**PUBLIC VERSION**

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 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**

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**MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION**

**PUBLIC VERSION**

## PART I ~ OVERVIEW

1. The Commissioner of Competition reached a settlement with four major publishers that promotes and protects the public interest in open retail price competition for e-books (the "**Consent Agreement**"). The Consent Agreement followed similar settlements reached in the United States and Europe.

2. Kobo is the largest e-book retailer in Canada. It challenges this Consent Agreement and brings this motion to stay the Consent Agreement pending the Tribunal's determination of its challenge. It does so in an attempt to preserve the status quo and its ability to charge higher prices to Canadian consumers for its e-books. As a result of the "agency" agreements with the Settling Publishers, Kobo is guaranteed a commission of 30%. Under the wholesale model, it has no such guarantee. It is not surprising therefore that Kobo seeks to protect its "agency" agreements.

3. Kobo asserts that its stay is justified because its challenge raises serious issues. The issues Kobo raises are, however, "matters destined to fail". Section 106(2) of the *Competition Act* (the "**Act**") allows "directly affected" parties to apply to the Tribunal to vary or rescind the Consent Agreement on the basis that its terms could not be the subject of an order of the Tribunal. Significantly, Kobo does not say that the terms of the Consent Agreement could not be ordered by the Tribunal under section 90.1 of the Act.

4. Kobo asserts that absent a stay it will suffer irreparable harm. More specifically, it claims that the Consent Agreement will lower prices for e-books to Canadian consumers and that it will suffer losses in revenue in the face of this competitive discounting. Even accepting that Kobo will suffer losses in revenue (which it has not shown), the harm Kobo asserts it

will suffer does not support a stay. Rather, it supports the opposite conclusion: that the Consent Agreement should continue to have effect. To find otherwise would frustrate the purpose of the Act, which is to protect competition, not the business interests of individual competitors.

5. The only irreparable harm will be to the public interest. The balance of convenience therefore strongly favours the public interest in allowing the Commissioner to exercise his statutory mandate to promote and protect competition in Canada by continuing the Consent Agreement.

6. For the foregoing reasons, Kobo has failed to demonstrate that a stay of the Consent Agreement is justified.

## PART II ~ FACTS

### A. The Commissioner and Four Major Publishers Reached a Consent Agreement

7. Approximately 1.5 years ago, the Commissioner commenced a multi-party inquiry into anti-competitive conduct to restrict retail price competition for e-books in Canada (the "**Inquiry**").

8. Further to the Inquiry, the Commissioner and four major publishers, 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. (the "**Settling Publishers**"), reached a Consent Agreement, which was filed with the Competition Tribunal, pursuant to section 105 of the Act and section 106 of the *Competition Tribunal Rules* ("**Tribunal Rules**").

9. The Consent Agreement resolves the Commissioner's concerns with respect to the alleged anti-competitive conduct of the Settling Publishers. The Commissioner alleges that the Settling Publishers engaged in conduct further to an agreement or arrangement with the result that competition was substantially lessened or prevented in the markets for e-books in Canada, contrary to section 90.1 of the Act.[1] The Settling Publishers deny these allegations but for the purpose of executing, registering, interpreting, enforcing, varying or rescinding the Consent Agreement agree that they will not contest the Commissioner's allegations.

10. The Consent Agreement prohibits the Settling Publishers from engaging in the following conduct: (i) restricting, limiting or impeding an e-book retailer's ability to discount the price of e-books sold to consumers up to a certain amount and (ii) having clauses in their contracts with e-book retailers whereby the price at which one e-book retailer sells an e-book to Canadian consumers depends on the price at which another e-book retailer sells the same e-book to consumers (the "Price MFN" clause). Agreements that are consistent with the foregoing conditions have been referred to in other jurisdictions as "agency lite" agreements.[2]

11. The first prohibition begins 40 days following the date of registration of the Consent Agreement and ends 18 months thereafter. The second prohibition lasts for 4.5 years from the date of registration of the Consent Agreement.

12. The Consent Agreement also requires Settling Publishers to amend or to take steps to terminate any existing "agency" agreements with e-book retailers that violate the aforementioned prohibitions. The Consent Agreement provides the Settling Publishers with 40 days to do so.

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[1] Consent Agreement, Exhibit "I" to the Tamblyn Affidavit, Kobo's Motion Record, Tab 2-I, p 122.
[2] Tamblyn Affidavit at para 17, Kobo's Motion Record, Tab 2, p 16.

