Court File No. CT-2014-002

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 ebooks in Canada;

A**ND 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:

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

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION
(*Motion to Suspend s. 106(2) Proceeding)*

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PART I: OVERVIEW

1. Kobo Inc. ("**Kobo**") seeks an order suspending the s. 106(2) proceeding pending the Supreme Court of Canada's ("**SCC**") decision regarding its leave application and, if leave is granted, pending the disposition of its appeal.

2. Kobo argues that suspending the s. 106(2) proceeding is in the interests of justice and embeds the 3-part *RJR* injunction test in that argument.

3. The Commissioner submits that the Tribunal should apply the *RJR* test in disposing of Kobo's motion, but that regardless of whether that test or the "interests of justice" test is applied, Kobo's motion must fail because the arguments it relies on are unsupported by evidence and fundamentally flawed.

Irreparable Harm

4. Kobo does not meet the *RJR* test because it has not demonstrated that it will suffer irreparable harm if the s. 106(2) proceeding is not suspended. Kobo maintains that it will suffer irreparable harm if the Application proceeds *and* it fails to have the Consent Agreement rescinded. Kobo's position is based on speculation as to the outcome of the s. 106(2) proceeding and does not provide a basis for a finding of irreparable harm. Kobo has filed no evidence, much less clear and compelling evidence, to support its irreparable harm argument.

Balance of Convenience

5. The balance of convenience prong of the *RJR* test requires that the irreparable harm established by a moving party be weighed against the harm that would be suffered by the person who opposes the granting of relief. Given that Kobo has led no evidence which would allow the Tribunal to make a finding of irreparable harm, there is no need for the Tribunal to consider the balance of convenience part of the *RJR* test.

6. In any event, the evidence the Commissioner has adduced establishes that Kobo knew that imposing the agency model in the market for ebooks in Canada would take away consumers' ability to choose amongst ebook retailers based on price and drive the prices that Canadian consumers would have to pay for ebooks higher.

7. Kobo's argument that judicial and the parties' resources would be wasted is unsupported by credible evidence. The only evidence relied on by Kobo in making that argument is a Tribunal scheduling order made months *before* the Tribunal issued its Reference Decision.

8. Further, the only way that there could even be a possibility of wasted resources is *if* Kobo is granted leave at the SCC and *if* it is successful on appeal. Even if that were to occur, there would be little if any wasted resources associated with proceeding with the s. 106(2) case now because Kobo is not seeking to have the Tribunal's Reference Decision, or the test articulated therein, set aside. Therefore the same issues would be at play in the s. 106(2) proceeding now, as would be the case in any post-SCC proceeding, though if the SCC were to construe s. 106(2) more expansively than the Tribunal, it is possible that additional issues would be at play in a post-SCC proceeding.

9. It would not be in the interests of justice if the mere possibility of some minimal wasted resources could form the basis for suspending Tribunal proceedings. If that standard were to be adopted by the Tribunal, suspensions would become virtually automatic in the face of any appeal.

PART II – HISTORY

10. On February 7, 2014, the Commissioner filed with the Tribunal a consent agreement (the "**Consent Agreement**") that it has with four major publishers (the "**Settling Publishers**") to resolve the Commissioner's concerns with respect to certain alleged anti-competitive conduct in the market for ebooks in Canada.[1]

11. In Canada and the United States, ebook retailers have typically entered into one of two types of contracts with ebook publishers:

    a. under the **wholesale** model, a publisher typically enters into a wholesale agreement with an ebook retailer pursuant to which the retailer pays the publisher its designated wholesale price for each ebook and the retailer sets the retail price; and

    b. under the **agency** model, a publisher typically enters into an agency agreement with an ebook retailer pursuant to which the publisher sets the retail price and the retailer who sells the ebook on the publisher's behalf, earns a commission on that sale.

12. The Consent Agreement required each of the Settling Publishers to amend or terminate any "agency" contracts they had with ebook retailers to address the Commissioner's concerns in respect of the Canadian ebook market.[2]

13. On February 21, 2014, Kobo filed a s. 106(2) application with the Tribunal, seeking to have the Consent Agreement rescinded or varied.

14. On March 18, 2014, the Tribunal stayed the implementation of the Consent Agreement.

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[1] Kobo's Motion Record, Exhibit "B", at p. 60.
[2] Kobo's Motion Record, Exhibit "B", at p. 64.

