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 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 HOLDINGS CO.

Respondents

REPLY OF THE COMMISSIONER OF COMPETITION
(Reference re subsection 106(2) of the Competition Act)

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I. OVERVIEW

1. Prior to 2002, under the consent order process, the Competition Tribunal (the "**Tribunal**") had a limited jurisdiction to determine whether a draft consent order would be effective in addressing the competition concerns identified by the Commissioner of Competition (the "**Commissioner**"). Even with the Tribunal having that limited jurisdiction, the consent order process was too slow, costly and uncertain, in large measure because of the active role played by third party intervenors.

2. In 2002, the consent order process was replaced with a consent agreement process, which allows agreements to be filed with the Tribunal for immediate registration and provides a right for directly affected third parties to seek a limited review of those agreements.

3. Kobo Inc. ("**Kobo**") asserts that s. 106(2) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, (the "**Act**"), provides the Tribunal with jurisdiction to engage in a broad, fact-based review of any or all aspects of a matter so as to be able to decide: first, whether it would lack "threshold jurisdiction" to issue *any* order in connection with that matter; and second, whether it would lack "remedial jurisdiction" to make an order on the terms set out in the consent agreement.

4. Kobo's interpretation of s. 106(2) of the Act is wrong. Kobo misapprehends the legislative history of s. 106(2), the plain meaning of s. 106(2) and the purpose and scheme of the Act.

5. Kobo's interpretation would defeat Parliament's purpose in creating the consent agreement regime by broadening the Tribunal's jurisdiction well beyond the bounds of the consent order process, and paving the way for an even slower, costlier and less certain process.

6. The Tribunal's inquiry under s. 106(2) is to determine whether the terms set out in a consent agreement are terms that could be contained in an order issued by the Tribunal, or whether the terms are so vague or ambiguous as to be unenforceable or that would lead to "no enforceable obligation." This inquiry does not involve the Tribunal making findings of fact or mixed fact and law on the merits of the case.

7. With s. 106(2), Parliament has struck a balance between the public interest in having an efficient and effective mechanism to address competition concerns and the right of directly affected third parties to seek rescission or variation of consent agreements. That balance ensures that the Commissioner has the ability to resolve matters in a timely way, while ensuring that he cannot include terms in consent agreements which the Act would not allow the Tribunal to impose.

II. SUBMISSIONS

A. Kobo's Interpretation of Subsection 106(2) is Fundamentally Flawed

8. In its Memorandum, Kobo does not clearly articulate its position regarding the scope of the Tribunal's jurisdiction under s. 106(2) of the Act. Instead, Kobo variously asserts that s. 106(2):

    a. 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";[1] and

    b. requires the Tribunal to determine whether it "would have had the jurisdiction to grant the relief in the first place" or to "determine whether the terms could be the subject of an order at all."[2]

9. Kobo likens a review under s. 106(2) to an appeal in respect of a court order. It states:

> 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 [sic] 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.[3]

10. Kobo states that "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."[4]

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[1] Memorandum of Argument of Kobo Inc. (Commissioner's Reference) ["**Kobo's Memorandum**"], at para. 4.
[2] *Ibid*, at paras. 31 and 33.
[3] *Ibid*, at para. 33.
[4] *Ibid*, at para. 35.

11. With respect to remedy, Kobo asserts that s. 106(2) requires the Tribunal to "review ... not only the remedial terms, but the *basis* for them, as the 'whole idea' is that a consent agreement should [not] be entered into if it could not have been arrived at through a trial—which must include a consideration of jurisdiction."[5]

12. From the foregoing, the Commissioner understands that it is Kobo's position that s. 106(2) provides the Tribunal with jurisdiction to engage in a broad, fact-based review of any or all aspects of a matter so as to be able to decide: first, whether it would lack "threshold jurisdiction"[6] to issue *any* order in connection with that matter; and, second, whether it would lack "remedial jurisdiction"[7] to make an order on the terms set out in the consent agreement.

13. Kobo maintains that the Tribunal's determinations of both threshold jurisdiction and remedial jurisdiction in any given s. 106(2) application are inextricably linked to the facts of the particular case and that the Tribunal must be able to "look behind" the consent agreement to examine the facts that underpin the agreement in considering a s. 106(2) application.[8]

14. Kobo's interpretation would open every consent agreement to the possibility of a full *de novo* review. This is at odds with Parliament's intention to create a more streamlined, less costly and more certain consent process. For the reasons set out in the Commissioner's Reference Memorandum of Fact and Law ("**Commissioner's Reference Memorandum**"), Kobo's interpretation is also at odds with the purpose and scheme of the Act, as well as the plain meaning of s. 106(2).

15. More importantly, Kobo's interpretation would defeat Parliament's aim of creating a certain and efficient consent agreement regime, by broadening the Tribunal's jurisdiction well beyond its previous bounds and paving the way for a slower, costlier and less certain process than existed under the former consent order regime.

