

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act*, relating to certain alleged anti-competitive conduct in the markets for e-books in Canada;

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

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act*, by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
March 3, 2014 CT-2014-002	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 12

KOBO INC.

Applicant

- and -

THE COMMISSIONER OF COMPETITION;

**HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC.,
HACHETTE DIGITAL, INC; HARPERCOLLINS CANADA LIMITED;
HOLTZBRINCK PUBLISHERS, LLC; AND SIMON & SCHUSTER CANADA, A
DIVISION OF CBS HOLDINGS CO.**

Respondents

COMMISSIONER OF COMPETITION'S RESPONSE

A. OVERVIEW

1. Following an eighteen month investigation, the Commissioner of Competition and four major publishers (the “**Settling Publishers**”) agreed to a consent agreement that resolves the Commissioner’s concerns with respect to the Settling Publishers’ alleged anti-competitive conduct (the “**Consent Agreement**”). The Commissioner alleges that the Settling Publishers engaged in conduct further to an agreement or arrangement that restricts e-book retail price competition in Canada, contrary to section 90.1 of the *Competition Act*, RSC 1985, c. C-34 (the “**Act**”).
2. The Consent Agreement requires each Settling Publisher to amend or terminate any “agency” contracts with e-book retailers that: (i) restrict the e-book retailer from discounting – and thus lowering – the price of e-books sold to Canadian consumers; and (ii) make the retail price of an e-book sold by one e-book retailer depend on the retail price of the same e-book sold by another e-book retailer (“Price MFN” clauses). The Consent Agreement follows similar agreements reached by the United States Department of Justice and the European Commission to remedy related civil conspiracies among publishers in the United States and Europe.
3. Kobo Inc. (“**Kobo**”) is the largest e-book retailer in Canada. It sells e-books to Canadian consumers through the “agency” contracts it has with each Settling Publisher. The Settling Publishers’ shift to an agency model with major e-book retailers — where the e-book publisher not the e-book retailer sets the retail price of e-books — has enabled Kobo to avoid competing on the retail price of e-books sold to Canadian consumers while maintaining its market position.
4. Kobo brings this motion to stay the Consent Agreement pending the Competition Tribunal’s (the “**Tribunal**”) determination of its application to

rescind or vary the Consent Agreement. It does so in an attempt to preserve the status quo: that is, its ability to sell its e-books at higher prices to Canadian consumers and its ability to maintain its market position without having to compete against other e-book retailers on retail price. For the reasons set out below, Kobo's motion to stay the Consent Agreement should be dismissed with costs.

B. Kobo Fails to Raise Issues that Justify a Stay of the Consent Agreement

5. Kobo seeks to rescind or vary the Consent Agreement on grounds that exceed the Tribunal's jurisdiction under subsection 106(2) of the Act. Subsection 106(2) of the Act provides that a "directly affected" third party may apply to vary or rescind a consent agreement and the Tribunal may grant the application if that party can establish that the terms of the consent agreement "could not be the subject of an order of the Tribunal". Significantly, Kobo does not claim that the actual prohibitions of the Consent Agreement relating to "agency" agreements are terms that "could not be the subject of an order of the Tribunal", as they clearly could be.
6. Rather, Kobo argues that the Commissioner has not provided sufficient details of its allegations in its recitals and that the Tribunal in exercising its jurisdiction under subsection 106(2) of the Act must satisfy itself based on the evidence that the elements of the reviewable conduct have been made out. In reality, what Kobo seeks to do is to transform a negotiated resolution among consenting parties into a contested proceeding on the merits of the case. This is not permitted on a proper interpretation of subsection 106(2) of the Act. Kobo has not, therefore, raised serious issues for the Tribunal to consider.

C. Kobo Fails to Demonstrate that it Will Suffer Irreparable Harm

7. Kobo asserts that absent a stay of the Consent Agreement it will suffer “significant unrecoverable losses”. Kobo claims, in essence, that it will suffer these financial losses because it will have to compete with other e-book retailers on the retail price of e-books. Tellingly, Kobo says that the losses it will incur will depend on how it decides to respond to the pricing strategies of other e-book retailers, and that by the time the application is heard it may not be able to reinstate its “agency” contracts because consumers’ expectations regarding the price for e-books will have shifted and consumers will expect to pay lower prices.
8. Kobo’s position that a stay of a Consent Agreement is justified because it will incur financial losses from having to compete on the retail price for the sale of e-books is wholly at odds with the Act, which protects competition, not competitors. The harm that Kobo asserts it will suffer does not and cannot therefore establish “irreparable harm” that would justify a stay of a Consent Agreement.
9. Further, the harm that Kobo asserts it will suffer is in the nature of general harm that any third party may claim in relation to any negotiated settlement. Kobo’s position, if accepted, would harm the stability and certainty of negotiated settlements. It would make negotiated settlements vulnerable to the business interests of any third party that says it will suffer financial harm because of changes in the market that are brought about by a negotiated resolution to remedy anti-competitive conduct.
10. Kobo cannot rely on its experience in the United States or its speculations about the experiences of other parties in the United States to meet its burden of demonstrating that *it will* suffer actual irreparable harm in Canada absent a stay of this Consent Agreement.

11. Consequently, the harm that Kobo claims it will suffer from having to compete in the sale of e-books does not constitute harm – let alone irreparable harm – that justifies the granting of a stay of the Consent Agreement. On the contrary, the financial harm that Kobo says it will suffer supports the opposite conclusion: that the Consent Agreement continue so that Canadian consumers may benefit without delay from open competition and lower retail prices for e-books in Canada.

D. The Balance of Convenience Favours the Public Interest

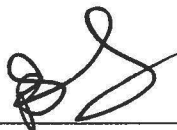
12. The Consent Agreement advances the public interest by resolving the Commissioner’s concerns regarding the alleged anti-competitive conduct to restrict e-book retail price competition. Canadian consumers are thus harmed by delaying open competition for the sale of e-books in Canada.
13. In contrast, Kobo will not suffer “irreparable harm” from the Consent Agreement. As discussed above, Kobo claims it will suffer financial losses from having to compete with other e-book retailers on the retail price of e-books sold to Canadian consumers. That Kobo does not want to compete on retail price and that it may suffer financial losses from having to do so does not, however, justify delaying the benefits of open competition for Canadian consumers. Indeed, as discussed above, Kobo’s position is contrary to the purpose of the Act and, if accepted, would also undermine the certainty and stability of negotiated resolutions under the Act.
14. Kobo also claims that the Canadian market may be harmed absent a stay. Kobo, however, speculates on the effects of the settlement in the United States and argues that those same effects may occur in Canada. Kobo’s claims are hypothetical at best and fail to demonstrate actual harm that favours the granting of a stay of the Consent Agreement.

15. Consequently, the harm to the public interest of granting the stay outweighs any harm that Kobo claims it may suffer absent a stay.
16. For the foregoing reasons, Kobo's motion should be dismissed.
17. *The Competition Act*, RSC 1985, c. C-34, as amended, including sections 1.1, 90.1, 105 and 106.
18. *The Competition Tribunal Act*, RSC 1985, c. 19 (2nd Supp), as amended, including section 8.
19. *The Competition Tribunal Rules*, SOR/2008-141.
20. *The Federal Court Rules*, SOR/98-106.
21. Such further and other grounds as counsel may advise and the Tribunal may permit.

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

1. The Affidavit of Hollie Felix.
2. Such further and other documents as counsel may advise and the Tribunal may admit.

DATED AT GATINEAU, QUÉBEC on 3 March 2014.



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