15. On April 15, 2014, the Commissioner referred the following question to the Tribunal pursuant to s. 124.2(2) of the *Competition Act*[3] (the "**Reference**"):

> 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?[4]

16. On September 8, 2014, the Tribunal released its decision in the Reference (the "**Reference Decision**").

17. On September 17, 2014, Kobo appealed the Reference Decision to the Federal Court of Appeal (the "**FCA**").

18. On December 22, 2014, during a case management conference, the Commissioner's counsel reiterated his previous statement to Kobo and the Settling Publishers that the Commissioner was prepared to consent to the primary relief sought by Kobo in its s. 106(2) application.[5]

19. Following the case management conference, the Tribunal ordered that the s. 106(2) application proceedings be suspended pending the FCA's determination of Kobo's appeal.

20. Pursuant to an application made on January 22, 2015 under s. 11 of the Act, the Commissioner obtained an order requiring Kobo and Indigo Books and Music Inc. ("**Indigo**") to produce certain documents and written returns of information. The Commissioner had, prior to making the referenced application, advised both parties of his intention to seek s. 11 orders.[6]

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[3] *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**").
[4] Kobo's Motion Record, Exhibit "H", at p. 127.
[5] Kobo's Motion Record, Exhibit "R", at p. 247-249.
[6] Affidavit of Mallory Kelly, para. 3-4 ("**Kelly's Affidavit**").

21. In the context of discussions regarding the proposed orders, Kobo asserted that the Commissioner was unfairly targeting Kobo with a s. 11 application, suggesting that the order was being sought because Kobo had filed a s. 106(2) application challenging the Consent Agreement. Counsel for the Commissioner categorically rejected that assertion. Kobo further indicated that the information the Commissioner was seeking through the proposed order would be of no use to the Commissioner, unless like information was sought from other market participants. Indigo made similar allegations.[7]

22. Following the issuance of the s. 11 orders against Kobo and Indigo, Crampton C.J. issued reasons in respect of those orders in which he addressed the foregoing issues. Justice Crampton stated:

> [46] Kobo and Indigo also suggested that the Commissioner is acting inappropriately because he is only seeking information pursuant to section 11 from the two parties seeking to have the [Consent Agreement] set aside or varied, and is not seeking to obtain information from other participants in the Canadian book industry, including the Settling Publishers.
>
> [47] Leaving aside the Settling Publishers for a moment, for the reasons discussed at paragraphs 27 to 29 above, and based on the information set forth in section III of the Russell Affidavit filed in proceeding T-61-15, I am satisfied that it is entirely legitimate for the Commissioner to be seeking, pursuant to section 11, the information described in Schedules I and II to the Orders.[8]

23. On June 18, 2015, the FCA summarily dismissed Kobo's appeal of the Reference Decision from the bench.

24. On July 7, 2015, Kobo advised the respondents that it intended to seek leave to appeal the decision of the FCA to the SCC.

25. On July 21, 2015, the Tribunal directed that Kobo bring a motion for the suspension of the s. 106(2) application.

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[7] Kelly's Affidavit, Exhibit "A".
[8] Kelly's Affidavit, Exhibit "C" at p. 14.

26. On August 13, 2015, Kobo filed its Leave Application with the SCC.

27. On September 14, 2015, Commissioner filed his Response to Kobo's Leave Application with the SCC.

28. On September 24, 2015, Kobo filed its Reply with the SCC.

PART III - SUBMISSIONS

The Tribunal should apply the *RJR* test in deciding Kobo's Motion

29. Historically, the Tribunal has applied the test from *RJR-MacDonald Inc. v. Canada (Attorney General)*[9] in deciding whether to suspend its proceedings.[10]

30. In applying the *RJR* test, the Tribunal has indicated that it will not lightly adjourn hearings before it. This is consistent with the fact that the *Competition Tribunal Act* provides that all proceedings before the Tribunal "shall be dealt with as expeditiously as the circumstances and considerations of fairness permit".[11]

31. The Tribunal has on one occasion decided against applying the *RJR* test in determining whether to suspend a proceeding. In that case - *Commissioner of Competition v. Toronto Real Estate Board* - the Tribunal found that it would be "unduly onerous" to require TREB to demonstrate irreparable harm to obtain a

[9] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at pp. 347-349 ["***RJR***"]
[10] *Commissioner of Competition v. Sears Canada Inc*., 2003 Comp. Trib. 20, File no.: CT2002004 at paras 8-11 ["***Sears***"]; *Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada,* [1994] C.C.T.D. No. 17; upheld by *Canada (Director of Investigation and Research) v. The D & B Companies of Canada*, [1994] F.C.J. No. 1504 ["***D&B Companies of Canada***"]
[11] *United Grain Growers Ltd. v. Canada (Commissioner of Competition),* [2006] C.C. T.D. No. 23 ["***United Grain***"] at para. 24; *Competition Tribunal Act,* R.S.C., 1985, c. 19 (2nd Supp.), ss. 9(2).

suspension. On that basis, the Tribunal applied the "interests of justice" test in deciding the issue.[12]

32. Kobo has not provided any reason for the Tribunal to depart from its usual practice of applying the *RJR* test in the context of motions for suspension. Rather, unlike TREB, Kobo embraces the *RJR* test and argues that it satisfies each of its three prongs.

