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 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:

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 ARGUMENT OF KOBO INC.
(Commissioner's Reference)

Date: June 10, 2014

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3. While the argument that follows addresses all of the points raised by the Commissioner, ultimately, the use of the word "establish" in s. 106(2) disposes of the Commissioner's view that s. 106(2) applications are meant to be resolved without reference to facts or evidence. The Supreme Court of Canada has held that when Parliament uses the verb "establish" (in the Act and elsewhere), it means proving facts based on evidence. Applications under s. 106(2) are therefore factual contests, to see if the applicant has established—i.e., proven—that the consent agreement is inconsistent with the Act. The notion that s. 106(2) contemplates "proving" one's case is also reflected in the testimony of then-Commissioner von Finckenstein at the time of s. 106(2)'s enactment.

4. The correct interpretation of s. 106(2) is one that allows the Tribunal to engage in some probing of facts and weighing of evidence to ensure that it would have had jurisdiction to make the order had the case proceeded as a contested matter. The extent of that probing and weighing will vary, depending on the section of the Act in relation to which the consent agreement is filed, and the allegations contained in the s. 106(2) application.

PART 2 - FACTS

5. Kobo maintains that the proper time for the interpretation of s. 106(2)[1] is as part of the hearing of its Application, when the Tribunal will have the benefit of evidence and a properly established factual context. The Commissioner's decision to approach this interpretive exercise by way of reference has precluded that possibility. Kobo is therefore advancing legal arguments below on the interpretive question posed in this Reference, albeit maintaining that the Tribunal would be better positioned to interpret the section with the benefit of facts and evidence.

PART 3 - ISSUE

6. The issue is whether the Commissioner's interpretation of s. 106(2) is correct and, if not, what the proper interpretation of the section should be. Section 106(2) reads as follows:

> A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

PART 4 - LAW AND ARGUMENT

(A)

THE COMMISSIONER'S INTERPRETATION IS WRONG

7. For ease, we describe the Commissioner's interpretation as the "**bare comparative approach**", in that the approach proposed is to compare the operative parts of the consent agreement to the menu of remedies allowed for by the Act, to see if the operative parts reflect the types of orders that the Tribunal is empowered to make. We add the qualifier "bare" as the Commissioner argues that the Tribunal is not to "consider the facts underpinning a consent agreement or any of the questions of law or

[1] *Competition Act*, RSC, 1985, c C-34, s 106(2) [**Act**].

mixed fact or law that would have been at issue had the matter proceeded as a contested case".[2]

8. The Commissioner's bare comparative approach cannot stand for four reasons.

9. **First:** the bare comparative approach ignores Parliament's use of the verb "establish" in s. 106(2). "Establish" is a synonym of "prove", which is how Parliament uses the word throughout the Act and how the Supreme Court of Canada interprets that word.[3] "Establish" in this context means proving a fact on the balance of probabilities on the basis of evidence. It does not refer to engaging in a fact-less comparison of the words of the consent agreement and the words of the Act. Indeed, Commissioner von Finckenstein expressly acknowledged prior to s. 106(2)'s enactment that these sorts of applications would be contests of proof.[4]

10. **Second:** the bare comparative approach ignores the words "could not be the subject of". Pursuant to s. 105, a consent agreement must be based on terms that could *be the subject of* a Tribunal order. The focus of s. 106(2) is on whether that basis is made out. The Commissioner's argument seeks to rewrite s. 106(2) to have the inquiry focus on whether the terms of the consent agreement are "terms that could not *be contained in* an order of the Tribunal".[5] That is not what the section says. It says "terms that could not *be the subject of* an order". That requires looking beyond the words of the consent agreement to see what basis there would be for an order.

11. **Third:** the bare comparative approach is incongruous with the notion that the threshold for standing under s. 106(2) is high.[6] If the approach to s. 106(2) was

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[2] Commissioner's Memorandum of Argument [**MOA**] at para 13.

[3] *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, Kobo's BOA, Tab 1. *R v Oakes*, [1986] 1 SCR 103 at 117, Kobo's BOA, Tab 2.

[4] *House of Commons Debates (Standing Committee on Industry, Science and Technology)*, 37th Parl, 1st Sess [***Debates***], No 50 (7 November 2001) at 1720 (Konrad von Finckenstein), Kobo's BOA, Tab 3E.

[5] Commissioner's MOA at para 12 [emphasis added]. See also Commissioner's MOA at paras 5, 49, 52, 54, 83, 98 and 102.

[6] *Burns Lake Native Development Corp v Canada (Commissioner of Competition*, 2006 Comp Trib 16 at para 55 [***Burns Lake***], Kobo's BOA, Tab 4.

meant to be divorced from the facts of the case, there would be no need for a third party to establish that it "is a third party who experiences first hand a significant impact on a right which relates to competition or on a serious interest which relates to competition… [and which is] definite and concrete (i.e. not speculative or hypothetical) and must be caused by the consent agreement and not by another agreement or obligation."[7] Indeed, if the bare comparative approach is correct, Parliament could have achieved the same end by allowing the Tribunal, of its own accord, to rescind or vary a consent agreement. It is nonsensical to make it nearly impossible for a third party to obtain standing, and then, when standing is established, to limit that third party to engaging in a bare comparative exercise. Facts matter for obtaining standing under s. 106(2). They similarly matter for granting relief under s. 106(2).