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[5] *Ibid*, at para. 70.

[6] Kobo's Notice of Application (Section 106(2) Application), CT-2014-02 ["**Kobo's Notice of Application**"], at para. 36(c). For ease of reference, paragraph 36 of Kobo's Notice of Application is set out in **Appendix A** of this Memorandum.

[7] *Ibid*, at para. 36(d).

[8] Kobo's Memorandum, *supra* note 1, at para. 5; Memorandum of Argument of Kobo Inc. (Motion to Strike Notice of Reference), [**"Kobo's Motion to Strike Memorandum"],** at para. 29.

(i) Subsection 106(2) does not provide the Tribunal with the power to conduct a de novo review to determine whether it lacks "threshold jurisdiction"

16. The substantive provisions in Part VIII of the Act (eg., sections 79, 90.1, and 92) provide the Tribunal with the jurisdiction to make certain orders, provided it has made certain findings. In any given case, if the Tribunal does not make the requisite findings, it lacks the power to make any order.

17. For example, s. 79 of the Act provides that where the Tribunal makes the "findings" contemplated by paragraphs 79(1)(a), (b) and (c), it may make certain orders under that section. Each of paragraphs 79(1)(a), (b) and (c) requires a separate analysis and findings, each of which normally requires an extensive factual record and expert evidence.[9]

18. Under s. 79(1)(a), the Tribunal must determine whether one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business. In making that determination, the Tribunal examines product market, geographic market and market power, each of which typically requires consideration of a host of issues. Under s. 79(1)(b), the Tribunal must determine whether the "person or persons" in issue have engaged in or are engaging in a practice of anti-competitive acts. In determining whether that test is met, the Tribunal must examine a number of issues.[10] Finally, under s. 79(1)(c), the Tribunal must determine whether the practice of anti-competitive acts has had, is having or is likely to have the effect of preventing or lessening competition substantially a market. Again, this is a heavily fact-based determination, which often involves competing expert evidence on a range of issues.

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[9] For example, in *Canada (Commissioner of Competition) v. Visa Canada Corp.*, [2013] C.C.T.D. No. 10, between them, the parties called 10 experts, whose evidence with respect to, among other things, industrial organization and antitrust economics as applied to payments systems, survey methods and the principles governing the design and management of survey research, competition policy and economics, and the payments industry and payment systems, was heard in the course of a 24-day hearing.

[10] See, for example, *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 at paras. 66-69 , Commissioner's Supplementary BOA Tab 1; and *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2014 FCA 29 at paras 13-23, Commissioner's Supplementary BOA Tab 2.

19. Absent the required findings of fact and mixed fact and law under each of paragraphs 79(1)(a), (b) and (c), the Tribunal is without jurisdiction to make any order under that section. In Kobo's words, it would lack *threshold jurisdiction*. As the Tribunal noted at page 51 of its Reasons in *Canada (The Director of Investigation and Research) v. The D & B Companies of Canada Ltd.*:

> Having made the findings set out above under paragraphs (a), (b) and (c) of subsection 79(1), the Tribunal is authorised by the closing words of that subsection to make an order prohibiting the respondent from engaging in the practice found to be a practice of anti-competitive acts.[11]

20. Similarly, before the Tribunal can make an order under sections 75, 76, 77, 81, 82, 83, 84, 90.1 or 92, it must make the requisite findings of mixed fact and law, based on the facts of the particular matter, after having afforded the parties involved a fair proceeding.

21. Kobo's construction of s. 106(2) would open the door for a directly affected third party to raise any or all issues that would be in play in a fully contested matter under the relevant substantive provision. For example, in respect of a consent agreement in an abuse of dominance matter, a directly affected third party could assert that the facts did not support the findings under any or all of paragraphs 79(1)(a), (b) and (c). In particular, a directly affected third party could lead evidence and argue that the facts do not support a finding of substantial or complete control, the existence of a practice of anti-competitive acts and/or a substantial lessening or prevention of competition.

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[11] *Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd.*, [1995] C.C.T.D. No. 20), ["***D & B***"], at p. 51, Commissioner's Supplementary BOA Tab 3.

22. Kobo's interpretation of s. 106(2), if adopted, would extend the Tribunal's jurisdiction well beyond what was provided under the previous consent order regime, thereby frustrating the Commissioner's ability to remedy anti-competitive conduct through consensual resolutions in the form of consent agreements. Kobo's approach would undercut the very purpose for which settlements are made, which is to resolve competition concerns expeditiously and avoid the cost, delay and uncertainty that trials necessarily bring. It would also make every consent agreement subject to broad-based challenge and undermine Parliament's goal of creating a more expeditious, more certain and less costly process for the resolution of competition issues.