Application of the *RJR* Test

i) Serious Issue to be Tried

33. The Commissioner concedes for purposes of the instant motion that Kobo's proposed appeal raises a serious issue.

34. However, the Commissioner submits that it bears noting that Kobo's arguments as to the scope and meaning of s. 106(2) of the Act were fully canvassed and ultimately rejected by Crampton C.J. in his well-reasoned and exhaustive Reference Decision. Further, on appeal, the FCA endorsed Crampton C.J.'s reasons and summarily dismissed Kobo's appeal from the Bench without hearing from counsel for the Commissioner.

ii) Refusal of a Suspension Will Not Cause Irreparable Harm to Kobo

35. Kobo has failed to satisfy the irreparable harm part of the *RJR* test because it has not provided the Tribunal with any clear and non-speculative evidence that it will suffer irreparable harm if the s. 106(2) proceeding is not suspended.

36. In *Canada (Commissioner of Competition) v. Parkland Industries Ltd*, the Tribunal held that irreparable harm is harm that is not curable and must be "established on the basis of clear and not speculative evidence" which demonstrates *how* such harm will occur and that it will result if the relief is not granted.[13]

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[12] *Commissioner of Competition v. Toronto Real Estate Board,* 2014 Comp. Trib. 10 File No.: CT-2011-003 at paras. 18 and 19. ["***TREB***"]; citing *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc*., 2011 F.C.A. 312 at paras. 8-11.

[13] *Canada (Commissioner of Competition) v. Parkland Industries Ltd.* 2015 Comp. Trib. 4 at paras 48-50, 58 ["***Parkland***"].

37. The Tribunal's decision in *Parkland* is consistent with the application of *RJR* by the Tribunal in other proceedings,[14] as well as by the Federal Court, FCA and SCC.

38. Kobo asserts that it will suffer irreparable harm if the s. 106(2) application proceeds now *and*, in the context of that proceeding, it fails to have the Consent Agreement rescinded.[15]

39. Kobo's position is based on speculation as to the outcome of the s. 106(2) application and cannot provide a basis for a finding of irreparable harm.

40. In *Janssen Inc. v. Abbvie Corporation,*[16] Abbvie sued Janssen in Federal Court for patent infringement. The Court bifurcated the proceeding into liability and remedy phases. One of the remedies that Abbvie was seeking was an order enjoining Janssen from selling the relevant drug, Stelara. Following the first phase of the proceeding, the Federal Court found that Janssen had infringed Abbvie's patent.

41. Janssen sought an order from the FCA suspending the remedy phase of the proceeding, pending its appeal of the Federal Court's infringement finding. Janssen maintained that it would suffer irreparable harm if the remedy phase of the proceeding went ahead prior to its appeal being determined and that the Federal Court's proceeding should therefore be suspended.

42. The FCA refused to suspend the Federal Court's proceeding. In discussing the nature of the evidence required to establish irreparable harm, Stratas J. wrote that "it would be strange if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief".[17]

[14] *Sears, supra* note 10, at para. 11.
[15] Kobo, Notice of Motion, at para. 40.
[16] *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 (CanLII) ["***Janssen*"].**
[17] *Ibid*, para. 24.

43. In its submissions on irreparable harm, Janssen emphasized the suffering of patients who would not be able to use Stelara.

44. The FCA rejected Janssen's argument regarding irreparable harm on the basis that the outcome of the remedy phase of the Federal Court proceeding was speculative. With respect to the speculative nature of Janssen's evidence, the FCA stated:

> … at present, patients can still use Stelara. That may change depending on how the Federal Court determines the issue of injunction.
>
> The Federal Court might grant an injunction on terms that protect patients. It might grant an injunction on other terms that reduce or eliminate the harm to patients or, for that matter, other harms that Janssen could suffer. Or it might not grant the injunction at all. Right now, any harm to patients, or for that matter to Janssen, is speculative and hypothetical.[18]

45. As in *Janssen*, the harm that Kobo says it will suffer is speculative because the outcome of Kobo's s. 106(2) application is unknown. There is therefore simply no basis for concluding that Kobo will suffer irreparable harm if the s. 106(2) proceeding is not suspended and it therefore does not meet the *RJR* test which lies at the heart of its motion.