12. **Fourth:** the bare comparative approach renders s. 106(2) meaningless or inoperative with respect to much of Part VIII, the very part of the Act this section was enacted to safeguard. This is because many sections in Part VIII of the Act tie the Tribunal's remedial powers directly to the alleged anticompetitive conduct. Without the ability to review the facts of the anticompetitive conduct, the Tribunal's ability to test the link between the operative parts of the consent agreement and the anticompetitive conduct is frustrated. It cannot test whether the obligations in the consent agreement are ones that the Tribunal could have ordered. Equally problematically, on the Commissioner's interpretation, some consent agreements would effectively be beyond review, as some sections in Part VIII grant the Tribunal authority to make <u>any</u> order it sees fit once it finds there has been anticompetitive conduct. If the Tribunal is precluded from probing into the alleged anticompetitive conduct, it would have nothing to review in a s. 106(2) application. An interpretation such as this, which is not in line with the scheme of the Act, is clearly incorrect.

13. Ruth Sullivan articulated the modern approach to statutory interpretation as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical

[7] *Ibid* at para 55, Kobo's BOA, Tab 4.

> and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. … At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its *plausibility*, that is, its compliance with the legislative text; (b) its *efficacy*, that is, its promotion of legislative intent; and (c) its *acceptability*, that is, the outcome complies with accepted legal norms; it is reasonable and just.[8]

14. As can be seen from the foregoing four points, the Commissioner's interpretation is implausible (it ignores the text of s. 106(2)), inefficacious (it ignores the purpose of s. 106(2)), and unacceptable (it unjustly denies directly affected third parties their s. 106(2) rights). It must be rejected.

15. This is not to say that the Commissioner's approach and Kobo's approach are the only possible interpretations to consider. Indeed, in an article published shortly after *Burns Lake*, several practitioners outlined their interpretation of s. 106(2).[9] Their proposal would go a step further than Kobo's interpretation, and allow a review not only of jurisdiction but of the effectivness of the consent agreement to ensure that the terms remedy the anticompetitive behaviour. Many of the Commissioner's complaints seem aimed at the approach advanced in that article, rather than Kobo's approach.

16. We address the four shortcomings of the Commissioner's interpretation below, in light of the purpose and history of s. 106(2), before turning to the interpretation that better reflects Parliament's intention and the words of the statute.

(1)
The Purpose and History of Section 106(2)

17. Prior to 2001, proposed settlements between the Commissioner and private parties were subject to a lengthy and uncertain process that required a hearing

[8] Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2008) at 1, 3 [emphasis added], Kobo's BOA, Tab 5.

[9] Mark J Nicholson, Chris Hersh & Yana Ermak, "Challenges to Consent Agreements After Burns Lake" (Fall 2006) Can Comp Rec 102, Kobo's BOA, Tab 6.

to obtain the approval of the Tribunal in the form of a consent order.[10] In practice, this process engendered delays, as intervenors took advantage of the process as a way to disrupt commercial deals.[11] The Commissioner's onus at these hearings was to show that the remedy was effective.[12]

18. In 2001, Parliament introduced amendments to the Act designed to streamline the settlement process, especially for time-sensitive mergers.[13] One of these changes was the replacement of consent orders with the consent agreement process.

19. The Bill initially did not provide for any third party involvement in the consent agreement process. Registration of consent agreements was to be automatic, and only the Commissioner or a consenting party could apply for variation or rescission.[14] Several prominent witnesses pressed the Parliamentary Committee to address this gap:

- "The process improvement, if I can characterize it that way, I think goes too far by eliminating any opportunity for third-party intervention…" [15] *Former Commissioner George Addy*

- "[I]n a perfect world there would still be some opportunity for review of these under extraordinary circumstances, the way we had hoped there would be. I would like to think there is some **safety valve** in the case where a deal has been worked out between the commissioner and the parties that perhaps didn't accurately reflect the realities if the marketplace – maybe because the

[10] *Ibid* at 105-06, Kobo's BOA, Tab 6. See also Calvin S Goldman & Navin Joneja, "The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner" (2010) 41 Loy U Chicago LJ 535 at 549-52, Kobo's BOA, Tab 7.

[11] *Debates*, *supra* note 4, No 48 (6 November 2001) at 1010 (Robert Russell), Kobo's BOA, Tab 3D. See also Goldman & Joneja, *ibid* at 551, Kobo's BOA, Tab 7.

[12] See eg *Canada (Commissioner of Competition) v Ultramar Ltd*, [2000] CCTD No 4 at paras 30-33 (Comp Trib), Kobo's BOA, Tab 8.

[13] Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess, 37th Parl, 2001 (first reading 4 April 2001), Kobo's BOA, Tab 9A.

[14] *Ibid*.

