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;

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:

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

RESPONSE OF THE COMMISSIONER OF COMPETITION
(Motion to Suspend s. 106(2) Proceeding)

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OVERVIEW

1. In its motion, Kobo asks this Tribunal to re-suspend the s. 106(2) application. Kobo will suffer no irreparable harm if the proceedings are permitted to proceed. Its motion must fail.

2. On February 6, 2014, the Commissioner and four major publishers (the **"Settling Publishers"**) entered into a consent agreement to resolve the Commissioner's concerns with respect to certain alleged anti-competitive conduct (the "**Consent Agreement**" or "**Agreement**").

3. The Commissioner expected that prices paid by Canadian consumers for ebooks would go down as a result of the Consent Agreement. Kobo shared that expectation.

4. Kobo brought an application to set aside or vary the Consent Agreement and obtained an order staying the Agreement pending the disposition of its application.

5. As a consequence of Kobo's action, the Consent Agreement has been stayed for the last 18 months and its provisions have been rendered inoperable.

6. Kobo now seeks to prevent its s. 106(2) application from proceeding pending a possible appeal to the Supreme Court of Canada. Kobo asserts staying the s. 106(2) proceeding is "in the interest of justice".

Procedural History

7. On February 7, 2014, the Commissioner filed the Consent Agreement with the Tribunal. 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.

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 On February 21, 2014, Kobo filed a s. 106(2) application with the Tribunal, seeking to have the Consent Agreement rescinded or varied.

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

10. On April 15, 2014, the Commissioner referred the following question to the Tribunal pursuant to s. 124.2(2) of the *Competition Act* (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?

11. On April 29, 2014, Kobo filed a motion to strike the Reference.

12. On May 14, 2014, the Tribunal issued a scheduling order in respect of the s. 106(2) application and the Reference, which provided, among other things, that the

Commissioner was to file a Response to Kobo's application on September 5, 2015, but recognized that the schedule was subject to change as a result of, among other things, the Reference.

13. On June 10, 2014, the Tribunal dismissed Kobo's motion to strike the Reference.

14. On August 20, 2014, the Tribunal issued a direction providing that the deadlines established in the scheduling order of May 14, 2014, were suspended pending the issuance of a decision in the Reference.

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

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

17. On December 22, 2014, during the case management conference, the Commissioner's counsel reiterated that the Commissioner was prepared to consent to the relief sought in Kobo's s. 106(2) application, stating that the Consent Agreement does not, in the Commissioner's view, meet the requirements set out in the Reference Decision.

18. On December 22, 2014, following the case management conference, the Tribunal ordered that the s. 106(2) application would continue to be suspended pending the determination of Kobo's appeal of the Reference Decision by the FCA.

19. Pursuant to applications the Commissioner made under s. 11 of the Act, on January 22, 2015, the Commissioner obtained orders from Crampton C.J. of the Federal Court 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 applications, advised both parties of his intention to seek s. 11 orders.

20. In the context of discussions regarding the proposed order, Kobo accused the Commissioner of 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 the assertion that the s. 11 order was being sought to unfairly target Kobo or for some other improper purpose. Kobo further indicated that the information the Commissioner was seeking through the proposed order would be of no use to the Commissioner in the ebook inquiry, unless like information was sought from other market participants. Indigo made similar allegations.

21. Following the issuance of s. 11 orders against Kobo and Indigo, Crampton C.J. issued Reasons for Orders. In his Reasons, Crampton C.J. addressed, among other things, the issues identified above as follows:

> [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.

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

23. On July 7, 2015, Kobo advised the respondents that it intended to seek leave to appeal the decision of the FCA to the Supreme Court of Canada ("**SCC**").