46. In any event, in view of the fact that the Consent Agreement, on its face, does not satisfy the test outlined in the Reference Decision (Commissioner *alleges* rather than *concludes*) and that the Commissioner is prepared to consent to the rescission of the Consent Agreement, there is a strong likelihood that the Consent Agreement will be rescinded if the s. 106(2) proceeding goes ahead.

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[18] *Ibid*, para. 33, 34.

iii) The Balance of Convenience Favours Proceeding with the Case Now

47. The balance of convenience prong of the *RJR* test requires that the irreparable harm established by a moving party be weighed against the harm that would be suffered by the person who opposes the granting of relief, so it may be determined where the balance of convenience lies.

48. Given that Kobo has led no evidence which would allow the Tribunal to make a finding of irreparable harm, there is no need for the Tribunal to consider the balance of convenience part of the *RJR* test.

49. However, if the Tribunal decides that it wishes to consider the third prong of the test, it is submitted that the balance of convenience overwhelmingly favours not suspending the s. 106(2) proceeding.

50. The Commissioner entered into the Consent Agreement to eliminate contractual provisions which are inherently anti-competitive in that they severely restrict or altogether eliminate price competition between ebook retailers operating under the agency model.

51. The evidence before the Tribunal establishes that Kobo understood the relationship between the retail price and ebooks under the wholesale and agency models. Kobo knew that moving from a wholesale model to the agency model in Canada would drive retail ebook prices higher and that if the Consent Agreement was implemented, retail ebook prices would go down substantially.

52. Kobo's understanding was based on its experience in the US market, as well as its knowledge more generally, that the agency model would take away consumers' ability to choose between ebook retailers based on price and eliminate price competition between ebook retailers.

Harm to Consumers and Competition

53. The Commissioner is appointed under section 7 of the Act and is responsible for the administration and enforcement of the Act.

54. The actions taken by the Commissioner pursuant to the Act are presumed to be *bona fide* and in the public interest.[19] In *Parkland*, the Tribunal stated:

> It thus follows from the guidance in *RJR-Macdonald* and its progency that, from an evidentiary standpoint, the Commissioner is assisted by the presumption that, as a public authority exercising his mandate, he is acting in the public interest. It does not change the Commissioner's burden of proof, which is still the balance of probabilities. But the Tribunal needs to factor this presumption when scrutinizing the evidence of irreparable harm which, according to the Commissioner, will result from a proposed transaction, and in determining whether the alleged harm can be reasonably and logically drawn from the evidence.

55. Though the Commissioner is not the party seeking an injunction in the s. 106(2) proceeding, the foregoing reasoning is apposite to the consideration of harm under the balance of convenience prong of the test in this case.

56. The recitals to the Consent Agreement set out the Commissioner's allegation 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".[20]

57. The Consent Agreement required each of the Settling Publishers to amend or terminate any "agency" contracts they had with ebook retailers that:

    a. restrict the ebook retailer from discounting the price of ebooks sold to Canadian consumers; or

    b. make the retail price of an ebook sold by one ebook retailer dependent on the retail price of the same ebook sold by another ebook retailer.

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[19] *Parkland, supra* note 13 at para 108; see also, *Commissioner of Competition v. Pearson Canada Inc. and Penguin Canada Books Inc.* 2014 FC 376 at para. 43.

[20] Kobo's Motion Record, Exhibit "B", at p. 60.

58. Contractual provisions which restrict competitors' ability to discount the price of the goods they sell and which operate in the manner of the MFN provision, as described below, are inherently anti-competitive.

59. Both the Commissioner and Kobo expected that as a result of the removal of the impugned contractual provisions, competition among ebook retailers in Canada would increase, resulting in lower prices for ebooks for Canadian consumers.[21] This expectation was based in significant measure on what occurred in respect of ebooks in the U.S.

The US ebooks Case

60. On April 11, 2012, the United States Department of Justice (the "**US DOJ**") filed a civil antitrust action, *United States of America v. Apple, Inc., et al.* (the **"US DOJ Complaint**"), before the United States District Court for the Southern District of New York (the "**US Court**") against the following US publishers:

    a. Hachette Book Group, Inc. ("**Hachete**");
    b. HarperCollins Publishers L.L.C. (**"Harper Collins"**);
    c. Holtzbrinck Publishers, LLC, doing business as Macmillan (**"Macmillan"**);
    d. The Penguin Group, a division of Pearson PLC, and Penguin Group (USA), Inc. (**"Penguin"**); and Simon & Schuster, Inc. (**"S&S"**);(collectively, the "**US Publisher Defendants**").

