outcome of the Reference, if it proceeds. In consequence of those decisions, the deadlines set out below may be altered. The Tribunal agrees with the joint request of the parties that the Motion to Strike be disposed of in writing.

**IN THIS CONTEXT, THE TRIBUNAL ORDERS THAT:**

**The Motion to Strike:**

Friday, May 9, 2014

The Commissioner is to serve and file responding motion materials.

May 9 – 16, 2014

Cross-examinations, if any.

Friday, May 16, 2014	Kobo is to serve and file its motion record.
Friday, May 23, 2014	Commissioner is to serve and file responding motion record.

**The Reference:**

Tuesday, June 10, 2014	Kobo is to serve and file a response to the Reference with a responding reference record.
Friday, June 20, 2014	The Commissioner is to file his final reference record.
Wednesday, June 25, 2014	Hearing of the Reference, commencing at 9:30 a.m. in the hearing room of the Competition Tribunal at 90 Sparks Street, Ottawa, Ontario, for a duration of 1 day.

DATED at Ottawa, this 14<sup>th</sup> day of May, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

**COUNSEL:**

For the applicant:

Kobo Inc.

Nikiforos Iatrou  
Mandy L. Seidenberg  
Bronwyn Roe

For the respondents:

Commissioner of Competition

Jonathan Chaplan  
John Syme  
Parul Shah  
Esther Rossman

Hachette Book Group Canada Ltd.,  
Hachette Book Group, Inc.,  
Hachette Digital, Inc.

James Gotowiec

HarperCollins Canada Limited

Katherine L. Kay

Holtzbrinck Publishers, LLC


Emrys Davis

Simon & Schuster Canada, a division of CBS Canada Holdings Co.

Peter Franklyn

**TAB M**

This is **Exhibit "M"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

**Competition Tribunal****Tribunal de la Concurrence**

**Date:** August 20, 2014

**Subject:** CT-2014-002 - Kobo Inc. v. The Commissioner of Competition, Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital Inc., HarperCollins Canada Limited, Holtzbrinck Publishers, LLC, Simon & Schuster Canada, A division of CBS Canada Holdings Co.

**Direction to Counsel (from Justice Rennie Chairperson)**

The deadlines established in the Scheduling Order of May 14, 2014 are suspended pending the release of the Tribunal's decision on the reference.


A case management conference will be convened following the release of the decision at which time a revised schedule will be established.

Joseph (Jos) LaRose  
Deputy Registrar / Registraire adjoint  
Competition Tribunal / Tribunal de la concurrence  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857

**TAB N**



This is **Exhibit "N"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

Competition Tribunal



Tribunal de la Concurrence

Reference: *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 14

File No.: CT-2014-02

Registry Document No.: 99

IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*, R.S.C., 1985, c. C 34 as amended,

AND IN THE MATTER OF a Reference to the Tribunal under subsection 124.2(2) of the *Competition Act*.

BETWEEN:

**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)



Date of hearing: 20140625

Before Judicial Member: Crampton C.J.

Date of Reasons and Order: September 8, 2014

**REASONS FOR ORDER AND ORDER**

## A. INTRODUCTION AND OVERVIEW

[1] These reasons explain the basis for the attached order issued in response to a Reference made by the Commissioner of Competition in the above-captioned proceeding, pursuant to subsection 124.2(2) of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”).

[2] The question of law in this Reference is:

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?

[3] For the reasons that follow, I have concluded that the jurisdiction of the Tribunal on an application under subsection 106(2) is limited to assessing the following:

- i. Whether the terms of a consent agreement are not within the scope of the type of order(s) that the Tribunal is permitted to issue in respect of the reviewable trade practice in question. (Terms that are not within the purview of one or more specific types of orders that may be made by the Tribunal in respect of a particular reviewable trade practice could not be the subject of an order of the Tribunal, within the meaning of subsection 106(2).)
- ii. Whether the consent agreement (a) identifies each of the substantive elements of the reviewable trade practice in question; and (b) contains either (i) an explicit agreement between the Commissioner and the respondent(s) 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 respondent(s) that they do not contest that conclusion.
- iii. Whether the terms of the consent agreement are unenforceable or would lead to no enforceable obligation, for example, because they are too vague.

[4] Applicants under subsection 106(2) are confined to establishing one or more of these three things. It is not open to them to attempt to establish that one or more of the substantive elements of a reviewable trade practice have not in fact been met, or that a defence or exception set forth in the Act is applicable. The Tribunal does not have the jurisdiction to consider these things under subsection 106(2).

[5] Accordingly, in these proceedings, it is open to Kobo Inc. (“Kobo”) to attempt to establish (i) that one or more of the terms of the consent agreement that is the subject of this proceeding are not within the scope of the *type of order(s)* that the Tribunal is permitted to issue pursuant to section 90.1 of the Act; (ii) that one or both of the conditions described in paragraph 3(ii)(a) and (b) above have not been satisfied; and/or (iii) that one or more of the terms of the consent agreement is unenforceable or would establish no enforceable obligation, for example because they are vague or ambiguous. If Kobo wishes to adduce factual evidence to establish any of these things, it may do so.

[6] However, it is not open to Kobo to attempt to establish, whether by factual evidence or otherwise, that one or more of the substantive elements set forth in section 90.1 of the Act are not met, including whether there is an agreement or arrangement – whether existing or proposed – between persons two or more of whom are competitors. Disputes with respect to these and other substantive elements, such as whether an agreement is likely to prevent or lessen competition substantially, are beyond the scope of subsection 106(2).

## **B. RELEVANT LEGISLATION**

[7] Section 105 of the Act provides for the entering into consent agreements and the registration of those agreements by the Tribunal. Section 105 states:

**105.** (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.

**105.** (1) Le commissaire et la personne à l’égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite de l’ordonnance provisoire prévue à l’article 103.3 — peuvent signer un consentement.

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par le Tribunal.

(3) The consent agreement may be filed with the Tribunal for immediate registration.

(3) Le consentement est déposé auprès du Tribunal qui est tenu de l'enregistrer immédiatement.

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures.

**[8]** Pursuant to subsection 106(2), third parties may apply to the Tribunal to vary or rescind a consent agreement. That provision states:

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement 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.

(2) Toute personne directement touchée par le consentement — à l'exclusion d'une partie à celui-ci — peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

**[9]** For the purpose of better understanding the opposing interpretations of subsection 106(2) being advanced on this Reference by the Commissioner of Competition (the "Commissioner") and Kobo, it is helpful to keep in mind the substantive requirements in section 90.1. That provision states:

**90.1 (1)** If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition

**90.1 (1)** Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un

substantially in a market, the Tribunal may make an order

marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

a) interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout acte au titre de l'accord ou de l'arrangement;

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

b) enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

[10] It is also helpful to keep in mind the purposes of the Act, as set forth in section 1.1. That provision states:

**1.1** The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

**1.1** La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficacité de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

## C. BACKGROUND

[11] On February 7, 2014, a consent agreement (the “CA”) between the Commissioner and various book publishers (the “Respondents”) was filed and registered with the Competition Tribunal (the “Tribunal”) pursuant to section 105 of the Act.

[12] The Respondents are Hachette Book Group Canada Ltd and certain of its affiliates, Holtzbrinck Publishers, LLC (doing business as Macmillan), HarperCollins Canada Limited and Simon & Schuster Canada, a division of CBS Canada Holdings Co.

[13] One of the recitals to the CA states that “the Commissioner alleges that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act.”

[14] Broadly speaking, the CA is directed towards distribution agreements between the Respondents and retailers of electronic books (“E-books”). Among other things, the CA prohibits the Respondents from directly or indirectly restricting, limiting or impeding an E-book retailer’s ability to set, alter or reduce the retail price of any E-book for sale to consumers in Canada, or to offer price discounts or any other form of promotions to encourage consumers in Canada to purchase one or more E-books. The CA also prohibits the Respondents from entering into an agreement with any E-book retailer that has one of those effects. These prohibitions apply for 18 months, commencing on the fortieth day following the registration of the CA.

[15] Certain other terms in the CA prohibit the Respondents from entering into agreements with E-book retailers that contain particular types of most-favoured nation clauses, for a period of four years and six months from the date of the registration of the CA.

[16] In addition, the CA requires the Respondents to take steps to terminate, and not renew or extend, agreements with E-book retailers that have certain types of provisions. In lieu of such action, the CA permits the Respondents to take certain alternative steps to satisfy their obligations.

[17] On February 21, 2014, Kobo filed a Notice of Application (the “NOA”) pursuant to subsection 106(2) of the Act for, among other things:

- i. an order rescinding the CA; and

- ii. in the alternative, an order varying the terms of the CA, to remove certain obligations of the Respondents;

[18] One of Kobo’s primary business operations is as a retailer of E-books. Kobo also develops and retails E-Book reading devices and creates free application software for reading E-books on computers and mobile devices.

[19] In its Statement of Grounds and Material Facts appended as Schedule “A” to the NOA, Kobo states that the effect of the CA “is to swiftly and radically alter Kobo’s contractual relationships with four key publishers – Simon & Schuster, Macmillan, HarperCollins, and Hachette.”

[20] After further describing the basis for its submission that it is “a person directly affected by a consent agreement” within the meaning of subsection 106(2) of the Act, Kobo alleges that the CA is not based on terms that could be the subject of an order of the Tribunal, as required by that provision, because the Tribunal lacks both the “threshold” jurisdiction and the “remedial” jurisdiction to make any order under subsection 90.1(1).

[21] Pursuant to an Order of Justice Rennie, dated March 18, 2014 the registration of the CA has been stayed “pending the determination of Kobo’s application under section 106 of the Act”.

[22] On April 15, 2014, the Commissioner filed a Notice of Reference pursuant to subsection 124.2(2) of the Act, in which he posed the question set forth at paragraph 2 above. Given that the question posed is a question of law, no evidence was filed by either party. However, each of the Commissioner and Kobo included in their respective Book of Authorities similar excerpts from minutes of the meetings of the House of Commons Standing Committee on Industry, Science and Technology (the “**Committee**”), at which the language of what are now sections 105 and 106 of the Act was considered, amended, and effectively finalized. The parties are in agreement that those minutes are properly before the Tribunal.

#### **D. SUMMARY OF THE PARTIES’ POSITIONS**

##### **(i) The Commissioner**



[23] The Commissioner submits that the Tribunal’s jurisdiction under subsection 106(2) of the Act is limited to reviewing the terms of a consent agreement to determine whether those terms:

- i. are terms that could be *contained in* an order issued by the Tribunal; and
- ii. are so vague or ambiguous as to be unenforceable, or would lead to no enforceable obligation.

[24] For greater certainty, the Commissioner submits that the Tribunal does not have the jurisdiction in a proceeding under subsection 106(2) to consider the facts underpinning a consent agreement or any of the questions of law or mixed fact and law that would have been at issue had the matter proceeded as a contested case. These include whether the substantive elements set forth in subsection 90.1(1) have been met.

[25] In oral submissions, the Commissioner elaborated upon his position by stating that the words in subsection 106(2) refer to terms of a sort that the Tribunal could not issue under the substantive provisions pertaining to the relevant reviewable trade practice, that is to say, terms that are outside the four corners of the Act, in the sense that they are terms the Tribunal could never impose (my emphasis - Transcript, June 15, 2014, at pp. 56 and 81 (the “Transcript”)).

**(ii) Kobo**

[26] Kobo submits that the correct interpretation of subsection 106(2) is one that allows the Tribunal to engage in some probing of facts and weighing of evidence to ensure that it would have had jurisdiction to make the order had the case proceeded as a contested matter. In its view, the extent of that probing and weighing will vary, depending on the section of the Act in relation to which the consent agreement is filed, the allegations contained in the application under subsection 106(2), and the circumstances of each particular case.

[27] In other words, Kobo submits that subsection 106(2) permits the Tribunal to go beyond comparing the terms of the consent agreement with the types of orders that the Tribunal has the remedial jurisdiction to impose, to assessing whether there is a substantive basis for making the

order. This would allow the Tribunal to “test the basis of” the consent agreement, including by assessing whether one or more substantive elements of that reviewable trade practice has been met. For example, in these proceedings, Kobo would like to make submissions on whether there is “an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors”, as required by subsection 90.1(1).

[28] For greater certainty, Kobo clarified in its oral submissions that it does not wish to make submissions with respect to whether the impugned conduct of the Respondents “prevents or lessens, or is likely to prevent or lessen, competition substantially in a market,” as is also required by subsection 90.1(1). However, Kobo stated that it should be open to the Tribunal to assess this issue in an appropriate case (Transcript, at pp. 106 and 165-176).

## **E. ANALYSIS**

[29] The Commissioner asserts that Kobo’s position would:

- i.** be inconsistent with the overall purpose of the Act;
- ii.** frustrate Parliament’s intent in amending the Act, as evidenced by the legislative history of sections 105 and 106;
- iii.** be at odds with the scheme of the Act; and
- iv.** not be supported by a plain reading of subsection 106(2) of the Act.

[30] I generally agree with the Commissioner, although I have concluded that the proper interpretation of subsection 106(2) is not as narrow as he submits.

### ***i. The Overall Purpose of the Act***

[31] There does not appear to be any dispute between the parties that the purpose of the Act is to maintain and encourage competition, not for its own sake, but to achieve the four paramount objectives set forth in section 1.1, reproduced in section B above (*Canada (Commissioner of Competition) v. Premier Career Management Group Corp*), 2009 FCA 295, at para 60).

[32] In exercising his statutory mandate, the Commissioner benefits from a presumption that actions taken pursuant to the Act are *bona fide* and in the public interest (*Commissioner of Competition v. Pearson Canada Inc.*, 2014 FC 376, at para 43). The Commissioner also has broad discretion to settle matters on terms that he considers advisable, provided that he does so within the bounds of the law. Settlements are an efficient way to resolve matters and they provide a means for a regulatory authority to achieve a flexible remedy that is tailored to address the interests of both the public and the person whose conduct is under investigation (*British Columbia (Securities Commission) v. Seifert*, 2007 BCCA 484 at para 31). Achieving resolutions that expeditiously address competition concerns with certainty and finality, and that provide market participants with clarity regarding the terms of settlement, are consistent with the broad purposes of the Act. Once again, there does not appear to be any disagreement between the parties with respect to these broad propositions, with which I agree.

[33] However, the parties disagree as to the relevance for this Reference of the presumption that actions taken by the Commissioner, including the entering into of consent agreements, are *bona fide* and in the public interest. The Commissioner's position appears to be that this presumption lends support to his view that any ambiguity regarding the scope of the Tribunal's jurisdiction under subsection 106(2) should be resolved in favour of a more narrow interpretation. I acknowledge that there is some merit to this position. Nevertheless, I agree with Kobo that there are limits to how far this presumption can be taken. In my view, any inconsistency between this presumption and the clear legislative history of subsection 106(2), the scheme of the Act or a plain reading of subsection 106(2) should be resolved against the presumption.

[34] There does not appear to be any disagreement between the parties with respect to the Commissioner's submission that the words of subsection 106(2) should "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act,

the object of the Act, and the intention of Parliament.” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para 21; *Commissioner of Competition v. Sears Canada Inc.*, 2005 Comp. Trib. 2, at para 223); *Interpretation Act*, R.S.C. 1985, c. I-21, s. 10).

[35] With the foregoing in mind, the Commissioner maintains that Kobo’s interpretation of subsection 106(2) would frustrate the purpose of the Act in at least three ways.

[36] First, as was the case with the former consent order process, which is further discussed in section E.ii of these reasons below, the Commissioner asserts that Kobo’s interpretation would add cost and engender delay to the resolution of competitive concerns. The Commissioner maintains that this would limit the number of matters to which the Commissioner could respond. More importantly, the delays would allow competitive problems to persist to the detriment of competition, Canadian business and Canadian consumers.

[37] I acknowledge that Kobo’s interpretation would have these results. However, in my view, the magnitude of the adverse effects is overstated by the Commissioner. In the overall scheme of things, it is not obvious to me that those effects alone would be greater than the unforeseen adverse effects to competition and the Canadian economy as a whole that might be established by a third party in a section 106(2) proceeding, under Kobo’s interpretation.

[38] Second, the Commissioner submits that Kobo’s interpretation would create uncertainty in respect of competition issues resolved by way of consent agreement. As was the experience under the consent order process discussed below, this uncertainty and the absence of finality would have a chilling effect on parties’ willingness to enter into consent agreements with the Commissioner.

[39] I agree. As further discussed in section E.ii below, it is common ground between the parties that this was an important part of the “mischief” associated with the former consent order process that Parliament sought to address when it enacted the existing consent agreement provisions in 2002 (Transcript, at pp. 101-2 and 166).

[40] In my view, it is readily apparent that if, as Kobo suggests, persons directly affected by a consent agreement can challenge the basis for the Commissioner’s conclusion that one or more of the substantive elements of the relevant reviewable trade practice have been met, this would

have a potentially greater chilling effect on domestic and international businesses than was the case under the former consent order provisions.

[41] This is because the scope of the Tribunal's review power would likely be broader than it was under the latter provisions. Pursuant to those provisions, the Tribunal's focus was simply to satisfy itself of two things, namely, (i) that "the measures proposed in the consent order are sufficiently well defined to be effective and enforceable", and (ii) that "the measures proposed are adequate to eliminate the substantial lessening of competition that would otherwise arise" from the reviewable conduct in question (*The Commissioner of Competition v. Ultramar Ltd.*, 2000 Comp. Trib. 4, at para 33, ("**Ultramar**"). In that context, the alleged substantial prevention or lessening of competition was presumed. It was not open to third parties to challenge the conclusion of the Commissioner with respect to that substantive element or others set forth in the provisions pertaining to the reviewable trade practice in question. (*Ultramar*, above; *Commissioner of Competition v. Trilogy Retail Enterprises L.P.*, 2001 Comp. Trib. 29, at paras. 20-21 ("**Trilogy**").

[42] If one or more of the Commissioner's conclusions with respect to the elements of the relevant restrictive trade practice were subject to dispute under subsection 106(2), this would open up a potentially far broader range of complex issues in the average proceeding under that provision than was ever in dispute under the former consent order process. Particularly given the experience under the former consent order regime, it is entirely reasonable to expect that this would likely have a chilling effect on a potentially broad range of reviewable business conduct that might otherwise advance one or more of the objectives set forth in section 1.1 of the Act. Contrary to Kobo's position, it is not necessary for the Commissioner to lead "cogent evidence" on this point. This is within the Tribunal's expertise as a specialized administrative tribunal.

[43] I acknowledge that disputes with respect to certain substantive elements, defences or exceptions established in Part VIII of the Act may not lead to significant uncertainty. One such example might be the requirement under paragraph 75(1)(c) that a person seeking to be supplied with a particular product establishes that he is willing and able to meet the usual trade terms of the supplier of that product. Another example might be the exception in subsection 90.1(7) for agreements between affiliated companies. However, the parties were not able to identify any

principled basis upon which subsection 106(2) could be interpreted in a manner that would allow only those types of straightforward substantive elements, defences or exceptions to be reviewable under subsection 106(2), while excluding from the purview of subsection 106(2) the other substantive provisions in Part VIII – most of which can give rise to very complex disputes. Interpreting subsection 106(2) in a manner that would permit the Tribunal to make such determinations on a “case by case basis”, as suggested by Kobo, would seriously undermine Parliament’s intention to address the above-mentioned mischief, by establishing a more predictable framework for the Tribunal’s oversight of negotiated settlements.

[44] With the foregoing in mind, I agree with the Commissioner’s position that the interpretation of subsection 106(2) being advanced by Kobo would significantly frustrate the paramount purposes of the Act, as set forth in section 1.1, because of the potentially significant adverse effects that it would have on competition (by delaying settlement) and on business conduct that would promote those purposes.

[45] Third, the Commissioner asserts that as a result of the increased chilling effect described above, more cases would be settled by way of undertakings rather than consent agreements, thereby compromising the Commissioner’s ability to enforce negotiated settlements that would otherwise be registered under section 105 of the Act.

[46] I agree that this would also be inconsistent with the purposes of the Act, and that the likelihood of this outcome is demonstrated by the experience under the former consent order process, which is discussed in further detail in the next section below.

#### *ii. The Legislative History of sections 105 and 106*

[47] Prior to the amendments that were enacted in 2002 pursuant to Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1<sup>st</sup> Sess., 37<sup>th</sup> Parl., 2002 (“Bill C-23”), section 105 of the Act provided the Tribunal with the authority to issue consent orders. At that time, the wording of section 105 was as follows:

105. Where an application is made to the

105. Lorsqu’une demande d’ordonnance est

Tribunal under this Part for an order and the [Commissioner] and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

faite au Tribunal en application de la présente partie et que le [commissaire] et la personne à l'égard de laquelle l'ordonnance est demandée s'entendent sur le contenu de l'ordonnance en question, le Tribunal peut rendre une ordonnance conforme à cette entente sans que lui soit alors présentée la preuve qui lui aurait autrement été présentée si la demande avait fait l'objet d'une opposition.

[48] Sections 33 to 36 of the *Competition Tribunal Rules*, SOR/87-373 (the “**Former Rules**”), set forth the procedures to be followed on applications under section 105 of the Act. These included, pursuant paragraph 34(3)(b), a requirement to file a statement setting out the anticipated effect that the order would have on competition if the proposed order were made. These statements came to be called consent order impact statements.

[49] Notwithstanding the limited role that Parliament conferred upon the Tribunal on consent order applications, the deference with which the Commissioner’s positions were treated, and the assumption that consent orders “will accomplish what the [Commissioner] asserts they are designed to do” (*Canada (Director of Investigation and Research) v. Imperial Oil Limited*, [1990] C.C.T.D. No. 1, at p. 9 (QL)), the consent order process ultimately attracted widespread criticism and was replaced with the current consent agreement process.

[50] It is common ground between the parties that the “mischief” which Parliament sought to address in 2002 in establishing the consent agreement process that is now enshrined in sections 105 and 106 included the significant cost, delay and uncertainty associated with the former consent order process. Those problems arose primarily because that process “created too many incentives, too many ways for third parties to get involved and to lengthen the process ...” (Kobo’s oral submissions, Transcript, at pp. 101-2, and 166).

[51] It is not disputed that these problems deterred businesses from participating in the consent order process, led to a practice of negotiating “undertakings” with the Commissioner that may not have been enforceable, and gave rise to a widespread consensus that the consent order process was “broken and needed to be fixed.”

[52] However, the parties disagree as to what Parliament intended when it enacted the current wording in sections 105 and 106.

[53] When the 2002 amendments were initially introduced to Parliament for first reading as part of Bill C-23, the proposed language of the legislation would have permitted consent agreements to be filed for immediate registration, without review by the Tribunal. There was no provision that would have allowed third parties to seek review of those agreements.

[54] Moreover, the initially proposed wording of subsection 105(2) provided that consent agreements “shall be based on terms that could be the subject of an order of the Tribunal against that person, and may include other terms, whether or not they could be imposed by the Tribunal” (my emphasis).