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

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

The Interests of Justice Do Not Support Suspending the s. 106(2) Application

26. It is not in the interests of justice to further suspend Kobo's s. 106(2) application.

27. Kobo submits that it is in the interests of justice for the Tribunal to suspend its s. 106 application because:

    a. Kobo's proposed appeal to the SCC raises a serious issue;

b. Proceeding with the s. 106(2) application now will result in a waste of judicial and the parties' resources, even if the SCC hears the appeal and upholds the Reference Decision;

c. Kobo will suffer irreparable harm if the s. 106(2) application proceeds now *and* Kobo fails to have the Consent Agreement rescinded; and

d. Suspending the s. 106(2) application pending the SCC's disposition of Kobo's leave application and, if leave is granted, pending the disposition of the appeal, will not result in any harm to consumers or competition as evidenced by the fact that, among other things, the Commissioner is prepared to consent to the rescission of the Consent Agreement.

a. Serious Issue

28. The standard for determining whether an appeal raises a serious issue is low, requiring only a preliminary assessment of the merits to ensure that the appeal is neither frivolous nor vexatious.

29. The Commissioner concedes for purposes of the instant motion that Kobo's appeal to the SCC raises a serious issue. However, the Commissioner notes 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.

b. Few if Any Resources Will Be Wasted if the s. 106(2) Application Proceeds

30. If Kobo's leave application to the SCC is denied, no resources will have been wasted as a result of proceeding with the s. 106(2) application.

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

32. In the unlikely event that Kobo is granted leave *and* is successful on appeal, few if any resources will have been wasted as a result of proceeding with the s. 106(2) application. In its appeal, Kobo maintains that the Tribunal's jurisdiction under s. 106(2) is broader than that found by Crampton C.J.; however, importantly, Kobo does not seek to set aside the test articulated by Crampton C.J. in his Reference Decision. The Commissioner has not appealed the Reference Decision.

33. Therefore, in any s. 106(2) proceeding going forward, whether now or after any appeal decision the SCC might render, the issues set out in the Reference Decision will have to be addressed by the Tribunal. Time and resources spent addressing those issues will not have been wasted.

34. In the unlikely event Kobo obtains leave *and* is successful on appeal such that the Tribunal would *in theory* be required to consider other issues as well, it could re-convene the s. 106(2) proceeding following the issuance of the SCC's decision. We

say *in theory* because in all likelihood, should leave be granted, by the time the SCC renders its decision, the Consent Agreement would have already been rescinded and the s. 106(2) proceeding would have concluded.

35. All the foregoing notwithstanding, even if there were to be some minimal wasted resources as a result of proceeding with the s. 106(2) application now, which is not admitted, that outcome does not provide a basis for suspending the proceeding. As Rennie J. noted in his motion to strike decision, the Tribunal has the means to address that issue:

> [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 are concerned, the Tribunal has a broad discretion which can remedy any unfairness that might arise through the two parallel, but inter-related processes were that to be the case.

36. If the remote possibility of some minimal wasted resources in this instance could constitute grounds for suspending the s. 106(2) application, then suspensions pending appeals of Tribunal decisions would become virtually automatic. The Commissioner submits that that outcome would not be in the interests of justice.

c. That Kobo Will Suffer Irreparable Harm if the s. 106(2) Application Proceeds is Highly Speculative

37. 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.

38. 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.

39. That said, in view of fact that: (1) the Consent Agreement, on its face, does not satisfy the test outlined in the Reference Decision (Commissioner *alleges* rather than *concludes*); and (2) the Commissioner is prepared to consent to the rescission of the Agreement, there is a strong likelihood that the Agreement will be rescinded.

d. Consumers, Competition and the Public Interest

Wholesale and Agency Agreements

40. In the United States and Canada, 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.

The US Ebooks Case

41. 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.;

b. HarperCollins Publishers L.L.C.;

c. Holtzbrinck Publishers, LLC, doing business as Macmillan;

d. The Penguin Group, a division of Pearson PLC, and Penguin Group (USA), Inc.; and

e. Simon & Schuster, Inc. (collectively, the "**US Publisher Defendants**").

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

43. Each of the US Publisher Defendants subsequently reached settlements with the US DOJ that 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 US Publisher Defendants to take steps, either by terminating agreements or not enforcing them, to nullify provisions in their Agency Agreements that:

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 ("**MFN**") provision, as further described below.