61. The US DOJ Complaint was also filed against Apple Inc. ("**Apple**").

62. Whereas each of the US Publisher Defendants reached settlements with the U.S. Department of Justice, Apple did not and the matter proceeded to trial.

[21] Kobo's Motion Record, Exhibit "F", at para 27. ("**Stay Reasons**").

The Apple Decision

63. On July 10, 2013, the US Court issued its Opinion and Order in *United States of America v. Apple Inc.*, *et al*. The US Court made the following findings:

   a. In 2009, the US Publisher Defendants sold ebooks pursuant to the wholesale model. At that time, Amazon was by far the largest ebook retailer in the US. It used a discount pricing strategy through which it charged $9.99 for certain new release and bestselling e-books. To compete with Amazon, other e-book retailers adopted a $9.99 or lower retail price for many e-books.[22]

   b. In 2009, Apple was developing the iPad and planned to demonstrate the iPad to the public on January 27, 2010. One of the functionalities of the iPad was the possibility of reading ebooks.[23]

   c. Apple was not interested in entering the ebook market by pursuing a low-price strategy.[24]

   d. There were intense negotiations between the Defendant Publishers and Apple in New York in January 2010 in respect of the model under which the Publishers would supply ebooks to Apple. Eddy Cue led the negotiations for Apple.

   e. On January 22, 2010, Mr. Cue reported to Steve Jobs that Hachette, S&S, Macmillan and Penguin had committed to move to the agency model.[25]

   f. In the final days of January 2010, Apple entered into Agency Agreements with Hachette, HarperCollins, Macmillan, Penguin and S&S. Under those agreements, the Publishers set the retail price for ebooks. Apple's commission on ebook sales was 30% of the retail price.[26]

   g. The referenced Agency Agreements also contained an MFN provision, which provided that the publishers would adjust Apple's retail price for any given "new release" ebook to match any lower retail price offered by another ebook retailer.[27] The MFN eliminated any risk that Apple

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[22] Kelly's Affidavit, Exhibit "G"; *United States of America* v. *Apple Inc*., et al., 12 Civ. 2826 (DLC) at p. 14.

[23] *Ibid*, p. 26-28.

[24] *Ibid*, p. 35.

[25] *Ibid*, p. 74-75.

[26] *Ibid*, p. 76-77.

[27] For example, if a Publishers set the price for one of its ebooks sold by Apple at an agency price of $14.99, but that same ebook was being sold by Amazon at $9.99, the Publisher would be required to

would ever have to compete on price when selling ebooks, while as a practical matter forcing the Defendant Publishers to adopt the agency model across the board.[28]

h. By the end of March 2010, having faced the threat of having its supply of ebooks cut off by certain publishers, Amazon had entered into agency agreements with Macmillan, HarperCollins, Hachette, and S&S.[29]

i. Apple launched the iBookstore in the United States in April 2010.[30]

j. Amazon's increase in ebook prices after moving to the agency model, averaged 14.2% for new releases, 42.7% for its New York Times bestsellers, and 18.6% across all of the US Publisher Defendants' ebooks.[31]

k. The price increases by four of the US Publisher Defendants occurred at the opening of the iBookstore, while Random House's average ebooks prices hovered around $8. Penguin's price increases awaited the execution of its agency agreement with Amazon, which followed within a few weeks after the agreements with Macmillan, HarperCollins, Hachette, and S&S. Those changes in price are illustrated by the following chart:[32]

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change Apple's agency price to $9.99, but Apple would still earn a 30% commission or $3 on the sale of that ebook.

