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 <u>type of order(s)</u> 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

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

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;

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'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.

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*, 1st Sess., 37th 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, 37th Parl., 1st 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, 37th Parl., 1st 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, 37th Parl., 1st 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, 37th Parl., 1st 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, 37th Parl., 1st 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 section79.

[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^{th}) 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 exlusio 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 <u>be the subject of</u> 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 hat 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:

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