44. Apple did not settle its case with the US DOJ and the matter proceeded to trial.

45. On July 10, 2013, the US Court issued its Opinion and Order in *United States of America v. Apple Inc., et al.* ("the **US Apple Decision**"). In the course of its decision, the US Court made the following findings:

a. In 2009, the US Publisher Defendants sold ebooks pursuant to the wholesale model.

b. In the final days of January 2010, in view of its planned entry in the ebook market, Apple entered into Agency Agreements with the following publishers; Hachette Book Group, Inc.; HarperCollins Publishers L.L.C. (**"Harper Collins"**); Holtzbrinck Publishers, LLC, doing business as Macmillan (**"Macmillan"**); Penguin Group (USA) Inc.(**"Penguin"**); and Simon & Schuster (**"S&S"**), Inc. Under those agreements the publishers set the retail selling price for ebooks and set Apple's commission on ebook sales at 30% of the retail selling price of any ebook.

c. 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.[1]

d. By the end of March 2010, Amazon had entered into agency agreements with Macmillan, HarperCollins, Hachette, and S&S.

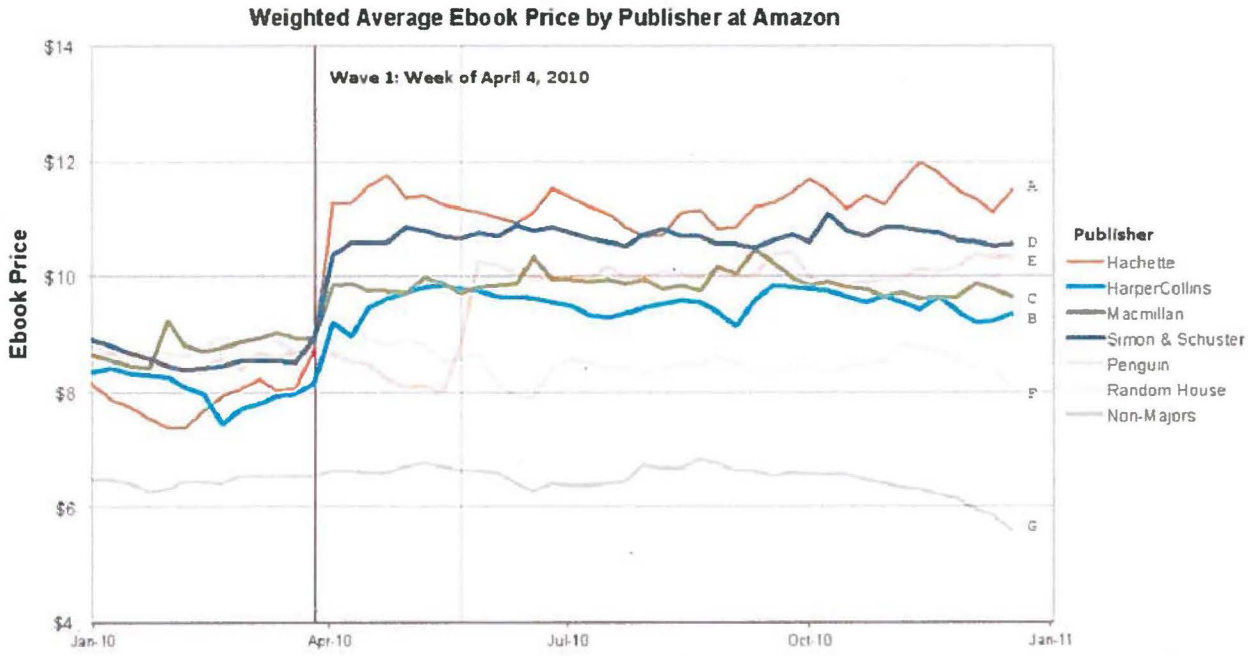
e. Apple launched the iBookstore in the United States (**"US"**) in April 2010.

f. Amazon signed an agency agreement with Penguin on June 2, 2010.