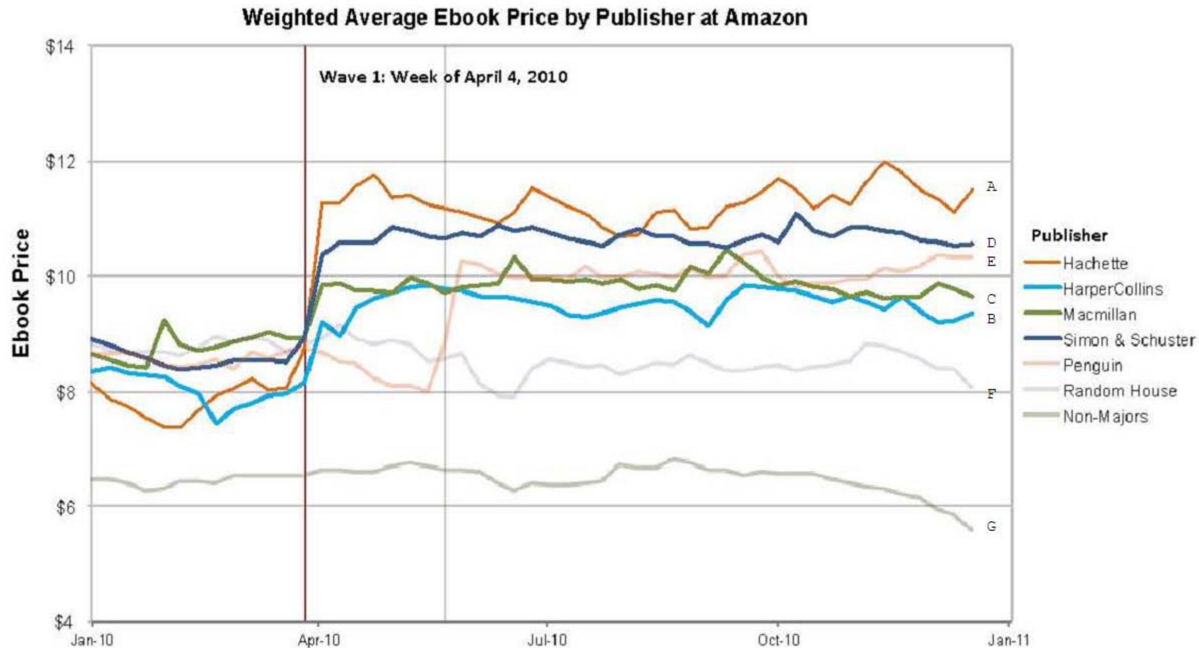
[28] *Ibid*, p.75.

[29] *Ibid*, p. 68 and 92-93.

[30] *Ibid*, p. 94.

[31] *Ibid*, p. 94.

[32] *Ibid*, p. 94-95.



l. Each of the US Publisher Defendants had a decline in the quantity of ebooks sold as a result of the price increases.[33]

m. Consumers suffered in a variety of ways from the scheme to eliminate retail price competition and to raise ebook prices. Some consumers had to pay more for ebooks; others bought a cheaper ebook rather than the one they preferred to purchase; and it can be assumed that still others deferred a purchase altogether rather than pay the higher price.[34]

64. Apple appealed the US Court's decision. On June 30, 2015, the US Court of Appeals for the Second Circuit issued its decision upholding the US Court's decision.[35]

The US Settlement

65. As noted, each of the of the US Publisher Defendants reached settlements with the US DOJ, which were entered as Final Judgments between September 6, 2012, and August 12, 2013. While the precise terms of the Final Judgments varied among the US Publisher Defendants, they all required the Publishers to take steps, either by

[33] *Ibid*, p. 98.
[34] *Ibid*, p. 98.
[35] Kelly's Affidavit, Exhibit "H", *United States of America* v. *Apple Inc*., et al., USA Court of Appeals for the 2nd Circuit, August Term 2014, No. 13-3741-cv (L).

terminating agreements or not enforcing them, to nullify provisions in their Agency Agreements which:

a. limited ebook retailers' ability to set, alter, or reduce the retail price of any ebook or to offer price discounts to consumers; or

b. constituted a most favoured nation or MFN provision.[36]

66. Kobo felt the impact of the US settlement. In the affidavit he swore in connection with Kobo's Stay Motion, Michael Tamblyn, Kobo's President, indicated that the shift away from the agency model following the implementation of the US settlement resulted in a reduction in retail prices for ebooks. Kobo was forced to compete by discounting titles to match the deep discounting that some of its US competitors engaged in, but was unable to compete in the US market in that environment.[37]

67. In the Reasons for Decision it issued in connection with the stay it granted, the Tribunal stated:

> Based on its experience in the U.S. market following the implementation of similar settlement agreements there, Kobo has calculated that it will suffer substantial financial losses as a result. It maintains that the U.S. is an apt comparator market on which to base its forecasting.[38]

The Canadian ebooks market

68. Recalling Kobo's evidence on its Stay Motion and the Tribunal's observation that the US was an apt comparator market, it is clear from the course of events in the US that had the Consent Agreement been implemented, retail prices for ebooks paid by Canadian consumers would have declined substantially.

69. However, even absent the events in the US, it is clear that Kobo understood the relationship between wholesale and agency pricing and the impact a move to agency pricing would have on the retail price for ebooks.

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[36] Kelly's Affidavit, Exhibits "I", "J", "K".
[37] *Ibid*, Exhibit "M" at p. 16.
[38] Stay Reasons, *supra* note 21, para 27.