[15] *Debates*, *supra* note 4, No 38 (16 October 2001) at 0930 (George Addy), Kobo's BOA, Tab 3B.

commissioner's staff was overworked, or missed some important bits of information, or whatever."[16] *Professor Tom Ross* [emphasis added]

- "[T]he proposal will marginalize the tribunal and undermine the adjudicative oversight of the tribunal with respect to the enforcement of the act. … [It is] designed to turn our competition laws into an administrative process where much of the power resides in the hands of the commissioner and the commissioner can make deals with private parties without public oversight. I think that is a serious mistake …."[17] *Stanley Wong*

- "[It is] bad public policy to turn the tribunal into a post office, to just mail them a consent order and require them to enforce it, whether they consider it appropriate or not."[18] *Professor Michael Trebilcock, who also "strongly endorse[d]" the comments of Stanley Wong above*

20. It is wrong to say, as the Commissioner does, that the "'safety valve' proposal" was rejected in favour of the final wording of s. 106(2). There was no such "proposal" tabled. These witnesses did not put forward "amendments"[19] that were rejected by Parliament; rather, they expressed concerns about the draft Bill to the Parliamentary Committee. Parliament and the then-Commissioner heard those concerns, came up with a compromise, and revised the Bill accordingly.[20]

21. The compromise was that the Bureau would retain broad powers to automatically register consent agreements, but there would be the safety valve that the critics of the amended process identified as necessary. In explaining the rationale, the then-Commissioner stated:

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[16] *Ibid*, No 41 (23 October 2001) at 0930 (Thomas W Ross) Kobo's BOA, Tab 3C.

[17] *Ibid*, No 48 (6 November 2001) at 0910 (Stanley Wong) Kobo's BOA, Tab 3D.

[18] *Ibid*, No 48 (6 November 2001) at 0910 (Michael J Trebilcock) Kobo's BOA, Tab 3D.

[19] See Commissioner's MOA at paras 43, 52.

[20] *Debates*, *supra* note 4, No 50 (7 November 2001) at 1630 (Konrad von Finckenstein) Kobo's BOA, Tab 3E. In this respect, Parliament struck a balance between two competing visions encapsulated by the debate between Robert Russell, on the one hand, and Stanley Wong, on the other: *ibid*, No 48 (6 November 2001) at 1010 (Robert Russell & Stanley Wong) Kobo's BOA, Tab 3D. That balance is similar to what Thomas Ross had been hoping for.

> "We are suggesting the **consent decree**, which would be something the commissioner agreed with the respondent. But **it** has to be something that is within the four corners of the tribunal's authority. […] Now if **it** affects a third party and somebody gets sideswiped by **it** whom we didn't think of – […] that third party should have in our view a right to have a term rescinded of right, if we did something the tribunal couldn't have done."[21]
>
> …
>
> "Basically, the commissioner can make a consent agreement with any party as long as **it's** consistent with the act. Anybody directly affected by that agreement who feels it's inconsistent with the act has 60 days to go to the tribunal and challenge the consent agreement."[22]

22. As the above history shows, in enacting s. 106(2), Parliament intended to implement a meaningful check on the Commissioner's discretion to settle competition cases. While that check is much more contained than the consent order regime that existed before 2001, it placed restraints on the unfettered discretion the Commissioner would have had under the original Bill. Now:

- only directly affected parties can bring an application;
- the time in which to file such an application is short (just 60 days);
- the burden rests on directly affected parties to establish the s. 106(2) allegation (under the consent order regime, the burden was on the Commissioner);[23] and
- the question has been recast, from looking at the effectiveness[24] of the remedy to be ordered to the basis upon which such an order would be founded.

23. Settlements reached by the Commissioner and the "target" party frequently have an impact on the rights or interests of third parties. The remedy in this

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[21] *Ibid*, No 50 (7 November 2001) at 1720 (Konrad von Finckenstein) [emphasis added], Kobo's BOA, Tab 3E.

[22] *Ibid*, No 60 (4 December 2001) at 1655 (Konrad von Finckenstein) [emphasis added] Kobo's BOA, Tab 3F.

[23] *Canada (Director of Investigation) v Imperial Oil Ltd* (1989), CT-1989-003/390 at 14 (Comp Trib), Kobo's BOA, Tab 10: "The burden of proof in a consent order application is on the parties **and particularly on the [Commissioner]**." [Emphasis added].

[24] See eg *Canada (Commissioner of Competition) v Ultramar Ltd*, *supra* note 12 at paras 30-33 (Comp Trib), Kobo's BOA, Tab 8.

case results in the third party suffering the financial harm[25] while the ostensible wrongdoers are kept whole. That is the very reason that s. 106(2) was enacted, as this "sideswiping" possibility was recognized at the time.[26] The objective of reaching settlement agreements between two consenting parties, each seeking to achieve their own ends, was tempered with a meaningful process to ensure that those agreements do not overreach and directly affect another party in a manner that could not have been achieved had the matter proceeded to a hearing before the Tribunal.

(2)
The Commissioner's Interpretation Is Implausible, Inefficacious, and Unacceptable for Four Reasons

(i)
The Commissioner's approach ignores Parliament's use of the verb "establish"

24. Section 106(2) provides that the Tribunal may grant a directly affected person's application "if it finds that the person has *established* that the terms could not be the subject of an order of the Tribunal."[27] The Supreme Court of Canada has held that "the phrase 'to establish' is the equivalent of 'to prove'".[28]

25. Moreover, in the Parliamentary proceedings leading up to s. 106(2)'s enactment, Commissioner von Finckenstein expressly acknowledged that it would be a contest of proof:

> **Mr. Konrad von Finckenstein:** We start an action against the company. The company comes to us and says, why don't we settle this? We make a **consent agreement**, we draft **it**, we register **it**, and **it** becomes a judgment of the court. If somebody else is directly affected by **that** and says that we shouldn't have done it, that this was something

[25] *Kobo Inc v Canada (Commissioner of Competition)*, 2014 Comp Trib 2 at paras 35, 39, Kobo's BOA, Tab 11.