23. For these reasons, Kobo's interpretation should be rejected.

(ii) Subsection 106(2) does not provide the Tribunal with the power to review the consent agreement to determine whether it lacks "remedial jurisdiction"

24. In competition law, remedies are not binary or "one size fits all." Rather, remedies are tailored to the particular circumstances of the matter in question. For example, with respect to the merger provisions, the object of any remedy is to "restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."[12] In a contested abuse of dominance case, the Tribunal framed the issue as follows:

> The Tribunal is aware that its orders pursuant to subsections 79(1) and 79(2) must only go as far as it considers necessary in order to restore competition in the relevant markets. It agrees with counsel for Laidlaw's argument that it is not part of the Tribunal's function to impose penalties or punitive measures. What is necessary to restore competition is a judgment which must be made by reference to the evidence which has been put before the Tribunal as to how the markets in question operate and have operated and the effects the anti-competitive acts are having thereon. The Tribunal has taken these considerations into account in deciding which of the orders requested by the Director it is prepared to grant.[13]

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[12] *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para 85. Commissioner's Supplementary BOA Tab 4.

[13] *Canada (Director of Investigation and Research, Competition Act) v. Laidlaw Waste Systems Ltd.*, [1992] C.C.T.D. No. 1, ["***Laidlaw***"] at p. 53, Commissioner's Supplementary BOA Tab 5.

25. Having regard to the decisions of *Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc.*,[14] *Laidlaw*[15] and *D & B*[16] and, in particular, the remedy discussions in those contested cases, it is readily apparent that the Tribunal appropriately drew on the extensive record before it in deciding the terms of the respective orders.

26. Recall that under the consent *order* process, the Tribunal's role was limited to reviewing draft consent orders with a view to determining whether or not the terms of those orders would likely eliminate the substantial lessening or prevention of competition which was presumed to arise in the circumstances.[17] The Tribunal has described its role under that process as follows:

> At the same time, the legislation sends a very clear message to the tribunal that it is not anticipated that the tribunal should take a detailed role in the crafting of consent orders.
>
> ...
>
> The tribunal accepts the Director's argument that the role of the tribunal is not to ask whether the consent order is the optimum solution to the anti-competitive effects which it is assumed would arise as a result to the merger. The tribunal agrees that its role is to determine whether the consent order meets a minimum test. That test is whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated.[18]

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[14] *Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* [1997] C.C.T.D. No. 8, Commissioner's Supplementary BOA Tab 6.

[15] *Supra* note 13, Commissioner's Supplementary BOA Tab 5.

[16] *Supra* note 11, Commissioner's Supplementary BOA Tab 3.

[17] *Canada (Commissioner of Competition) v. Trilogy Retail Enterprises L.P.*, 2001 Comp. Trib. 29, [***"Trilogy"***] at para. 20, Commissioner's Supplementary BOA Tab 7, citing *Director of Investigation and Research v. Imperial Oil Limited (26 January 1990),* CT8903/390, Reasons and Decision at 14, [1990] C.C.T.D. No. 1 (QL) (Comp. Trib.).

[18] *Trilogy, supra* note 17, at para. 21, Commissioner's Supplementary BOA Tab 7, citing the Tribunal's decision in *Director of Investigation and Research v. Air Canada* (1989), 27 C.P.R. (3d) 476 at 512-513, [1989] C.C.T.D. No. 29 (QL) (Comp. Trib.)

27. Though the precise boundaries of the Tribunal's jurisdiction under Kobo's "remedial jurisdiction" concept are difficult to delineate, "remedial jurisdiction" would, at a minimum, provide the Tribunal with a broad, fact-based review power to consider the "basis for the remedy"; the "effects that gave rise to the need for a consent agreement" [19]; and, the "purpose of the order and the extent of terms necessary to achieve the order's purpose."[20]

28. In its Memorandum, Kobo states that s. 106(2) allows the Tribunal to consider the basis for a remedy, not its effectiveness, which will "in most cases, obviate the need for a full-scale battle of experts that one would see in a contested case."[21] Though Kobo's assertion regarding the need for a full-scale battle of experts being obviated is unsupported by evidence and highly speculative, it illustrates that under Kobo's remedial jurisdiction construct, such a battle is a possibility in *every* s. 106(2) case and, more importantly, that the Tribunal's jurisdiction under s. 106(2) is sufficiently broad to allow for that possibility.

29. Kobo's interpretation again would frustrate the Commissioner's ability to remedy anti-competitive conduct through settlements by way of consent agreement by undercutting the purpose for which settlements are made, which, as noted above, is to resolve competition issues expeditiously and avoid the cost, delay and uncertainty associated with trials. It would also subject all consent agreements to the possibility of a broad-based challenge and undermine Parliament's goal in amending the consent resolution process under the Act.

30. For these reasons, Kobo's interpretation should be rejected.

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[19] Kobo's Motion to Strike Memorandum, *supra* note 8, at para. 32.
[20] *Ibid.* at para. 34.
[21] Kobo's Memorandum, *supra* note 1, at para. 67.