[55] Collectively, these provisions reflected a substantial recalibration of the respective roles of the Commissioner and the Tribunal that attracted significant criticism. In brief, several parties who appeared before the Committee essentially stated that the amendments as initially worded would have given too much power to the Commissioner and would have confined the Tribunal’s jurisdiction to that of providing a “rubber stamp.” Among other things, they suggested that the Commissioner’s ability to file consent agreements “for immediate registration” would virtually eliminate the Tribunal’s oversight function in relation to such settlements. They also questioned why the Commissioner should have more remedial power than the Tribunal, as reflected in the underlined wording in the immediately preceding paragraph above. In addition, they expressed concern that the proposed amendments would completely eliminate any opportunity for input by third parties.

[56] In response to these comments, the Commissioner proposed two important changes to the proposed amendments. The first of those changes was to delete the language in subsection 105(2) that would have allowed consent agreements to “include other terms, whether or not they could be imposed by the Tribunal.” The second was to add what is now subsection 106(2), to provide third parties with an ability to apply to have one or more terms of a consent agreement rescinded or varied, and to grant the Tribunal the jurisdiction to 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.”



[57] The Commissioner notes that his predecessor, Konrad von Finckenstein, explained these changes as follows:

On consent agreements, concern has also been expressed that proposed subsection 105(2), dealing with the possible terms of a consent agreement between the commissioner and a person against whom an order from the tribunal has or might be sought is too broad.

We do not agree with this view. Our intent was to provide a provision that would allow us to address competition concerns in a flexible manner. Nevertheless, because of the concerns that were raised, the bureau proposes changing proposed subsection 105(2) on page 29 so that it only reads:

The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

In other words, the rest of the proposed subsection, “and may include other terms, whether or not they could be imposed by the Tribunal” should be taken out.

In order to make the latter change meaningful, the bureau would also suggest changes to proposed section 106, which would make it possible for a third party directly affected by a consent agreement to apply to the tribunal for a change to an agreement, on the grounds that the relevant terms could not have been subject to an order by the tribunal.

This could be done by adding the following to proposed section 106 after line 27 on page 30:

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement 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.

This, in my view, would make the consent provisions more streamlined and would eliminate the objection raised before you.

(House of Commons, Standing Committee on Industry, Science and Technology, 37<sup>th</sup> Parl., 1<sup>st</sup> Sess., Meeting no. 50 (7 November 2001), at 1630 (Konrad von Finckenstein).

[58] The Commissioner further referred to an exchange between Mr. von Finckenstein and the Honourable Chuck Strahl, a member of the Committee. In that exchange, Mr. Strahl referred to the process under the U.S. *Tunney Act*, 15 U.S.C. § 16, which gives the U.S. Courts fairly broad

powers of review of proposed consent orders entered into under U.S. antitrust laws. Mr. von Finckenstein began his reply to Mr. Strahl's question by stating that the proposed amendments were not based on the *Tunney Act* model. He then clarified that a consent agreement:

... has to be something that is within the four corners of the tribunal's authority. It's something the tribunal could have done, but we can save ourselves the necessity of going through a trial if both parties agree, "Yes, this is a fair resolution." We do it, we sign it, we register it, it becomes effective.

Now, if it affects a third party and someone gets sideswiped by it whom we didn't think of – unlikely, but it's this kind of ... that third party should have in our view a right to have a term rescinded of right, if we did something the tribunal couldn't have done.

If the tribunal could have done the same thing, then the case is exactly what we have here: we have something that is within the power of the tribunal to do ...

What you want to have here is control. If there's something that's being done that is really outside the purview of the Competition Tribunal, then it shouldn't be done by consent decree either, because the whole idea is to substitute a consent decree for a full trial. But the outcome should be something that could have been ordered by the tribunal

(My emphasis)

(House of Commons, Standing Committee on Industry, Science and Technology, 37<sup>th</sup> Parl., 1<sup>st</sup> Sess., Meeting no. 50 (7 November 2001), at 1720 (Konrad von Finckenstein.

[59] Given that the only amendments made by the Committee were those suggested by Mr. von Finckenstein, the Commissioner submits that it can be inferred that Parliament decided not to make any amendments to the consent agreement provisions that would have responded to the "proposals" that were made by others who appeared before the Committee. He asserts that where Parliament focuses on an issue and makes a choice among various legislative proposals, that decision must be respected.

[60] It is common ground between the parties that there were no amendments made to sections 105 and 106 subsequent to the amendments made by the Committee, either in the House of Commons or in the Senate.

[61] In the Commissioner’s view, Parliament implicitly decided to confine the Tribunal’s review power to assessing whether a consent agreement contains “terms” that the Tribunal could order, in the sense of “terms that could be contained in an order issued by the Tribunal,” as opposed to terms that are “outside the purview of” the Tribunal. The Commissioner also maintains that the Tribunal also has the jurisdiction to review the terms of a consent agreement to determine whether they “are so vague or ambiguous as to be unenforceable or would lead to no enforceable obligation.” This will be further discussed in my concluding remarks, in section F of these reasons below.

[62] Kobo submits that Parliament did not intend that the Commissioner’s substantive basis for entering into consent agreements would go untested by the Tribunal. In support of this position, Kobo relies on the following passage from the testimony of Mr. von Finckenstein, reproduced at paragraph 58 above:

What you want to have here is control. If there’s something that’s being done that is really outside the purview of the Competition Tribunal, then it shouldn’t be done by consent decree either, because the whole idea is to substitute a consent decree for a full trial. But the outcome should be something that could have been ordered by the tribunal.

[63] Kobo asserts that this statement contemplates a review of not only the remedial terms of a proposed consent agreement, but the substantive jurisdictional basis for those terms as well. Kobo asserts that this is because the “whole idea” was that a consent agreement should not be entered into if it could not have been arrived at through a trial – which must include a consideration of substantive, or “threshold,” jurisdiction.

[64] Kobo maintains that the following exchange between Mr. von Finckenstein and Mr. Strahl further reflects an intention that the Tribunal’s review under subsection 106(2) is meant to focus on the substantive basis for the consent agreement as a whole, as opposed to the discrete terms thereof:

Mr. Konrad von Finckenstein: We start an action against the company. The company comes to us and says, why don't we settle this? We make a consent agreement, we draft it, we register it, and it becomes a judgment of the court. If somebody else is directly affected by that and says that we shouldn't have done

it, that this was something the tribunal couldn't impose, they have 60 days to go to the tribunal to challenge the agreement.

Mr. Chuck Strahl: If you use the current sexy issue, which is airlines, let's suppose there were some sort of interim agreement agreed to between two parties, but somehow we'd forgotten to think of some little guy who's flying to Victoria from Abbotsford. If he feels that it's somehow compromising his future and contravenes the act, then could he apply under this grace period here, the 60-day period?

Mr. Konrad von Finckenstein: If he could prove that he's likely affected by it and that what we did was outside the act, yes indeed, he could do it.

(Kobo's emphasis.)

(House of Commons, Standing Committee on Industry, Science and Technology, 37<sup>th</sup> Parl., 1<sup>st</sup> Sess., Meeting no. 60 (4 December 2001), at 1655.)

**[65]** Kobo adds that Mr. von Finckenstein's use of the word "prove" also reflects that subsection 106(2) was intended to be a factual contest in which evidence would be adduced with respect to the substantive basis for the consent agreement as a whole.

**[66]** With respect to the Commissioner's suggestion that Parliament expressly rejected the "proposals" made by various witnesses who appeared before the Committee, Kobo asserts that no other witness made specific proposals for amendment. Instead, it maintains that the Committee heard the various concerns that were expressed about the language of sections 105 and 106, as initially proposed, and produced a compromise. According to Kobo, that compromise was that the Commissioner would retain broad powers to file consent agreements for automatic registration by the Tribunal, but there would be a "safety valve" that at least one person who appeared before the Committee suggested would be helpful. This safety valve was the power of the Tribunal to conduct a meaningful check on the basis for the proposed consent agreement as a whole.

**[67]** Once again, Kobo relies on some of the statements made by Mr. von Finckenstein in the passage of his testimony reproduced at paragraph 58 above, namely:

[I]t has to be something that is within the four corners of the tribunal's authority ... Now, if it affects a third party and someone gets sideswiped by it whom we didn't think of – [...] that third party should have in our view a right to have a term rescinded of right, if we did something the tribunal couldn't have done.

(Kobo's emphasis.)

[68] Kobo asserts that its position is further supported by the following statements of Mr. von Finckenstein:

Basically, the commissioner can make a consent agreement with any party as long as it's consistent with the act. Anybody directly affected by that agreement who feels it's inconsistent with the act has 60 days to go to the tribunal and challenge that consent agreement.

(House of Commons, Standing Committee on Industry, Science and Technology, 37<sup>th</sup> Parl., 1<sup>st</sup> Sess., Meeting no. 60 (4 December 2001), at 1655.)

[69] I disagree with Kobo's interpretation of Mr. von Finckenstein's testimony and the broader legislative history relating to the current text of sections 105 and 106 of the Act.

[70] In my view, it is very clear from the legislative history, including Mr. von Finckenstein's testimony, that Parliament did not intend to confer upon the Tribunal the jurisdiction to hear and adjudicate upon factual disputes with respect to the basis for the conclusions reached by the Commissioner regarding either the substantive elements of reviewable trade practices, or the defences and exceptions set forth in the Act in respect of those trade practices.

[71] As Kobo recognizes, the 2002 amendments to sections 105 and 106 were designed to, among other things, streamline the settlement process and make it faster and more predictable (*Rona Inc. v. Commissioner of Competition*, 2005 Comp. Trib. 18, at para 77).

[72] The language that was initially proposed for those two sections when Bill C-23 was introduced to the House of Commons for First Reading made this abundantly clear. As discussed above, that language did not permit any review by the Tribunal, either on its own initiative or upon application by a third party. In addition, the initial language of subsection 105(2) provided that consent agreements "shall be based on terms that could be the subject of an order of the Tribunal against that person, and may include other terms, whether or not they could be imposed by the Tribunal." (My emphasis.)

[73] The only changes that were subsequently made to these initially proposed amendments to sections 105 and 106 were the two changes proposed by Mr. von Finckenstein, word for word. Contrary to Kobo's suggestion, there was no compromise that accommodated any other concerns that had been raised by other witnesses who appeared before the Committee. This includes the concern that there be a "safety valve" to permit the Tribunal to address unforeseen or extraordinary circumstances, including unforeseen effects on a third party that may not flow from "terms [that] could not be the subject of an order of the Tribunal." It also includes the proposal that subsection 105(4) be worded to provide that a consent agreement would be registered upon the expiry of 30 days from the date on which it was filed with the Tribunal, "unless a determination has been made by a judicial member of the Tribunal that there may be grounds for not registering the agreement based on a reasonable apprehension of bias, bad faith or a conflict of interest on the part of the Commissioner, or an excess of jurisdiction." (House of Commons, Standing Committee on Industry, Science and Technology, 37<sup>th</sup> Parl., 1<sup>st</sup> Sess., Meeting no. 48 (6 November 2001), at 1030 (Mark Katz).) Of course, even though it can be inferred from the foregoing that Parliament rejected the suggestion that the Tribunal have the jurisdiction to consider these matters, it would be potentially open to a party to raise them before the Federal Court on an application for judicial review brought pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (*Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, at para 40 ("**Air Canada**"), leave to appeal to SCC refused, 29202 (19 December, 2002). Indeed, the Commissioner recognized this possibility during the hearing of this Reference (Transcript, at pp. 41 and 210).

[74] The effect of the two amendments proposed by Mr. von Finckenstein, and accepted by the Committee, was to remove the ability of the Commissioner to include in consent agreements terms that could not be imposed by the Tribunal, and to add a very limited ability for third parties to apply to the Tribunal to have one or more terms of the agreement rescinded or varied. The Tribunal's jurisdiction under subsection 106(2) to grant the application was confined to circumstances where the applicant "has established that the terms could not be the subject of an order of the Tribunal."

[75] The best evidence of what was meant by the latter language is Mr. von Finckenstein's testimony, as it was he who proposed that language, and indeed the initially proposed text of sections 105 and 106, when Bill C-23 was introduced at First Reading.

[76] In my view, it is clear from that testimony of Mr. von Finckenstein that the words "has established that the terms could not be the subject of an order of the Tribunal" were intended to mean "has established that 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 the reviewable trade practice in question." In other words, when Parliament enacted Mr. von Finckenstein's proposals word for word after hearing his very specific testimony, it appears to have simply intended that terms which are not within the purview of one or more specific types of orders in respect of a particular reviewable trade practice can not be the subject of an order of Tribunal, within the meaning of subsection 106(2). In my view, the legislative record does not support the more expansive interpretation of that provision that has been advanced by Kobo.

[77] The best indication of the limited nature of the review contemplated by Mr. von Finckenstein, and by implication Parliament when it accepted his proposed amendments and did not accommodate other concerns that had been raised, is provided in the underlined language in the quote reproduced from his testimony before the Committee, at paragraph 58 above. This includes the words "within the four corners of the Tribunal's authority," "something the Tribunal couldn't have done," and "outside the purview of the Tribunal." In my view, those words, and the words "outside the act" in the quote reproduced at paragraph 64 above, are more consistent with the restrictive interpretation described above, than with the broader interpretation adopted by Kobo.

[78] The more restrictive interpretation that I have adopted is also more consistent with Mr. von Finckenstein's expressed intent to streamline the Tribunal's oversight role and to avoid the necessity of going through a trial. In my view, it is very unlikely that he would have conveyed the desire to avoid going through a trial, if he had contemplated that the Tribunal's jurisdiction would include the ability to review the substantive basis for the consent agreement. Experience to date with contested applications under Part VIII of the Act demonstrates that even the review

of a single substantive element in Part VIII of the Act can be enormously time consuming and costly.

[79] Finally, I do not accept Kobo’s suggestion that Mr. von Finckenstein’s use of the word “prove” (in the quote reproduced at paragraph 64 above) reflects that subsection 106(2) was intended to be a factual contest in which evidence would be adduced with respect to the substantive basis for the consent agreement as a whole. In my view, the context in which Mr. von Finckenstein made this statement suggests that he intended the word “prove” to mean “establish”, in the sense of demonstrating on a balance of probabilities.

### *iii, The Scheme of the Act*

[80] The Commissioner submits that his interpretation of subsection 106(2) is supported by the scheme of the Act and, more particularly, an analysis of the consent agreement provisions themselves, various other provisions where Parliament clearly expressed its intention to confer a broader review power on the Tribunal, and the private access provisions of the Act.

[81] Broadly speaking, I agree that the scheme of the Act supports a narrow interpretation of the Tribunal’s review powers under subsection 106(2), although not quite as narrow as the Commissioner submits.

[82] With respect to the consent agreement provisions, the Commissioner notes that section 105 does not provide the Tribunal with the power to review the terms of consent agreements that are filed or the factual and legal underpinnings for the agreements. Rather, pursuant to subsection 105(3), consent agreements may be filed with the Tribunal for immediate registration.

[83] In addition, the Commissioner notes that while subsection 105(2) provides that a consent agreement is to be based on terms that could be the subject of an order of the Tribunal “against that person”, the words “against that person” are not found in subsection 106(2). The Commissioner maintains that it can be inferred that Parliament made a conscious decision to refrain from including in subsection 106(2) the same language that was set forth in subsection



105(2). He submits that this indicates that Parliament intended to eliminate from the purview of subsection 106(2) a consideration of whether the consent agreement could be the subject of an order “against that person”.

[84] The Commissioner also contrasts the important differences in the language of subsection 106(2) and paragraph 106(1)(a), which deals with applications by the Commissioner or a party to a consent agreement or an order, to vary or rescind that agreement or order. In particular, whereas the latter provision contemplates a review by the Tribunal of “the circumstances that led to the making of the agreement or order,” no such language appears in subsection 106(2). The sole focus of subsection 106(2) is upon the “terms” of the consent agreement and upon whether those terms could be the subject of an order of the Tribunal. The Commissioner maintains that if Parliament had intended to provide the Tribunal with a broader review power under subsection 106(2), it would have done so, as it did in paragraph 106(1)(a).

[85] Kobo submits that the words “against that person” were not included in subsection 106(2) because it was unnecessary to do so, since the applicant under the latter provision is a stranger to the agreement. Kobo maintains that since subsection 106(1) is the section which deals with the rights of the person referred to in subsection 105(2), the inclusion of the words “against that person” in subsection 106(2) would have made the latter provision unnecessarily confusing.

[86] I agree with both of these submissions by Kobo. However, I do not accept Kobo’s position that this interpretation necessarily implies that subsection 106(2) contemplates a review by the Tribunal of the substantive basis for the consent agreement.

[87] In my view, the order contemplated by subsection 106(2) is the order referred to in subsection 105(2), namely, the order against the person referred to in subsection 105(1), who is a party to the consent agreement.

[88] This interpretation is the most plausible and acceptable one, in the sense of producing an outcome that is reasonable, just, rational and consistent with a harmonious, coherent reading of the scheme established by subsections 105(2) and 106(2) as a whole (Ruth Sullivan, *Sullivan on the Construction of Statutes* (Fifth Ed., Markham: LexisNexis, 2008, at 1, 3, 223 and 325).

[89] The Commissioner's interpretation falls short of enjoying these attributes, as it would lead to the incongruous result that the Tribunal would be powerless to enforce the requirements of subsection 105(2).

[90] An alternative interpretation, which both enjoys these attributes and is consistent with Parliament's apparent intent to achieve an expeditious and predictable scheme for the registration and review of negotiated settlements, as reflected in both the legislative history and a reading of sections 105 and 106 as a whole, would be more appropriate and preferable.

[91] In my view, this desirable outcome can be comfortably achieved by reading subsection 106(2) as providing the Tribunal with the ability 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, that 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. According to Kobo, this is

because the provisions in the Act pertaining to certain reviewable trade practices grant the Tribunal the authority to make any order that may be agreed upon between the Commissioner and a person who is the subject of the order. In particular, the combined effect of paragraphs 90.1(1)(a) and 90.1(1)(b) permits the Tribunal to require any person – whether or not a party to the impugned horizontal agreement or arrangement – to take any action, with the consent of that person and the Commissioner. The same is true with respect to the combined effect of the provisions in paragraph 92(1)(e), dealing with completed mergers, as well as the combined effect of the provisions in paragraph 92(1)(f), dealing with proposed mergers.

[95] In proceedings under subsection 106(2) involving these types of cases, there may well be nothing for the Tribunal to review, in terms of assessing whether the terms of the consent agreement are within the purview of the type of order that the Tribunal is authorized to make. However, the Tribunal would still have the important task of making a determination with respect to the two matters described in paragraph 92 above. As discussed below, it would also have the task of ensuring that the terms of the consent agreement are enforceable. Indeed, the Commissioner acknowledged during the hearing of this Reference that the Tribunal would have this latter function in this case (Transcript, at p. 61).

[96] The interpretation of the consent agreement scheme that I have adopted would also respond to Kobo's position that the Commissioner's interpretation of the scope of the Tribunal's jurisdiction under subsection 106(2) would frustrate the Tribunal's review of whether the terms of a consent agreement are within the scope of paragraph 90.1(1)(a). 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.

[97] Likewise, the interpretation that I have adopted would respond to Kobo's similar position regarding the requirement in subsection 79(3) that an order be limited to terms that will, in the Tribunal's opinion, "interfere with the rights of any person to whom the order is directed or any

other person affected by it only to the extent necessary to achieve the purpose of the order.” This is because the two things described in paragraph 92 above would provide the Tribunal with the information it requires to reach an appropriate understanding of the purpose of the order, and to make this determination, in a subsection 106(2) proceeding that concerns a consent agreement involving conduct alleged to satisfy the elements of section 79.

[98] Kobo advanced similar positions with respect to the limitations set forth in subsections 77(2) and 77(3), as well as the exception set forth in subsection 81(2). For the purposes of these Reasons for Order, these positions do not appear to be different in kind from Kobo’s position that subsection 106(2) provides the Tribunal with a broad jurisdiction to review whether a sufficient basis exists to permit the Commissioner to enter into a consent agreement at all – including by hearing and adjudicating upon submissions with respect to whether the substantive elements of the reviewable trade practice in question have in fact been met.

[99] In my view, there is nothing in the Act which clearly indicates or suggests that the Tribunal’s jurisdiction under subsection 106(2) is as extensive as Kobo suggests, or is any broader than the interpretation that I have adopted, based primarily on the conclusions that I have reached with respect to the scheme established in sections 105 and 106, the legislative history of those provisions, and the overall purpose of the Act.

[100] I recognize that my interpretation of the scope of the Tribunal’s jurisdiction under subsection 106(2) may not provide a substantial scope for third parties who are directly affected by a consent agreement to obtain relief under that provision to address any unintended adverse impacts that the agreement may have upon them. From the position of such persons, a fairer and more balanced approach may well have been to confer upon the Tribunal the jurisdiction to address such impacts where an applicant for relief has established a strong *prima facie* case of the existence of an exceptional, unintended, adverse impact in this regard. However, notwithstanding that this concern (regarding unintended effects on third parties) was raised during the Committee’s hearings, it was not embraced by Parliament or addressed in the existing wording of subsection 106(2), except to the extent contemplated by the interpretation of that provision that I have adopted. Parliament’s implicit decision to confine the Tribunal’s jurisdiction in the manner that I have determined must be respected. As a statutory

administrative body, the Tribunal only has such powers as Parliament has decided to confer upon it (*Air Canada*, above, at para 43).

[101] For greater certainty, I do not read the comments of Chief Justice Iacobucci, as he then was, in *Re American Airlines, Inc. and Competition Tribunal* (1988), 54 DLR (4<sup>th</sup>) 741, at 749 (FCA) (“American Airlines”) as implying that the considerations of fairness referred to in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c. 19 (2nd Supp) (the “CT Act”) dictate a broader interpretation of subsection 106(2) than I have adopted. That case concerned the scope of *participation* rights of interveners in proceedings before the Tribunal, which is a very different issue from the one in dispute here. Subsection 9(2) states: “All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.” Chief Justice Iacobucci relied on that provision, together with his interpretation of the plain meaning of the word “representations” in subsection 9(3) of the CT Act, and Parliament’s intent in enacting subsection 9(3), to conclude that the inherent authority of the Tribunal to permit interventions on terms and conditions that it considers to be appropriate should not be limited in the manner decided at first instance by Strayer J. In my view, the fairness considerations referred to in subsection 9(2) cannot trump the conclusions that I have reached in the different context of this case, with respect to the scheme established in sections 105 and 106, the legislative history of those provisions and the overall purpose of the Act.

[102] In summary, the various positions that Kobo has advanced regarding the scheme of the Act do not provide persuasive support for the view that subsection 106(2) should be interpreted more broadly than I have determined. These include the arguments that Kobo has advanced with respect to the interplay between sections 105 and 106, as well as the language in paragraphs 90.1(1)(a), 90.1(1)(b), 92(1)(e), 92(1)(f), and subsection 77(3).