[26] *Debates*, *supra* note 4, No 50 (7 November 2001) at 1720 (Konrad von Finckenstein), Kobo's BOA, Tab 3E; No 60 (4 December 2001) at 1655 (Konrad von Finckenstein & Chuck Strahl), Kobo's BOA, Tab 3F.

[27] Act, *supra* note 1, s 106(2) [emphasis added].

[28] *R v Oakes*, *supra* note 3 at 117, Kobo's BOA, Tab 2. See also *R v Wholesale Travel Group Inc*, *supra* note 3 at 197-98, Kobo's BOA, Tab 1.

> the tribunal couldn't impose, they have 60 days to go to the tribunal to challenge **the agreement**.
>
> **Mr. Chuck Strahl:** If you use the current sexy issue, which is airlines, let's suppose there were some sort of interim agreement agreed to between two parties, but somehow we'd forgotten to think of some little guy who's flying to Victoria from Abbotsford. If he feels that it's somehow compromising his future and contravenes the act, then could he apply under this grace period here, the 60-day period?
>
> **Mr. Konrad von Finckenstein:** If he could **prove** that he's likely affected by **it** and that what we did was outside the act, yes indeed, he could do it.[29]

26. The bolded portions above illustrate two points about the intention underpinning s. 106(2). First, s. 106(2) reviews are meant to focus on basis for the consent agreement as a whole, not just a narrow subset of elements of the consent agreement (illustrated by the use of the word "it" throughout). The tenor of this exchange is broader than simply conducting a cursory review of a given clause within a consent agreement.

27. Second, s. 106(2) was contemplated to be a factual contest in which evidence would be adduced ("proved"). The equivalence of "establish" and "prove" is also apparent from a review of the use of the word "establish" elsewhere in the Act. The word "establish" appears approximately 25 times in the Act, as a synonym for "prove" in the context of establishing certain matters or conditions;[30] establishing offences or other contraventions of the Act; [31] establishing defences, including a defence of due diligence;[32] or establishing the availability of saving provisions.[33] There is a presumption that the legislature uses language carefully and consistently within a statute, and that the meaning given to the word "establish" will be the same throughout.[34]

28. The correct interpretation therefore must provide for a factual contest, albeit acknowledging that, unlike under the consent order regime, the onus is on the

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[29] *Debates*, *supra* note 4, No 50 (7 November 2001) at 1720 (Konrad von Finckenstein) [emphasis added], Kobo's BOA, Tab 3E.

[30] Act, *supra* note 1, ss 12(4), 52.1(5), 74.02, 74.03(4), 103.3(5.3), 52.1(5).

[31] *Ibid*, ss 52(1.1), 52.1(7), 53(4), 52.01(4).

[32] *Ibid*, ss 45(4), 52.1(6), 52.1(7)-(8), 53(3)-(5), 55(2.2), 60.

[33] *Ibid*, ss 74.01(5), 74.04(3), 74.05(2), 74.07(1), 74.1(3).

[34] Sullivan, *supra* note 8 at 214-15, Kobo's BOA, Tab 5.

third party applicant, not on the Commissioner, and the focus is more tailored than it was under the previous regime.

(ii)

The Commissioner's approach ignores the words "could not be the subject of"

29. The Commissioner asserts in his Memorandum of Argument that the wording of s. 106(2) calls for the Tribunal to determine whether the terms of the consent agreement "could be **contained** in an order issued by the Tribunal".[35]

30. Such an interpretation is contrary to the wording of the statute. Section 106(2) provides, "The Tribunal may grant the application if it finds that the person has established that the terms could not be **the subject of** an order of the Tribunal."[36]

31. The Commissioner's position is that the Tribunal can conduct only a cursory review of the terms of the consent agreement to determine whether they are of a nature that could be included in the order. For example, if the provision underlying the consent agreement does not permit the Tribunal to levy a fine, the consent agreement could not include a term imposing a fine. That interpretation is inconsistent with the nature of the s. 106(2) inquiry—whether the terms could be the *subject* of an order—which requires an assessment of whether the Tribunal would have had the jurisdiction to grant the relief in the first place.

32. It is impossible, upon a cursory review of the consent agreement, to determine whether the Tribunal would have jurisdiction. The Act sets limitations on the Tribunal's jurisdiction to grant an order, many of which are factual. For example, there are exceptions prohibiting the Tribunal from issuing an order in respect of conduct between affiliated corporations or similarly related parties,[37] where a prescribed amount of time has passed since the conduct,[38] or for certain mergers under federal legislation

[35] Commissioner's MOA at para 12 [emphasis added]. See also Commissioner's MOA at paras 5, 49, 52, 54, 83, 98 and 102.

[36] Act, *supra*, note 1, s 106(2) [emphasis added].

[37] *Ibid*, s 76(4).

[38] *Ibid*, s 79(6).

overseen by the Minister of Finance or the Minister of Transport.[39] The Tribunal cannot make any order if these exceptions exist, and thus *no* terms could be the subject of a Tribunal order. Consideration of the facts is necessary to determine whether the Tribunal's jurisdiction is removed by an exception.