(iii) Additional Problems with Kobo's Interpretation

31. In addition to the foregoing, Kobo' interpretation of s. 106(2) raises two further problems.

32. *First*, Kobo's construction assumes that when the Commissioner enters into a consent agreement, the Commissioner will have such documents and information as would be necessary for him to pursue the matter subject to the consent agreement on a fully contested basis. The natural consequence of Kobo's interpretation would be for the Commissioner to prolong and intensify his investigation or inquiry, even in the face of parties that may wish to resolve a matter by way of consent agreement, to ensure that he is litigation-ready and able to defend against a possible third party challenge under s. 106(2) or else be faced with the prospect of trying to complete his inquiry while defending a fully contested application.

33. The tension between resolving matters expeditiously and with certainty, and prolonging inquiries to ensure that the Commissioner is able to defend a s. 106(2) application will be particularly acute in the merger context, where timing is often critical. In this context, the Bureau encourages parties to adopt a "fix it first" approach as a means of resolving competitive concerns in an expeditious manner.[22]

34. This result is at odds with the goals of Parliament in creating the consent agreement process and with the notion that in administering and enforcing the Act, the Commissioner must be able to resolve competition concerns he has identified in an effective, efficient and timely manner.

35. *Second*, Kobo's interpretation of s. 106(2) of the Act, insofar as it relates to remedial jurisdiction, would result in a curious anomaly. A number of provisions in Part VIII of the Act provide that the Tribunal may make certain types of orders (eg., for a completed merger, dissolution and divestiture) and may also, with the consent of the person against whom the order is made, make any additional order. Kobo's interpretation would allow the Tribunal to fully review certain consent agreement terms, while leaving others subject to a narrower review.

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[22] Competition Bureau *Information Bulletin on Merger Remedies in Canada*, September 22, 2006, at paras. 28-31, Commissioner's Supplementary BOA Tab 8.

36. To illustrate the point, consider a situation where two companies complete a merger and subsequently enter into a consent agreement with the Commissioner. The agreement requires Mergeco to divest a production facility and contains a behavioural remedy requiring Mergeco to supply one of the two merging companies' customers, ABC Co, for three years with widgets at a certain price. One of ABC Co's competitors, XYZ Co, brings a s. 106(2) application alleging that it is directly affected by the behavioural remedy because it can only obtain widgets for 150% of the price that ABC Co will pay to Mergeco under the terms of the consent agreement. XYZ Co would almost certainly qualify as a directly affected third party under s. 106(2) of the Act.

37. Under Kobo's construction of s. 106(2), while the Tribunal could, if appropriate, vary or rescind the terms of the order requiring Mergeco to make a divestiture, it could do nothing in respect of the behavioural remedy term of the consent agreement, unless that term was determined to be so vague as to be unenforceable. The Tribunal would have limited jurisdiction to vary or rescind the behavioural remedy *because* it is in a consent agreement, which means that Mergeco consented to that remedy. By virtue of that consent, the Tribunal could have imposed that remedy and, therefore, could not find that that term of the consent agreement "could not be the subject of a Tribunal order".

B. Kobo Misconstrues the Legislative History of s. 106(2)

38. The legislative history of s. 106(2) makes it clear that Parliament intended to confer a narrow review jurisdiction on the Tribunal.

39. In its Memorandum, Kobo notes that prior to 2001, settlements between the Commissioner and private parties were subject to a lengthy and uncertain process that required a hearing before the Tribunal to obtain a consent order. It further notes that the consent order process engendered delays as intervenors took advantage of the process as a way to disrupt commercial deals.[23]

[23] Kobo's Memorandum, *supra* note 1, at para. 17.

40. As Kobo states, in 2001 Parliament introduced amendments to the Act to streamline the consent order process. The first draft of the Bill, Bill C-23, provided that registration of consent agreements would be automatic and that only the Commissioner and consenting parties could apply for variation or rescission (i.e., there was no role for third parties). Kobo asserts that several witnesses appearing before the House of Commons Standing Committee on Industry, Science and Technology that considered Bill C-23 (the "**Committee**") submitted that this "gap" should be addressed. Kobo then re-produces excerpts of witness testimony from the Committee proceedings and submits that, on the basis of this history, Parliament's intention in enacting s. 106(2) can be divined.

41. Kobo refers to the testimony of certain witnesses who appeared before the Committee, including to portions of the former Commissioner's testimony.[24] It then submits that the "above history shows, in enacting s. 106(2), [that] Parliament intended to implement a meaningful check on the Commissioner's discretion to settle competition cases."[25] Kobo submits that the Commissioner is wrong to say that the proposal that the consent agreement process include a "safety valve" was rejected, as no such proposal was ever tabled. More generally, Kobo says that the witnesses appearing before the Committee did not put forward amendments; rather, they expressed concerns about the initial draft bill.