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

g. Amazon's ebook prices after moving to the agency model amounted to an average per unit ebook retail price increase of 14.2% for new releases, 42.7% for its New York Times bestsellers, and 18.6% across all of the US Publisher Defendants' ebooks.

h. 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. Those changes in price are illustrated by the following chart:



i. Each of the US Publisher Defendants had a decline in the quantity of ebooks sold as a result of the price increases.

j. 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.

46. 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.

Harm to Canadian Consumers and Competition

47. Kobo anticipated in 2010 that moving from wholesale pricing to agency pricing for ebooks would represent a change to the entire ebook industry model.

48. Kobo expected that shifting to an agency model would, in respect of ebooks sold further to agency agreements, significantly reduce or eliminate price competition among all retailers, including Kobo and Amazon.

49. Apple launched its Canadian iBookstore on July 1, 2010, having entered into agency agreements with the majority of the Settling Publishers prior to that date.

50. Kobo has agency agreements for the sale of ebooks with each of the Settling Publishers.

51. On February 6, 2014, the Commissioner entered into a consent agreement with the Settling Publishers. The Consent Agreement was similar to the settlements that the US DOJ reached with the US Publisher Defendants in the sense that it required the

Settling Publishers to terminate or amend any agreement they had with an ebook retailer, including Kobo and Amazon, which:

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

b. included an MFN provision that made 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.

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

53. The Commissioner 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 ebook for Canadian consumers.

54. In its motion for a stay, Kobo submitted that it expected to suffer irreparable financial harm following the implementation of the Consent Agreement because it would increase competition and result in lower ebook prices in Canada.

55. Kobo's expectation was based on its experience in the US, where the shift from the agency model to "agency lite" following the US settlement resulted in Kobo being forced to compete by discounting titles to match the deep discounting that some of its

US competitors engaged in. Notwithstanding its attempts to discount, Kobo found itself unable to compete in the US market in that environment.

56. Kobo did not want to see the aggressive competition and deep discounting in Canada in respect of ebooks that it had faced in the US.

57. Kobo applied pursuant to s. 106(2) of the Act to have the Consent Agreement set aside or varied and obtained a stay of the Consent Agreement. In the interim, the provisions in the agency agreements Kobo had with the Settling Publishers would continue to offer Kobo protection from price competition from ebooks competitors.

58. The Consent Agreement is stayed pending the disposition of the s. 106(2) proceeding. Kobo seeks to have the s. 106(2) proceeding re-suspended, a result which would place the Consent Agreement in a state of continued suspended animation. As long as the s. 106(2) application is stayed, the Commissioner's ability to take steps to address the impact of the provisions targeted by the Consent Agreement is hindered.

59. The Commissioner's indication that he is prepared to consent to the rescission of the Consent Agreement is simply a reflection of the Commissioner's recognition of the test Crampton C.J. articulated in his Reference Decision. It does not indicate that there "can be no harm to competition or consumers in the continued stay of the Consent Agreement", a matter that is not before the Tribunal in this motion; or, that the Commissioner is no longer concerned about the anti-competitive effect of the impugned contractual provisions on competition in the ebooks market in Canada.

60. Kobo's motion should be dismissed, with costs.

61. The *Competition Act,* R.S.C. 1985, c. C-34, as amended, including sections 1.1, 69, 90.1, 105 and 106.

62. *The Competition Tribunal Act,* R.S.C. 1985, c. 19 (2nd Supp), as amended, including sections 8 and 9(2).

63. *The Competition Tribunal Rules,* SOR/2008-141.

64. *The Federal Court Rules,* SOR/98-106

65. 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 Mallory Kelly affirmed on August 28, 2015.

2. Such further and other documents as counsel may advise and the Tribunal may admit.

DATED AT Gatineau, Quebec on August 28, 2015.

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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

RESPONSE OF THE COMMISSIONER OF COMPETITION
(Motion to Strike the Notice of Reference)

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