33. The Commissioner focuses on the use of the phrase "terms of the consent agreement". This phrase must be read with a view to what the Tribunal is to do: determine whether the terms could be the subject of an order at all. The Commissioner's observation that the consent agreement does not contain findings of fact is correct, but is of no assistance. The same is true of an order of a court, which contains terms, while separate reasons for decision are issued containing findings of fact. Although it is the order that get appealed, the analysis on appeal extends to the underlying reasons. The approach under s. 106(2) should be no different. The use of the phrase "terms of the order" does not narrow the usual jurisdiction of review.

34. Moreover, in this particular consent agreement, the recitals, which contain factual allegations, are themselves terms of the consent agreement pursuant to paragraph 10 thereof.[40] Having incorporated the recitals as part of the substantive agreement, the Commissioner cannot now say that the recitals do not form part of the agreement and therefore cannot be reviewed.

35. The correct interpretation must permit looking behind the consent agreement to test its basis. The question is not whether the terms could be ordered if both sides agree that the jurisdiction for an order exists. Rather, the entire exercise is designed to allow a third party to show why the Commissioner and consenting parties lacked jurisdiction to enter into a consent agreement that adversely affects it.

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[39] *Ibid*, s 94.

[40] "The Recitals of this Agreement are integral to, and deemed to be a part of, this Agreement."

(iii)
The Commissioner's approach is incongruous with the high threshold for standing under s. 106(2)

36. The bare comparative approach does not make sense in the context of the entire wording of s. 106(2). The section contemplates that the applicant be "directly affected" by the consent agreement. This has been interpreted by the Tribunal as connoting a high threshold to be established by the applicant**:** [41]

> [A] party that is directly affected… is a third party who experiences first hand a significant impact on a right which relates to competition or on a serious interest which relates to competition… [and which is] definite and concrete (i.e. not speculative or hypothetical) and must be caused by the consent agreement and not by another agreement or obligation.

37. If the review contemplated by s. 106(2) was limited to determining whether the remedy is patently not contemplated by the Act, this requirement of standing would not be necessary. There is no logical justification for why it must be a directly affected party who takes on the time and cost to vary or rescind such agreements.

38. It is also difficult to imagine any circumstances in which a person *could* be directly affected by the terms of the order such that it would challenge them, if the review is limited in the manner the Commissioner suggests. For example, if the consent agreement levies a fine against the settling party where none is permitted by the Act, it is difficult to conceive of a circumstance in which any party other than the party liable to pay the fine (i.e., the settling party) would be directly affected in a manner related to competition.

39. In imbuing the words of a provision with meaning, the interpretation must look at the context: the immediate context (the words of the provision), the Act as a whole, and the relevant external context.[42] The aim in doing so is to establish a meaning that is consistent and coherent with the setting of the words.

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[41] *Burns Lake*, *supra* note 6 at para 55, Kobo's BOA, Tab 4.

[42] Sullivan, *supra* note 8 at 353-58, Kobo's BOA, Tab 5.

40. The correct interpretation must approach s. 106(2) in a coherent fashion, rejecting an interpretation that pits one part of the section against the other. The correct interpretation must take the section as a whole, with all of its constitutive parts being read harmoniously with one another. The only reason to place a high evidentiary burden on directly affected parties in the first part of s. 106(2) is to limit the number of instances in which the factual examinations provided for in the second part will be engaged.

(iv)
The Commissioner's approach would render s. 106(2) meaningless or inoperative with respect to many sections in Part VIII of the Act

41. Interpreting legislation is not a purely academic exercise. The meaning given to legislation has real effects. The judicial body considering the wording must perform a consequential analysis to avoid an interpretation that would result in absurdity, including an interpretation that would defeat Parliament's intentions. The only way to do this is to consider what the practical result of the interpretation would be.

42. The key propositions employed in consequential analysis are summarized by Sullivan:[43]

> The modern understanding of the 'golden rule' or the presumption against absurdity includes the following propositions.
>
> (1) It is presumed that the legislature does not intend its legislation to have absurd consequences.
>
> (2) Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.
>
> (3) Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.
>
> (4) The more compelling the absurdity, the greater the departure from ordinary meaning that is tolerated.

[43] *Ibid* at 300-01, Kobo's BOA, Tab 5.

43. The importance of consequential analysis in this case is evident when the interpretation advanced by the Commissioner is considered. The "bare comparative approach" leads to absurd results, illustrated by applying it to the provisions of Part VIII. For example:

(a) **Section 90.1(1)(a)**:[44] The terms of a prohibition order must be tied directly to the terms of the alleged agreement or arrangement between competitors. Without the ability to examine what the alleged arrangement contemplated, the Tribunal's review of whether the prohibitionary terms of the order are directed toward activity that was contemplated by the arrangement or agreement is frustrated.

(b) **Section 90.1(1)(b)**: The Tribunal can require a party to take <u>any</u> other action, so long as that party consents. Without the ability to consider whether it has threshold jurisdiction to make an order at all, there would be nothing for the Tribunal to review on a s. 106(2) application.

(c) **Section 77**:[45] Similar to s. 90.1(1)(b), the Tribunal can make <u>any</u> order it sees fit to overcome the effects of exclusive dealing or tied selling, and to restore or stimulate competition in the market. Without the ability to consider the alleged wrongdoing or the effects thereof, the terms of such a consent agreement would be immune from s. 106(2) review, since s. 77 says that <u>any</u> order can be made.