42. The fact that most of the witnesses appearing before the Committee did not table draft legislation misses the point. The witnesses Kobo refers to in its submissions clearly indicated that there should be an opportunity for public review and comment before a consent agreement could become effective and for a more robust role for the Tribunal at that stage.[26]

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[24] *Ibid*, at para. 19.
[25] *Ibid*, at para. 22.
[26] See, for example, Committee Testimony of Mr. George N. Addy, October 16, 2001at 0930, Commissioner's BOA tab 14A, or Committee Testimony of Mr. Stan Wong, November 6, 2001 at 1010, Commissioner's BOA tab 14C.

43. Moreover, contrary to Kobo's submission, the Canadian Council for International Business ("CCIB") did table draft amendments to the consent agreement provision in Bill C-23. The CCIB's amendments provided that consent agreements would be filed with the Tribunal at least 30 days prior to their effective date, and could be based only on terms that could be the subject of an order of the Tribunal. Under the CCIB amendments, consent agreements would be registered 30 days after being filed, unless prior to that time the Tribunal determined that there may be grounds for not registering the agreement based on a reasonable apprehension of bias, bad faith or a conflict of interest on the part of the Commissioner, or an excess of jurisdiction. [27]

44. Only one witness appearing before the Committee, Professor Tom Ross, spoke specifically in terms of a "safety valve", though arguably the proposals put forth by the other witnesses referenced above contemplated a safety valve in one form or another. Professor Ross testified that the legislation should include a "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 of the marketplace - maybe because the commissioner's staff was overworked, or missed some important bits of information, or whatever."[28]

45. The language the Commissioner proposed for s. 105 and s. 106(2), which ultimately became law, does not capture any of the foregoing concepts. The notion of a 30-day waiting period for public comment is absent, as are the notions of the Tribunal being empowered to examine whether the consent agreement constituted an "excess of jurisdiction" or failed to reflect "the realities of the marketplace."

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[27] Committee Testimony of Mr. Mark Katz, November 6, 2001 at 1030, Commissioner's BOA Tab 14C.
[28] Committee Testimony of Professor Thomas W. Ross, October 23, 2001 at 0930, Commissioner's BOA tab 14B.

46. Also absent from the Commissioner's proposed language is any notion of the Tribunal being empowered to "look behind" the consent agreement to examine the circumstances underpinning it. The absence of any reference to "circumstances" in s. 106(2) is particularly notable given that s. 106(1)(a)(i) expressly provides that in an application under that subparagraph, the Tribunal is to make findings with respect to "the circumstances that led to the making of the agreement" and the "circumstances that exist at the time the application is made". As set out in paragraph 57 below, had Parliament wished to provide the Tribunal with jurisdiction to look behind consent agreements or examine the circumstances surrounding them, it could have easily made that plain in s. 106(2), as it did in s. 106(1)(a) of the Act.[29]

47. The foregoing is consistent with the Commissioner's testimony before the Committee. In introducing the proposed amendment to s. 105(2), then Commissioner von Finckenstein noted the concern of some witnesses that the first iteration of s. 105(2), which like s. 74.12(2) would have allowed the Commissioner to include in consent agreements "other terms", was too broad. The Commissioner indicated that the Bureau's intent was to provide a provision that would allow the Commissioner to address competition concerns in a flexible manner. However, the Commissioner proposed changing s. 105(2) by eliminating the words "and may include other terms, whether or not they could be imposed by the Tribunal." The revised subsection, which became law, provides:

> 105(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person ~~and may include other terms, whether or not they could be imposed by the Tribunal~~.

[29] *Air Canada v. Canada (Commissioner of Competition)*, [2002] FCA 121 at para. 44, Commissioner's BOA tab 25.

48. Commissioner von Finckenstein testified that in order to make that change "meaningful," the Bureau proposed that s. 106 be amended by adding what is now s. 106(2) of the Act. The Commissioner explained that this would make it possible for a third party directly affected by a consent agreement to apply to the Tribunal to vary or rescind an agreement, on the grounds that the relevant terms could not have been subject to an order by the Tribunal.[30] In other words, unlike under s. 74.12(2) of the Act, the Commissioner could not include in a consent agreement under s. 105(2) terms that the Tribunal would have no power to impose. If a consent agreement did contain such a term, a directly affected third party could, under s. 106(2), seek to have it varied or rescinded. In view of the inclusion of the words "and may include other terms, whether or not they could be imposed by the Tribunal" in s. 74.12(2), third parties do not have that same ability in respect of consent agreements under Part VII.1 of the Act.

49. The Commissioner's proposal for amending s. 105(2) and s. 106(2) was narrow and targeted. It addressed the concern expressed by some witnesses that the Commissioner ought not to have the ability, as under s. 74.12 of the Act, to enter into consent agreements which include terms that the Tribunal would not have the power to impose.[31]

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[30] Committee Testimony of Commissioner Konrad von Finckenstein, November 7, 2001 at 1630, Commissioner's BOA tab 14D.