[103] These also include Kobo’s argument that its broad interpretation of subsection 106(2) is consistent with Parliament’s clear intention to streamline the settlement process and make it faster and more predictable. Kobo bases this position on the fact that the consent agreement scheme established by sections 105 and 106, as interpreted by Kobo, achieves these objectives. According to Kobo, it does this by (i) establishing a high threshold for standing by third parties, by requiring that they be directly affected by a consent agreement, (ii) placing the onus on third

parties to establish that the terms of the consent agreement in question could not be the subject of an order of the Tribunal, (iii) providing for automatic registration of the consent agreement, without the need for the Commissioner to file supporting evidence, thereby placing third parties who may wish to avoid the immediate effects of the agreement in the position of having to obtain a stay from the Tribunal; (iv) requiring third parties to challenge consent agreements within 60 days, and (v) changing the focus of the examination conducted before the Tribunal from assessing the effectiveness of the settlement in remedying the presumed substantial lessening or prevention of competition, to testing the substantive basis for the consent agreement.

**[104]** I do not agree with Kobo's submission that the combined effect of these five changes, as interpreted by Kobo, would greatly simplify the inquiry to be engaged in by the Tribunal, and would achieve the appropriate balance intended by Parliament, if Kobo's interpretation of subsection 106(2) were adopted. As discussed at paragraphs 40 to 44 above, Kobo's expansive interpretation of subsection 106(2) would allow for potentially lengthy and complex disputes with respect to all or most of the substantive elements of virtually every reviewable trade practice in Part VIII of the Act, as well as with respect to a significant number of limitations, defences and exceptions.

**[105]** Common sense, and indeed the experience under the former consent order process, suggests that this would seriously undermine, if not completely negate, various objectives that Parliament intended to achieve when it established the existing consent agreement scheme. These include streamlining the Tribunal's oversight role with respect to negotiated settlements, making the consent agreement process more predictable and expeditious than was the case with the former consent order process, and removing the chilling effect that that process had on business activity in Canada. They also included encouraging business persons to negotiate settlements that are filed with the Tribunal, so that the Tribunal will have a greater role to play in the oversight of negotiated settlements than it had when the business community's aversion to consent orders led to the common practice of negotiating settlements that did not involve oversight by the Tribunal.

**[106]** The fact that there have only been two applications to date under subsection 106(2) does not greatly assist Kobo's case, as there may very well have been many more if the interpretation

of that provision being advanced by Kobo had previously been embraced by the Tribunal. Moreover, the serious potential for the various adverse effects described in the immediately preceding paragraph above would still exist.

[107] In addition to the foregoing, I agree with the Commissioner that Kobo's expansive interpretation of subsection 106(2) would significantly slow down the process of negotiating and registering settlements. This is because, among other things, the Commissioner would be effectively required to conduct a more in-depth investigation prior to settlement, in order to be prepared for potential litigation by a third party under subsection 106(2).

[108] I also agree with the Commissioner's position that if Parliament had wanted to give the Tribunal the type of broad review jurisdiction under subsection 106(2) being suggested by Kobo, it could have made that plain, as it did in paragraph 106(1)(a), subsection 106.1(6), subsection 104.1(7), as it existed prior to its repeal in 2009, and subsection 74.11(1). The application of the principle of statutory interpretation *expression unius exclusio alterius* would preclude an interpretation of subsection 106(2) that would provide the Tribunal with such jurisdiction (*Air Canada*, above, at paras 43-44).

[109] As noted at paragraph 84 above, paragraph 106(1)(a) contemplates a review by the Tribunal of "the circumstances that led to the making of the agreement or order." I agree with the Commissioner that the absence of similar language in subsection 106(2) reflects an intention by Parliament to refrain from granting similar jurisdiction to the Tribunal under this latter provision.

[110] Subsection 106.1(6) allows the Tribunal, on application by the Commissioner, to vary or rescind a consent agreement between two private parties, "if it finds that the agreement has or is likely to have anti-competitive effects." If Parliament had intended under subsection 106(2) to provide the Tribunal with a similar power, or with the power to vary or rescind a consent agreement based on findings made with respect to these or other substantive matters, it would have made that clearer, as it did in subsection 106.1(6).

[111] As to the former subsection 104.1(7), that provision allowed the Tribunal, on application by a person against whom a temporary order had been issued by the Commissioner under the former subsection 104.1(1), to vary or set aside the order under certain circumstances. These

included setting aside the order where it was not satisfied that one or more of the substantive conditions described in subparagraph 104.1(1)(b) had been met, including likely “injury to competition that cannot adequately be remedied by the Tribunal,” the elimination of a person as a competitor, and the suffering of significant loss of market share or revenue. As with subsection 106.1(6), this is another example of Parliament making it plain where it wished to confer upon the Tribunal the jurisdiction to make determinations with respect to substantive matters relating to reviewable trade practices. The fact that Parliament included no such language in subsection 106(2), and confined the Tribunal to assessing whether “the terms [of the consent agreement] could not be the subject of an order of the Tribunal,” suggests that it did not intend to provide the Tribunal with the jurisdiction to revisit the basis for the determinations made with respect to the substantive elements in Part VIII of the Act.

[112] With respect to subsection 74.11(1), that provision permits the Tribunal, on application by the Commissioner, to issue a temporary prohibition order where it finds “a strong *prima facie* case that a person is engaging in reviewable conduct under [Part VII.1 of the Act].” Had Parliament wished to confer upon the Tribunal the jurisdiction to vary or rescind a consent agreement under subsection 106(2) upon ascertaining even a strong *prima facie* case that one of the substantive elements of a reviewable trade practice was not met, it presumably would have included such language in that provision. It can be inferred from the fact that it did not do so that the Tribunal has no such jurisdiction (*Air Canada*, above, at paras 43-44).

[113] Finally, I agree with the Commissioner’s position that interpreting subsection 106(2) in the manner suggested by Kobo would be inconsistent with the “private access” provisions in the Act.

[114] Pursuant to subsection 103.1(1), any person may apply to the Tribunal for leave to make an application under section 75, 76 or 77. However, pursuant to subsection 103.1(4), the Tribunal shall not consider an application for leave in respect of certain types of matters. These include where the matter (i) is the subject of an inquiry by the Commissioner, (ii) is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76 or 77, or (iii) was the subject of an inquiry that has been discontinued because of a settlement



between the Commissioner and the person against whom the order under one or more of those sections is sought.

[115] Pursuant to those provisions, Parliament appears to have decided that even for those reviewable trade practices in respect of which private access to the Tribunal is permitted, such access should not be permitted where the Commissioner has an ongoing inquiry or has resolved the matter by way of a settlement. I agree with the Commissioner that Kobo's interpretation of subsection 106(2) would be at odds with this scheme, because it would permit a private party who is precluded by subsection 103.1(4) from bringing an application to the Tribunal, to seek what may amount to the same or similar broad relief under subsection 106(2). To use the Commissioner's example, if ABC Co. complained to the Bureau that XYZ Co. was engaged in anti-competitive "price maintenance," as contemplated by section 76 of the Act, ABC Co. would be precluded by subsection 103.1(4) from obtaining relief from the Tribunal. However, ABC Co. could circumvent this under Kobo's interpretation of subsection 106(2), by seeking to have the settlement varied, if it had been registered as a consent agreement. The interpretation of subsection 106(2) that I have adopted would substantially reduce the scope for such an inconsistent outcome to arise.

*iv. The Plain Meaning of subsection 106(2)*

[116] The Commissioner submits that the plain meaning of the word "terms" is "obligations that an order creates," which are distinct from findings of fact, mixed fact and law, and legal determinations.

[117] That said, the Commissioner recognizes that in contested proceedings under Part VIII, no order could be made by the Tribunal without the Tribunal having made the necessary findings of fact and mixed fact and law to underpin that order. However, the Commissioner maintains that this has no bearing in the context of negotiated consent agreements, because the sole focus of subsection 106(2) is upon the "terms" of a consent agreement.

[118] For its part, Kobo submits that the words "could not be the subject of an order" plainly convey Parliament's intent that the Tribunal should look beyond the words of the consent

agreement, to see what basis there would be for an order. Stated differently, Kobo submits that those words contemplate an assessment of whether the Tribunal would have had the jurisdiction to grant the relief in the first place. In its view, this includes not only assessing the substantive elements of the reviewable trade practice in question, but also whether any of the applicable exceptions are met.

[119] Kobo also asserts that the requirement in subsection 106(2) that the third party be a “person directly affected by” a consent agreement, would not make sense if Parliament had intended to limit that party to engaging in an exercise of simply comparing the terms of an order with the Tribunal’s order making powers, to determine whether the terms fall within the purview of such powers. Kobo maintains that it would be nonsensical to require that a third party meet the difficult test of establishing that it is directly affected by a consent agreement, and then limit that party to the comparative exercise described in the preceding sentence immediately above. Kobo further maintains that Parliament could have achieved the same end by allowing the Tribunal, of its own accord, to rescind or vary a consent agreement if it determined that one or more of the terms of an agreement were outside the purview of the types of order the Tribunal is permitted to issue. It adds that the only reason why Parliament would have required parties to meet the high threshold of demonstrating that they are directly affected by an order is to limit the number of instances in which the factual examinations contemplated by the balance of subsection 106(2) will be engaged.

[120] In addition, relying on authorities that have interpreted the word “establish” to mean “prove” in certain contexts (*R. v. Oakes*, [1986] 1 S.C.R. 103, at 117-118; *R. v. Wholesale Travel* [1991] 3 S.C.R. 154, at 197), Kobo submits that the words “has established” in subsection 106(2) reflect that Parliament contemplated that applications under that provision would be “a factual contest in which evidence would be adduced.” It asserts that the word “establish” is used approximately 25 times elsewhere in the Act as a synonym for the word “prove.”

[121] I do not find the arguments of either the Commissioner or Kobo to be particularly helpful or persuasive, in terms of assisting to support the respective interpretations that they have advanced regarding the meaning of the words in subsection 106(2). It is readily apparent to me that the wording of subsection 106(2) is somewhat ambiguous. In my view, an analysis of that

wording alone does not add anything to the analysis conducted in parts E. (i), (ii) and (iii) of these reasons above.

[122] I also disagree with the Commissioner’s position that his position is supported by the Tribunal’s decision in *Burns Lake Native Development Corp. et al. v. Commissioner of Competition*, 2006 Comp. Trib. 16. The Commissioner placed particular emphasis on paragraph 78 of that decision. However, there, the Tribunal simply stated:

[78] Subsection 105(3) of the Act says that a consent agreement is to be filed “for immediate registration”. Since the Tribunal has no time or mandate to review a consent agreement and since the Act does not require a filing, there is no reason to conclude that any evidence must be submitted when a consent agreement is filed for registration with the Tribunal.

[123] In my view, these observations were not intended to have any bearing on the scope of the Tribunal’s jurisdiction under subsection 106(2).

## F. CONCLUSION

[124] For the foregoing reasons, I have concluded that the jurisdiction of the Tribunal on an application under subsection 106(2) is limited to assessing the following three things:

[125] First, the Tribunal may assess whether the terms of a consent agreement are not within the scope of the type of order(s) that the Tribunal is permitted to issue in respect of the reviewable trade practice in question. Terms that are not within the purview of one or more specific types of orders that may be made by the Tribunal in respect of a particular reviewable trade practice could not be the subject of an order of the Tribunal, within the meaning of subsection 106(2). Put differently, they would not be within what Kobo characterized as being the Tribunal’s remedial jurisdiction.

[126] Second, the Tribunal may assess whether the consent agreement (a) identifies each of the substantive elements of the reviewable trade practice in question; and (b) contains either (i) an explicit agreement between the Commissioner and the respondent(s) 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 respondent(s) that they do not contest that conclusion. The Tribunal may vary or set aside a consent agreement where it determines that either of these conditions has not been satisfied.

[127] However, it is not open to an applicant under subsection 106(2) to attempt to establish that one or more of the substantive elements of a reviewable trade practice have not in fact been met, or that a defence or exception set forth in the Act is applicable. The Tribunal does not have the jurisdiction to consider these matters under subsection 106(2).

[128] Third, applicants under subsection 106(2) may establish that one or more of the terms of a consent agreement are unenforceable or would lead to no enforceable obligation, for example, because they are too vague. In my view, the past pronouncements by the Tribunal regarding this jurisdiction continue to apply with respect to consent agreements filed under section 105 of the Act. In brief, the Tribunal may assess whether agreements that are filed under that section, and that have the same force and effect as if they were orders of the Tribunal (ss. 105(4)), are sufficiently clear as to be justiciable and legally enforceable (*Ultramar*, above, at paras 33 and 45 – 50; *Canada (Director of Investigation and Research) v. Imperial Oil Limited*, [1990] C.C.T.D. No. 1 (QL) (“Imperial Oil”). Stated differently, the Tribunal may determine whether the terms of consent agreements are “expressed in terms sufficiently clear to permit a person governed thereby to know with tolerable certainty the extent to which conduct engaged in” either contravenes or does not contravene the consent agreement (*Canada (Director of Investigation and Research) v. Palm Dairies Ltd.*, [1986] C.C.T.D. No. 10 (QL), at p. 12). In this regard, the Tribunal may also satisfy itself that those terms will not require perpetual monitoring by the Tribunal (*Imperial Oil*, above, at 43).

[129] Accordingly, in these proceedings, it is open to Kobo to attempt to establish that one or more of the terms of the CA are unenforceable or do not establish an enforceable obligation, for example because they are vague or ambiguous. It is also open to Kobo to seek to establish that the CA does not satisfy the two things described in paragraph 126 above. If Kobo wishes to adduce factual evidence to establish any of these things, it may do so. However, it is not open to Kobo to attempt to establish that one or more of the substantive elements set forth in section 90.1 of the Act are not met, including whether there is an agreement or arrangement – whether

existing or proposed – between persons two or more of whom are competitors. Disputes with respect to these and other substantive elements, such as whether an agreement is likely to prevent or lessen competition substantially, are beyond the scope of subsection 106(2).

#### ORDER

1. For the reasons set forth in the Reasons for Order attached hereto, the responses to the questions posed on this Reference are as follows:

***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?***

2. The words of subsection 106 quoted immediately above mean “terms that are not within the scope of the type of order(s) that the Tribunal has the jurisdiction to make against the person described in subsection 105(1) of the Act, pursuant to the provisions of the reviewable trade practice(s) in the Act that are referenced in the consent agreement.”

***What is the nature and scope of the Tribunal’s jurisdiction under subsection 106(2)?***

3. In addition to assessing whether the terms of a consent agreement could not be the subject of an order of the Tribunal, as described above, the Tribunal may assess whether the consent agreement (a) identifies each of the substantive elements of the reviewable trade practice in question; and (b) contains either (i) an explicit agreement between the Commissioner and the respondent(s) 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 respondent(s) that they do not contest that conclusion.
4. The Tribunal may also assess whether one or more of the terms of a consent agreement are unenforceable or would lead to no enforceable obligation, for example, because they are too vague.
5. The Tribunal may vary or set aside a consent agreement where it makes an affirmative determination with respect to the matters described in paragraphs 2 and 4 of this Order, or a negative determination in respect of a matter described in paragraph 3 of this Order.

6. For greater certainty, the scope of the Tribunal's jurisdiction under subsection 106(2) does not extend to beyond what is described above, to assessing whether one or more of the substantive elements of a reviewable trade practice have in fact been met, or that a defence or exception set forth in the Act is applicable.
7. As costs were not sought on this Reference, there is no order as to costs.

DATED at Ottawa, this 8th day of September, 2014.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Paul Crampton C.J.

## APPEARANCES:

## For the Applicant:

Kobo Inc.

Nikiforos Iatrou  
Mandy L. Seidenberg  
Bronwyn Roe

## For the Respondents:

The Commissioner of Competition

John Syme  
Parul Shah  
Esther Rossman

Hachette Book Group Canada Ltd, Hachette Book Group,  
Inc., Hachette Digital, Inc.

James Gotowiec


HarperCollins Canada

Katherine Kay

TAB O



This is **Exhibit "O"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

Court File No. *A-401-17*

## FEDERAL COURT OF APPEAL

BETWEEN:

RAKUTEN KOBO INC.

Appellant

- 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

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 NOTICE OF APPEAL
 

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## TO THE RESPONDENTS:

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the appellant. The relief claimed by the appellant appears on the following page.

**THIS APPEAL** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court in Toronto.

**IF YOU WISH TO OPPOSE THIS APPEAL**, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

- 2 -

**IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION** of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

**YOGINDER GULIA**  
**REGISTRY OFFICER**  
**AGENT DU GREFFE**

Date: September 17, 2014

Issued by: \_\_\_\_\_  
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(service to be effected by filing duplicate  
copies in the Registry pursuant to Rule  
133 and Section 48 of *Federal Courts Act*)

**APPEAL**

THE APPELLANT, Rakuten Kobo Inc. ("**Kobo**") appeals to the Federal Court of Appeal from the order of the Competition Tribunal ("**Tribunal**") in matter number CT-2014-02 dated September 8, 2014 in which the Tribunal responded to the following question posed by the Commissioner of Competition ("**Commissioner**") in a Reference pursuant to s. 124.2(2) of the *Competition Act*, R.S.C. 1985, c. C-34 ("**Act**"): "What is the nature and scope of the Tribunal's jurisdiction under subsection 106(2) [of the Act] 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?".

THE APPELLANT ASKS for:

- (i) an order allowing the appeal and determining that:
  - a. the nature and scope of the Tribunal's jurisdiction is such that, in hearing an application under s. 106(2) of the Act, the Tribunal is not restricted to considering only the words of the consent agreement and its recitals, but may also consider facts and evidence related to the reviewable trade practice at issue, the alleged violation of the Act, the consent agreement in question, and any other facts and evidence as it considers to be fair and necessary in order to resolve the application; and
  - b. the meaning of the words "the terms could not be the subject of an order of the Tribunal" is such that the Tribunal may consider whether it would have had the jurisdiction to make any order had the matter proceeded as a contested matter; and
- (ii) such further and other orders as counsel may advise and this Honourable Court may permit.



THE GROUNDS OF APPEAL are as follows:

1. On February 7, 2014, the Commissioner filed a consent agreement for registration with the Tribunal;
2. On February 21, 2014, Kobo filed an application under s. 106(2), seeking to have the consent agreement varied or rescinded, on the basis that (i) Kobo, although not a party to the consent agreement, is directly affected by the consent agreement because the consent agreement alters its contractual relationships with the publishers who are parties to the consent agreement; (ii) the consent agreement is, on its face, deficient as it failed to properly allege or disclose any violation of the Act; and (iii) there is no jurisdiction for a consent agreement at all, as there is evidence that there has been no violation of the Act. Simultaneously, Kobo sought a stay of the registration of the consent agreement, pending the determination of the s. 106(2) application;
3. On March 18, 2014, the Tribunal issued the stay, with reasons that followed on March 27, 2014;
4. On April 15, 2014, the Commissioner brought a reference pursuant to s. 124.2(2) of the Act, requesting an answer to the question set out above. The reference was heard on June 25, 2014;
5. On September 8, 2014, in response to the reference, the Tribunal issued the order that is the subject of this appeal. The Tribunal held that while Kobo could seek to have the consent agreement varied or rescinded on the basis of any deficiencies that are apparent on the face of the consent agreement, including its recitals, Kobo could not pursue its argument that the Commissioner exceeded his jurisdiction because the factual allegations underpinning the consent agreement are incorrect;
6. The Tribunal held that questions regarding excess of jurisdiction should not be advanced pursuant to s. 106(2) of the Act, but rather by way of judicial review pursuant to s. 18.1 of the *Federal Courts Act*;
7. The Tribunal erred in law by interpreting s. 106(2) so as to foreclose the possibility of varying or rescinding a consent agreement where there is evidence that there has been no violation of the Act;

8. The Tribunal erred in law by creating a parallel and overlapping system for challenging consent agreements, whereby the Tribunal can only consider arguments about the face of the consent agreement under a s. 106(2) application, while substantive arguments about excess of jurisdiction can be advanced only by way of judicial review. This is contrary to the intention of Parliament which, in enacting s. 106(2), established an effective review procedure within the Act;
9. The Tribunal erred in law by failing to consider that the requirements for standing to bring a judicial review are different from those for being considered a “directly affected” third party under s. 106(2), such that judicial review may not be available to a party considered to be “directly affected” under s. 106(2);
10. The Tribunal erred in law by finding that the words of s. 106(2) are ambiguous, but then failing to interpret the section in a manner consistent with its purpose, which is to provide a meaningful check on the Commissioner’s otherwise broad discretion to register consent agreements;
11. The Tribunal erred in law by interpreting s. 106(2) in a manner that is inconsistent with the statutory scheme by maintaining a high threshold for standing, but granting parties with standing only the right to bring cursory, superficial challenges to the registration of a consent agreement, while denying them the ability to raise substantive deficiencies about the consent agreement;
12. The Tribunal erred in law by failing to engage in contextual analysis of the wording of s. 106(2), and in particular erred by its inconsistent interpretations of the words “establish” and “prove”;
13. The Tribunal erred in law by limiting its jurisdiction on a s. 106(2) application to assessing whether the consent agreement identifies the elements of a reviewable trade practice while prohibiting itself from considering whether there is any factual basis for the conclusion that a reviewable trade practice has occurred, which is contrary to both the purpose of the section and the statutory scheme;
14. The Tribunal erred in law by finding, in the absence of any evidence, that an interpretation of s. 106(2) that would permit review by the Tribunal of more than the wording of a consent agreement would lead to increased costs and delays and have a



“chilling effect” on business conduct, effectively taking judicial notice of a non-notorious fact or hypothetical outcome;

15. The Tribunal erred in law by disregarding precedent that states that parties in a position akin to a s. 106(2) applicant are entitled to procedural rights of fairness;
16. The Tribunal erred in law by holding that an interpretation of s. 106(2) that would permit review by the Tribunal of more than the wording of a consent agreement would be at odds with the “private access” provisions of the Act;
17. Each of the errors set out above is a reversible error of law and has a direct bearing on the Tribunal’s interpretation of s. 106(2), such that the interpretation of the Tribunal cannot stand;
18. Sections 1.1, 7, 90.1, 103.1, 105, 106, and 106.1 of the Act;
19. Section 13 of the *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.);
20. Sections 18.1, 27, 28, and 52 of the *Federal Courts Act*, R.S.C., 1985, c. F-7; and
21. Such further grounds as counsel may advise.

Date: September 17, 2014



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Lawyers for the Appellant

Court File No.

**FEDERAL COURT OF APPEAL**

BETWEEN:

**RAKUTEN KOBO INC.**

Appellant

- 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

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**NOTICE OF APPEAL**

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**Lawyers for the Appellant**

TAB P

This is **Exhibit "P"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

A handwritten signature in cursive script, appearing to read "Bronwyn Roe", written over a horizontal line.