(d) **Section 79**:[46] The Tribunal can include in an order "such terms as will in its opinion interfere with the rights of any person to whom the order is directed <u>or any other person affected by it only to the extent necessary to achieve the *purpose of the order*</u>".[47] Without the ability to probe into the purpose of the order and available means to achieve it, the Tribunal would

[44] Act, *supra* note 1, s 90.1(1)(a). See reproduction of provision at Schedule A.
[45] *Ibid*, s 77(2).
[46] *Ibid*, s 79(1).
[47] *Ibid*, s 79(3).

be frustrated in ensuring that the consent agreement only goes as far as necessary to achieve the purpose of the order.

(e) **Section 81**: Section 81(2) states that "[n]o order shall be made…where the Tribunal finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality".[48] Without the ability to probe in to the supplier's capacity, the Tribunal could never test if it would have jurisdiction to make an order.

44. For s. 106(2) to have any meaning, the Tribunal must be allowed to consider the facts. Without that, it cannot determine if it would have had jurisdiction to make an order, or whether it would have been precluded from doing so because, for example, the party or conduct fell within an exception or the Act was not violated at all.

45. An interpretation that permits the applicability of s. 106(2) to all of Part VIII is also required by the presumption of coherence. As Sullivan explains:[49]

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

46. The examples above demonstrate that the bare comparative approach is incoherent. Such an interpretation is therefore incorrect.

(3)

Other Interpretive Issues with the Commissioner's Approach

Reference to Language in Other Provisions

47. The Commissioner makes four comparisons between the language of s. 106(2) and language used in other provisions to purportedly show that the wording of

[48] *Ibid*, s 81(2).

[49] Sullivan, *supra* note 8 at 223, 325, Kobo's BOA, Tab 5.

s. 106(2) shows that Parliament intended a narrow scope of application.[50] However, these comparisons ignore the varying purposes of the sections, and the necessity of using different language to achieve those purposes. The fact that different language was used to reflect these different purposes is not surprising and cannot be interpreted to read down the scope of review permitted by s. 106(2).

48. In particular, the Commissioner highlights the language in s. 105(2) mandating the terms be ones that "could be the subject of an order of the Tribunal against that person", noting that this calls for factual specificity. He then tries to divorce s. 106(2) from that factual inquiry by pointing out that its language differs. The Commissioner's position is that the very section enacted to review the automatically registered consent agreement does not permit the Tribunal to consider whether it accords with s. 105(2). Instead, he argues that the question is whether the terms are ones the Tribunal could hypothetically order against anyone in any circumstances. That cannot be right. The reason the words "against that person" were not included in s. 106(2) is because it was unnecessary to do so, since the applicant under s. 106(2) is a stranger to the agreement. Section 106(1) is the section dealing with the rights of the person referred to in s. 105(2). Adding "against that person" to s. 106(2) would have made the section unnecessarily confusing.

49. At the same time that he argues for reading down the language of s. 106(2), the Commissioner seeks to read into the section an obligation to review whether the terms of the order are "so vague or ambiguous as to be unenforceable or that would lead to no 'enforceable obligation'".[51] The Commissioner draws support for this from cases that pre-date the shift from consent order to consent agreement.

50. As stated above, under the prior process, the focus was on the *effectiveness* of the proposed settlement. Under that process, it made sense for the Tribunal to ensure that the consent agreement was not so vague as to be unenforceable (and therefore ineffective). Under the current process, which focuses on

[50] Comparing ss. 106(1)(a), 105(2), 106.1, and the now-repealed 104.1(7). See Commissioner's MOA at paras 56-83.

[51] Commissioner's MOA at para 12.

the basis of the remedy rather than its effectiveness, the criteria proposed by the Commissioner is—though laudable—not part of the s. 106(2) test. There is nothing in the wording of the section or in the Debates that indicates this is the test that Parliament intended when it enacted s. 106(2). The Commissioner's proposed reading in of these criteria reflects a dated view of the settlement process.

Private Access

51. The Commissioner asserts that anything other than the bare comparative approach would be inconsistent with the enactment of the private access provisions of the Act and would permit third parties "to do through the back door (subsection 106(2)) what they are precluded from doing through the front".[52] This argument ignores the starkly different purposes of the provisions.

52. The private access regime was put into place so that, if the Commissioner chooses not to pursue a matter, a private applicant can. It is someone who is directly affected by the **anti-competitive conduct** who has the ability **to seek a remedy**. The then-Commissioner explained this purpose at the time of the enactment:[53]

> We don't bring many [civil] cases. It's a difficult area of law, especially given our limited resources. Also, as is normal for a state agency, we focus on issues of great magnitude that have an economic impact on the whole country or a whole region, etc. The areas that are targeted here [with private access], such as refusal to deal, tied selling, etc., are essentially issues between two companies, usually a supplier and a distributor, and they are essentially private in nature. Very rarely do they have sufficient economic impact or involve sufficient complicated legal issues that we will take them forward. We resolve a lot of them through what we call alternative case resolution. But some companies undoubtedly feel we don't do enough. I can't see any reason why we would not give those parties the ability to try on their own, with their own means, to convince the tribunal to get an order.