[31] See, for example, Committee Testimony of Mr. Tim Kennish, October 23, 2001 at 0920, Commissioner's BOA tab 14B; and Committee Testimony of Mr. Stan Wong, November 6, 2001 at 1010, Commissioner's BOA tab 14C.

50. The wording of the first iteration of s. 105(2) was identical to the wording of s. 74.12(2) of the Act, which governs consent agreements under Part VII.1 of the Act.[32] Pursuant to s. 74.12(2), the Commissioner can enter into consent agreements that include terms the Tribunal could order (cease and desist, administrative monetary, etc.), as well as "other terms" the Tribunal could not order. Examples of such terms have been to cancel all franchise agreements with of in respect of an alleged rust prevention device,[33] create a compliance program,[34] notify the public about the dangers of exposure to tanning lights[35] or, before the Act provided for it, pay restitution to consumers who had been duped by a false or misleading representation.[36]

51. The legislative history of s. 106(2) makes it clear that Parliament intended to confer a narrow jurisdiction on the Tribunal, limited to determining whether the terms set out in a consent agreement are terms that could be contained in an order issued by the Tribunal, or whether the terms are so vague or ambiguous as to be unenforceable or that would lead to "no enforceable obligation". This inquiry does not involve the Tribunal making findings of fact or mixed fact and law that the Tribunal would make in a contested proceeding.

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[32] Subsection 74.12(2) provides that, "[t]he consent agreement shall be based on terms that could be the subject of an order of a court against that person, and may include other terms, whether or not they could be imposed by the court."

[33] *Commissioner of Competition v. Professional Consultants (Electroprotections) Inc. - Gestion Professionnelle (Électroprotections) Inc.*, CT-2000-003, Consent Agreement filed with the Tribunal on September 12, 2000, at para. 3, Commissioner's Supplementary BOA Tab 9.

[34] *The Commissioner of Competition v. Grafton-Fraser Inc. and Glenn A. Stonehouse*, CT-2006-007, Consent Agreement filed with the Tribunal on February 27, 2006, at paras. 9-12, Commissioner's Supplementary BOA Tab 10.

[35] *The Commissioner of Competition v. Fabutan Corporation and Douglas Scott McNabb,* CT-2005-003, Consent Agreement filed with the Tribunal on February 27, 2006, at para. 4A, Commissioner's Supplementary BOA Tab 11.

[36] *The Commissioner of Competition v. Performance Marketing Ltd., Kevin Atkinson and Duane Gartman*, Consent Agreement filed with the Tribunal on December 13, 2004, at paras. 9-10, Commissioner's Supplementary BOA Tab 12.

C. Purpose of the Act

52. Paragraphs 16 through 27 of the Commissioner's Reference Memorandum address the interpretation of s. 106(2) in light of the purpose of the Act, as set out in s. 1.1 of the Act. Kobo does not address s. 1.1 of the Act in its Memorandum. Kobo's primary response to the Commissioner's "purpose of the Act" submissions is to allege that the Commissioner has adduced no evidence to support his position that certain negative consequences would likely result if Kobo's interpretation of s. 106(2) were to be adopted.

53. However, in this case, the Tribunal has the benefit of a natural experiment in the form of the former consent order process. While the Commissioner acknowledges that there are differences between the former consent order process and the consent agreement process as Kobo envisions it, certain key elements are the same. First and foremost, the same commercial incentives that drove third parties to intervene in Tribunal consent order proceedings will remain under the consent agreement process. Second, the test for a s. 106(2) applicant to gain standing to pursue an application is the same as it was for a third party to obtain intervenor status under the consent *order* process.

54. If anything, Kobo's threshold/remedial jurisdiction construction of s. 106(2), which would afford s. 106(2) applicants broad scope to challenge consent agreements on a wide range of grounds, creates a greater risk that third party involvement in consent proceedings will cause delays, and increase costs and uncertainty, than was the case under the consent order process.

D. Scheme of the Act

55. Paragraphs 55 through 91 of the Commissioner's Reference Memorandum address the interpretation of s. 106(2) in light of the scheme of the Act. The Commissioner first addresses the scheme of the consent agreement process as embodied by sections 105 and 106, and then references other provisions in the Act where Parliament has made it clear that it wished to confer a broad, fact-based review power on the Tribunal.

(i) Sections 105 and 106

(a) circumstances that led to the making of the agreement

56. In his Reference Memorandum, the Commissioner notes that s. 106(1)(a) provides that the Tribunal may rescind or vary a consent agreement on application by the Commissioner or the person who consented to the agreement if it finds that:

> *the circumstances that led to the making of the agreement* ... have changed and, *in the circumstances that exist at the time the application is made*, the agreement ... would not have been made or would have been ineffective in achieving its intended purpose. [emphasis added]

57. The Commissioner submitted that the wording of s. 106(1)(a) makes it clear that Parliament intended that the Tribunal should, in a review under paragraph (a), examine the facts relating to a consent agreement. That is not the case under s. 106(2) of the Act. Had Parliament wished the Tribunal to "go behind" the consent agreement to look at the underlying facts, as Kobo alleges, it could have so indicated. Given the proximity between the two provisions and the fact that they relate to the same thing (the review of consent agreements), Parliament's decision not to mention facts has to be given some meaning.