**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.

**File No. / Dossier 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:**

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**

**BEFORE:**

The Honourable Mr. Justice Donald J. Rennie

**Chairperson**

**HELD VIA TELECONFERENCE**

24 November 2014

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APPEARANCES

Nikiforos Iatrou	For the Applicant (Kobo Inc.)
John Syme Jonathan Chaplan Esther Rossman	For the Respondent (Commissioner of Competition)
James Gotowiec	For the Intervenor (Hachette Book Group Canada Ltd, Hachette Book Group, Inc., Hachette Digital, Inc.)
Katherine L. Kay Danielle Royal	For the Intervenor (HarperCollins Canada)
Randal Hughes Emrys Davis	For the Intervenor (Holtzbrinck Publishers, LLC)
Mahmud Jamal	For the Intervenor (Simon & Schuster Canada, a division of CBS Canada Holdings Co.)
Derek D. Ricci	For the potential Intervenor (Indigo Books and Music Inc.)
Mr. William Curley	Court Reporter (StenoTran Services Inc.)
Mr. Joseph (Jos) LaRose	Court Registrar

1 Teleconference

2 --- Upon commencing on Monday, November 24, 2014

3 at 4:04 p.m.

4 **THE OPERATOR:** Good afternoon, all  
5 participants. Your meeting is ready to begin. I would now  
6 like to conduct a brief roll call. When I call your name,  
7 please respond with your location.

8 I would like to begin with Mr. John Syme.

9 **MR. SYME:** Yes, here in Gatineau.

10 **THE OPERATOR:** Thank you.

11 And Mr. James Gotowiec?

12 **MR. GOTOWIEC:** Yes, I'm here in Toronto.

13 **THE OPERATOR:** Ms Katherine Kay?

14 **MS KAY:** Yes, here in Toronto.

15 **THE OPERATOR:** Okay. Mr. Randal Hughes?

16 **MR. HUGHES:** Here in Toronto.

17 **THE OPERATOR:** Thank you.

18 And Mr. Jamal Mahmud?

19 **MR. JAMAL:** It's Mahmud Jamal.

20 **THE OPERATOR:** Mahmud Jamal, I'm sorry.

21 **MR. JAMAL:** And yes, I am here in Toronto.

22 **THE OPERATOR:** Thank you. Mr. Derek

23 Ricci?

24 **MR. RICCI:** Yes, I am here in Toronto.

25 **THE OPERATOR:** And we have Mr. Nikiforos

1 Iatrou.

2 **MR. IATROU:** Iatrou --

3 **THE OPERATOR:** Iatrou.

4 **MR. IATROU:** -- with Bronwyn Roe in  
5 Toronto.

6 **THE OPERATOR:** Excellent. Thank you very  
7 much.

8 And Mr. Bill Curley?

9 **MR. CURLEY:** Yes, here in Ottawa.

10 **THE OPERATOR:** Thank you very much.

11 We have Mr. Joseph LaRose?

12 **THE REGISTRAR:** Yes, here in Ottawa.

13 **THE OPERATOR:** Thank you. And we have  
14 Justice Rennie as well.

15 **MR. JUSTICE RENNIE:** Yes, speaking.

16 **THE OPERATOR:** Excellent. Thank you very  
17 much.

18 Should anyone require assistance during  
19 the conference, feel free to press \*0 on your telephone  
20 keypad and we will be happy to assist you. Please go ahead.

21 **THE REGISTRAR:** Thank you.

22 This is a case conference call in the case  
23 between Kobo Inc. and the Commissioner of Competition, et  
24 al. The Honourable Mr. Justice Donald Rennie is presiding.

25 Counsel are asked to please identify



1 themselves when they speak. The conference call is now  
2 open.

3 **MR. JUSTICE RENNIE:** Thank you, Mr.  
4 LaRose. And thank you counsel for joining us this afternoon  
5 for this call.

6 It should not be a lengthy discussion  
7 based on the number of items I wish to raise with counsel,  
8 although there may be other items that counsel want to  
9 raise. So we could turn to those shortly.

10 The purpose of the call from my point of  
11 view is simply to get an update on the status of the Kobo  
12 matter and to determine what steps, if any, ought to be  
13 taken at this point in time in respect of scheduling. I am,  
14 of course, aware of the decision of Chief Justice Crampton  
15 on the Reference and the pending appeal of that decision,  
16 although I'm not aware of the timing of that appeal and  
17 where we are in that process.

18 To be blunt about it, I'm looking at the  
19 dates in May that we had tentatively scheduled for the  
20 hearing of this matter and are under pressure, as you can  
21 understand, to either release those dates for other trial  
22 matters or to use them one way or another. So there has  
23 been no request for a stay and I haven't heard from counsel  
24 as to any consent agreement between yourselves as to how you  
25 wish to proceed pending the appeal.

1                   The decision of the Chief Justice on the  
2 Reference obviously has considerable implications for the  
3 content and length of any hearing of the matter on the  
4 merits.

5                   So that's the background to my inquiry  
6 and, simply put, I want to know what counsel would like to  
7 do, if anything, with the hearing of this matter, which we  
8 tentatively scheduled for May.

9                   I will start with you, Mr. Iatrou.

10                  **MR. IATROU:** Thank you, Justice Rennie.

11                  Until very recently I was planning to  
12 update you on the progress and I will do that very quickly  
13 in terms of the appeal, in terms of all the parties have  
14 been working quite efficiently and cooperatively to get all  
15 the appeal material in before the deadline so as to try to  
16 make the appeal move forward as quickly as possible. There  
17 has been good cooperation on that front.

18                  There have also been talks underway  
19 between the Bureau, the publishers and Kobo to try to find a  
20 way through this and I was going to be presenting to you,  
21 you know, my views as to how to deal with the scheduling  
22 issues.

23                  **MR. JUSTICE RENNIE:** Right.

24                  **MR. IATROU:** But then about -- you know,  
25 about an hour and a half ago or so I got a call from Mr.

1 Syme with an update from the Commissioner's point of view,  
2 which I think throws some wrenches into all of this and we  
3 are still reflecting on whether they are good wrenches or  
4 bad wrenches.

5 But at this point I think I should turn it  
6 over to Mr. Syme because the Commissioner reached out to the  
7 publishers and to Kobo with a new position and I think I  
8 should let him present that.

9 **MR. JUSTICE RENNIE:** Thank you, Mr.  
10 Iatrou.

11 Mr. Syme...?

12 **MR. SYME:** Thank you, Justice Rennie.  
13 And thank you, Mr. Iatrou.

14 Justice Rennie, as my friend says, we did  
15 reach out to the publishers and to Kobo earlier today and,  
16 as he also said, there is no secret about this, there have  
17 been some discussions with a view to seeing if there is a  
18 way out of the thicket. Where we are now and what I advised  
19 my friends earlier today is in view of, among other things,  
20 the Reference decision, the Commissioner is prepared to  
21 consent to the relief sought.

22 And I'm just looking at my friend's  
23 application, and you may or may not have it in front of you,  
24 but I will give you the pinpoint reference. It's page 1 of  
25 the application. It is actually unnumbered, but it's page

1 1, paragraph (a) and what that says is:

2 "The applicant is seeking an order  
3 rescinding the consent agreement as  
4 between the Commissioner and the --  
5 what we describe as the consenting  
6 publishers registered with the  
7 Tribunal under section 105 on  
8 February 7, 2014." (As read)

9 In fairness to my friends, they have only  
10 just learned this. I won't go into the circumstances for  
11 the timing unless that matter is of interest to the  
12 Tribunal, and perhaps I will leave it there.

13 **MR. JUSTICE RENNIE:** All right.

14 **MR. SYME:** I appreciate my friends may  
15 well have something they wish to say in response to that.

16 **MR. JUSTICE RENNIE:** Right.

17 Back to you, Mr. Iatrou.

18 **MR. IATROU:** Thanks, Justice Rennie.

19 You know, we are still digesting this. As  
20 we understand it, what Mr. Syme is proposing is that the  
21 Commissioner would consent to the order to rescind the  
22 consent agreement. I still don't -- I don't have  
23 instructions on that.

24 Obviously if that is to happen, given  
25 everything that has transpired that, you know, I will take

1 you back, that the starting point for all of this was that  
2 Kobo was a party who was never alleged to have done anything  
3 wrong, but was all of a sudden having its contracts amended  
4 as a result of a consent agreement and so had to take all  
5 the steps that have been taken.

6 I expect that my instructions will be that  
7 if that is going to happen that Kobo get full indemnity  
8 costs for all of the steps that it has had to undergo since  
9 the filing of the consent agreement.

10 I also think, given that there is an  
11 appeal of the Reference pending and, you know, depending on  
12 what the Commissioner's next steps are with respect to its  
13 e-books investigation, I think we would want to seek some  
14 sort of order that if the Commissioner brought a case back  
15 on that the Reference appeal would continue and that the  
16 stay would continue to be in place, that it would come back  
17 on if that were to happen.

18 I understand that the Commissioner is  
19 agreeing to have this particular consent agreement rescinded  
20 and I think it is just a question that if we were to see a  
21 consent agreement that is functionally similar, and by that  
22 I mean that somehow Kobo ends up having to pay the price for  
23 an alleged conspiracy among other players, that we would  
24 probably be back at --

25 **MR. JUSTICE RENNIE:** You would be back at

1 it --

2 **MR. IATROU:** -- step one.

3 **MR. JUSTICE RENNIE:** -- right. All right.

4 I will turn now to other counsel on the  
5 record in any particular order.

6 **MS KAY:** Well, I will go first in any  
7 particular order.

8 It's Katherine Kay here.

9 **MR. JUSTICE RENNIE:** Yes.

10 **MS KAY:** As Mr. Syme properly said, we  
11 were first advised of the Commissioner's proposal a little  
12 before 2 o'clock today. We have indicated to Mr. Syme that  
13 we would not have an opportunity to reflect on the matter  
14 and get instructions in time for the call today, and asked  
15 that we simply put this call over for a couple of weeks to  
16 give us an opportunity to consider the implications and the  
17 position we would take.

18 I will say, speaking on behalf of my  
19 client, which is HarperCollins, and without instructions,  
20 you know, my client is a party to a contract entered into  
21 for all the right reasons with the Commissioner of  
22 Competition. For the Commissioner of Competition to purport  
23 to unilaterally rescind a contract strikes us as not on --  
24 strikes me is not on, but that is without instructions.

25 This is a tricky issue not only on the

1 face of it, but in terms of what might happen next and what  
2 the implications would be for the publishers arising from  
3 that.

4 So we have had some discussion with Mr.  
5 Syme and have had some discussion with counsel for Kobo and  
6 there are lots more discussions to be had.

7 But this, knowing what happens next is  
8 simply premature from the publishers' perspective. I think  
9 I can say that safely on behalf of all of them, but others  
10 may have more to add.

11 **MR. JUSTICE RENNIE:** Thank you, Ms Kay.

12 Mr. Jamal...?

13 **MR. JAMAL:** I don't have anything further  
14 to add. We heard about this at 2 o'clock today and I don't  
15 have instructions yet, Justice Rennie.

16 **MR. JUSTICE RENNIE:** All right, thank you.

17 Mr. Hughes...?

18 **MR. HUGHES:** Yes, Justice Rennie. We are  
19 in the same position as my friends.

20 We don't have instructions either and we  
21 would echo Ms Kay's comments about the nature of the  
22 Commissioner's purported actions and how it affects other  
23 parties to the agreement.

24 **MR. JUSTICE RENNIE:** Am I missing anyone  
25 else on the record?

1                   **MR. GOTOWIEC:** It's James Gotowiec for  
2 Hachette and --

3                   **MR. JUSTICE RENNIE:** Yes.

4                   **MR. GOTOWIEC:** -- we are in the same  
5 position.

6                   **MR. JUSTICE RENNIE:** Right. All right.  
7 And is Mr. Ricci on for Indigo?

8                   **MR. RICCI:** Yes, it's Mr. Ricci here for  
9 Indigo.

10                   I don't have anything to add either. I'm  
11 learning about this for the first time on this call, so I  
12 don't have instructions.

13                   **MR. JUSTICE RENNIE:** All right. Well, I  
14 guess this is what happens when the Court schedules a  
15 telephone conference. Everything happens. I should have  
16 more of them.

17                   Just maybe an observation, Mr. Syme, for  
18 you is, am I fair in saying that when I read the Globe and  
19 Mail I'm watching play out in Canada what's playing out in  
20 the United States, in some broad terms. Is there a  
21 relationship between these issues?

22                   **MR. SYME:** You will have to help me.  
23 Forgive me, Justice Rennie.

24                   **MR. JUSTICE RENNIE:** All right.

25                   **MR. SYME:** You are referring to,



1 obviously, what is going on with publishers in the United  
2 States?

3 **MR. JUSTICE RENNIE:** Yes. Right, yes.

4 **MR. SYME:** I want to be very careful about  
5 saying --

6 **MR. JUSTICE RENNIE:** Right. So I didn't  
7 want to put you on the spot.

8 **MR. SYME:** No, and I think my answer would  
9 be somewhat nuanced, and I just want to be accurate. So  
10 perhaps, if I may, I will leave that.

11 **MR. JUSTICE RENNIE:** That's just fine.  
12 That's just fine. I just wanted you to know that the Court  
13 does read the paper from time to time.

14 **MR. SYME:** I appreciate that and forgive  
15 me for -- you know, to elucidate --

16 **MR. JUSTICE RENNIE:** No. No, probably an  
17 unfair question.

18 But none of you have told me what your  
19 view is with respect to the reason I wanted to have the  
20 call, which is the May dates. I need to know what we are  
21 going to do in May.

22 **MR. IATROU:** Justice Rennie, its Niki  
23 Iatrou speaking here.

24 **MR. JUSTICE RENNIE:** Right.

25 **MR. IATROU:** I think, speaking for myself,

1 I think even setting aside this late-breaking issue and as  
2 as Ms Kay said, I think we need to think through how this  
3 works in terms of what does this mean for the rest of the  
4 investigation --

5 **MR. JUSTICE RENNIE:** Right.

6 **MR. IATROU:** -- whether people are  
7 consenting or not. You know, we are going to have to think  
8 that through and I think probably will want to come back  
9 after we have had a chance to get instructions and whenever  
10 the Tribunal has availability to hammer out with the  
11 Tribunal where we are at.

12 Irrespective of that, even if we were just  
13 proceeding with the decision -- you know, let's say that  
14 hadn't arisen -- I think it would likely be difficult for us  
15 to hold onto the May date, irrespective. I mean my position  
16 was going to be that while some steps could be taken in the  
17 litigation while the appeal is pending, I think there is too  
18 much of a risk that we would end up having to start all over  
19 again once we see Reasons from the Federal Court of Appeal,  
20 because it would affect how the matter gets pleaded, it  
21 would affect what the scope is for interventions, and so on  
22 and so forth.

23 So the schedule that we had put in place  
24 had contemplated having a response from the Commissioner in  
25 September and we are now end of November. And we all knew

1 when the Reference came forward that it would engender  
2 delays and that was part of the reason why I had sought to  
3 strike it, but we are where we are, so I think it would be  
4 hard for us to hold onto the May dates. There may be -- so  
5 that would be my position on that.

6 **MR. JUSTICE RENNIE:** Right.

7 Mr. Syme...?

8 **MR. SYME:** We disagree. I'm not sure --  
9 as you alluded to at the outset, I know you weren't taking a  
10 firm view on this necessarily. But we certainly are of the  
11 view that if a 106(2) proceeding were to go ahead in this  
12 matter that it would be a much more abbreviated and focused  
13 proceeding, in view of Justice Crampton's Reference  
14 decision.

15 I don't see that we have a need to wait  
16 for the Federal Court of Appeal, with the greatest respect  
17 to the Court. We have a decision. My friend has not sought  
18 a stay of this proceeding and, absent that, if the 106(2)  
19 proceeding is going ahead, it ought to go ahead in our view  
20 on the basis of Justice Crampton's Reference decision.

21 And we don't see the need -- for example,  
22 I don't know if my friend is contemplating extensive  
23 discoveries or what it is that he thinks may take a long  
24 period of time. We don't see it and we think that May dates  
25 would be workable.

1                   **MR. JUSTICE RENNIE:** All right.

2                   **MS KAY:** Can I offer -- it's Katherine  
3 Kay.

4                   **MR. JUSTICE RENNIE:** Yes. I was just  
5 going to turn to you, Ms Kay. Yes.

6                   **MS KAY:** So just a view from the cheap  
7 seats, and this is again without instructions -- and  
8 thinking about the wrench or the wrinkle or whatever is a  
9 whole other topic -- but speaking only for myself, and again  
10 without instructions, it strikes me that having our client,  
11 which is a respondent to the application, have to go and  
12 litigate something that may be a do over depending on what  
13 the Federal Court of Appeal decides is not an efficient use  
14 of anybody's resources and in particular would give rise to  
15 a set of costs for our client, which again has "done the  
16 right thing" by entering into the consent agreement and that  
17 would be unfortunate.

18                   So I say that on a preliminary basis  
19 because I don't have instructions, but just sort of speaking  
20 with counsel with some experience in these matters it  
21 doesn't make a lot of sense to me that we would forge ahead  
22 with a proceeding, the contours of which are the subject of  
23 a pending appeal before the Federal Court of Appeal.

24                   **MR. JUSTICE RENNIE:** Thank you.

25                   Mr. Hughes...?

1                   **MR. HUGHES:** I don't have anything to add  
2 to Ms Kay's comments.

3                   **MR. JUSTICE RENNIE:** Messers Ricci or  
4 Jamal?

5                   **MR. JAMAL:** No, nothing further.

6                   **MR. JUSTICE RENNIE:** Mr. Gotowiec...?

7                   **MR. GOTOWIEC:** No, thanks.

8                   **MR. JUSTICE RENNIE:** No, all right.

9                   All right. There has been no formal stay  
10 application made. We are well past the date under the  
11 existing scheduling order for response and I think we have  
12 to take a serious look at two issues here.

13                   First, whether or not the parties can be  
14 ready for a hearing. Regardless of how it is scoped,  
15 whether it is scoped on the basis of -- as determined by  
16 Chief Justice Crampton on the Reference or whether it is  
17 scoped differently by the Court of Appeal, I am very  
18 concerned that simply we are getting close to that date.

19                   Secondly, if the Court of Appeal's  
20 decision comes down subsequent to the hearing, we could well  
21 end up in a situation where it was heard on terms which were  
22 not the correct legal basis and I'm not so sure where that  
23 would leave the parties.

24                   I think what I am going to do is -- given  
25 these developments, I think I'm just going to put this over

1 for an indeterminate period of time. Actually, maybe I will  
2 make it a determinate period of time for two weeks hence. I  
3 think at that time I would like to reconvene to discuss this  
4 issue of the May dates again.

5 By that time you will have had a chance to  
6 digest the proposals and perhaps focus more on the May  
7 dates, but I am skeptical about the utility of proceeding  
8 pending the appeal myself. So we will make a decision on  
9 that issue two weeks hence on a date that is convenient to  
10 the Court and all the parties.

11 Is that alright with you, Mr. Iatrou?

12 **MR. IATROU:** That's perfectly fine by us,  
13 Justice Rennie.

14 I guess the one thing I would like to just  
15 comment on quickly is that we haven't sought a stay. I  
16 mean, the schedule had been paused, you know, as the  
17 Reference was going through and we didn't see a need to add  
18 to it by bringing some sort of a motion on for the stay.

19 **MR. JUSTICE RENNIE:** Right.

20 **MR. IATROU:** We assumed that we would be  
21 dealing with these questions on a case management  
22 conference. If you would like to see a formal motion for a  
23 stay I could do it, but given all these moving parts I just  
24 wanted to explain to you why we hadn't formalized that.  
25 It's that the schedule had been paused and we thought that

1 this case management conference was to decide how to un-  
2 pause it.

3 **MR. JUSTICE RENNIE:** Yes, all right.

4 Mr. Syme...?

5 **MR. SYME:** Yes, that's fine with us. And  
6 perhaps what I can do is, when we reconvene speak to the  
7 issue of the stay and the utility of the proceeding,  
8 notwithstanding the FCA appeal, having heard of course what  
9 you said about your skepticism in terms of the utility of  
10 proceeding. We have made careful note of it.

11 **MR. JUSTICE RENNIE:** Yes. Right, thank  
12 you.

13 Yes, I think -- I wasn't -- I didn't mean  
14 to suggest that we should have a formal motion for a stay.  
15 I knew the matter had been put on pause and that counsel  
16 were working through these issues collaboratively. It was  
17 more, I believe, Mr. Syme had mentioned there was no formal  
18 stay in process and just knowing what the Court of Appeal's  
19 docket is like in terms of hearing schedules, you obviously  
20 don't have a date for hearing yet.

21 **MR. SYME:** That's correct.

22 **MR. JUSTICE RENNIE:** Yes, yes.

23 All right, thank you very much, counsel,  
24 for this. It may not seem like progress, but I think if we  
25 give everybody two weeks to think about this we will come

1 back and make a decision on the May dates by mid-December.

2 Thank you very much.

3 **MR. SYME:** Thank you.

4 **MS KAY:** Thank you.

5 **MR. IATROU:** Thank you.

6 **THE REGISTRAR:** The hearing is now closed.

7 --- Whereupon the teleconference adjourned at 4:30 p.m.

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## CERTIFICATION

WE HEREBY CERTIFY that the foregoing has been reported and  
transcribed to the best of our skill and ability

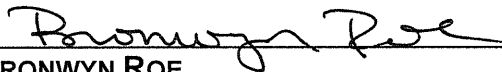
\_\_\_\_\_  
William Curley

\_\_\_\_\_  
Jean Desaulniers

\_\_\_\_\_  
Karen Paré

TAB Q

This is **Exhibit "Q"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

**Bronwyn Roe**

---

**From:** Syme, John: CB-BC <John.Syme@bc-cb.gc.ca>  
**Sent:** Friday, December 19, 2014 12:10 PM  
**To:** LaRose, Jos: CT; Filing Depot  
**Cc:** Chaplan, Jonathan: CB-BC; Rossman, Esther: CB-BC; Bronwyn Roe; Fanaki, Adam; dricci@dwpv.com; kkay@stikeman.com; DRoyal@stikeman.com; lplumpton@torys.com; jgotowiec@torys.com; hughesr@bennettjones.com; davise@bennettjones.com; pfranklyn@osler.com; MJamal@osler.com; Nikiforos Iatrou  
**Subject:** RE: Kobo v. Commissioner of Competition et al - Case management conference

Dear Mr. LaRose,

We write further to the Tribunal's Notice of Hearing for Case Management Conference (CMC) and ask that you bring the following matter to Justice Rennie's attention.

The Commissioner respectfully requests an opportunity to address during the CMC whether, in all of the circumstances and in particular, the Commissioner's indication that he is prepared to consent to the rescission of the Consent Agreement, there is a need for the s. 106(2) proceeding, the object of the proceeding being to determine whether the Consent Agreement should be rescinded.

For greater certainty, the Commissioner acknowledges that there are six other parties to the Consent Agreement (Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital Inc., HarperCollins Canada Limited, Holtzbrinck Publishers, LLC, Simon & Schuster Canada, A division of CBS Canada Holdings Co.) and we expect some or all of them will have views with respect to this issue.

The Commissioner also acknowledges that Kobo and Indigo may wish to address the foregoing matter; though, of course the rescission of the Consent Agreement is the very purpose of Kobo's s. 106(2) Application. Indigo has indicated that it generally supports Kobo's Application.

