

**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	
December 22, 2015	
CT-2014-002	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 158

**RAKUTEN 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**

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**THE COMMISSIONER OF COMPETITION'S RESPONSE  
TO RAKUTEN KOBO INC.'S AMENDED NOTICE OF APPLICATION**

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## **I. OVERVIEW**

1. The Commissioner consents to the rescission of the Consent Agreement on a without prejudice basis.
2. There is no basis for granting an order 'with prejudice' in these circumstances. Kobo's amendment to the prayer for relief is improper, because that change is in no way driven by the Reference Decision and because the Commissioner had previously stated that he is prepared to consent to the relief sought in Kobo's original Application. Further, granting an order 'with prejudice' would be tantamount to granting Kobo's Amended Application, which improperly includes allegations grounded in the substantive elements of a reviewable trade practice.
3. Kobo's Amended Application raises issues and introduces facts that go well beyond the parameters established by the Reference Decision. These issues and facts have been raised improperly and, to the extent that they go beyond the permitted scope of an application pursuant to ss. 106(2) of the Act, should be disregarded.

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### II. FACTS

4. Except as otherwise admitted herein, the Commissioner denies all of Kobo's allegations as set out in its Amended Application.
5. On February 7, 2014, the Commissioner of Competition (the "**Commissioner**") and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (together, the "**Settling Publishers**"), filed and registered a consent agreement with the Competition Tribunal (the "**Tribunal**") pursuant to s. 105 of the *Competition Act* (the "**Act**") (the "**Consent Agreement**").
6. On February 21, 2014, Kobo Inc. (now Rakuten Kobo Inc.) ("**Kobo**") applied under ss. 106(2) of the Act to have the Consent Agreement set aside or varied. Kobo's application contemplated that ss. 106(2) provided the Tribunal with a broad jurisdiction to review all matters that could be considered in a fully contested proceeding.
7. Given the scope of Kobo's application, the Commissioner filed a reference question with the Tribunal. The question of law considered was:

What is the nature and scope of the Tribunal's jurisdiction under subsection 106(2) and, in that connection, what is the meaning of the words "the terms that could not be the subject of an order of the Tribunal" in subsection 106(2) of the Act?

8. The Tribunal described Kobo's and the Commissioner's views with respect to the scope of the Tribunal's jurisdiction under ss. 106(2) as being "diametrically opposed."<sup>1</sup> Kobo maintained that ss. 106(2) granted the Tribunal a broad, plenary power to review any and all of the aspects of a matter which would be considered by the Tribunal in a fully contested case. The Commissioner argued that ss. 106(2) of the Act confers a substantially more limited jurisdiction on the Tribunal.

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<sup>1</sup> *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 8, para. 18.

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9. In the Reference Decision,<sup>2</sup> the Tribunal did not accept Kobo's interpretation of ss. 106(2). The Tribunal concluded that the jurisdiction of the Tribunal under ss. 106(2) is limited to assessing:
- i. Whether 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. (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.<sup>3</sup>
10. The Tribunal indicated that, under ss. 106(2), applicants are confined to establishing one or more of the foregoing three things and that 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."<sup>4</sup>
11. Kobo's appeal of the Reference Decision was summarily dismissed by the Federal Court of Appeal on June 18, 2015.<sup>5</sup>
12. Following the dismissal of Kobo's appeal and the Tribunal's subsequent dismissal of Kobo's motion for a continuation of the suspension of the ss. 106(2) proceeding,<sup>6</sup> the

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<sup>2</sup> *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 14 ["Reference Decision"].

<sup>3</sup> Reference Decision, para.3.

<sup>4</sup> Reference Decision, para. 4.

<sup>5</sup> *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2015 FCA 149.

<sup>6</sup> *Kobo Inc. v. The Commissioner of Competition*, 2015 Comp. Trib. 14 ["Suspension Decision"].

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Tribunal issued a schedule requiring, among other things, that Kobo file an amended Notice of Application.<sup>7</sup>

13. Kobo filed an amended ss. 106(2) application on November 30, 2015 (“**Kobo’s Amended Application**”). The only substantive changes Kobo made to its original Application were changing the prayer for relief so that the rescission of the Consent Agreement would now be ‘with prejudice’, and the addition of grounds for rescission related to the enforceability of the Consent Agreement.
14. Kobo’s Amended Application largely ignores the framework set by the Tribunal in the Reference Decision, and, as a result, is largely inconsistent with the Reference Decision.

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<sup>7</sup> *Kobo Inc. v. The Commissioner of Competition*, 2015 Comp. Trib. 19 [the “**Scheduling Order**”].

