

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 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 March 13, 2014 CT-2014-002 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 25

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 HEATHER REISMAN
(Sworn March 13, 2014)

I, HEATHER REISMAN, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am the Chief Executive Officer of Indigo Books & Music Inc. ("Indigo").
2. I have read carefully and considered the Consent Agreement filed by the Commissioner of Competition (the "Commissioner") with the Competition Tribunal (the "Tribunal") on February 7, 2014 in the within proceeding (the "Consent Agreement") and the Notice of Application filed by Kobo Inc. ("Kobo") on February 21, 2014 seeking an order to vary or rescind the Consent Agreement.
3. I have personal knowledge of the facts and matters referred to in this Affidavit, except where stated to be based on information from others, in which case I verily believe such information to be true.

A. Overview

4. Indigo is Canada's largest book retailer, operating "bricks and mortar" stores in all ten provinces and one territory in Canada. In addition to operating physical stores for the sale of books and other products, Indigo also operates an online channel ("indigo.ca") that features E-books, as well as traditional, physical books, and other products. The growth of E-books in Canada is having a profound impact on traditional book sales, presenting unique challenges for book retailers, such as Indigo.
5. Despite the growing importance of E-books for Canadian consumers, the market for E-books in Canada is highly concentrated, with the Applicant, Kobo, and the U.S. supplier, Amazon.com, Inc. ("Amazon"), being the largest competitors in the market. As

described in greater detail below, Indigo has partnered with Kobo in an effort to develop and sustain a competitive alternative to Amazon for the supply of E-books in Canada.

6. However, as a result of the Consent Agreement, Kobo's effectiveness as a competitor to Amazon in Canada will be significantly diminished, potentially resulting in a reduction of its Canadian operations (as Kobo has done in the United States following the implementation of a remedy similar to the Consent Agreement) or a withdrawal from the Canadian market (as other E-book suppliers have done in respect of the U.S. market), with the result that Amazon will gain a monopoly or near-monopoly position for the supply of E-books in Canada.

7. The Kobo business is a central and integral component of Indigo's E-book and broader eReading strategy. Indigo promotes and markets Kobo eReaders at its various in-store locations and online. In addition, customers who wish to purchase E-books through Indigo's website are transferred directly to Kobo's E-reading service to make such purchases. Moreover, under the terms of an agreement between these parties, Kobo is required to pay to Indigo a share of its revenues generated from the sale of each E-book to a customer in Canada.

8. The removal or diminishment of Kobo as an effective competitor for the supply of E-books in Canada will have a significant and direct effect on Indigo's operations and the broader market for E-books in Canada. Without access to an effective partner for the sale of E-books in the Canadian market, such as Kobo, it is unlikely that Indigo will be able to effectively compete in this market.

9. Despite the obvious and direct impact of the Consent Agreement on Indigo's operations, at no time during the Commissioner's 18-month Inquiry was Indigo consulted about the potential impact of the Consent Agreement on Indigo or on the supply of E-books in Canada more generally.

B. Indigo

10. Indigo is Canada's largest book retailer, operating "bricks and mortar" stores in all ten provinces and one territory in Canada. As at December 28, 2013, Indigo operated 96 superstores under the banners "Chapters", "Indigo" and the "World's Biggest Bookstore", and 131 small format stores under the banners "Coles", "Indigospirit", "SmithBooks" and "The Book Company". Indigo employs approximately 5,900 Canadians on a full or part-time basis.

11. Indigo also operates an online channel ("indigo.ca") where customers can purchase traditional, physical books. Indigo's website also features E-books, expanded book title selections, gift and home products, video games and a broad assortment of toys. As set out in the Consent Agreement, E-books are electronically formatted books designed to be read on a computer, handheld device or any other electronic device capable of visually displaying E-books.

12. The growth of E-books is having a profound impact on traditional book sales in Canada. Specifically, the continued growth in E-books has led to declines in physical or hard copy book sales both in-store and online. Recognizing this fact, Indigo has made extensive investments in a redesigned website and in the development of a broader

eReading strategy to provide improved access and greater options for those customers that wish to migrate away from physical books towards mobile and tablet usage.

13. The products and services supplied by Kobo are central to Indigo's eReading strategy. As an example, customers of Indigo wishing to purchase E-books through Indigo's website are transferred directly to Kobo's eReading service to make such purchases. In addition, Indigo extensively promotes and sells Kobo eReaders to its customers, such as the "kobo aura", "kobo glo" and "kobo touch" eReaders.