Respectfully,

John Syme

John L. Syme  
General Counsel | Avocat général  
Services juridiques, Bureau de la concurrence | Competition Bureau Legal Services  
Justice Canada  
Place du Portage  
50, rue Victoria, 22e étage / 50 Victoria Street, 22nd Floor  
Gatineau, QC K1A 0C9  
Tel: (819) 953-3903  
Fax: (819) 953-9267

---

**From:** Nikiforos Iatrou [<mailto:niatrou@weirfoulds.com>]  
**Sent:** December-17-14 11:53 AM

**To:** LaRose, Jos: CT

**Cc:** Syme, John: CB-BC; Chaplan, Jonathan: CB-BC; Rossman, Esther: CB-BC; Bronwyn Roe; 'Fanaki, Adam'; 'dricci@dwpv.com'; Katherine L. Kay - Stikeman Elliott LLP ([kkay@stikeman.com](mailto:kkay@stikeman.com)); Danielle Royal ([DRoyal@stikeman.com](mailto:DRoyal@stikeman.com)); Linda M. Plumpton ([lplumpton@torys.com](mailto:lplumpton@torys.com)); Gotowiec, James ([jgotowiec@torys.com](mailto:jgotowiec@torys.com)); Randal Hughes - Bennett Jones ([hughesr@bennettjones.com](mailto:hughesr@bennettjones.com)); Emrys Davis - Bennett Jones ([davise@bennettjones.com](mailto:davise@bennettjones.com)); Peter Franklyn ([pfranklyn@osler.com](mailto:pfranklyn@osler.com)); [MJamal@osler.com](mailto:MJamal@osler.com)

**Subject:** Kobo || Case management teleconference

Dear Mr. LaRose,

We write further to the Tribunal's Notice of Hearing for a Case Management Teleconference scheduled for December 22, 2014 and would ask that you bring the note below to the Chair's attention.

In addition to the issue of whether the matter should proceed as currently scheduled, we respectfully request an opportunity to briefly address one additional topic during the Teleconference. We were recently informed that the Commissioner of Competition intends to seek orders under section 11 of the Competition Act against the applicant, Kobo Inc., and the proposed intervenor, Indigo Books & Music Inc., with respect to issues that relate directly to the subject-matter of this proceeding. Drafts of the specifications were provided to each of us on Friday for the purpose of pre-issuance dialogue. Given the obvious potential impact of such orders on, among other things, the pre-hearing disclosure and the related implications with respect to the current schedule, we believe that the Tribunal should be fully apprised of this development. We understand that counsel for Indigo also intends to make brief submissions with respect to this issue at the Teleconference. Please do not hesitate to contact us should you have any questions.

Sincerely,

Nikiforos Iatrou

**NIKIFOROS IATROU** | Partner | T. 416-947-5072 | [niatrou@weirfoulds.com](mailto:niatrou@weirfoulds.com)

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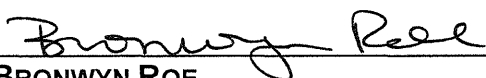
**WeirFoulds** LLP

66 Wellington Street West, Suite 4100, P.O. Box 35, Toronto-Dominion Centre, Toronto, Ontario, Canada. M5K 1B7 | T. 416-365-1110 | F. 416-365-1876 | [www.weirfoulds.com](http://www.weirfoulds.com)

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**TAB R**

This is **Exhibit "R"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

File No. / Dossier 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:**

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**

**BEFORE:**

The Honourable Mr. Justice Donald J. Rennie

**Chairperson**

**HELD VIA TELECONFERENCE**

22 December 2014



- ii -

APPEARANCES

Nikiforos Iatrou Bronwyn Roe	For the Applicant (Kobo Inc.)
John Syme Jonathan Chaplan	For the Respondent (Commissioner of Competition)
James Gotowiec Linda M. Plumpton	For the Intervenor (Hachette Book Group Canada Ltd, Hachette Book Group, Inc., Hachette Digital, Inc.)
Katherine L. Kay	For the Intervenor (HarperCollins Canada)
Randal Hughes Emrys Davis	For the Intervenor (Holtzbrinck Publishers, LLC)
Peter Franklyn	For the Intervenor (Simon & Schuster Canada, a division of CBS Canada Holdings Co.)
Adam Fanaki	For the potential Intervenor (Indigo Books and Music Inc.)
Mr. William Curley	Court Reporter (StenoTran Services Inc.)
Mr. Joseph (Jos) LaRose	Court Registrar

1 via teleconference

2 --- Upon commencing on Monday, December 22, 2014

3 at 10:03 a.m.

4 **THE OPERATOR:** Good morning, all  
5 participants. Your meeting is ready to begin.

6 I would now like to conduct a brief roll  
7 call. When I call your name, please respond with your  
8 location.

9 I would like to begin with Mr. Jonathan  
10 Chaplan.

11 **MR. CHAPLAN:** I am here on a cell phone in  
12 Toronto.

13 **THE OPERATOR:** Thank you.

14 And Mr. Peter Franklyn?

15 **MR. FRANKLYN:** Yes, I'm here in Toronto.

16 **THE OPERATOR:** Thank you.

17 Mr. Bill Curley?

18 **THE COURT REPORTER:** Yes, I'm here in

19 Ottawa.

20 **THE OPERATOR:** Thank you.

21 Mr. Emrys Davis?

22 **MR. DAVIS:** I'm in Pembroke.

23 **THE OPERATOR:** Thank you.

24 Mr. Adam Fanaki?

25 **MR. FANAKI:** Here in Toronto.

1                   **THE OPERATOR:** Thank you.

2                   Mr. Nikiforos Iatrou?

3                   **MR. IATROU:** I am here in Toronto with my  
4 colleague, Bronwyn Roe.

5                   **THE OPERATOR:** Thank you.

6                   Mr. John Syme?

7                   **MR. SYME:** Yes, here in Gatineau.

8                   **THE OPERATOR:** Thank you.

9                   Mr. James Gotowiec?

10                  **MR. GOTOWIEC:** Yes, I'm here.

11                  **THE OPERATOR:** Thank you.

12                  Mr. Randal Hughes?

13                  **MR. HUGHES:** Yes, I'm here in Toronto.

14                  **THE OPERATOR:** And we have Mr. Joseph  
15 LaRose on the line.

16                  **MR. IATROU:** I think we are missing one  
17 party, which is Katherine Kay. She just emailed me to  
18 ensure that she get called. I have her telephone number  
19 here.

20                  **THE OPERATOR:** Excellent, thank you. May  
21 I have this number, if you please?

22                  **MR. IATROU:** It's XXX-XXX-XXXX.

23                  **THE OPERATOR:** Excellent. Thank you very  
24 much. I will be dialing out to her immediately.

25                  **MR. IATROU:** Thank you.

1                   **THE OPERATOR:** So should anyone require  
2 assistance during the conference, feel free to press \*0 on  
3 your telephone keypad and I will be happy to assist you.

4                   Please go ahead.

5                   **THE REGISTRAR:** Is the operator still on  
6 here? Hello?

7                   **THE OPERATOR:** Yes, I am still on the  
8 line, sir.

9                   **THE REGISTRAR:** Could we just be put on  
10 hold for three minutes to give you a chance to reach Ms Kay  
11 and then get us back on the line?

12                   **THE OPERATOR:** Certainly, sir. Would you  
13 like me to put music on hold?

14                   **UNIDENTIFIED SPEAKER:** It depends what the  
15 music is?

16 --- Laughter

17                   **UNIDENTIFIED SPEAKER:** As long as it's not  
18 Christmas music.

19                   **THE OPERATOR:** Certainly.

20 --- Upon recessing at 10:05 a.m.

21 --- Upon resuming at 10:08 a.m.

22                   **THE REGISTRAR:** Hello. This is a case  
23 management conference in the case between Kobo Inc. and the  
24 Commissioner of Competition, et al. The Honourable Mr.  
25 Justice Donald Rennie is presiding.

1                   Counsel are requested to please identify  
2 themselves when they speak. The hearing is now open.

3                   **MR. JUSTICE RENNIE:** Good morning,  
4 counsel.

5                   **UNIDENTIFIED SPEAKERS:** Good morning.

6                   **MR. JUSTICE RENNIE:** It's Justice Rennie  
7 here. I know we have some of you on cell phones and we are  
8 scattered throughout Southern Ontario so I hope that this  
9 conference call proceeds without interruption.

10                   Mr. Chaplan and Mr. Syme, I will start  
11 with you simply because (off microphone) receipt of your  
12 email of December 19 indicating that the Commissioner is  
13 prepared to consent to rescission of the Consent Agreement  
14 and that, of course, would have a material impact on what  
15 was the original purpose of this call, which was to discuss  
16 the scheduling of Kobo's application on the merits under 106  
17 to have the existing Consent Agreement varied or set aside.

18                   I note, Mr. Chaplan and Mr. Syme, that you  
19 expect that some of the respondents to the Consent Agreement  
20 will have views on the issue of whether the Consent  
21 Agreement should be rescinded. So I think it's best to  
22 start with you two to just advise us as to what the  
23 Commissioner's intentions are and, I suppose, particularly  
24 whether or not you intend to bring an application to vary or  
25 set aside the Consent Agreement.

1                   **MR. SYME:** Perhaps, Justice Rennie, I will  
2 start off. It's John Syme speaking and I will invite my  
3 colleague, Jonathan Chaplan, to jump in if he wishes.

4                   A couple of things at the outset, perhaps.  
5 You will recall that at the last case management conference  
6 we indicated that the Commissioner was prepared to consent  
7 to the rescission of the Consent Agreement which is the  
8 primary relief sought by Kobo in the application, and you  
9 will also recall I think that, just prior to that CMC, we  
10 had advised both Kobo and the consenting (off microphone)  
11 pardon me -- of that position and they indicated they wanted  
12 some time to reflect on their position, as I believe Kobo  
13 did as well. So that information has been sort of "in the  
14 market" now for some time.

15                   It is our position that, in view of where  
16 we stand now, that the 106(2) proceeding is unnecessary, and  
17 if you will allow me, perhaps I can walk you through the  
18 logic of that position. There are a couple of -- as in many  
19 aspects of this case, there are a couple of moving parts.

20                   So if we start with the fact that Kobo has  
21 appealed Justice Crampton's Reference decision. That  
22 decision was made in the context of Kobo's section 106  
23 application. With that application, Kobo of course seeks  
24 rescission of the Consent Agreement between the Commissioner  
25 and the Publishers. As I have indicated, the Commissioner

1 has now said that he is prepared to consent to the  
2 rescission of the Consent Agreement.

3 In terms of the appeal to the Federal  
4 Court of Appeal, two things are important, in our  
5 submission. The first thing is that the Commissioner has  
6 not cross-appealed the Reference decision. In other words,  
7 the Commissioner accepts the standard established by Justice  
8 Crampton in that decision. Therefore, if before the Court  
9 of Appeal of the Commissioner prevails in arguing that the  
10 Crampton standard is right, we say the Consent Agreement  
11 will have to be rescinded. Why is that? It's because the  
12 Reference decision sets out certain requirements for a  
13 Consent Agreement and a Consent Agreement in this case  
14 between the Commissioner and the publishers, in our  
15 submission, does not meet those requirements. So that is  
16 the first thing.

17 The second important thing in terms of the  
18 appeal arises from the position Kobo has taken in the Court  
19 of Appeal. In its appeal Kobo takes the position that the  
20 Tribunal erred by limiting its jurisdiction on a Section  
21 106(2) application to assessing whether the Consent  
22 Agreement identified the elements of reviewable conduct  
23 while prohibiting itself from considering whether there is  
24 any factual basis for the conclusion that reviewable conduct  
25 has occurred. There I am referring to paragraph 13 of

1 Kobo's Notice of Appeal.

2 In other words, with its appeal, Kobo does  
3 not seek to set aside what I have described as the Crampton  
4 standard, rather what Kobo says is that Justice Crampton  
5 erred by limiting its jurisdiction to consider only those  
6 matters contemplated by the standard. Therefore, if Kobo  
7 prevails on appeal, the Crampton standard will remain in  
8 tact and, again, the Consent Agreement will have to be  
9 rescinded, in our submission.

10 So we think that rescission of the Consent  
11 Agreement at this point is inevitable and that it is  
12 appropriate, in view of that fact, not to carry on with a  
13 106 proceeding, the object of which is to determine whether  
14 or not the Consent Agreement should be rescinded.

15 I'm going to pause there for a moment, and  
16 I am happy to answer any questions you may have. I  
17 appreciate of course that others may have comments in  
18 response to what I have just said.

19 **MR. JUSTICE RENNIE:** Thank you, Mr. Syme.  
20 You can continue.

21 **MR. SYME:** I'm going to invite Mr. Chaplan  
22 to add anything if he wishes. Those are my submissions in  
23 respect of that first point.

24 **MR. JUSTICE RENNIE:** All right.

25 **MR. SYME:** Thank you.



1                   **MR. CHAPLAN:** Thank you. I have nothing  
2 to add. I would just confirm that the problematic part of  
3 the Crampton decision seems to have always been the position  
4 of -- the problematic part of the decision in the sense that  
5 what prevents the Consent Agreement from being valid seems  
6 consistent with Kobo's position throughout. I would just  
7 echo what Mr. Syme says. I have nothing further to add at  
8 this point.

9                   **MR. JUSTICE RENNIE:** Thank you, Mr.  
10 Chaplan.

11                   All right, can I hear from the Respondents  
12 now? In no particular order, I will start with counsel for  
13 Hachette.

14                   Is there no one on the line for Hachette?

15                   **MS KAY:** There probably is. It's  
16 Katherine Kay for HarperCollins. I'm happy to start us off,  
17 if that makes sense.

18                   **MR. JUSTICE RENNIE:** Yes, please. Thank  
19 you, Ms Kay.

20                   **MS KAY:** So there are lots of moving  
21 pieces in this and I might just say that, from my  
22 perspective, this call was a scheduling call and not a call  
23 to address substantive issues and, again, speaking only for  
24 myself, we are somewhat limited in the instructions we have  
25 in terms of dealing with this substantively today.

1                   What I can tell you -- and this is the  
2 position that, I believe -- although the others will speak  
3 for themselves -- but this is the position of all of the  
4 settling publishers, is that we don't agree that the  
5 Commissioner can simply consent to the Kobo application,  
6 primarily because the result of that is that it purports to  
7 rescind an agreement to which our clients are parties  
8 without our agreement. That raises a whole host of legal  
9 issues and policy issues that need to be addressed.

10                   I guess the other thing I would say to  
11 Your Honour is that, addressing that, it seems to us makes  
12 sense that that happen only after the appeal has been heard.  
13 If there is some question as to whether or not the appeal  
14 should proceed or some question as to the status of the  
15 appeal, that is an issue to be addressed by the Federal  
16 Court of Appeal and I say, respectfully, not the Tribunal,  
17 but as far as I know there is an appeal pending before the  
18 Federal Court of Appeal, it is an appeal from the decision  
19 of Chief Justice Crampton sitting on the Competition  
20 Tribunal, and unless the Federal Court of Appeal does  
21 something to oust that appeal then the issues arising from  
22 Justice Crampton's decision are all live and before him.

23                   So just from a sequencing or orderly  
24 process perspective, those issues ought to be addressed  
25 before we talk about what happens back at the Tribunal.

1                   But, in any event, the question of the  
2 Commissioner's ability to unilaterally purport to rescind  
3 the Consent Agreement without our agreement and without  
4 bringing an application under the relevant provision of the  
5 *Competition Act*, that is an issue that may need to be  
6 addressed, but now is not the time to address that.

7                   **MR. JUSTICE RENNIE:** Thank you, Ms Kay.  
8 Counsel for Holtzbrinck, Mr. Hughes?

9                   **MR. HUGHES:** Yes, Justice Rennie. We  
10 agree with the position as stated by my friend Ms Kay, that  
11 is that the Commissioner cannot purport to consent to Kobo's  
12 application which is effectively for a rescission of the  
13 agreement to which we are parties, and that the issues  
14 around the validity of the Consent Agreement can only be  
15 properly determined, and parties appreciate and analyse  
16 their positions, once the Federal Court of Appeal has  
17 decided the contours of the requirements and elements that  
18 go into a Consent Agreement.

19                   So we say that that should not occur now  
20 and that the Consent Agreement should not be rescinded on a  
21 unilateral request by the Commissioner, largely for  
22 strategic reasons, as we discern them.

23                   **MR. JUSTICE RENNIE:** Thank you, Mr.  
24 Hughes. Counsel for Simon & Schuster, Mr. Franklyn.

25                   **MS KAY:** I'm sorry, Justice Rennie, just

1 before you carry on, we are told by email that counsel for  
2 Hachette -- I think they can hear us and they are speaking,  
3 but they appear to be on mute by virtue of something the  
4 conference operator has done.

5 **MR. JUSTICE RENNIE:** Oh, all right. Thank  
6 you

7 **MS KAY:** So I don't know whether they can  
8 be dialed back in, but they have sent a bit of an S.O.S.  
9 asking that we let you know that.

10 **MR. JUSTICE RENNIE:** Right. Okay. Thank  
11 you.

12 We will just take a brief pause here and  
13 Mr. LaRose will see if he can contact the operator.

14 --- Pause

15 **MS PLUMPTON:** Hello?

16 **MR. JUSTICE RENNIE:** Hello.

17 **MS PLUMPTON:** Thank you. Justice Rennie,  
18 its Linda Plumpton for Hachette and I hope that you can now  
19 hear us.

20 **MR. JUSTICE RENNIE:** Yes. Thank you,  
21 Ms Plumpton. Were you able to hear the conversation to  
22 date?

23 **MS PLUMPTON:** We were and we have nothing  
24 to add beyond what was already ably stated by counsel for  
25 HarperCollins and counsel for Macmillan. That is Hachette's

1 position as well as to how the Commissioner's position  
2 should be handled.

3 **MR. SYME:** Justice Rennie, it's John Syme  
4 speaking.

5 I appreciate there are other publishers to  
6 come in terms of their comments. I'm just wondering if I  
7 can short-circuit one aspect of this by making it clear, if  
8 it hasn't been clear already, the Commissioner is not  
9 purporting to unilaterally rescind the Consent Agreement,  
10 the Commissioner has said that he is prepared to consent to  
11 that rescission, but we expressly acknowledged in our email  
12 to the Tribunal and we have expressly acknowledged to our  
13 friends that that is not the Commissioner's position.

14 So I think I just want to make that clear  
15 if it isn't clear already. I apologize for jumping in out  
16 of sequence.

17 **MR. JUSTICE RENNIE:** All right, thank you.

18 **MS KAY:** Although the million-dollar  
19 question is what the difference is between one and the other  
20 is one I'm sure the Tribunal will be interested in hearing.

21 **MR. JUSTICE RENNIE:** I was going to turn  
22 to you, Ms Kay, since you seem to be speaking generally for  
23 the publishers as to your reaction to that comment because  
24 I'm -- let me just say to all counsel the purpose of this  
25 call is to address scheduling issues, and I wanted to keep

1 the focus on scheduling. You will remember about a month  
2 ago, when we have the first call, I was looking at the fact  
3 that dates have slipped on the Kobo application, we had the  
4 pending appeal in respect of which -- which was moving  
5 forward, there was no application to stay the Tribunal's  
6 proceedings pending the appeal, and I thought,  
7 realistically, given the impact of the appeal decision on  
8 the form, shape, and substance of any application, the issue  
9 of whether it was wise to proceed was a very live issue.

10 So I don't want to drift into substantive  
11 issues here, so I think --

12 **MR. IATROU:** Justice Rennie, it's Nick  
13 Iatrou speaking --

14 **MR. JUSTICE RENNIE:** Yes.

15 **MR. IATROU:** -- for Kobo here, and perhaps  
16 on that particular point if I can say, I mean we are wholly  
17 in agreement that the outcome of the appeal will inform the  
18 form, shape, and substance of our application, but I think  
19 that what we are hearing from the publishers -- so to that  
20 end my position is the application should wait until the  
21 outcome of the appeal, and we have moved forward as quickly  
22 as we can to put forward -- to move the appeal forward  
23 swiftly.

24 Our material is due today and we have an  
25 agreement in place with all counsel, including the

1 Commissioner and us, that the appeal, assuming it's going to  
2 be heard, that we will all agree to have that scheduled and  
3 accelerated. So we have that agreement in place between  
4 counsel, formally on the record.

5 But I think what we are hearing from the  
6 publishers as well is that the outcome of the appeal won't  
7 just inform the form, shape, and substance of Kobo's 106(2)  
8 application, it could inform the publishers' positions on  
9 our application because until they know exactly what the  
10 boundaries are of a section 106(2) application, I think --  
11 you know, their position might change as to whether they  
12 consent or don't consent because I think, as you have heard  
13 from counsel, they have a Consent Agreement in place, Kobo  
14 has sought to challenge it, the Bureau is seeking to consent  
15 to Kobo's rescission, but it doesn't necessarily follow that  
16 the publishers are willing to consent to it because, you  
17 know, to be fair to them, they have negotiated this position  
18 and it is a Consent Agreement that they -- at least back in  
19 February -- were satisfied with.

20 So I think my view is a proceeding in May  
21 is unrealistic for the application and could result not only  
22 in the redo of the application, but in a redo of other  
23 motions that might arise, including if, you know, we may  
24 have a motion as to whether the Commissioner's decision to  
25 consent to our application can be given effect if the others

1 don't accept it or, if as you indicated at the outset of  
2 this call, or whether the Bureau is actually -- the  
3 Commissioner is actually going to do what the rules say the  
4 Commissioner should do, which is apply for rescission or  
5 variation under 106(1), which I guess would be the  
6 appropriate section if there isn't a unity of position among  
7 the signatories to the Consent Agreement.

8 So at this point I think it's -- and we  
9 haven't even gotten to the Section 11 issue, which has also  
10 arisen since of the last conference call, which I think as  
11 well may well be the subject of a motion, given its timing  
12 and its scope.

13 In light of all of that, I find it hard to  
14 believe that we would be able to realistically hit the May  
15 date for a hearing of our application -- and, even if we  
16 were, I suspect we are at great risk of having to do  
17 do-overs on a number of these moving parts.

18 **MR. FRANKLYN:** Your Honour, if I may, it's  
19 Peter Franklyn on behalf of Simon & Schuster.

20 If I might just add, I agree with the  
21 comments made by counsel on behalf of Hachette,  
22 HarperCollins and Macmillan. I would add that, as  
23 Mr. Iatrou has just pointed out, it is also my view that  
24 there is in fact a statutory framework for rescission or  
25 variation by the Commissioner which, I think, if that is how



1 he intends to proceed, would be the appropriate mechanism.

2 Furthermore, I believe what is proposed  
3 has very important potential policy issues that are broader  
4 than just the ones that relate to this matter alone, in  
5 addition to the impact that it has on our clients'  
6 negotiated interests in arriving at a settlement, as we did  
7 in February.

8 So I just wanted to add those to the  
9 comments that have been made as well.

10 **MR. JUSTICE RENNIE:** Thank you, Mr.  
11 Franklyn.

12 I'm not so sure that I have managed to  
13 keep us moving through this in a coherent way, but I think  
14 we are making progress.

15 Let me return to the publishers. Have I  
16 heard from everyone on the publishers' side?

17 **MS KAY:** You have, yes.