53. In contrast, s. 106(2) allows a person directly affected by a **settlement** reached by the Commissioner to apply to have **the remedy rescinded or varied**. The applicant is not the same "person" as the private access applicant, and seeks to achieve

[52] Commissioner's MOA at paras 84-91.

[53] *Debates*, *supra* note 4, No 37 (4 October 2001) at 0925 (Konrad von Finckenstein), Kobo's BOA, Tab 3A.

an entirely different purpose: to rescind or vary a consent agreement that is affecting it, not to obtain a remedy for anti-competitive conduct affecting it. The Commissioner is incorrect to suggest that a person could, on Kobo's interpretation, obtain through the "back door" relief akin to that available under the private access provisions.

54. While the Commissioner's argument regarding s. 103.1(4) might be a concern in very particular circumstances if an interpretation permitting review of effectiveness were adopted, it is not of any moment if Kobo's interpretation is adopted.[54] It is true that the private access provisions are unavailable in the circumstances of a settled or ongoing case. This is to avoid double jeopardy.[55] There is no such risk in the case of a directly affected third party seeking to vary or rescind an agreement.

(4)

Conclusion regarding the Commissioner's Approach

55. The "bare comparative approach" advanced by the Commissioner cannot be correct in view of the principles of statutory interpretation.

56. It ignores the plain wording of the statute, which contemplates "establish[ing]" that the terms could not be the "subject of" an order. This connotes an inquiry beyond checking whether the remedial term is of a type permitted by the Act.

57. It is inconsistent with the legislative purpose of instituting a meaningful check on the consent agreement process that was called for by critics, and which its introduction was intended to address.

58. It is logically inconsistent with the requirement under the very same legislative provision that the party seeking to initiate such a review must first meet the high threshold of demonstrating it is "directly affected".

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[54] See Commissioner's MOA at para 89.

[55] *Debates*, supra note 4, No 60 (4 December 2001) at 1555 (Konrad von Finckenstein), Kobo's BOA, Tab 3F.

59. It creates internal incoherence within the Act and leads to the absurd result of rendering s. 106(2) effectively inapplicable to many of the provisions of Part VIII, the very Part it is meant to safeguard.

60. As Sullivan elucidates, an interpretation that suffers from all of these shortcomings must be rejected. Parliament itself has mandated, "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objectives."[56] The bare comparative approach does not achieve that end. We turn now to the proper interpretation.

(B)

THE RIGHT INTERPRETATION INVOLVES SOME PROBING OF FACTS AND WEIGHING OF EVIDENCE

61. The purpose of the shift to consent agreements from consent orders was to streamline the settlement process and make it faster and more predictable. Parliament intended to, and did, streamline the process. However, it did so not by eliminating any factual review of consent agreements, as the Commissioner suggests, but by shifting the focus of the inquiry from effectiveness to jurisdiction.

62. That shift was not intended to go from one extreme—open season for all intervenors—to the other—open season for the Commissioner to take action even in circumstances in which he is precluded from doing so by the Act. Rather, Parliament struck a balance.

63. That balance is encapsulated in s. 106(2), which allows for a meaningful check without throwing the entire consent agreement process into disarray. Parliament curtailed the previous "free for all" of the consent order process in four ways.

64. **First**, it implemented a high threshold for standing under s. 106(2) to limit the number of times it would have to engage in these.

[56] *Interpretation Act*, RSC 1985, c I-21, s 12.

65. **Second**, it placed the onus on the third party to make it more challenging for third parties to alter settlements.

66. **Third**, it provided for automatic registration of the consent agreement without the need for the Commissioner to file supporting evidence,[57] and allowed only 60 days for any directly affected party to bring an application challenging the agreement.[58] This allowed for greater certainty as to timing for settling parties.

67. **Fourth**, it changed the focus of the examination conducted under s. 106(2) from the effectiveness of the remedy to the basis for a remedy. This greatly simplifies the inquiry to be engaged in by the Tribunal, since it should, in most cases, obviate the need for a full-scale battle of experts that one would see in a contested case. Moreover, it limits the factual inquiry to one that can satisfy the Tribunal that the terms could be the subject of an order, rather than the terms being the most effective form of order.

68. Parliament has achieved the right balance, with the result that there have been very few challenges to consent agreements. Indeed, Kobo's is only the second in a dozen years. The Commissioner seeks to avoid even these few challenges through an impermissibly narrow reading of the section.

69. The consent agreement process was never intended to permit the Commissioner to enter into a consent agreement without examining whether sufficient basis for one existed. The then-Commissioner explained:

> What you want to have here is control. If there's something that's being done that is really outside the purview of the Competition Tribunal, *then it shouldn't be done by consent decree either, because the whole idea is to substitute a consent decree for a full trial*. But the outcome should be something that could have been ordered by the Tribunal.[59]

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[57] *Burns Lake*, *supra* note 6 at paras 78, 81(iii), Kobo's BOA, Tab 4.

[58] Act, *supra* note 1, s 106(2).

[59] *Debates*, *supra* note 4, No 50 (7 November 2001) at 1720 (Konrad von Finckenstein) [emphasis added], Kobo's BOA, Tab 3D.

70. This explanation contemplates a review of not only the remedial terms, but the *basis* for them, as the "whole idea" is that a consent agreement should be entered into if it could not have been arrived at through a trial—which must include a consideration of jurisdiction. There was never any intention that the Commissioner's basis for entering into the consent agreement would be untested. Commissioner von Finckenstein's comments at the time indicate just the opposite.