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### III. GROUNDS OF ARGUMENT

#### A. Commissioner Consents to Rescission on a Without Prejudice Basis

15. The Commissioner consents to the rescission of the Consent Agreement on a without prejudice basis.

#### B. There is no Basis for Rescinding the Consent Agreement on a With Prejudice Basis

##### *Kobo's Amended Prayer for Relief*

16. Prior to being served with Kobo's Amended Application, the Commissioner went on record that he was prepared to consent to the relief sought in Kobo's original Application, namely an order rescinding the Consent Agreement.<sup>8</sup>
17. With its Amended Application, Kobo has amended the relief sought and now requests that the Tribunal rescind the Consent Agreement with prejudice to the Commissioner entering into a consent agreement with any of the [Settling] Publishers on the basis of allegations that are the same or substantially the same as the allegations that form the basis of the Consent Agreement.<sup>9</sup> (emphasis added)
18. The requirement for Kobo to file an amended application was driven by the Reference Decision, which delineated the scope of the Tribunal's jurisdiction under ss. 106(2) of the Act.
19. The 'with prejudice' relief Kobo now seeks is not a direct result of the Reference Decision, and could have been sought in Kobo's original Application. To seek that amendment now, after the Commissioner has gone on record in respect of the relief sought in the original Application, is wholly improper.
20. The amendment to the prayer for relief should be disregarded.

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<sup>8</sup> See, for example, the Suspension Decision at para.53, and the Scheduling Order at para. 7.

<sup>9</sup> Kobo's Amended Application, para. 61.

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### *With Prejudice Orders*

21. Even if the Tribunal accepts Kobo's amendment to its relief as valid, there is no basis on which the Tribunal could issue a 'with prejudice' order rescinding the Consent Agreement.
22. Kobo's request for 'with prejudice' relief attempts to curtail the Commissioner's enforcement powers in a manner that is not contemplated by the Act and is without basis in law. With prejudice orders are akin to judgments based on the substantive merits of a given matter, and granting one would not be appropriate in these circumstances.
23. The process for filing and registering a consent agreement under s. 105 of the Act does not involve any substantive assessment or review by the Tribunal. Rather, a consent agreement may be filed with the Tribunal for immediate registration and, upon registration, has the same force and effect as if it were an order of the Tribunal.
24. Under ss. 106(2) of the Act, the Tribunal does not have jurisdiction to review the substantive elements of a reviewable trade practice that is the subject of a given consent agreement.
25. 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.<sup>10</sup> Precluding the Commissioner from entering into a new consent agreement to address the conduct at issue in the markets for e-books in Canada would be contrary to the public interest.
26. Granting an order 'with prejudice' would be tantamount to granting Kobo's Amended Application, which improperly includes allegations grounded in the substantive elements of a reviewable trade practice, and would unjustifiably circumscribe the Commissioner's enforcement powers under the Act.

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<sup>10</sup> Reference Decision, para. 32, citing *British Columbia (Securities Commission) v. Seifert*, 2007 BCCA 484.

**C. Kobo's Amended Notice of Application Does Not Properly Rely upon the Appropriate Grounds for Review set out in the Reference Decision**

27. Kobo's Amended Application fails to properly take into account the parameters established by the Reference Decision and, to the extent of this inconsistency, Kobo's grounds for application should be disregarded.
28. As summarized in the Reference Decision, Kobo's position in response to the Reference Question was that the correct interpretation of ss. 106(2) is one that allows the Tribunal to engage in some probing of facts and weighing of evidence to ensure that the Tribunal would have had jurisdiction to make the order, had the case proceeded as a contested matter. Kobo argued that the Tribunal was permitted 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. In other words, Kobo argued that the Tribunal should be allowed to "test the basis of" the consent agreement.<sup>11</sup>
29. Kobo's interpretation of the Tribunal's jurisdiction under ss. 106(2) was reflected in its original Application, filed prior to the Reference Decision. The Amended Application is substantially similar to the original (except for the relief sought and the addition of argument related to the enforceability of the Consent Agreement). Kobo's original Application could understandably not have been drafted taking into account the Reference Decision; however, the refiling of the original text in a virtually unedited form reflects a decision by Kobo that the Amended Application includes grounds for application and arguments that are inconsistent with the parameters established by the Reference Decision.
30. Pursuant to the Reference Decision, it is not open for Kobo to attempt to establish, for example:
  - a. that there was no agreement or arrangement between competitors;<sup>12</sup>
  - b. that the Consent Agreement was based on the *wrong* agreement;<sup>13</sup>

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<sup>11</sup> Reference Decision, para. 26-27.

<sup>12</sup> Kobo's Amended Application, para 49: "the facts do not support the existence of such an agreement or arrangement....As such, the alleged conduct...cannot have been the result of an agreement or arrangement among the Consenting Publishers."



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- c. the facts which underpin the Consent Agreement;<sup>14</sup> or
- d. that the specific terms agreed to by the parties fail to satisfactorily address the conduct under the agreement or arrangement.<sup>15</sup>

31. The Commissioner has not addressed the specific facts relied upon by Kobo in making the above-noted arguments, because the Reference Decision makes it clear that those matters are not relevant to an application under ss. 106(2) of the Act.<sup>16</sup>

32. It is only on the basis of one of the three grounds enumerated in the Reference Decision that the Tribunal may exercise its discretion pursuant to ss. 106(2) and decide to rescind or vary one or more terms of the Consent Agreement. Kobo's Amended Application does not properly allege the first or the second grounds, and incorrectly interprets the Consent Agreement with respect to the third ground.