18 **UNIDENTIFIED SPEAKERS:** You have, yes.

19 **MR. JUSTICE RENNIE:** I think I have, yes.

20 I will turn it back to you, Mr. Chaplan  
21 and Mr. Syme, for your reaction to Mr. Iatrou's suggestion  
22 that, really, the proper way to proceed with respect to a  
23 106(2) application, whereby the change of circumstances are  
24 put before the Tribunal, the Consent Order is either varied  
25 or rescinded.

1                   **MR. SYME:** I will address that point in  
2 just a moment.

3                   I guess this is a somewhat novel situation  
4 because we have here Kobo speaking on behalf of, or  
5 summarizing the position of the respondents for parties  
6 opposite to it in the appeal, among other places, and Kobo  
7 having the Commissioner saying is prepared to consent to  
8 Kobo's application and the Commissioner expecting Kobo to  
9 run with open arms to him and that not happening. It is a  
10 most curious and puzzling situation and I think the answer  
11 to that situation lies in the fact that we are in a  
12 situation here where we have agency agreements that are the  
13 subject of a Consent Agreement that have been in place for  
14 3 1/2 years; that agreement is stayed.

15                   A consequence of that is that, unlike the  
16 situation in the U.S. where the Consent Agreement is in  
17 place and, as I believe you observed, Justice Rennie, at our  
18 last CMC, we are seeing the market evolve, with Amazon  
19 having entered into new agreements with Hachette, Simon &  
20 Schuster, and now Macmillan. We also see, and a casual  
21 observation tells us this, that even allowing for  
22 differences in currency rates, prices in the U.S. for many  
23 books, especially bestsellers, are substantially lower in  
24 the U.S. than in Canada.

25                   **MS KAY:** Your Honour, I'm sorry to

1 interrupt to my friend

2 **MR. SYME:** In other words --

3 **MS KAY:** I'm sorry to interrupt my friend,  
4 Your Honour.

5 **MR. JUSTICE RENNIE:** You have an objection  
6 to what Mr. Syme is saying, I take it, Ms Kay, is that it?

7 **MS KAY:** Yes, I do.

8 **MR. JUSTICE RENNIE:** Okay.

9 **MR. SYME:** I have one more sentence and  
10 then I'm done on this point. In other words --

11 **MS KAY:** Well, it doesn't change the fact  
12 that my friend is giving a --

13 **MR. SYME:** In other words, Canadian  
14 consumers have been taking it in the pocket book for 3 1/2  
15 years, and if my friends, including Kobo and the Publishers,  
16 have that way, that will go on for the foreseeable future.

17 **MS KAY:** Okay. I think --

18 **MR. JUSTICE RENNIE:** Okay.

19 **MS KAY:** I think all counsel are probably  
20 objecting at this time, Justice Rennie.

21 **MR. JUSTICE RENNIE:** Right.

22 **MS KAY:** That was an inappropriate  
23 submission --

24 **MR. JUSTICE RENNIE:** All right.

25 **MS KAY:** -- and evidentiary in nature with

1 no substantiation.

2 **MR. JUSTICE RENNIE:** Right, no. Thank  
3 you, Ms Kay. I appreciate that, and I can assure all  
4 counsel that what I understood Mr. Syme to be saying was  
5 foreshadowing the kind of information that the Commissioner  
6 might lead either in seeking to expedite an appeal or to  
7 stay the proceedings before the Tribunal or to make an  
8 application under 106(a) about change of circumstances or  
9 whatever. So there is some evidence out there about the  
10 implications of the current decision and current proceeding  
11 which may have impacts and policy consequences.

12 This is all about the mechanisms by which  
13 we go forward and when.

14 It's all very interesting, but it has no  
15 impact on how I proceed. I'm going to decide what we are  
16 doing in terms of scheduling. So thank you, counsel.

17 Is there anyone else?

18 I'm going to turn to Mr. Syme or Mr.  
19 Chaplan and ask for your final succinct observation as to  
20 what you think should be done with respect to the current  
21 application that is before the Tribunal. I have heard from  
22 Mr. Iatrou in very clear terms as to what his expectations  
23 are insofar as scheduling, but I will ask you, Mr. Iatrou,  
24 if you wish to add after Mr. Syme has spoken, and then I am  
25 going to turn to you, Ms Kay, or any other publishers who

1 wish to comment on those propositions coming from counsel  
2 with respect to the scheduling of the current 106  
3 application.

4 So Mr. Chaplan or Mr. Syme, what do you  
5 say should be done with respect to that?

6 **MR. SYME:** We say first of all that the  
7 106(2) proceeding ought not to go ahead and the Consent  
8 Agreement should be rescinded for reasons I have already  
9 said; I'm not going to go through that again.

10 In terms of -- if that's not going to  
11 happen, then we say the 106 proceeding should go ahead with  
12 all due dispatch for reasons I said a moment ago. You don't  
13 have an application or a motion for a stay before you, you  
14 don't have a motion for a stay before you, you have no  
15 evidence to support either of those things, the Federal  
16 Court and the Tribunal have observed on a number of  
17 occasions that an appeal does not create an automatic stay  
18 or adjournment and, indeed, in your own decisions in the  
19 motion to strike, Justice Rennie, in response to -- I am  
20 referring to paragraphs 22 and 23 of those reasons, in  
21 response to an argument by Kobo, that:

22 "...the decision on the Reference  
23 will be appealed, resulting in  
24 further delay or costs thrown away if  
25 the parties embark on a course of

1                                   proceeding only to learn, on appeal,  
2                                   they were headed down the wrong  
3                                   path."

4                                   In 23 of that decision you wrote:

5                                   "Whether the subsection 106(2)  
6                                   application is stayed pending an  
7                                   appeal of the decision on the  
8                                   Reference is speculative, as is the  
9                                   existence of an appeal itself."

10                                  Well, we have the appeal. Then you go on  
11                                  to say:

12                                   "These arguments also presume that  
13                                   the application could not proceed in  
14                                   tandem with any appeal. Insofar as  
15                                   the issue of costs being thrown away  
16                                   are concerned, the Tribunal has a  
17                                   broad discretion which can remedy any  
18                                   unfairness that might arise through  
19                                   the two parallel, but inter-related  
20                                   processes were that to be the case."

21                                  We say that the matter should go ahead,  
22                                  that it should not be delayed further, and those are my  
23                                  submissions, subject -- the Commissioner's submissions,  
24                                  pardon me, subject to anything that Mr. Chaplan would like  
25                                  to add.

1                   **MR. CHAPLAN:** I have nothing to add, thank  
2 you.

3                   **MR. JUSTICE RENNIE:** Thank you, Mr.  
4 Chaplan.

5                   Mr. Iatrou, do you want to expand on what  
6 you said earlier or are you content?

7                   **MR. IATROU:** Just very briefly on a couple  
8 of points, Your Honour.

9                   As I indicated on the last CMC, we didn't  
10 seek a stay of this because the schedule for the hearing of  
11 our 106(2) application was stayed. The Tribunal said the  
12 schedule would not proceed until, you know, matters  
13 regarding the Reference got sorted out, and that is what the  
14 purpose of these calls are. I didn't see the need to seek a  
15 stay because I knew we would be speaking about scheduling at  
16 this point.

17                   On the scheduling point, I mean, I would  
18 note that we are at the cusp of January. If we were to  
19 proceed with the hearing of the 106(2) application, here is  
20 what I can see would need to happen -- and this is assuming  
21 that we are willing to take the risk of having to go through  
22 a do-over, which I think is a very live risk. We would have  
23 to briefly amend our application in order to respond to some  
24 of the points that Chief Justice Crampton says we are  
25 allowed to proceed on, the Bureau would have to respond to

1 that application, as well as the publishers, unless of  
2 course the Bureau decides not to respond because of its  
3 position that the Commissioner takes the position that he is  
4 going to simply consent, but the publishers may wish to  
5 respond.

6 We would have to deal with the question of  
7 interveners and deal with any intervention motions. We  
8 would have to deal with the question of whether the  
9 Commissioner's decision to consent to our application means  
10 that indeed the order can just be granted and the Consent  
11 Agreement set aside notwithstanding the objection of the  
12 publishers.

13 We will have to deal with the fact that  
14 the Bureau -- the Commissioner is proceeding with the  
15 investigation even further by issuing section 11s against  
16 Kobo and Chapters, and in our respectful view there is case  
17 law to suggest that the Tribunal, when there is a live  
18 issue, when there is a live application before it, should  
19 have the supervisory role to play there. We don't need to  
20 dig in on that right now, we haven't seen what the final  
21 section 11 is going to be, but when it does arrive -- and we  
22 think that the Commissioner may be moving quite swiftly to  
23 get that section 11 order -- we suspect that we will have  
24 motions to be heard -- a motion to be heard on that.

25 So we are in a complicated situation, and



1 any one of those elements would have to potentially be  
2 redone if the appeal decision comes out any differently than  
3 Chief Justice Crampton's decision. So both as a question of  
4 practicality and trying to get all this in before May -- I  
5 mean, I haven't even touched on affidavits of documents,  
6 discovery scheduling, things along those lines -- I just  
7 don't see how realistically that can happen before May. You  
8 know, there are certain elements that perhaps could, but in  
9 my view we really risk that risk of all of these costs being  
10 thrown away and the whole process having to be redone, which  
11 is why the Commissioner is not seeing us running into his  
12 arms and thanking him for his proposal to consent, because,  
13 as was alluded to earlier, we think that there are strategic  
14 reasons behind the Commissioner seeking rescission, which is  
15 that he wants to come back to the Tribunal again on this  
16 later without having the benefit --

17 **MR. SYME:** Justice Rennie, it's John Syme  
18 speaking. I am going to object to this now. That is the  
19 second reference to strategic reasons, that is some sort of  
20 shady or cloudy reference to something -- I don't know if  
21 it's something improper that is being suggested on behalf of  
22 the Commissioner, but I don't think there is any basis for  
23 what is being said. Mr. Hughes made that statement and now  
24 Mr. Iatrou has made that statement. I think it is  
25 inappropriate. I apologize for intervening, but I felt I

1 had to do that on behalf of my client.

2 **MR. JUSTICE RENNIE:** Thank you, Mr. Syme.  
3 Were you finished, Mr. Iatrou, or --

4 **MR. IATROU:** I am, Your Honour, thank you.

5 **MR. JUSTICE RENNIE:** Thank you very much.  
6 I will turn to the publishers. Ms Kay?

7 **MS KAY:** Thank you, Justice Rennie.

8 So I guess I agree with everything that  
9 has been said with respect to the matters that would need to  
10 be addressed before May, and the consequences from a cost  
11 thrown away perspective. Your Honour will understand that,  
12 if you are sitting in the shoes of our clients, of the  
13 settling publishers clients who "did the right thing" by  
14 resolving the issues the Commissioner raised and by entering  
15 into a voluntary Consent Agreement to resolve those issues  
16 and then to be faced with the prospect of lengthy and  
17 expensive litigation which may need to be done over  
18 depending on what happens at the Court of Appeal, I mean,  
19 all of that is quite a startling proposition, if you are in  
20 the shoes of the settling publishers, to contemplate.

21 So for reasons of practicality, for  
22 reasons of fairness, for reasons of order, it strikes us, as  
23 settling publishers, that the right way to proceed here is  
24 to await the result in the Federal Court of Appeal. Perhaps  
25 that includes some sort of proceeding taken by the

1 Commissioner in respect of the Federal Court of Appeal, but  
2 that is only speculation on my part and we don't have any  
3 such proceeding.

4 Again, from our clients' perspective, we  
5 have done the right thing, we have resolved our differences,  
6 we have a Consent Agreement we stand by and are prepared to  
7 abide by at the right time and, you know, the Commissioner's  
8 position is, frankly, a little bit mystifying, but -- I  
9 don't want to editorialize, but nevertheless that is the  
10 position we, the settling publishers are in, and May looks  
11 awfully unrealistic on any evaluation.

12 **MR. JUSTICE RENNIE:** Thank you, Ms Kay.  
13 Ms Plumpton?

14 **MS PLUMPTON:** Nothing to add beyond what  
15 Ms Kay has indicated. It is our view as well that the  
16 rescheduling should await the outcome from the Federal Court  
17 of Appeal.

18 **MR. JUSTICE RENNIE:** Thank you.  
19 Mr. Hughes?

20 **MR. HUGHES:** That's our position as well,  
21 Justice Rennie.

22 **MR. JUSTICE RENNIE:** Mr. Franklyn?

23 **MR. FRANKLYN:** That's our position as the  
24 well, Justice Rennie. Thank you.

25 **MR. JUSTICE RENNIE:** Thank you. Have I

1 missed anyone? I think that concludes the list.

2 Thank you very much, counsel, for one of  
3 the more interesting scheduling case management calls the  
4 Tribunal or the Court has had.

5 --- Laughter

6 **MR. JUSTICE RENNIE:** I'm not going to make  
7 a decision right now, but you will have my views on  
8 scheduling I think as an early Christmas present.

9 So I wish you all, I'm sure, a  
10 well-deserved and relaxing holiday period and look forward  
11 to seeing you in one form or another in the new year. Thank  
12 you.

13 **UNIDENTIFIED SPEAKERS:** Thank you.

14 **THE REGISTRAR:** The hearing is now closed.

15 --- Whereupon the teleconference adjourned at 10:43 a.m.

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CERTIFICATION

WE HEREBY CERTIFY that the foregoing has been reported and transcribed to the best of our skill and ability

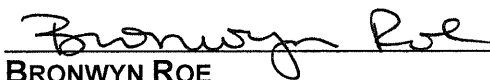
\_\_\_\_\_  
William Curley

\_\_\_\_\_  
Jean Desaulniers

\_\_\_\_\_  
Brian Denton

TAB S

This is **Exhibit "S"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

A handwritten signature in cursive script that reads "Bronwyn Roe". The signature is written above a solid horizontal line.

**BRONWYN ROE**

A Commissioner for taking Affidavits, etc.

Competition Tribunal



Tribunal de la Concurrence

Reference: *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 21

File No.: CT-2014-02

Registry Document No.: 113

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

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*;

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act*, by 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)

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)



Date of case management teleconference: 20141222

Before Judicial Member: Rennie J. (Chairperson)

Date of Order: December 22, 2014

**ORDER AND REASONS FOLLOWING A CASE MANAGEMENT  
TELECONFERENCE**



[1] This Order follows a case management teleconference held today with counsel for all parties. It is useful to revisit the history to date.

[2] Kobo Inc. filed an application for an order rescinding or varying a consent agreement entered into by the Respondents and registered with the Tribunal on February 7, 2014 (the “Consent Agreement”). The Commissioner subsequently framed a question to be determined by way of reference to the Tribunal. The Tribunal’s Scheduling Order of May 14, 2014, provided that the hearing of Kobo’s application would commence on May 11, 2015, in Ottawa, and noted that the Tribunal’s decision on the reference filed by the Commissioner of Competition would affect the form and content of the section 106(2) proceedings filed by Kobo Inc. In light of this, the Tribunal issued a direction on August 20, 2014, providing that the “deadlines established in the Scheduling Order of May 14, 2014 are suspended pending the release of the Tribunal’s decision on the reference”.

[3] Kobo Inc. appealed the Tribunal’s decision on the reference dated September 8, 2014. 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.

[4] In view of the pending appeal, the proceedings before the Tribunal, including the date of the hearing, should continue to be suspended pending the determination of the appeal. This is a pragmatic and cost-effective approach which takes into consideration the factors set out in subsection 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.).

[5] The Tribunal notes, parenthetically, that if the Commissioner of Competition 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 subsection 106(1) of the *Competition Act*, R.S.C. 1985, c. C-34.

**NOW THEREFORE THE TRIBUNAL ORDERS THAT:**

[6] The section 106(2) proceedings, including the date of the hearing of Kobo’s application, are suspended pending the determination by the Federal Court of Appeal of the appeal from the Tribunal’s decision dated September 8, 2014 (Court File No. A-401-14).

[7] There shall be no order as to costs.

DATED at Ottawa, this 22<sup>nd</sup> day of December, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

**APPEARANCES:**

For the applicant:

Kobo Inc.

Nikiforos Iatrou

For the respondents:

Commissioner of Competition

Jonathan Chaplan

John Syme

Hachette Book Group Canada Ltd.,

Hachette Book Group, Inc.,

Hachette Digital, Inc.

Linda Plumpton

James Gotowiec

HarperCollins Canada Limited

Katherine L. Kay

Danielle Royal

Holtzbrinck Publishers, LLC

Randal Hughes

Emrys Davis

Simon & Schuster Canada, a division of CBS Canada Holdings Co.

Peter Franklyn

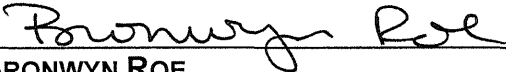
Indigo Books & Music Inc. (potential intervener)

Adam Fanaki

Derek D. Ricci

TAB T

This is **Exhibit "T"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

Federal Court of Appeal



CANADA

Cour d'appel fédérale

**Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur**  
**TO / DESTINATAIRE(S) :**

1. Name / Nom : Me Nikiforos Latrou

Facsimile / Télécopieur : 416-365-1876

Telephone / Téléphone :

- As requested / tel que demandé
- Left voice message / suite au message vocal

2. Name / Nom : Me Kay/ Me. Royal

Facsimile / Télécopieur : 416-947-0866

Telephone / Téléphone :

- As requested / tel que demandé
- Left voice message / suite au message vocal

3. Name / Nom : Me Randal Hughes

Facsimile / Télécopieur : 416-863-1716

Telephone / Téléphone :

- As requested / tel que demandé
- Left voice message / suite au message vocal

Name / Nom : Me Peter Franklyn/ Me Jamal Telephone / Téléphone :

Facsimile / Télécopieur : ~~819-953-9267~~

- As requested / tel que demandé
- Left voice message / suite au message vocal

Name / Nom : Me John Syme

Facsimile / Télécopieur : ~~416-863-1716~~

Telephone / Téléphone :

- As requested / tel que demandé
- Left voice message / suite au message vocal

Name / Nom : Me Linda Plumpton

Facsimile / Télécopieur : 416-865-7380

Telephone / Téléphone :

- As requested / tel que demandé
- Left voice message / suite au message vocal

**SUBJECT / OBJET :**

Court File No. / N° du dossier de la Cour : A-401-14

Judgement and reasons for Judgement of the Court

**COMMENTS / REMARQUES :**

If you require a certified copy of the above-noted decision, please advise and one will be forwarded to you by regular mail. / Si vous avez besoin d'une copie certifiée de la décision susmentionnée, veuillez nous en aviser et nous vous en enverrons une par courrier.

Federal Court of Appeal



Cour d'appel fédérale

CANADA

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Federal Court of Appeal



Cour d'appel fédérale

Date: 20150618

Docket: A-401-14

Toronto, Ontario, June 18, 2015

CORAM: DAWSON J.A.  
RYER J.A.  
WEBB J.A.

BETWEEN:

RAKUTEN KOBO INC.

Appellant

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

JUDGMENT

The appeal is dismissed with costs.

“Eleanor R. Dawson”

J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150618

Docket: A-401-14

Citation: 2015 FCA 149

**CORAM:** DAWSON J.A.  
RYER J.A.  
WEBB J.A.

**BETWEEN:**

**RAKUTEN KOBO INC.**

**Appellant**

**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**

Heard at Toronto, Ontario, on June 18, 2015.  
Judgment delivered from the Bench at Toronto, Ontario, on June 18, 2015.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**DAWSON J.A.**



Federal Court of Appeal



Cour d'appel fédérale

Date: 20150618

Docket: A-401-14

Citation: 2015 FCA 149

CORAM: DAWSON J.A.  
RYER J.A.  
WEBB J.A.

BETWEEN:

RAKUTEN KOBO INC.

Appellant

and

THE COMMISSIONER OF COMPETITION,  
HACHETTE BOOK GROUP CANADA LTD.,  
HACHETTE BOOK GROUP, INC.,  
HACHETTE DIGITAL INC.,  
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HOLTZBRINCK PUBLISHERS, LLC, and  
SIMON & SCHUSTER CANADA, A DIVISION  
OF CBS CANADA HOLDINGS CO.

Respondents

**REASONS FOR JUDGMENT OF THE COURT**

(Delivered from the Bench at Toronto, Ontario, on June 18, 2015).

**DAWSON J.A.**

[1] In 2012, the Commissioner of Competition commenced an investigation into the e-book industry in Canada. The investigation resulted in the Commissioner entering into a Consent

Agreement with the four publishers who are respondents to this appeal. The Consent Agreement recites that the agreement resolves the Commissioner's concerns that the respondent publishers had engaged in conduct that substantially lessened or prevented competition.

[2] Subsection 106(2) of the *Competition Act*, R.S.C. 1985, c. C-34 (Act) allows a person directly affected by a consent agreement to apply to the Competition Tribunal to have the consent agreement rescinded or varied. The Tribunal may grant the application if it finds that the applicant establishes that "the terms [of the consent agreement] could not be the subject of an order of the Tribunal".

[3] The appellant, Rakuten Kobo Inc., is an e-book retailer which alleges that it was directly affected by the Consent Agreement because the Consent Agreement altered existing contractual relationships between Kobo and the respondent publishers. As such, it applied under subsection 106(2) of the Act for an order rescinding or varying the Consent Agreement. One ground asserted by Kobo to justify rescission was that there was no jurisdiction to enter into the Consent Agreement because there had been no violation of the Act.

[4] Kobo's application therefore raised an issue of statutory interpretation: does the phrase "the terms [of the consent agreement] could not be the subject of an order of the Tribunal" permit an inquiry into the merits of the underlying case so as to determine whether the merits would justify the making of an order? In the alternative, is the Tribunal limited to, among other things, an inquiry into whether the terms of the Consent Agreement are terms the Tribunal has jurisdiction to order?

[5] Accordingly, the Commissioner referred a question of law to the Tribunal for determination. The question was:

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?

[6] For reasons cited as 2014 Comp. Trib. 14, the Tribunal concluded, among other things, that subsection 106(2) allows the Tribunal to determine whether the terms of a consent agreement are within the purview of one or more specific types of order that may be made by the Tribunal. This is an appeal brought by Kobo from that judgment.

[7] We are all of the view that the appeal should be dismissed, substantially for the reasons given by the Tribunal. In reaching this conclusion, we have considered each of the errors asserted by Kobo. For the following reasons, we have concluded that the Tribunal did not err as Kobo alleges.

[8] First, the Tribunal did not ignore Parliament's purpose for inserting subsection 106(2) into the new consent agreement regime. The Tribunal carefully and comprehensively reviewed the legislative history and the testimony given before the relevant parliamentary committee. That history and testimony amply supported the Tribunal's conclusion that the amendments to sections 105 and 106 of the Act were intended to streamline the Tribunal's oversight role and to avoid the necessity of a trial. The Tribunal did not err by interpreting subsection 106(2) through that lens.

[9] Second, the Tribunal did not fail to take into account what Kobo characterizes to be the high threshold for standing and the requirement for an applicant to prove its case, when considering the scope of review under subsection 106(2). The concepts of standing, burden of proof and the justiciability of an issue are distinct questions. As well, the Tribunal made no error when it contrasted the scope of review provided to a directly affected person with the scope of review expressed in paragraph 106(1)(a) and subsection 106.1(6) of the Act.