70. On January 22, 2010, Michael Serbinis, then Kobo's CEO, reported to Heather Reisman of Indigo from New York regarding the developments in the ebooks market. Mr. Serbenis indicated that "the entire industry model is changing". He stated in respect of the agency model:

> **Pubs want it; they set the price, we get a commission of 30%.**
> **…**
> **-this will make us far more profitable; but take away price control from us / everyone.**
> **…**
> **-Apple was here working to make it happen.**
> **-Amazon was here to fight it as the change in terms will apply to everyone selling ebooks.** [39]

71. Kobo expected that shifting from a wholesale to an agency model would significantly reduce or eliminate price competition among all retailers, including Kobo and Amazon.[40]

72. This view is reflected in a presentation Michael Tamblyn[41] gave in February 2010 in which he discussed ebook pricing. He indicated that at that time the average price of an ebook sold at Kobo was $8.76 USD.

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[39] Kelly's Affidavit, Exhibit "D", Email from Michael Serbinis (CEO Kobo) to Heather Reisman dated January 22, 2010 (emphasis added).

[40] Kelly's Affidavit, Exhibit "F", Email from Michael Serbinis (CEO Kobo) to Heather Reisman dated January 22, 2010; and, Exhibit "E", Presentation by Michael Tamblyn (EVP Kobo) dated April 2, 2010, at KOBO 00010676-10688.

[41] *Ibid*, Exhibit "E", at the time he gave the presentation, Mr. Tamblyn was Kobo's EVP Content Sales & Merchandising.

73. The slides in Mr. Tamblyn's presentation tell the story regarding the impact that imposing the agency model would have on ebook prices:[42]

74. Kobo has agency agreements with the Settling Publishers.

[42] *Ibid*; pp. KOBO0010672 to KOBO0010679

75. On February 7, 2014, the Commissioner entered into a consent agreement with the Settling Publishers. The Consent Agreement was similar to the settlement reached by the US DOJ with the US Defendant Publishers in that it required the Settling Publishers to terminate or amend any agreements they had with ebook retailers, including Kobo and Amazon, which:

- limited ebook retailers' ability to set, alter, or reduce the retail price of any ebook or to offer price discounts to consumers; or
- constituted a most favoured nation or MFN provision, as described above.[43]

76. The Commissioner expected that the Consent Agreement would benefit Canadian consumers by lowering the price of ebooks in Canada.[44] Kobo shared that expectation insofar as it related to the lowering of ebook prices in Canada.[45]

77. If the Tribunal suspends the s. 106(2) proceeding, the resolution of this matter, one way or another, will continue to be delayed. The stay of this proceeding has placed that Consent Agreement in a state of suspended animation, while Canadian consumers are deprived of the benefits of free and open competition.

78. The Tribunal has recognized that depriving the Commissioner of a timely decision as to whether a consent agreement should be rescinded is an important factor to be considered when granting an adjournment of s. 106 proceedings.[46]

<u>Few if any Resources will be wasted if the s. 106(2) proceeding is not suspended</u>

79. If Kobo's leave application to the SCC is denied, or if Kobo's leave application to the SCC is allowed but its appeal is ultimately unsuccessful, then no resources will have been wasted as a result of proceeding with the s. 106(2) application.

[43] Kelly's Affidavit, Exhibits "I", "J", "K".
[44] Kelly's Affidavit, Exhibit "L".
[45] Kelly' s Affidavit, Exhibit "M"; Affidavit of Michael Tamblyn, filed with the Tribunal on February 22, 2014 in connection with Kobo's Stay Motion at paras17-19, 29.
[46] *United Grain*, *supra* note 11, at para 40.

80. Kobo's argument that judicial and the parties' resources will be wasted is unsupported by credible evidence. In fact, the only evidence relied on by Kobo in making that argument is a Tribunal scheduling order made months *before* the Tribunal issued its Reference Decision. The schedule contemplated the possibility that the Tribunal would take an expansive view of s. 106(2) of the Act and be required to hold a broad fact-based proceeding as contemplated by Kobo's s. 106(2) application. However, in its scheduling order, the Tribunal expressly noted that the schedule would be informed by the Reference Decision and may have to be changed as a result of that decision.[47]

81. Without explanation or any evidentiary underpinning, Kobo suggests that even if the s. 106(2) proceeding were to proceed on the basis of the Tribunal's construction of s. 106(2) of the Act, all of the procedural steps provided for in the original pre-Reference Decision schedule, including full discovery and the filing of expert evidence, would be required. The Commissioner submits that this position defies logic and common sense and should be rejected.