14. As outlined in greater detail below and in the materials filed by Kobo in the within proceeding, the Consent Agreement will constrain or impair the ability of Kobo to effectively compete in the Canadian market for E-books. The removal of Kobo as an effective competitor for the supply of E-books in Canada will have a significant and direct effect on Indigo's operations. Without access to an effective partner, such as Kobo, for the sale of E-books, it is unlikely that Indigo will be able to effectively compete in the supply of E-books in Canada

C. Development of the Kobo Business

15. Indigo has consistently been at the forefront of the development of the digital book market in Canada. Indigo's entry into the digital book market began with the launch of Shortcovers in February 2009 as a new digital destination, "www.shortcovers.com", offering online and mobile services with instant access to books, articles and blogs.

16. On December 14, 2009, Indigo transferred the net assets of Shortcovers to a new company, Kobo Inc. (previously defined as "Kobo") in exchange for common shares of Kobo. The Shortcovers website was changed to "www.kobobooks.com".

17. Under the terms of an Amended and Restated Retailer Service Agreement (the "Service Agreement") dated as of April 3, 2011, Kobo agreed to grant access to its website so as to enable Indigo to provide its customers with the ability to read and purchase literary works through the Kobo website, eReader mobile devices and other applications. In addition, Kobo agreed to pay to Indigo a share of its revenues generated from the sale of each E-book sold to a customer in Canada.

18. On January 11, 2012, Indigo sold all of the outstanding shares of Kobo to Rakuten, Inc. Notwithstanding this sale, the revenue sharing and other aspects of the Service Agreement referenced above continue in effect between the parties. Further, Kobo remains as a central component of Indigo's online and eReading businesses, and functions as an important complement to Indigo's physical book retailing business.

19. In developing the Kobo business, Indigo wished to provide a Canadian alternative to existing eReaders and associated E-book content that were developed and focused upon the U.S. market. As an example, the E-books sold through the Kobo service to Canadian customers are listed in Canadian prices and the service has a stronger focus on content and other products of interest to Canadians.

D. Kobo Business Remains Central to Indigo's E-book Business

20. The Consent Agreement will impair Kobo's ability to effectively compete in the Canadian market by, for example, constraining Kobo's ability to make necessary investments in technology and the marketing of its products. Kobo uses the margin it generates from the sale of E-books to help make significant investments in devices and eReading technology. Impairing this aspect of Kobo's business may ultimately result in Kobo exiting from the Canadian market or significantly reducing its Canadian operations.

21. Following the issuance of similar prohibitions in the United States, Sony exited the U.S. market for E-books entirely and Barnes & Noble's NOOK E-book division reported heavy losses for the 2013 fiscal year. This suggests that even large, well established companies may not be able to effectively compete in a market where contracting practices are constrained in the manner proposed in the Consent Agreement.

22. Sony and Barnes & Noble were not alone in suffering the negative consequences of the prohibitions on contracting practices for E-books in the United States. Kobo's materials filed in the within Application state that following the implementation of a similar remedy in the United States, Kobo saw its net revenues steadily decline, resulting in the closure of its Chicago office, discontinued investment in the U.S. market, and a focus on other more viable markets.

23. The removal of Kobo as an effective competitor for the supply of E-books in Canada will have a significant and direct effect on Indigo's operations for the following reasons, among others:

- (a) The Kobo business is a central and integral component of Indigo's E-book and broader eReading strategy. Indigo promotes and markets Kobo eReaders at its various in-store locations and online. In addition, customers who wish to purchase E-books through Indigo's website are transferred to Kobo's website to complete the purchase;
- (b) Without access to an effective partner for the sale of E-books in the Canadian market, such as Kobo, it is unlikely that Indigo will be able to effectively compete in this market;
- (c) Providing easy access to leading E-reading technology and services is essential to Indigo's ability to meet the varying needs and demands of its customers. The lack of a viable partner for the delivery of E-book services would represent a significant gap in Indigo's product offerings to its customers; and
- (d) Pursuant to the revenue sharing provisions of the Service Agreement, Indigo has a direct pecuniary interest in the revenues of Kobo. An adverse event, such as the Consent Agreement, that threatens to dramatically reduce revenues to Kobo will have a direct impact on the revenues of Indigo under the Service Agreement.

E. Test for Intervention

24. I understand that the test for leave to intervene in this proceeding is as follows:

- (a) the person seeking leave to intervene must be directly affected and will suffer competitive consequences if the relief sought is not granted;

- (b) the matter alleged to affect the person seeking leave to intervene must be within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate;
- (c) the representations made by a person seeking leave to intervene must be relevant to an issue specifically raised in the proceeding; and
- (d) the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.