58. As Kobo has not addressed this point in its Memorandum, the Commissioner is at this stage without the ability to reply.

(b) against that person

59. The Commissioner's Reference Memorandum notes the difference between the wording of s. 105(2) (the provisions which govern what terms can be included in consent agreements entered into by the Commissioner) and s. 106(2).[37] The Commissioner submitted that the words "against that person" in s. 105(2) indicate some degree of factual specificity as it relates to the person with whom the Commissioner enters a particular consent agreement.

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[37] s. 105(2) states: "The consent agreement shall be based on terms that could be the subject of an order of the Tribunal *against that person*." [emphasis added]
s. 106(2) states: "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." [emphasis added]

Subsection 106(2) does not contain this notion of factual specificity: it simply refers to "terms" that could be made the subject of a Tribunal order, with no reference to the person who entered into the consent agreement in issue.

60. The Commissioner submitted that the omission from s. 106(2) of any language which captures the factual particularity connoted by the words "against that person" makes it clear that Parliament intended that the Tribunal's power under s. 106(2) be limited to considering whether the terms included in a consent agreement could be the subject of a Tribunal order. Extending the Tribunal's jurisdiction under s. 106(2) to consideration of whether the terms of the consent agreement could be the subject of an order "against [the] person" who entered into the consent agreement, or to some or all matters that would have been at issue in a fully contested proceeding had the matter been litigated before the Tribunal, would be to ignore Parliament's legislative choice.

61. Kobo states that the words "against that person" were not included in s. 106(2) because it was unnecessary to do so, since the applicant under s. 106(2) is a stranger to the consent agreement. Further, Kobo submits that adding the words "against that person" to s. 106(2) would have made the section unnecessarily confusing.[38]

62. The fact that Kobo is a stranger to the consent agreement is irrelevant. Kobo asserts that s. 106(2) of the Act provides the Tribunal with threshold and remedial jurisdiction to consider whether the terms of the consent agreement in this case could be the subject of an order *against the Consenting Publishers,* even though Parliament omitted that concept from s. 106(2).

[38] Kobo's Memorandum, *supra* note 1, at para. 48.

63. Moreover, Kobo's argument that adding the words "against that person" to s. 106(2) would make the provision confusing is flawed. Rather than making it confusing, had Parliament wished to confer the jurisdiction on the Tribunal that Kobo suggests it has, the addition of those words to s. 106(2) would have made that intention clear. For example, s. 106(2) could have provided:

> (2) 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, having regard to the circumstances at the time the consent agreement was filed, that the person has established that the terms could not be the subject of an order of the Tribunal against a party to the agreement.

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E. Parliament is clear when it confers a broad, fact-based review power on the Tribunal

64. In the Commissioner's Reference Memorandum, it was submitted that the following factors further reinforce the proposition that s. 106(2) of the Act confers a narrow jurisdiction on the Tribunal: the scheme of the consent agreement provisions themselves; certain other provisions in the Act, including s. 106.1, where Parliament has made clear its intention to confer a broader review power on the Tribunal; and the private access provisions of the Act.

65. Kobo dismisses these "scheme of the Act" arguments by asserting that they ignore the varying purposes of the sections cited, and the necessity of using different language to achieve those purposes. Kobo states that 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)."[39]

66. Kobo's submission misses the point. Both s. 106.1 (private access consent agreements) and the former s. 104.1 (airlines injunction) relate to the Tribunal's review power.

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[39] Kobo's Memorandum, *supra* note 1, at para. 47.

67. In respect of s. 106.1, the Tribunal must determine whether a private access consent agreement has or is likely to have anti-competitive effects. This would necessarily require the Tribunal to consider the factual underpinning of the agreement to understand the market and how it functions. In respect of s. 104.1, the Tribunal had to determine whether certain conditions existed or were likely to exist.[40] In each provision, Parliament carefully tailored the Tribunal's jurisdiction to correspond to the scope of review it considered appropriate in the circumstances. Moreover, in each circumstance, Parliament made it clear that the Tribunal, in exercising its jurisdiction under the relevant section, should examine certain factual issues that underpinned or related to the matter in issue. If comparable matters are meant to receive the same treatment, they will be dealt with in an identical or parallel fashion.[41]

68. Kobo argues that the Commissioner's "private access" argument is flawed because private access concerns private parties seeking relief from what they view as conduct contrary to the Act, whereas s. 106(2) relates to third parties seeking relief in respect of a consent agreement that directly affects them.