**i) Reference Decision Ground 1 - The type of terms in the Consent Agreement**

33. Kobo's application does not allege that the Consent Agreement includes any terms that are not of a type that could have been included in an order under s. 90.1.

34. Pursuant to s. 90.1(1) of the Act, 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

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<sup>13</sup> Kobo's Amended Application, para. 50: "Insofar as the Agency Agreements between E-book Retailers and Publishers themselves are alleged to be the agreement or arrangement for the purposes of s. 90.1, these too cannot trigger the Tribunal's jurisdiction."

<sup>14</sup> Kobo's Amended Application, paras. 51-52: "Even if the Tribunal found that agreements or arrangements had been entered into in the US by the Consenting Publishers' parent companies, those agreements or arrangements came to an end when the Settlement Agreement[s] were entered as Final Judgments in the US Courts... Accordingly, by the time the Consent Agreement was registered, any such alleged agreement or arrangement had long been terminated."

<sup>15</sup> Kobo's Amended Application, para. 55: "Without knowing what the terms of the agreement or arrangement are ... the Tribunal cannot be satisfied that the activity it is being asked to prohibit is activity contemplated by the agreement or arrangement."

<sup>16</sup> Reference Decision, para. 129.

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(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.

35. The Act does not place any additional limits or restrictions on the types of orders that may be included in an order pursuant to s. 90.1. As acknowledged at paragraphs 94 and 95 of the Reference Decision:

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.... 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.<sup>17</sup> (emphasis added)

36. As such, the grounds for application relied upon by Kobo at paragraphs 36(d)(i) and 36(d)(ii) of its Amended Application are inconsistent with the Tribunal's jurisdiction for review under ss. 106(2), and should be disregarded.

### ii) Reference Decision Ground 2 - Substantive elements of section 90.1

37. The substantive elements of s. 90.1 are that there must be (i) an agreement or arrangement (existing or proposed); (ii) between two or more competitors; and (iii) that prevents or lessens competition substantially in a market. The Consent Agreement recitals, both explicitly and by including a reference to actions taken contrary to s. 90.1 of the Act, include these elements.
38. Kobo's Amended Application does not allege that the Consent Agreement fails to include either (i) an explicit agreement between the Commissioner and the Settling Publishers that each of [the s. 90.1] elements has been met, or (ii) a statement that the Commissioner has concluded that each of [the s. 90.1] elements has been met, together with a statement by the Settling Publishers that they do not contest that conclusion.

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<sup>17</sup> Reference Decision, paras. 94-95.

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39. Rather, in a direct contradiction to the Reference Decision,<sup>18</sup> Kobo's Amended Application attempts to establish that one or more of the substantive elements of section 90.1 are not met.

40. The grounds for application relied upon by Kobo at paragraphs 36(c)(i), 36(c)(ii) and 36(c)(iii) of its Amended Application are inconsistent with the Tribunal's jurisdiction for review under ss. 106(2), and should be disregarded.

### iii) Reference Decision Ground 3 - Vague or unenforceable terms

41. Kobo's application *does* allege that the terms of the Consent Agreement – specifically, those in Paragraph 5 of the Consent Agreement - are unenforceable or would lead to no enforceable obligation, for example, because they are too vague.

42. However, simply because a calculation may be complicated, or may require the Commissioner to use information gathering tools to verify compliance, does not render an obligation unenforceable.

43. Further, the process set out within the Consent Agreement reflects a clear understanding between the Commissioner and the Settling Publishers regarding the discounting process. Paragraph 5 of the Consent Agreement establishes a minimum discount and a process by which to calculate the value of that discount. The exact dollar figure, or the exact discounting percentage, is a matter for commercial negotiation between an e-book publisher and an e-book retailer. However, the terms arrived at between those parties will be ascertainable, as will the fact of whether or not those terms, as operationalized, are in conformity with the terms of the Consent Agreement. Paragraph 5 is not vague or ambiguous.

44. As such, the grounds for application relied upon by Kobo at paragraph 36(e) of its Amended Application should be disregarded.

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<sup>18</sup> Reference Decision, para. 6.

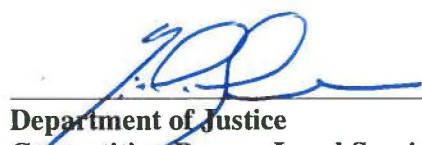
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**IV. OFFICIAL LANGUAGE**

45. The Commissioner agrees that the Application be heard in English and held in Ottawa, Ontario.

**DATED AT GATINEAU, QUÉBEC on December 22, 2015.**



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**Respondents**

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**COMMISSIONER OF COMPETITION'S RESPONSE  
TO RAKUTEN KOBO INC'S AMENDED NOTICE OF APPLICATION**

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