

March 4, 2014

VIA E-MAIL

Jos LaRose
 Competition Tribunal
 90 Sparks Street, Suite 600
 Ottawa, ON K1P 5B4

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT March 4, 2014 CT-2014-002 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 14

Nikiforos Iatrou
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 niatrou@weirfoulds.com

File 15483.00001

Dear Mr. LaRose:

Re: Kobo Inc. v. The Commissioner of Competition et al., Court File No. 2014-002

I ask that you bring the following letter to the attention of the Chair.

Kobo intends to request, at the outset of the hearing of its stay motion, that the Tribunal order that the 40-day “clock” contemplated by the Consent Agreement be paused pending the delivery of the Tribunal’s decision on the stay motion. If the Tribunal does not grant the stay, the clock would recommence immediately upon the issuance of the decision.

As the Tribunal is aware, the Consent Agreement contemplates that, within 40 days of its filing, the Consenting Publishers must amend or take steps to immediately terminate any agency agreements they have with E-book Retailers. That 40-day clock expires on March 19, 2014.

Kobo’s motion for a stay will be heard on March 17 and, if necessary, March 18. Kobo anticipates that, on reading the material that will be filed (including the memoranda of fact and law due next week), the Tribunal may need more than a day or two to evaluate the arguments that will be presented. To that end, pausing the clock would allow the Tribunal the time necessary to properly consider the arguments and issue its decision.

Kobo proposed the above solution in “with prejudice” correspondence to counsel for the Commissioner and the Consenting Publishers (see attached email exchange dated February 28, 2014). The only objection came from Counsel for the Commissioner, who indicated that his instructions were to not agree to such a proposal.

Kobo cannot see any harm that would flow from giving the Tribunal sufficient time to consider the arguments. Had there been any logistical or operational concerns, Kobo expects that the Consenting Publishers would have identified those in response to the February 28 e-mail. Had

there been any competition-related concerns, Kobo would have expected the Commissioner to outline how, after an 18-month investigation, the implementation of the Consent Agreement cannot wait a few more days while the Tribunal considers the issues Kobo raises.

Kobo relies on the informal motion procedure contemplated by Rule 81, and will be pleased to speak to the motion at the outset of the hearing on March 17.

Yours truly,

WeirFoulds LLP



Nikiforos Iatrou

NI/ck

Encl.

c: J. Chaplan/P. Shah, Competition Bureau Legal Services
L. Plumpton/J. Gotowiec, Torys LLP
K. Kay/D. Royal, Stikeman Elliott LLP
R. Hughes/ Emrys Davis, Bennett Jones LLP
P. Franklyn/M. Jamal, Osler Hoskin & Harcourt LLP

6201013.1

Chinda Kham

From: Jonathan.Chaplan@bc-cb.gc.ca
Sent: Friday, February 28, 2014 5:29 PM
To: Nikiforos Iatrou; lplumpton@torys.com; HughesR@bennettjones.com; Bronwyn Roe; kkay@stikeman.com; pfranklyn@osler.com; jgotowiec@torys.com; DRoyal@stikeman.com; DavisE@bennettjones.com; mjamal@osler.com; Parul.Shah@bc-cb.gc.ca; Mandy Seidenberg; Esther.Rossman@bc-cb.gc.ca
Cc: Jonathan.Chaplan@bc-cb.gc.ca
Subject: RE: CT-2014-002 - Kobo Inc. v. the Commissioner of Competition, et al. || Tolling of the 40 day period

Niki,

We have discussed this with our client and our instructions are not to agree to such a tolling agreement or interim interim injunction.

Regards,

Jonathan

Jonathan Chaplan
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Executive Director and Senior General Counsel
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From: Nikiforos Iatrou [<mailto:niatrou@weirfoulds.com>]
Sent: Friday, February 28, 2014 2:37 PM
To: 'Plumpton, Linda'; 'Randal Hughes'; Bronwyn Roe; 'Katherine L. Kay - Stikeman Elliott LLP (kkay@stikeman.com)'; 'Peter Franklyn (pfranklyn@osler.com)'; 'Gotowiec, James'; 'Danielle Royal'; 'Emrys Davis'; 'mjamal@osler.com'; Chaplan, Jonathan: CB-BC; Shah, Parul: LEG-DROIT; Mandy Seidenberg; Rossman, Esther: CB-BC
Subject: CT-2014-002 - Kobo Inc. v. the Commissioner of Competition, et al. || Tolling of the 40 day period

WITH PREJUDICE

Counsel –

As you are aware, the above-noted matter is set to be heard on March 17 and 18 (if necessary), 2014.

The 40-day deadline contemplated by the consent agreement is set to expire on March 19.

In our view, the Tribunal should be given sufficient time to properly consider the arguments it will hear.

We propose that the 40-day clock be tolled, so as to not deprive the Tribunal of the time it might need to issue a decision.

For example, if all of you were to agree to this proposal on Monday, March 3 (by my count, day 24), the 40-day clock would stop on Monday. If I fail to obtain the stay, the clock would resume on the day of the decision denying the stay (that day would become day 24).

If I cannot get universal agreement to this proposal, I plan to make an informal motion in writing, asking the Tribunal to consider making such an order at the outset of the hearing (day 38). In my view, there is no magic to the contracts turning over on March 19 versus a few days later, if the Tribunal would benefit from a few additional days to consider the arguments.

I look forward to your response. I will wait until Tuesday to write the Tribunal, to give you a chance to obtain instructions.

Niki

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