25. I believe that Indigo satisfies each of the elements for granting leave to intervene.

Specifically, as discussed in further detail below:

- (a) Indigo is directly affected by this Application, including the impact to Indigo's operations resulting from removal of Kobo as an effective competitor for E-books in Canada and the decrease in revenues Indigo will suffer as a result of any decline in Kobo's sales;
- (b) the matters alleged to affect Indigo are within the scope of the Tribunal's consideration and are matters sufficiently relevant to the Tribunal's mandate;
- (c) the representations to be made by Indigo are relevant to issues specifically raised in this Application; and
- (d) Indigo will bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.

F. Matters in Issue that Affect Indigo

26. Indigo is directly affected by the matters identified in the Application.

27. Among the central issues to be determined in the within Application is whether Kobo is directly affected by the terms of Consent Agreement. For example, it is my understanding and belief that if Kobo is unable to conclude agreements with the Respondent publishers that comply with the terms of the Consent Agreement, it will no longer be able to offer a full catalogue of E-books from all of Canada's major publishers. In such a circumstance, Kobo will not be able to effectively compete and would likely exit the Canadian market or significantly reduce its operations in Canada.

28. Conversely, if Kobo concludes such agreements, but is materially harmed in its ability to make long-term investments in its E-reading technologies or services, customers will likely migrate away from Kobo over time. Either way, Kobo's effectiveness as a competitor in Canada would be reduced or constrained.

29. The above affects not only Kobo, but the operations of Indigo and the broader market for the sale of E-books in Canada.

30. As noted above, Amazon and Kobo are the two largest competitors in the supply of E-books in Canada. Eliminating or significantly impairing Kobo's ability to compete would allow Amazon to gain a monopoly or near-monopoly position in the supply of E-books in Canada.

31. Given that Kobo plays a central role in the eReading strategy of Indigo, the termination or significant reduction in the operations of Kobo will have a substantial impact on Indigo's ongoing eReading operations. The same would apply if Kobo were to reduce the investments it makes in devices and E-reading technology, as was seen in the United States where Sony elected to exit that market.

32. It is highly important to Indigo that there remain vigorous and effective competition in respect of the supply of E-books in Canada. Among other benefits, such competition provides publishers and customers with a diversity of choices for the supply of E-book services. Canadian consumers also need a meaningful alternative to Amazon for the retail distribution of E-books. Kobo provides such an alternative. This is particularly important in that, unlike Amazon, Kobo has been focused upon the Canadian market and on supplying content and other products of interest to Canadians.

33. Even if it could be assumed (as the Commissioner's materials suggest) that the Consent Agreement would result in lower prices for E-books in the short term, the likely outcome of the Consent Agreement is that Amazon will gain a monopoly or near-monopoly position in respect of the supply of E-books in Canada. In such a market and without access to an effective partner such as Kobo, it is unlikely that Indigo will be able to effectively compete in the supply of E-books in Canada.

34. A reduction in the sale of E-books for Indigo will also have a broader impact on Indigo's online business. Customers visiting Indigo's website to purchase E-books can (and often do) also purchase other products available online from Indigo. A loss or significant reduction in the E-book business of Indigo will result in reduced sales of other online products by Indigo.

35. Pursuant to the revenue sharing provisions of the Service Agreement, Indigo also has a direct pecuniary interest in the sale of each E-book sold by Kobo to a customer in Canada. Under the terms of the Service Agreement, Indigo receives a portion of the sale of each E-book sold by Kobo to a customer in Canada. Further, Indigo has made

significant investments at both its physical and online retail services in the promotion of Kobo eReaders and E-books to customers.

36. A significant adverse event, such as the Consent Agreement, that substantially reduces revenues to Kobo and threatens Kobo's continued presence in the Canadian market will have a direct impact on the revenues of Indigo under the Service Agreement.

37. Accordingly, Indigo is directly and significantly affected by the outcome of this proceeding.

38. Despite the obvious and direct impact of the Consent Agreement on Indigo's operations, at no time during the Commissioner's 18-month Inquiry into this matter was Indigo consulted about the potential impact of the Consent Agreement on Indigo or on the supply of E-books in Canada more generally.

G. Matters Alleged to Affect Indigo are Within the Scope of the Tribunal's Consideration

39. The matters that affect Indigo relate to:

- (a) the impact or likely impact of the Consent Agreement on the ability of Kobo to effectively compete and expand in the market for E-books;
- (b) the impact or likely impact of the Consent Agreement on competition for E-books and eReaders in Canada, including the impact on Canadian retailers of E-books and eReaders, such as Indigo, and the reduction of consumer choice in the supply of these products; and
- (c) whether the Consent Agreement is based on terms that could be the subject of an order of the Tribunal.

40. I believe that these matters are within the scope of the Tribunal's consideration of Kobo's Application and are relevant to the Tribunal's mandate to hear and determine the issues raised by this Application.