71. Unlike the bare comparative approach, Kobo's interpretation, whereby the Tribunal engages in a review of the basis for the consent agreement, gives effect to the intention of Parliament—which is one of the tenets of statutory interpretation.

(C)

THE COMMISSIONER'S OBJECTIONS TO KOBO'S PROPOSED INTERPRETATION

72. The Commissioner asserts that the interpretation advanced by Kobo would lead to three results that would frustrate the purpose of the Act:[60]

(a) add cost and engender delay to the resolution of competitive concerns, limiting the number of matters to which the Commissioner could respond, which in turn would allow competitive problems to persist;

(b) create uncertainty in respect of competition issues, which, along with the absence of finality, would have a chilling effect on parties' willingness to enter into consent agreements; and

(c) more cases would be settled by way of undertakings than consent agreements, compromising the Commissioner's ability to enforce such settlements.

73. Although the Commissioner does not characterize them as such, these are all examples of consequential analysis. The Commissioner's difficulty—and why the Tribunal should pay these arguments no heed—is that he has adduced **no** evidence in support of any of them.

[60] Commissioner's MOA at para 27.

74. The Commissioner makes very broad and sweeping statements here, which he is uniquely able to support with evidence but for which he has opted not to file any. Without evidence of the purported scope of the costs and length of delays, for example, there is no basis for saying that the section's purpose would be frustrated. Absent any evidence as to how many cases, if any, the Commissioner would have to forego, it is simply a bald assertion. Such speculation should be ignored.

75. Similarly, there is no evidence that Kobo's interpretation would lead to a "chill" on settlements,[61] nor anything to suggest such a result. For example, the Commissioner could have filed an affidavit stating that he would not have entered into the Consent Agreement had Kobo's interpretation been understood to be the right one, or he could have sought to examine the Settling Publishers to achieve the same end. He has done neither. Again, the Commissioner cannot make broad, unsubstantiated predictions about a "chill" without putting forth cogent evidence and allowing Kobo to test that evidence. Otherwise, it is pure speculation.

76. The same point applies to the idea that Kobo's interpretation will lead to more undertakings and fewer consent agreements. The Commissioner has put forward no evidence as to what sort of cases in the future (or which cases in the past) would result in undertakings. It has always remained the case that the Commissioner has the discretion to resolve cases by entering into undertakings. He actively does so at present.[62] The Commissioner advances no evidence to substantiate why, if he stays within the bounds of the Act, there is any reason he cannot continue to use the consent agreement process to resolve violations of the Act. By staying within the bounds of the Act, the Commissioner would also avoid inviting challenges like Kobo's.

[61] Commissioner's MOA at para 276.

[62] See eg Competition Bureau, Announcement, "Competition Bureau Issues a 'No Action Letter' to TELUS" (29 November 2013) online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03634.html>; Competition Bureau, Announcement, "GardaWorld provides Competition Bureau with commitment in Quebec" (13 March 2014) online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03694.html>, Kobo's BOA, Tab 12.

77. Even if the Tribunal ignores the evidentiary vacancy of the Commissioner's criticisms, the Commissioner's criticisms also are logically flawed and based on faulty assumptions.

78. First, they assume that a stay will be granted in every s. 106(2) application. This is not the case. A s. 106(2) application does not itself suspend the implementation of the consent agreement. Instead, s. 105 provides that the consent agreement has the same effect as an order upon its registration, and allows for immediate registration. That is the status quo. It is only interrupted if a directly affected party files an application, moves for a stay, and meets the high threshold for obtaining a stay. As the course of the past 12 years has borne out, such circumstances are rare.

79. Second, it assumes that the Commissioner will be at the mercy of third parties indiscriminately bringing applications. Any s. 106(2) application requires the applicant to establish it is a "directly affected person", which is a substantial threshold that limits possible challenges. The cost associated with bringing a challenge also functions to limit the number of challenges to only the most serious ones, like Kobo's.

80. It is rare that a third party expends the substantial resources required to mount a challenge under s. 106(2). Although an expensive proposition for a third party, the existence of s. 106(2) is nonetheless vital, especially in cases like this, where the financial harm brought on by the consent agreement will not be suffered by the consenting parties, but rather by a party that has never been alleged to have acted in violation of the Act. The prospect of a meaningful review may—and should—give the Commissioner pause to ensure that his powers under s. 105 are only exercised where they are warranted.

81. While there is a presumption that the Commissioner acts in the public interest, as the Parliamentary Debates indicate, the Commissioner is not infallible. Where the Commissioner's actions are challenged, a meaningful review must take place. This benefits the public interest, fosters confidence in the Commissioner's activities, and promotes the overall ends of the Act. The bare comparative approach achieves none of these ends.

PART 5 - ORDER REQUESTED

82. Kobo requests that the Tribunal determine, pursuant to s. 124.1(2) of the Act, that the Tribunal's jurisdiction under s. 106(2) of the Act permits the Tribunal to engage in the consideration of evidence and facts related to the provision of Part VIII at issue, its alleged violation, and the consent agreement. Alternatively, Kobo requests that the Tribunal determine that the interpretation of s. 106(2) is a question best resolved in the course of Kobo's application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 10, 2014

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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 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:

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 ARGUMENT OF KOBO INC.
(Commissioner's Reference)

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