[10] Third, we are not persuaded Parliament intended to have all third-party challenges addressed under subsection 106(2). Even where the Tribunal has review powers under the Act, the possibility of judicial review exists (*Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C.R. 598, at paragraph 40).

[11] Fourth, the Tribunal did not take judicial notice of facts that do not lend themselves to judicial notice. The Tribunal was entitled to rely on its own experience with the prior legislative regime and to draw logical inferences from that experience. Similarly, the Tribunal was entitled to draw logical inferences as to the consequences that would flow from interpreting subsection 106(2) as sought by Kobo. Additionally, the legislative history before the Tribunal included commentary to the effect that the old consent order process was slow, uncertain and costly, such that a chill was cast on its use.

[12] Finally, the Tribunal did not err when, as part of its contextual analysis, it found Kobo's interpretation of subsection 106(2) could allow a party to circumvent the bar to private access contained in subsection 103.1(4) of the Act. In essence, a party who could seek leave to pursue

relief against certain restrictive trade practices, but instead complains to the Commissioner, is then barred from seeking leave to pursue its own relief if the Commissioner commences an inquiry into the complaint, discontinues an inquiry into the complaint or submits an application to the Tribunal in respect of the complaint. On Kobo's reading of subsection 106(2), the complainant would be entitled to seek a broad-based review if the Commissioner resolved the complaint by means of a consent agreement. It is not a rebuttal of the Tribunal's contextual analysis that relief under subsection 106(2) is discretionary.

[13] For these reasons, the appeal will be dismissed with costs.

\_\_\_\_\_  
"Eleanor R. Dawson"

J.A.

**FEDERAL COURT OF APPEAL****NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-401-14

**STYLE OF CAUSE:** RAKUTEN KOBO INC. v. 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.

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** JUNE 18, 2015

**REASONS FOR JUDGMENT OF THE COURT BY:** DAWSON J.A.  
RYER J.A.  
WEBB J.A.

**DELIVERED FROM THE BENCH BY:** DAWSON J.A.

**APPEARANCES:**

Nikiforos Iatrou  
Scott McGrath  
Bronwyn Roe

FOR THE APPELLANT

John Syme  
Jonathan Chaplan

FOR THE RESPONDENTS  
THE COMMISSIONER OF  
COMPETITION

Linda Plumpton

FOR THE RESPONDENTS  
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BOOK GROUP, INC.  
HACHETTE DIGITAL INC.

Katherine L. Kay

FOR THE RESPONDENTS  
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LIMITED

Randal Hughes

FOR THE RESPONDENTS  
HOLTZBRINCK PUBLISHERS,  
LLC

Mahmud Jamal

FOR THE RESPONDENTS  
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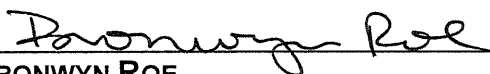
Osler, Hoskin & Harcourt LLP  
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FOR THE RESPONDENTS  
SIMON & SCHUSTER CANADA,  
A DIVISION OF CBS CANADA  
HOLDINGS CO.

TAB U



This is **Exhibit "U"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

July 7, 2015

**Nikiforos Iatrou**  
T: 416-947-5072  
niatrou@weirfoulds.com

**VIA E-MAIL**

File 15483.00001

**Jos LaRose**

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**Peter Franklyn/Mahmud Jamal**

Osler, Hoskin & Harcourt LLP  
First Canadian Place  
100 King Street West  
Toronto, ON M5X 1B8

Dear Mr. LaRose and Counsel:

**Re: Kobo Inc. v. The Commissioner of Competition, et al. (CT-2014-002)**

Further to the recent correspondence in respect of scheduling a case management conference in this matter, please be advised that Kobo will be seeking leave to appeal the June 18, 2015 decision of the Federal Court of Appeal (Court File No. A-401-14) to the Supreme Court of Canada.

Yours truly,

**WeirFoulds LLP**

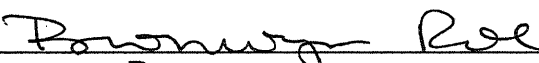


Nikiforos Iatrou

NI/BR  
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**TAB V**

This is **Exhibit "V"** referred to in the Affidavit of Anna Kusmider sworn before me this 14<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
**BRONWYN ROE**  
A Commissioner for taking Affidavits, etc.

File No. / Dossier 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:**

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**

**BEFORE:**

The Honourable Mr. Justice Denis Gascon

**Chairperson**

**HELD VIA TELECONFERENCE**

21 July 2015

- ii -

APPEARANCES

Nikiforos Iatrou Bronwyn Roe	For the Applicant (Kobo Inc.)
John Syme Jonathan Chaplan Esther Rossman	For the Respondent (Commissioner of Competition)
Linda M. Plumpton	For the Intervenor (Hachette Book Group Canada Ltd, Hachette Book Group, Inc., Hachette Digital, Inc.)
Katherine L. Kay	For the Intervenor (HarperCollins Canada)
Randal Hughes Emrys Davis	For the Intervenor (Holtzbrinck Publishers, LLC)
Mahmud Jamal	For the Intervenor (Simon & Schuster Canada, a division of CBS Canada Holdings Co.)
William Curley	Court Reporter (StenoTran Services Inc.)
Guillaume Phaneuf	Court Registrar

1 via teleconference

2 --- Upon commencing on Tuesday, July 21, 2015

3 at 1:01 p.m.

4 **THE REGISTRAR:** Could you proceed with a  
5 roll call, please?

6 **THE OPERATOR:** Perfect, yes.  
7 So online do we have Mr. Bill Curley?

8 **THE COURT REPORTER:** Yes.

9 **THE OPERATOR:** Perfect.  
10 Mr. Nikiforos Iatrou?

11 **MR. IATROU:** Yes, we do.

12 **THE OPERATOR:** Perfect.

13 **MR. IATROU:** With my colleague Bronwyn  
14 Roe.

15 **THE OPERATOR:** Perfect. Thank you.  
16 Mr. John Syme?

17 **MR. SYME:** Yes, with my --

18 **THE OPERATOR:** Jonathan --

19 **MR. SYME:** I'm sorry. Yes, go ahead.

20 **THE OPERATOR:** Jonathan Chaplan?

21 **MR. CHAPLAN:** Yes, I'm here.

22 **THE OPERATOR:** Esther Rossman?

23 **MS ROSSMAN:** I'm here.

24 **THE OPERATOR:** Mr. James Gotowiec?

25 **MS PLUMPTON:** Mr. Gotowiec is not on. You

1 have Linda Plumpton on for Hachette.

2 **THE OPERATOR:** Perfect.

3 Mr. Randal Hughes?

4 **MR. HUGHES:** Yes.

5 **THE OPERATOR:** And Emrys Davis?

6 **MR. DAVID:** Yes.

7 **THE OPERATOR:** And Mahmud Jamal?

8 **MR. JAMAL:** It's Mahmud. Yes, I'm here.

9 **THE OPERATOR:** Sorry.

10 And Mr. Guillaume Phaneuf, being the host  
11 of the conference.

12 **THE REGISTRAR:** Yes.

13 And we also have Ms Katherine Kay.

14 **THE OPERATOR:** Ms Katherine Kay, perfect.

15 And obviously the judge has currently been  
16 joined to the conference.

17 **MR. JUSTICE GASCON:** Thank you.

18 **THE OPERATOR:** So all the participants  
19 are in.

20 Should anyone require any assistance  
21 during the conference, please press \*0 on your telephone  
22 keypads.

23 Please go ahead.

24 **THE REGISTRAR:** Thank you.

25 This Case Management Conference call



1 between Kobo Inc. and The Commissioner of Competition,  
2 et al, is now open.

3 The Honourable Justice Gascon is  
4 presiding.

5 Counsel are requested to please identify  
6 themselves when they speak.

7 Your Honour...?

8 **MR. JUSTICE GASCON:** Thank you very much.

9 Good afternoon, counsel. Thanks for  
10 making yourself available today.

11 So, as everybody knows, the purpose of  
12 this Case Management Conference is to review the issues  
13 that have been discussed in various emails exchanged  
14 between the parties and is being held at the request of the  
15 Commissioner. Essentially, if I can use the words that  
16 counsel for the Commissioner used in the very first letter  
17 to discuss the next step in this section 106 proceeding, as  
18 everyone (off microphone) the June 18 decision of the  
19 Federal Court of Appeal, the suspension that was in effect  
20 further to the December 22nd Order of Justice Rennie is no  
21 longer in effect.

22 I guess it's obvious to everyone that Kobo  
23 intends to request a continuation of the suspension and  
24 what I will want to hear today is the position of the  
25 parties, first on the suspension itself, should we continue

1 the suspension pending the leave to appeal to the Supreme  
2 Court and whether in order to do so the Tribunal should be  
3 proceeding by way of a formal motion or if we rather can  
4 simply discuss that and decide it through a Case Management  
5 Conference like this one.

6 But first, perhaps what would be helpful,  
7 Mr. Iatrou, as counsel for Kobo, is to tell the Tribunal  
8 where we stand on the application for leave to appeal to  
9 the Supreme Court. I understand that you expressed the  
10 intent to file the application, but where are we on this  
11 application as such?

12 **MR. IATROU:** Yes, Justice Gascon.

13 So we have until September 18th --

14 **MR. JUSTICE GASCON:** Yes, I know.

15 **MR. IATROU:** -- to file our leave  
16 material. I expect that our leave material will be filed  
17 not next week, but the week following. We have an advanced  
18 draft in place, it will be in -- as I say, I don't think  
19 it's advanced enough to get the instructions from our  
20 client and incorporate their instructions in next week, but  
21 I expect that the week following we will have our leave  
22 material in.

23 **MR. JUSTICE GASCON:** Okay. So that  
24 means -- I'm sorry, I don't have a calendar before me.

25 --- Pause

1                   **MR. IATROU:** So if today is the 21st I  
2 expect that we will have it in the first week of August,  
3 sometime between -- the 3rd is the Civic holiday in  
4 Ontario, so 4th, 5th, 6th or 7th. In that week in August I  
5 expect that we will have our material in.

6                   **MR. JUSTICE GASCON:** Okay.

7                   And, again just to get the Tribunal up to  
8 date, have there been -- I mean I have seen the exchange  
9 between the parties on the suspension, but has there been  
10 any discussion on a possibility of agreeing on a timetable  
11 and the process on the application for leave to the Supreme  
12 Court which could bring the parties to agree on the process  
13 regarding the suspension of the proceeding before the  
14 Tribunal?

15                   Here I'm talking mostly to you as counsel  
16 for Kobo, but also to counsel for the Commissioner.

17                   **MR. IATROU:** So there have not been any  
18 conversations along those lines.

19                   I can tell you to date -- and I hope the  
20 Commissioner will echo this -- that at any point in time  
21 where we have sought to schedule any steps in this matter  
22 before the Tribunal or before the Federal Court of Appeal,  
23 at each step we have all agreed to move forward  
24 expeditiously, including putting in a consent to that  
25 effect when we sought the appeal. I don't see us as doing

1 anything differently here.

2 You see we are moving expeditiously to  
3 file the material, if there is a need or -- I'm not sure if  
4 there is an avenue to specifically request that our leave  
5 request be treated expeditiously, if there is I'm more than  
6 happy to consent to specifically requesting on the consent  
7 of all the parties that our material be heard  
8 expeditiously, as has been the case throughout.

9 We may disagree on how section 106(2)  
10 should be read, but to date all the counsel on this matter  
11 have been acting very professionally when it comes to  
12 scheduling matters and have always chosen the earliest  
13 possible dates and I don't see that changing.

14 **MR. JUSTICE GASCON:** Mr. Syme or  
15 Mr. Chaplan...?

16 **MR. CHAPLAN:** First, just let me indicate,  
17 Your Honour, that also on this call are my clients from the  
18 Bureau, Anthony Durocher, Jonathan Michaud and Barbara  
19 Russell, just so everyone is aware.

20 We are certainly not aware of any rules to  
21 expedite a leave to appeal. As indicated, I don't believe  
22 there has been any discussions.

23 Mr. Syme might know of anything further.

24 **MR. SYME:** No, that's correct, there  
25 haven't been any discussions in terms of expediting matters

1 or in terms of a schedule.

2 I don't disagree with Mr. Iatrou in terms  
3 of his characterization of parties moving things forward  
4 within the confines of the matter as currently structured.  
5 I would say, though, that certainly the Commissioner has  
6 been, from the outset -- and the record of this proceeding  
7 will indicate accordingly -- anxious to move the matter  
8 forward and indeed in the case conference which preceded  
9 the Justice Rennie's Order of -- I'm going by memory  
10 here -- I think it's December 22, 2014 in which the initial  
11 suspension was granted, we resisted that suspension and  
12 urged at that time the Tribunal to move the matter forward  
13 and our position remains the same, as is evident from our  
14 correspondence.

15 **MR. JUSTICE GASCON:** Yes. So assuming  
16 that your material is filed by the first week of August I  
17 mean, based on the most recent experience at the Supreme  
18 Court, it takes between 3 to 4 months to get a decision on  
19 a leave application, even -- and I understand that it is  
20 possible to file a motion to expedite, but with that you're  
21 looking at three months, which would lead, at least in the  
22 best case scenario, to a decision in November or  
23 thereabouts.

24 I understand from counsel for the  
25 Commissioner, that agreeing in any shape or form to a

1 suspension is not something that even with an expedited  
2 schedule on the leave application to the Supreme Court is  
3 not something that the Commissioner is contemplating at  
4 this stage.

5 **MR. CHAPLAN:** That's absolutely correct,  
6 Your Honour.

7 If I could just add, I think as outlined  
8 in some of the correspondence, that we find ourselves in a  
9 rather bizarre situation where clearly on both the decision  
10 of the Chief Justice and the decision of the Federal Court  
11 of Appeal, the applicant has clearly won his application on  
12 the face of it. It's quite clear from the face of the  
13 consent agreement that it can't survive, yet clearly the  
14 Kobo is enjoying the status quo and, if I can put it this  
15 way, refuses to win.

16 So we find ourselves in a rather strange  
17 situation.

18 **MR. JUSTICE GASCON:** Okay.

19 So in light of that if we could turn to  
20 the issue of whether continuing the suspension should  
21 proceed by way of a formal motion or we have a simple  
22 discussion in a case management conference. I would like  
23 to hear the position of the various parties on that,  
24 including not only the Commissioner and Kobo, but also the  
25 publishers are on the line through their counsel.

1                   So let's start with you, Mr. Syme or  
2 Mr. Chaplan.

3                   **MR. SYME:** Again as evident from our  
4 correspondence and I don't want to repeat myself, but we  
5 think this matter should proceed by way of a formal motion  
6 given the significance of it for the proceeding.

7                   If I look back -- as an example, if I look  
8 at the Tribunal's decision in TREB and I look at the record  
9 as available, I think to all parties, I look at the record  
10 in that proceeding, I see that there were formal  
11 submissions made, there was affidavit evidence put on the  
12 record, that evidence and information as referred to in  
13 Justice Simpson's decision, and she goes through, she  
14 canvases various factors, including the appropriate tests  
15 to apply in the circumstances. She determined it was  
16 Mylan, but she left open the possibility that the RJR test  
17 could apply.

18                   She then canvassed various factors,  
19 including change of circumstances, impact of proceeding on  
20 use of (indiscernible) resources, the leave and application  
21 and timing, the alleged anticompetitive harm and delay and  
22 the party's resources, and having canvassed those various  
23 issues she came to a decision.

24                   We think that it's important, in fact  
25 essential that you have an appropriate record before you to

1 allow you to render a decision whether you are going to  
2 apply the RJR test or the Mylan test. RJR of course is the  
3 three-part test that we're all familiar with; Mylan is an  
4 interest of justice test.

5 We say that in either event you need a  
6 record and a proper record before you and, moreover, the  
7 parties have to have an opportunity to in effect set out  
8 their positions and argue their positions prior to that  
9 decision being rendered.

10 We say that sort of an informal -- a very  
11 informal process where we just sort of make submissions  
12 without having seen, in our case, anything from the other  
13 side is simply not fair to the parties and, without wanting  
14 to think for the Tribunal, doesn't give the Tribunal an  
15 adequate record on which to exercise its discretion.

16 **MR. JUSTICE GASCON:** Mr. Chaplan, anything  
17 to add?

18 **MR. CHAPLAN:** No, thank you.

19 **MR. JUSTICE GASCON:** Okay.

20 Mr. Iatrou...?

21 **MR. IATROU:** The suspension in place  
22 originally came about without a motion, indeed not even  
23 with a Case Management Conference. It came about -- given  
24 the original schedule the Commissioner had a deadline that  
25 was looming in the beginning of September to file a



1 response and had reached out to the Registrar to indicate:  
2 Listen, at the time -- and this was late August -- we still  
3 didn't have the reference decision and wanted some  
4 direction as to how to proceed with his pending deadline.

5 Without a motion, without getting the  
6 parties on the phone, the schedule that was originally set  
7 in May was suspended. That was the initial suspension and  
8 there was no objection by any of the parties, there was no  
9 objection by the Commissioner, no one suggested that  
10 somehow the record was inadequate or that the Tribunal was  
11 doing anything untoward by suspending it, it seemed to make  
12 common sense.

13 Then we came about in December when the  
14 appeal process was winding its way through and we all got  
15 on the phone and we have a transcript of the Case  
16 Management Conference. We and the publishers outlined the  
17 risk of proceeding before we had the final decision on how  
18 the interpretation of 106(2) would unfold, and those risks  
19 involve not just the possibility of a do-over of the  
20 ultimate 106 hearing, but any motions or any steps that are  
21 taken to get to that hearing, so whether there are going to  
22 be interveners and what they will intervene on; whether  
23 there's going to be affidavits of documents and what their  
24 scope should be; whether there's going to be discoveries  
25 and what the scope of discovery should be. All of those

1 things could change depending on what the scope of 106(2)  
2 is.

3 I need to emphasize for a moment that I  
4 really disagree with the Commissioner's characterization  
5 that somehow Kobo is enjoying its position and refusing  
6 to win.

7 The reality is that what we have here is  
8 Kobo has brought its application and of course we welcome  
9 the fact that the Commissioner now -- after Kobo has spent  
10 significant resources that the Commissioner now comes to  
11 the view that his consent agreement is invalid. But the  
12 reality is that there are four other respondents who have  
13 not given that permission -- or given that consent.

14 And so there is going to be a proceeding,  
15 unless something changes, and Kobo's view is that that  
16 proceeding has to proceed on the proper interpretation  
17 of 106(2).

18 So given all of that, the two suspensions  
19 to date have occurred largely because common sense dictates  
20 that we need not bring a formal motion and that common  
21 sense dictates that we should avoid the potential waste of  
22 resources.

23 Because note here, Kobo is an innocent  
24 party as far as this consent agreement is concerned. The  
25 Tribunal has held that it will be irreparably harmed by

1 this consent agreement and it's investing the time to get  
2 the consent agreement properly set aside. To have it  
3 potentially risk having to expend needless money on  
4 accepting a proceeding that might have to be repeated isn't  
5 necessary and I would suggest that the same applies with  
6 respect to the need for a motion.

7 If we do proceed with the motion, yes, I  
8 mean we can probably add to the submissions that were made  
9 in December and the submissions that I can make today on  
10 it, but the bulk of what you will hear on a formal motion  
11 will come out in today's Case Management Conference,  
12 because I don't think there's anything particularly  
13 challenging about the arguments that the parties will put  
14 forward.

15 I do say this, though, if we do proceed  
16 with a motion, yes, we will file affidavit evidence that we  
17 need to file, but largely the situation is unchanged from  
18 December. The same risks of apply if we proceed without  
19 the suspension.

20 The only differences, I would suggest, are  
21 that, number one, we now have the Commissioner's firm  
22 position that this consent agreement is invalid, so I don't  
23 see any prejudice to the public in having the continued  
24 suspension of the consent agreement that the Commissioner  
25 and Kobo agree are invalid, and nor has this at all

1 impacted the Commissioner's ability to continue his  
2 investigation. He has been section 11-ing parties  
3 throughout, the investigation continues. So we don't see  
4 any need for a motion to cover off points that largely are  
5 self-evident.

6 If we do proceed with a motion I think we  
7 would end up agreeing with the Commissioner that it should  
8 be heard in writing, but our view is there is no need for  
9 a motion.

10 And section 9(2) of the Competition  
11 Tribunal Act says that:

12 "All proceedings ... shall be dealt  
13 with as informally and expeditiously  
14 as the circumstances and  
15 considerations of fairness permit."

16 That was what drove Justice Rennie's  
17 decision in December -- he built that into his December  
18 22nd Order -- and we would respectfully submit that the  
19 same should apply here today.

20 **MR. JUSTICE GASCON:** Thank you,  
21 Mr. Iatrou.

22 On behalf of the publishers, who wants to  
23 go first?

24 **MS KAY:** It's Katherine Kay for  
25 HarperCollins, Justice Gascon. I have been nominated to go

1 first and others will pick me up.

2 Just on the narrow question of how we  
3 ought to address this issue, I just echo the words of  
4 Justice Rennie from the December 22nd Order and Reasons  
5 following the Case Management Teleconference and that's --  
6 really what he had to say in paragraphs 3, 4 and 5  
7 continue, in my submission today.

8 So there's no question that the decision  
9 of -- the decision arising from the appeal, so there he was  
10 talking about the Federal Court of Appeal, but in my  
11 submission it's the same point with respect to the  
12 potential appeal before the Supreme Court of Canada.  
13 There's no question that the appeal decision will have a  
14 material impact on the form and content of the  
15 section 106(2) proceedings before the Tribunal. I'm  
16 reading from paragraph 3.

17 And then in paragraph 4 Justice Rennie  
18 said:

19 "In view of the pending appeal, the  
20 proceedings before the Tribunal,  
21 including the date of the hearing,  
22 should continue to be suspended  
23 pending the determination of the  
24 appeal." (As read)

25 I would add the word "appeal proceedings".

1 "This is a pragmatic and  
2 cost-effective approach which takes  
3 into consideration the factors set  
4 out in subsection 9(2) of the  
5 Competition Tribunal Act." (As read)

6 So the settling publishers are in the  
7 position where they have -- and I will firmly put quotation  
8 marks around this, they have done the right thing by  
9 reaching a resolution with the Commissioner, but it was a  
10 carefully calibrated resolution with the Commissioner on  
11 carefully calibrated and carefully negotiated language.

12 So we are in a position where we don't  
13 want to see that consent agreement ripped up, if I can put  
14 it that way, simply because the Commissioner takes a view  
15 of the result of the decision by Chief Justice Crampton.  
16 That decision is what is the subject of the leave to appeal  
17 application before the Supreme Court of Canada and to us,  
18 the settling publishers, it makes sense for all the reasons  
19 articulated by Justice Rennie that we await the result of  
20 that proceeding so that we know what it is that we are  
21 dealing with on the section 106 application.