69. Kobo's submission misses the possible interplay between s. 103.1 and s. 106(2). Imagine ABC Co. complains to the Bureau that XYZ Co. is engaged in "price maintenance," contrary to s. 76 of the Act. The Commissioner investigates and enters into a consent agreement with XYZ Co. to address the conduct.

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[40] The conditions were that in the absence of a temporary order against a domestic airline:
(i) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur, or
(ii) a person is likely to be eliminated as a competitor, suffer a significant loss of market share, suffer a significant loss of revenue or suffer other harm that cannot be adequately remedied by the Tribunal.

[41] Ruth Sullivan, *Construction of Statutes*, 5th ed (Markham: LexisNexis Canada, 2008) at pp. 359-360, and 366, Commissioner's Supplementary BOA Tab 13.

70. Even if the complainant was unhappy with the terms of the consent agreement, under s.103.1(4) of the Act it would be barred from commencing a private action to seek alternative relief. However, under Kobo's construction of s. 106(2), as a directly affected third party, the complainant could nonetheless make an application to have one or more terms of the consent agreement varied or rescinded. In pursuing that application, the complainant could raise any or all of the issues that the Tribunal would have canvassed had the matter proceeded as a fully contested case. In short, Kobo's construction of s. 106(2) would allow a directly affected third party to do indirectly what it would be barred from doing directly.

F. The Commissioner's Interpretation of s. 106(2) is Correct

71. The Commissioner submits that the Tribunal's inquiry under s. 106(2) is to determine whether the terms set out in a consent agreement are terms that could be contained in an order issued by the Tribunal, or whether the terms are so vague or ambiguous as to be unenforceable or that would lead to "no enforceable obligation". This inquiry does not involve the Tribunal making findings of fact or mixed fact and law on the merits of the case.

72. Parliament intended that the Tribunal's jurisdiction under s. 106(2) be limited. Kobo argues that this limited jurisdiction is unacceptable because of the standing requirement s. 106(2) applicants must satisfy to bring an application under that subsection. Kobo's position conflates, however, two distinct inquiries under s. 106(2); namely, the issue of standing (whether a party is entitled to pursue an application) and the issue of justiciability (whether the party raises justiciable issues).

73. Contrary to Kobo's position, the issue of standing does not determine what issues are also justiciable. More particularly, the fact that a party is "directly affected" by a consent agreement does not entitle that party, as a matter of law, to have the Tribunal review that agreement on the merits. Such an approach would, as discussed above, jeopardize the entire consent agreement process by turning a negotiated resolution into a contested proceeding on the merits. Rather, consistent with Parliament's intent, s. 106(2) limits the justiciable issues that the Tribunal may consider to rescind or vary the terms of a consent agreement where an application is brought by a "directly affected" third party to exceptional circumstances.

74. With s. 106(2) Parliament has struck a balance between the Commissioner's need for an efficient and effective mechanism to address competition concerns and the right of directly affected third parties to seek rescission or variation of consent agreements. That balance ensures that the Commissioner has the ability to resolve matters in a timely way, while ensuring that he cannot include terms in consent agreements which the Act would not allow the Tribunal to impose. If directly affected third parties are able to bring applications to rescind or vary consent agreements by challenging any or all aspect of the merits of the "case", the consent agreement process would be unworkable, which clearly was not Parliament's intention.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

At Gatineau, Quebec on June 20th, 2014.

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APPENDIX A

APPENDIX A

Excerpt of Kobo's Notice of Application (Section 106(2) Application), CT-2014-02:

36. Kobo meets the test for rescission under s. 106(2):

(a) Its legal and pecuniary rights are directly affected in a manner that will affect Kobo's competitiveness;

(b) Kobo is applying for relief within sixty days of the Consent Agreement's registration;

(c) The Consent Agreement is not based on terms that could be the subject of an order of the Tribunal, as the Tribunal would lack threshold jurisdiction to make any order under s. 90.1. There is:

(i) no agreement or arrangement between persons, two or more of whom are competitors;

(ii) no allegation by the Commissioner of an agreement or arrangement between persons, two or more of whom are competitors; and

(iii) no agreement or arrangement in relation to the Consenting Publishers' parent companies that was "existing or proposed" at the time of the registration of the Consent Agreement.

(d) The Consent Agreement is not based on terms that could be the subject of an order of the Tribunal, as the Tribunal would lack, under s. 90.1(1)(a), remedial jurisdiction to make the prohibition orders contained in paragraphs 2 and 3 of the Consent Agreement. There is:

(i) no link established or even alleged between the conduct contemplated by the agreement or arrangement and conduct prohibited by the prohibition orders set out in paragraphs 2 and 3 of the Consent Agreement; and

(ii) no method by which the Tribunal can be satisfied that the prohibition orders set out in paragraphs 2 and 3 of the Consent Agreement seek to prohibit activity "under the agreement or arrangement" as is required under s.90.1(1)(a).

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*.

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

REPLY
OF THE COMMISSIONER OF COMPETITION
(Reference re: subsection 106(2) of the Competition Act)

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