82. In any event, it is only in the unlikely event that Kobo is granted leave *and* is successful on appeal that there is even the possibility that any resources could be wasted as a result of proceeding with the s. 106(2) application now. Why? Kobo does not seek to set aside the test articulated by Crampton C.J. in his Reference Decision. Rather, Kobo maintains that the Tribunal's jurisdiction under s. 106(2) application should be broadened.

83. In the unlikely event that Kobo obtains leave and is successful on appeal such that the Tribunal would *in theory* be required to consider other issues beyond those contemplated by the Reference Decision, it could re-convene the s. 106(2) application following the issuance of the SCC's decision. We say "in theory" because in all likelihood, by the time the SCC rendered its decision, the Consent Agreement would have already been rescinded.

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[47] Kobo's Motion Record, Exhibit "K", at para. 3.

84. Therefore, whether s. 106(2) application proceeds now or after any appeal decision the SCC might render, the issues set out in the test articulated in the Reference Decision will have to be addressed. Time and resources spent addressing these issues will not have been wasted if the case proceeds now.

85. Waste of judicial and parties' resources could amount to an inconvenience, but not more than that. In any event, there is no persuasive, detailed and concrete evidence demonstrating waste of judicial or parties resources. As Justice Dawson stated in the context of an adjournment pending appeal motion brought by Sears:

> … as Mr. Justice Rothstein, sitting as the presiding judicial member of the Tribunal, wrote in *D & B Companies, supra* at page 4 of the report:
>
> The issue of disruption to Tribunal proceedings is not one that, in my view, can be characterized as coming within the category of irreparable harm. It is true that there could be serious inconvenience but that is not of itself tantamount to irreparable harm. It may be that examinations and cross-examinations may change if the respondent is successful on appeal and further information is produced and the matter is reheard. However, again, this is a matter of inconvenience and not irreparable harm. Whenever a case is sent back for rehearing as a result of appeal or judicial review, the parties are in the same position. Such rehearings are a regular part of the judicial process; I cannot conclude that this case is in some way unique so as to cause irreparable harm to the respondent if indeed examinations and cross examinations have to change.[48]

86. Even if there were to be some minimal wasted resources as a result of proceeding with the s. 106(2) case now, which is not admitted, it can be addressed by the Tribunal as Rennie J. noted:

> [23] Whether the subsection 106(2) application is stayed pending an appeal of the decision on the Reference is speculative, as is the existence of an appeal itself. These arguments also presume that the application could not proceed in tandem with any appeal. **Insofar as the issue of costs being thrown away is concerned, the Tribunal has a broad discretion which can remedy any unfairness that might arise through the two**

[48] *Sears*, *supra* note 10, at para. 14

> **parallel, but inter-related processes were that to be the case.** [emphasis added][49]

<u>Interest of Justice is served by dismissing this Motion</u>

87. Kobo's motion should be dismissed on the basis that it does not meet 2 of the 3 elements of the *RJR* test. It has not demonstrated that it will suffer irreparable harm or that the balance of convenience favour Kobo.

88. Further, it would not be in the interests of justice if the remote possibility of some minimal wasted resources in this instance could constitute grounds for suspending the s. 106(2) proceeding, then suspensions pending appeals of Tribunal decisions would become automatic, hindering the capacity of the Tribunal to proceed expeditiously. The Commissioner submits that this outcome would certainly not be in the interests of justice.

<u>Conclusion</u>

89. The Commissioner submits that the Tribunal should apply *RJR* test in disposing of Kobo's motion. However, regardless of whether the *RJR* test or the "interests of justice" test is applied, Kobo's motion must fail because the arguments it relies on are unsupported by evidence and fundamentally flawed.

[49] *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 8

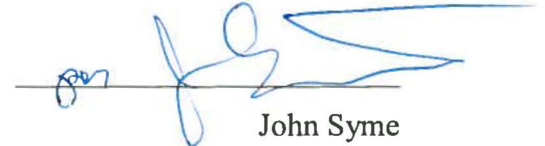
PART IV: ORDER REQUESTED

i) Kobo's motion be dismissed, with costs.

ii) Such further and other relief as the Tribunal may deem just.

Dated at Gatineau, Québec this 13th day of October, 2015

SIGNED BY:



John Syme
Jean-Sébastien Gallant
Arezou Farivar
Counsel for the Commissioner of Competition

File No. CT-2014-002

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 Ebooks 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*.

B E T W E E N:

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

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION
(Motion to Suspend s. 106(2) Proceeding)

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