22 So it strikes us -- I mean, we are in your  
23 hands, Justice Gascon, but it strikes us that you could  
24 address that issue on the same reasoning that Justice  
25 Rennie used on this call. We are in your hands as to form,

1 but the substance of it is no different. I guess to echo  
2 what Mr. Iatrou says, the substance is going to be no  
3 different whether it's by way of a formal motion or today's  
4 Case Management Conference and the substance is no  
5 different in that we are in the same spot we were in in  
6 December, that the shape of this reference will be  
7 determined following all of the appeal proceedings and we  
8 are not all the way through all of the appeal proceedings.

9 So the settling publishers don't want to  
10 spend money in respect of something that could be a do-over  
11 and the shape of which may well change. So that in essence  
12 is the position of the settling publishers with respect to  
13 today's proceeding.

14 **MR. JUSTICE GASCON:** Mr. Hughes, Mr. Jamal  
15 or Ms Plumpton?

16 **MR. HUGHES:** It's Mr. Hughes.

17 I don't have anything to add, Your Honour,  
18 subject to any questions that you might have of us.

19 **MS PLUMPTON:** And I am in, Your Honour,  
20 the same position, I adopt the submissions of Ms Kay.

21 **MR. JAMAL:** And likewise for Simon and  
22 Schuster, Your Honour.

23 **MR. JUSTICE GASCON:** Thank you.

24 I understand the context in which Justice  
25 Rennie took a less formal approach back in December. In

1 fact, I say "since then" because the information about the  
2 Commissioner being ready to consent to the rescission of  
3 the section 106 application I understand came on the eve of  
4 that Case Management Conference, so obviously the parties  
5 have had time to reflect on that. To me that is something  
6 that is slightly different from the context of the Case  
7 Management Conference back in December.

8 Also, since then the Federal Court of  
9 Appeal has definitely appealed unanimously on the Bench.

10 I would like to hear the comments of the  
11 parties, because to me these are two different  
12 circumstances and factual considerations that have an  
13 impact on the decision that the Tribunal has to make today  
14 in terms of whether to continue or not the suspension.

15 **MR. CHAPLAN:** Justice Gascon, Jonathan  
16 Chaplan, if I could just jump in for a moment.

17 First of all, not only did they dismiss it  
18 from the Bench, they dismissed it without hearing from the  
19 Commissioner unanimously, as you indicated.

20 Secondly, Mr. Iatrou talks about common  
21 sense and waste of resources and I still feel like Alice in  
22 Wonderland. If one was really worried about that, and if  
23 Kobo effectively set out to succeed on its application, one  
24 would think that they would bring an application for  
25 summary judgment which the Commissioner would succeed on



1 the basis of the clear wording (indiscernible) Federal  
2 Court and the Court of Appeal and if the other parties have  
3 something to say about that and can convince the court that  
4 for some reason this consent agreement meets the test -- we  
5 don't see how, but maybe they will have arguments -- I  
6 think that could be done very expeditiously and the matter  
7 could be dealt with.

8 So again, with the greatest of respect to  
9 my friend, this is about Kobo retaining the status quo, in  
10 our view.

11 **MR. SYME:** Well, if I may add a couple of  
12 points to what Nik has just said?

13 I begin by just noting that we seem to  
14 have gone from your initial question, which was: How  
15 should we deal with this matter in terms of process, i.e.  
16 should it be a formal motion or something else to bleeding  
17 into the substantial of arguments for why a suspension  
18 would be appropriate in the circumstances, argument by bits  
19 and pieces and not in a very -- and without being critical  
20 of my friends, not in a very, I wouldn't have thought, a  
21 coherent fashion.

22 One of the other points I just want to  
23 touch on is there is reference to the risks of proceeding  
24 and a do-over, and so forth and so on. As we look at it,  
25 if we were -- if the 106 proceeding were to go ahead and at

1 the same time the leave application goes ahead  
2 (indiscernible) outcomes.

3 The first is that leave will not be  
4 granted. In that event, then there is no waste in having  
5 proceeded with a 106. Of course there's no evidence of  
6 what waste there might be in any event, but even leaving  
7 that aside. So first is, leave is not granted, then there  
8 is no problem with having proceeded with the 106.

9 The second is, leave is granted but Kobo  
10 is not successful on appeal. Again, no problem with having  
11 proceeded with the 106.

12 A third possibility is leave is granted  
13 and Kobo is successful on appeal and I will leave you to  
14 reflect on the likelihood of that to the extent that you  
15 think it's relevant and bearing in mind, as you have noted,  
16 the FCA's dismissal from the Bench of Kobo's appeal.

17 Even in that event, the Supreme Court of  
18 Canada of course retains the power to refer the matter back  
19 to the Tribunal under subsection 43(1.1) of its Rules. --  
20 pardon me, of the Supreme Court Act, and that's referred to  
21 of course, by Justice Stratas in his decision in Mylan as  
22 well as in his subsequent decision in Sanchez v. Canada,  
23 which is Neutral Cite 2014 FCA 19.

24 So there is no significant or there is no  
25 evidence in fact whatsoever of waste. And even in the

1 event that the matter goes ahead, the likelihood of waste,  
2 in our submission, is extremely low and is being sort of  
3 held out by my friends as a significant issue, whereas we  
4 say it indeed is not.

5 **MR. JUSTICE GASCON:** Thank you, Mr. Syme.  
6 Mr. Iatrou...?

7 **MR. IATROU:** On the two points that you  
8 raised, Your Honour, the first one where you note what's  
9 suggested are two new facts that weren't really before  
10 Justice Rennie at the time, the first one is on the  
11 Commissioner's position that he has put on the record  
12 numerous times now that he is prepared to consent to Kobo's  
13 application.

14 Initially we had a Case Management  
15 Conference scheduled for November 24 and it was on the eve  
16 of that Case Management Conference that the Commissioner,  
17 shortly before -- I forget if it was the morning of it or  
18 the day before in terms of bringing it to Kobo's  
19 attention -- brought his position to Kobo's attention that  
20 he was willing to consent. And I think shortly before that  
21 he had brought it to the attention of the publishers.

22 So what happened was, on November 24th we  
23 all got on a Case Management Conference with Justice Rennie  
24 and everyone said, "Well, listen, this is late-breaking  
25 news, we need to get instructions, we don't know what it

1 means or how to react" and so that's how we ended up  
2 rescheduling or reconvening on December 22nd.

3 So come December 22nd it was no longer  
4 late-breaking news, we had had a month to consider it and  
5 the Commissioner repeated his position at that case  
6 management conference and it was taken down. So I don't  
7 see that as a new (indiscernible) distinguishing Justice  
8 Rennie's approach versus where we're at today.

9 In terms of the fact that the case has  
10 been dismissed, it was dismissed unanimously from the  
11 Bench, exactly as Your Honour and Mr. Chaplan have  
12 described it.

13 At the same time, I think most of the  
14 decisions I have seen in situations like this the Tribunal  
15 is quite cautious not to try to wager as to whether an  
16 appeal is going to be successful or not when it reaches the  
17 Supreme Court of Canada. And we are at the leave stage  
18 still and I am of the view that should leave be granted --  
19 well, sorry, I'm of the view that the appeal proceedings  
20 need to be completed before we schedule further steps in  
21 this matter.

22 All of this had been foreshadowed quite  
23 early on in this case when the Commissioner first brought  
24 the reference. We all knew what would happen once the  
25 reference proceeding were to start and that was that there

1 would be interlocutory appeals. And now that we're in the  
2 middle of it the Commissioner is upset about the fact that  
3 these appeal processes have to go through.

4 Now, that's because to date on the  
5 reference the Commissioner has been successful, but the  
6 stage was set for this quite early on and it seems wrong to  
7 now say, "Well, you had one kick at the can, Kobo, in terms  
8 of an appeal and that's it, now let's proceed and incur  
9 these possible risks."

10 I don't see where -- two last points.

11 On the question of there being some sort  
12 of summary judgment motion to be brought here, if the  
13 Commissioner -- that's the first time that this has been  
14 raised on this call. It's an interesting concept and one  
15 that I will consider. I note that the Commissioner could  
16 equally have brought that throughout should he wish to. So  
17 I don't see that as being somehow landing just with Kobo,  
18 that Kobo hasn't sought to bring it. I think we have all  
19 been at the point where up until now the schedule has been  
20 suspended as we are trying to figure out exactly what the  
21 law should be.

22 And then the final point I would make is  
23 simply the one I made earlier, which is we do plan and we  
24 have throughout moved as quickly as we could on any motions  
25 or any applications, be they motions and applications that

1 the Commissioner has brought, including the scheduling of  
2 the reference, and with the appeals. And the delay of a  
3 couple of months, given the lack of prejudice in this case  
4 to the Commissioner and to the public, I don't think  
5 outweighs the risks that are in play here.

6 But again, if we need to proceed by way of  
7 a formal motion we would put these sorts of arguments  
8 forward and we would likely find additional material to put  
9 into the affidavit, but our view is, to your original  
10 question, that this can be dealt with informally and  
11 expeditiously today.

12 **MR. CHAPLAN:** If I may, Justice Gascon,  
13 the idea that we could bring a summary judgment motion  
14 against ourselves as respondents is unknown to me in the  
15 Rules and I'm not going to suggest that Mr. Iatrou wouldn't  
16 be able to think on his own of bringing a summary judgment  
17 motion if he wanted to bring a matter to a close where the  
18 law was clearly on his side. Of course that's something  
19 that would have been in anyone's mind, but it's not  
20 something that is open to the Commissioner to do as a  
21 respondent in this matter.

22 **MR. SYME:** One final point.

23 Mr. Iatrou referred to the lack of  
24 prejudice. There has been no opportunity for the  
25 Commissioner to bring forward any evidence of prejudice nor

1 make submissions on that issue and so I don't know how you  
2 could conclude, with all due respect, that there is no  
3 prejudice to the public interest or indeed how you might  
4 reach a view as to the prejudice that might befall Kobo or  
5 the settling publishers by proceeding. There simply hasn't  
6 been evidentiary record to allow you to do that, with the  
7 greatest respect.

8 **MR. JUSTICE GASCON:** On the publishers'  
9 side regarding the last round of interventions, anything  
10 Ms Kay or any other counsel want to add?

11 **MS KAY:** Katherine Kay again. Thank you,  
12 Justice Gascon.

13 The only other note which we should not  
14 lose sight of is that the Tribunal ruled on December 22nd  
15 that if the Commissioner of Competition seeks to rescind  
16 the consent agreement without the agreement of all the  
17 signatories to the agreement he must do so within the  
18 statutory framework, including subsection 106(1) of the  
19 Competition Act.

20 That was Justice Rennie's decision back on  
21 December 22nd. The Commissioner took no appeal proceedings  
22 in respect of that ruling.

23 So we have a binding consent agreement.  
24 The Commissioner is saying as the result of Chief Justice  
25 Crampton's decision, which is itself the subject of appeal

1 proceedings, it doesn't have the -- this is my phrase, not  
2 Justice Crampton's and not my friends for the  
3 Commissioner -- but it doesn't have the magic words and  
4 therefore it's going to fall.

5 We don't agree with that but, in any  
6 event, if what the Commissioner seeks is to rescind the  
7 consent agreement he must do so within the framework of the  
8 Competition Act and he hasn't taken any steps to do that  
9 and I don't hear my friends for the Commissioner to be  
10 saying that's what they are going to do and indeed it would  
11 be the position of the settling publishers that the  
12 Commissioner doesn't meet the statutory test for rescission  
13 of the consent agreement under 106(1) or otherwise.

14 So the idea that the Commissioner could  
15 just say, "Oh well, we all know where this is going to end  
16 up and we should just get there quickly" in my submission  
17 is simply a submission without a basis. We have already  
18 had a ruling on that point, that ruling has not been  
19 appealed and we are effectively in the same spot we were in  
20 back in December, we are just at a different stage of the  
21 appeal proceeding.

22 **MR. CHAPLAN:** If I could just respond  
23 briefly? It's Jonathan Chaplan.

24 No, we are not resending, we are saying  
25 that the application on its face appears to be successful



1 in light of reading the consent agreement and in light of  
2 reading the judgment, both of the Chief Justice and the  
3 Court of Appeal. That's a different notion than the  
4 Commissioner trying to rescind.

5 **MS PLUMPTON:** But with respect -- this is  
6 Ms Plumpton -- that's precisely the argument that was made  
7 before Justice Rennie that led to the passages that were  
8 just cited to you by Ms Kay.

9 **MR. JUSTICE GASCON:** Any other comments on  
10 the publisher's part?

11 **MR. HUGHES:** No, thank you.

12 **MR. DAVIS:** No, Your Honour.

13 **MR. JAMAL:** Not here, Your Honour.

14 **MR. JUSTICE GASCON:** I mean the issue to  
15 be decided is really whether we need to go through a motion  
16 to sort out all of those issues. I will take a couple of  
17 hours to reflect on that. I'm not going to make a decision  
18 now, but just to indicate to the parties that my first  
19 reaction, having heard what I'm hearing today, that there  
20 appears to be a number of issues to be discussed around  
21 that and that -- I mean to some extent there has been  
22 some -- I mean obviously time has gone by since December,  
23 there has been some development in this file in the context  
24 of that and bearing in mind the informal approach that the  
25 Tribunal typically wants to favour -- it wants to take in

1 those various proceedings -- whether here it would be  
2 indicated to go through the process of a motion.

3 Bearing in mind that, I mean, not only for  
4 the moving party, Kobo, but for all the parties going  
5 through the process of a motion would mean that it would  
6 take up resources on both sides.

7 In terms of the timeline, I mean we have  
8 not talked about that, but it could also -- it could take  
9 up a fair amount of time before getting to a resolution,  
10 which is why I was asking at the very beginning whether the  
11 parties had considered any possibility of agreeing to an  
12 expedited schedule for the application for leave at the  
13 Supreme Court, which would be satisfactory to both sides  
14 and would mean that an agreed suspension of the proceeding  
15 could be considered. I understand from the exchanges that  
16 I have heard that this is not something that is on the  
17 table as we speak.

18 Can you confirm that, Commissioner?

19 **MR. SYME:** That's correct, Your Honour.

20 John Syme speaking.

21 **MR. CHAPLAN:** If I just could add, there  
22 is certainly no concern about moving things along as  
23 quickly as possible, but even having said that our position  
24 is still that there should not be a suspension.

25 **MR. JUSTICE GASCON:** No, I meant in terms

1 of the motion itself. I mean the motion for suspension  
2 will likely require evidence and affidavits on both sides,  
3 depending on the test. I mean the issue of the test in  
4 itself is an issue that would need to be decided, but there  
5 would need to be affidavit evidence on both sides

6 **MR. CHAPLAN:** Understood. I think it's  
7 fair to say that the Commissioner's position is that that  
8 motion should take place. It should be a formal motion.

9 **MS KAY:** I would just observe, Justice  
10 Gascon -- it's Katherine Kay again -- that by the time we  
11 were done with that motion I think we would know whether  
12 leave was being granted.

13 **MR. SYME:** John Syme speaking.

14 Well, I think that's not a very optimistic  
15 forecast in terms of timeframe. We are looking at a leave  
16 decision maybe at earliest in November, perhaps as late as  
17 December.

18 Is Ms Kay actually suggesting that a  
19 decision on this motion wouldn't be rendered until then? I  
20 must be missing something.

21 **MS KAY:** Well, the Commissioner has made a  
22 number of statements in correspondence which the settling  
23 publishers would disagree with so I would be surprised if  
24 there were affidavits if there weren't requests to  
25 cross-examine in respect of them. So just being realistic

1 and taking into account the fact that we do have the summer  
2 somewhere in there, I think the timelines are going to be  
3 awfully similar.

4 Again, from the settling publishers  
5 perspective, right, we did the right thing and now we are  
6 being forced to expend resources in respect of these  
7 proceedings so where there is an opportunity to be  
8 cost-effective and to exercise -- to use an expression  
9 that's been used today -- common sense, then that would be  
10 a good thing from the settling publishers perspective.

11 **MR. JUSTICE GASCON:** And again, I mean  
12 it's coming back to what I was mentioning in the beginning  
13 that's something that -- I mean it's not for the Tribunal  
14 to decide, but for the parties to balance in terms of the  
15 resources which would be required in the context of a  
16 motion versus the expected or likely timeline on the  
17 decision on the application for leave.

18 I'm not talking about assuming there is  
19 leave, but on the application for leave. But I mean you  
20 are all experienced counsel so you are in a position to  
21 balance those two.

22 Yes...?

23 **MR. JAMAL:** Justice Gascon, it's Mahmud  
24 Jamal here.

25 I was just going to add that Mr. Iatrou is

1 in effect expediting at least in terms of his filing  
2 deadline by proposing to file by the first week of August,  
3 which is five weeks in advance of the deadline of  
4 September 18th.

5 So I guess whether or not a formal motion  
6 to expedite is brought to the Supreme Court, I guess the  
7 Commissioner could similarly choose to file his materials  
8 on a shorter timeframe in response to the motion for leave  
9 to appeal and, you know, that would move the timeline up,  
10 even without a formal motion to expedite the disposition  
11 of a leave application.

12 So I think in effect what I'm saying is  
13 that Mr. Iatrou is in effect expediting his leave  
14 application already.

15 **MR. JUSTICE GASCON:** I understand that,  
16 but at the same time I'm not in the shoes of the parties so  
17 I mean these are things that you can discuss amongst  
18 counsel if there is any possibility of resolution, but what  
19 I'm hearing today is that on this front the possibility of  
20 exploring something which would be manageable and  
21 (indiscernible) practical perspective and not something  
22 that is on the table as we speak.

23 Mind you, I mean if the Tribunal is to  
24 decide that there is a need for a motion, when time will  
25 come to discuss the scheduling timetable of the motion we

1       may have a better sense as to where the balancing act  
2       between those two options could be.

3                   **MR. IATROU:** Justice Gascon, I think what  
4       you're hearing from the parties is, I mean we are going to  
5       demonstrate by action, as Mr. Jamal kindly pointed out just  
6       now, rather than waiting for a formal expedited motion  
7       before the Supreme Court, but we will move forward on that.

8                   I will also undertake to reach out to all  
9       the parties, including the Commissioner, to see if we can  
10      get an agreement on expediting the schedule, because as far  
11      as we are concerned, irrespective of whether the schedule  
12      is suspended here or not, there is no need to delay our  
13      leave application.

14                  I don't imagine there will be much  
15      pushback in terms of that, I think, though, the question  
16      will really be before the Commissioner how much time does he  
17      need to prepare his response. But I think we have heard  
18      from the Commissioner that irrespective of whether we move  
19      expeditiously on our leave application, his position would  
20      be the same, that there should be no suspension, even if we  
21      got in all the leave material tomorrow.

22                  So while I think all the parties -- having  
23      had this Case Management Conference with you today, I think  
24      it's helpful for us to agree to an expedited schedule and I  
25      suspect we will be able to come up with that, but I don't

1 think it will resolve the question of whether the matter  
2 should be suspended (a), and (b) whether it should be  
3 suspended informally or formally. Whether what you have  
4 heard today suffices in terms of giving you the view that  
5 the matter should be suspended or if indeed we do have to  
6 go through the formal motion.

7 I would echo what was said a moment ago,  
8 which is if the decision -- our first view is there is no  
9 need for a formal motion, but if there is to be a motion  
10 inevitably we have to anticipate the worst, which is the  
11 RJR-MacDonald test will be applied so we will have to put  
12 in the affidavit evidence and I expect there will be  
13 responding affidavits and I do expect, especially with  
14 respect to the affidavit that the Commissioner would put  
15 in, I would be very surprised if there were not  
16 cross-examinations on those.

17 Ultimately I think the decision will still  
18 come on the basis that we are proceeding on today, but  
19 there will be additional facts that need to be put forward  
20 if we proceed formally.

21 **MR. SYME:** It's John Syme, Your Honour.

22 I don't want to keep the tennis match  
23 going to long, but Mr. Iatrou refers to additional facts  
24 that would have to be put forward if we're going to proceed  
25 formally. One wonders what those facts are and if they

1 would be put forward presumably he thinks they would be  
2 relevant to your consideration. He's asking you now to  
3 proceed informally without those facts before you. I  
4 just -- I see a fundamental contradiction in his position.

5 There's one other thing which I think --  
6 or two other things which I think bear noting.

7 The first is, there's no motion whatsoever  
8 before you, formal or informal. Indeed it was the  
9 Commissioner -- and I'm not criticizing my friend for this,  
10 but it was the Commissioner who brought to the Tribunal's  
11 attention the fact that a suspension was being sought. So  
12 there is no motion whatsoever before you.

13 The final point is just -- and you have  
14 heard reference to section 9(2) of the Competition Tribunal  
15 Act, and of course we are all familiar with it, but it ends  
16 with the words "and considerations of fairness permit." I  
17 think we can't throw fairness out of course in favour of  
18 expedition. Of course we can deal with things  
19 expeditiously and the Tribunal is bound to do that under  
20 9(2), however only insofar as fairness permits.

21 Here we would submit that hearing from my  
22 friends opposite their positions, and so forth and so on,  
23 in the course of this call without an opportunity to  
24 reflect on those and provide appropriate submissions and  
25 perhaps file evidence puts the Commissioner, candidly, in a



1 position of where there's an unfairness being worked  
2 against him and I don't say that lightly.

3 Thank you.

4 **MR. JUSTICE GASCON:** Okay. Thank you  
5 everyone.

6 As I said, I will be reflecting on that.

7 I should indicate at this stage, I mean  
8 having heard all the arguments and the issues that have  
9 been raised in the call, I'm inclined to think at this  
10 stage that having all those issues laid out through motion  
11 might be necessary.

12 The concern I have -- and I have raised  
13 that earlier and I'm mentioning that to the parties  
14 again -- is that it may be that going through a motion  
15 process might lead us, as Ms Kay mentioned, to a date which  
16 would be close to the date on which the decision of the  
17 Supreme Court on the application for leave would be issued.

18 So I mean I leave it at that for the  
19 parties, but that's something that in terms of when we are  
20 talking about being practical and using resources  
21 appropriately, that's something that the parties should  
22 consider if they are having discussions among themselves on  
23 this issue.

24 Does anyone want to read anything at  
25 this stage?

1                   **MR. SYME:** Nothing from the Commissioner;  
2           thank you.

3                   **MR. JUSTICE GASCON:** Mr. Iatrou...?

4                   **MR. IATROU:** No, thank you.

5                   **MR. JUSTICE GASCON:** Ms Kay, Ms Plumpton,  
6           Mr. Hughes and Mr. Jamal?

7                   **MS KAY:** I think were good. Thank you,  
8           Your Honour.

9                   **MR. JAMAL:** Nothing further here.

10                  **MR. JUSTICE GASCON:** Thank you everyone.  
11                  The hearing is now completed.

12                  **THE REGISTRAR:** This Case Management  
13                  Conference is now concluded; thank you.

14                  **MR. JUSTICE GASCON:** Thank you very much.

15                  --- Whereupon the teleconference ended at 1:53 p.m.

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## CERTIFICATION

WE HEREBY CERTIFY that the foregoing has been reported and  
transcribed to the best of our skill and ability

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William Curley

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Jean Desaulniers

**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

- 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

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**MOTION RECORD**

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