H. Indigo's Proposed Topics are Relevant to the Issues Raised by the Proceeding

41. Indigo's proposed topics (the "Indigo Proposed Topics") address the matters that affect Indigo in this proceeding and include:

- (a) the development and evolution of the market for E-books in Canada as it relates to Indigo;
- (b) the impact of the Consent Agreement on Kobo and specifically, whether Kobo is directly affected by the Consent Agreement;
- (c) the impact of the Consent Agreement on Indigo's operations and the market for E-books in Canada;
- (d) Indigo's perspective as a participant in the industry on the impact of the Consent Agreement;
- (e) whether the terms of the Consent Agreement could be the subject of an Order of the Tribunal; and
- (f) whether the Consent Agreement will actually impair competition by accelerating and encouraging further concentration in the market for the sale of E-books, rather than remedy an alleged substantial lessening of competition.

42. I believe that the Indigo Proposed Topics are relevant to the issues raised by the Application, including, but not limited to, the following issues raised in Kobo's Application:

- (a) Whether the Consent Agreement will affect Kobo's competitiveness [paragraphs 39 to 46 of Kobo's Application]; and
- (b) Whether the Consent Agreement is based on terms that could be the subject of an order of the Tribunal [paragraphs 47 to 57 of Kobo's Application].

43. I further believe that the Indigo Proposed Topics are relevant to the Tribunal's mandate to hear and determine the issues raised by this Application.

I. Indigo's Unique or Distinct Perspective

44. For the reasons set out below, I believe that Indigo has a perspective that is unique or distinct from all of the parties to this proceeding.

45. Indigo is the only retailer in Canada that is engaged in each of the three channels for the sale of books: in-store sales of physical books, online sales of physical books and E-books. These three channels are somewhat interconnected, such that a negative competitive effect on one channel will have a corresponding effect on the others.

46. In addition, Indigo is Canada's largest retailer of books and has been operating in the Canadian book market in a significant way for the past 18 years. Indigo has also been a pioneer in the development of the digital marketplace for books in Canada, including as the founding shareholder of Kobo.

47. Indigo has a perspective that is unique or distinct from that of the publishers that are Respondents in this proceeding. Indigo operates as a retail supplier of, among other things, works supplied by these publishing firms. As a retailer, Indigo operates at a

different level from these publishers in the chain of distribution of books and brings a perspective that is unique or distinct from these publishers.

48. As an experienced participant in the industry, as a retailer of books, eReaders and E-books, and as the developer of the Kobo business in Canada, Indigo will also bring a perspective to the issues and evidence that is distinct from the Commissioner's perspective.

49. In addition, although Indigo intends to support the position of Kobo generally, Indigo will bring a unique perspective from that of Kobo in this matter. As noted above, Indigo brings a broader perspective as Kobo's operations are limited to the sale of E-books. Indigo will bring the perspective of a retailer that participates in the broader market for the supply of books and other printed materials in Canada, including in-store sales (such as the supply of physical books) and on-line sales (such as the supply of E-books and eReaders).

50. Indigo also brings a unique perspective as a company that relies on Kobo as a partner to reach and service customers in respect of the supply of E-books. While Kobo may suffer a direct pecuniary impact from the Consent Agreement, Indigo will suffer a broader impact to its operations from the loss of a partnership in which it has invested so heavily since 2009.

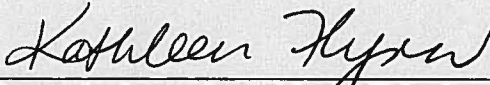
51. Further, Indigo also can offer its perspective as the developer of the Kobo business in Canada and as a firm that has been at the forefront of the development of the E-book business in Canada, including as a promoter of Canadian content in the digital marketplace.

52. In summary, I believe that Indigo's unique position as a firm that is continuously at the forefront of the development of the E-book industry in Canada, as a firm attempting to compete in the supply of E-books in Canada by partnering with Kobo, as Canada's largest physical retailer of books, as a party to the Services Agreement with Kobo and as a long-time participant in the Canadian market for books and printed materials, gives Indigo a unique ability to assist the Tribunal in its consideration of relevant issues.

J. Conclusion

53. For the reasons outlined above, I believe that Indigo meets the test for leave to intervene in this proceeding and that, by providing evidence and making submissions, Indigo's participation will assist the Tribunal in deciding the issues before it in this matter.

SWORN BEFORE ME at the City of
Toronto, in the Province of Ontario,
this 13th day of March, 2014



Commissioner for taking Affidavits,
etc.

Kathleen Flynn



HEATHER REISMAN

THE COMPETITION TRIBUNAL

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Respondents

AFFIDAVIT OF HEATHER REISMAN
(Sworn March 13, 2014)

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