## B. Similar Settlements Reached in Other Jurisdictions

13. The Consent Agreement follows similar settlements reached by the United States Department of Justice (the "**US DOJ**") and the European Commission (the "**EU Commission**") with the Settling Publishers or their affiliates. These foreign authorities reached final settlements at various times between September 2012 and August 2013.[3]

14. In the United States, these settlements were finalized following a civil anti-trust action the US DOJ filed on 11 April 2012 (the "**Complaint**"). In its Complaint, the US DOJ alleged that: (i) beginning no later than 2009, the defendants (including certain of the Settling Publishers and certain affiliates of the Settling Publishers) engaged in a conspiracy and agreement to raise, fix and stabilize retail e-book prices, to end price competition among e-book retailers, and to limit retail price competition among the publisher defendants; (ii) this conspiracy and agreement was ultimately effectuated by collectively adopting and adhering to functionally identical methods of selling e-books and price schedules; and (iii) the conspiracy and agreement among the defendants resulted in anti-competitive effects, including increasing the retail prices of trade e-books and eliminating competition on price among e-book retailers.[4]

15. In Europe, these settlements were finalized following the EU Commission's adoption of a Preliminary Assessment on 13 August 2012 setting out its competition concerns. Those concerns related to a concerted practice between and among the concerned parties (including

[3] Final Judgment of Judge Denise Cote dated September 6, 2012, Exhibit "C" to the Tamblyn Affidavit, Kobo's Record, Tab 2-C, p 48; Final Judgment of Judge Denise Cote dated August 12, 2013, Exhibit "D" to the Tamblyn Affidavit, Kobo's Record, Tab 2-D, p 68; Final Commitments – Hachette, Exhibit "D" to the Felix Affidavit, p 146; Final Commitments – Simon & Schuster, Exhibit "E" to the Felix Affidavit, p 154; Final Commitments – HarperCollins, Exhibit "F" to the Felix Affidavit, p 162; Final Commitments – Holtzbrinck / Macmillan, Exhibit "G" to the Felix Affidavit, p 171.

[4] Complaint at paras 94-95, 102, Exhibit "A" to the Felix Affidavit, pp 35-37.

certain affiliates of the Settling Publishers) in relation to a common global strategy, including in the European Economic Area, for the sale of e-books with the aim of raising retail prices or avoiding lower retail prices.[5]

## C. Kobo Will Not Suffer Irreparable Financial Harm Because of the Consent Agreement

### (i) Kobo Expected [redacted], Notwithstanding the Consent Agreement

16. Kobo established its worldwide e-books business approximately 4 years ago.[6] To date Kobo has delivered e-books in approximately 190 countries and currently has dedicated operations in approximately 15 of those countries.[7] It has approximately 18.4 million users of its e-readers and e-reading applications worldwide.[8] In Canada, Kobo remains the largest e-book retailer.

17. Kobo admits that parts of its worldwide business are highly competitive and unpredictable in regards to their future evolution.[9] [redacted]

18. At the end of 2011 or the beginning of 2012, Kobo was acquired by Rakuten, Inc.[11] Kobo admits that Rakuten has made investments in

[5] Commission Decision of 12 12 2012 at para 10, Exhibit "C" to the Felix Affidavit, p 116.
[6] Tamblyn Cross-Examination, pp 7, qq 16.
[7] Tamblyn Cross-Examination, pp 10, qq 27-28.
[8] Tamblyn Affidavit at para 3, Kobo's Record, Tab 2, p 13.
[9] Tamblyn Cross-Examination, pp 27-31, qq 88-100.
[redacted]
[11] Tamblyn Cross-Examination, pp7-8, qq 17-20; Tamblyn Affidavit at para 4, Kobo's Record, Tab 2, p 13.

Kobo's expansion that are tied to certain expectations that Kobo will be a profitable and sustainable business.[12]

19. [redacted]

20. Consequently, Kobo expected [redacted]

**(ii) [redacted] Kobo Entered into Agency Agreements**

21. Kobo's agreements with the Settling Publishers are all "agency" agreements.[16] It enters into wholesale agreements with smaller publishers who have chosen not to offer agency terms.[17]

22. Kobo admits that its "agency" agreements with the Settling Publishers tend [redacted] Further, Kobo admits that it is common for it to negotiate both "agency" and wholesale agreements.[19]

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[12] Tamblyn Cross-Examination, pp 12-13, qq 33-34.
[13] *Ibid*, p 13, q 35.
[14] *Ibid*, pp 13-14, q 38.
[redacted]
[16] *Ibid*, pp 42-43, qq 138.
[17] *Ibid*, pp 38, qq 123.
[redacted]
[19] Tamblyn Cross-Examination, pp 38, qq 123; Tamblyn Affidavit at para. 6, Kobo's Motion Record, Tab 2, p. 14.

23. Under the wholesale model Kobo has the independent ability to vary price.[20] Kobo admits that it varies the price of a wholesale book and the margin that is available to encourage consumers to purchase its e-books. Kobo claims that it will use the ability to discount a book to allow a consumer to see that there is a benefit to purchase a book in a given period of time through a time limited cost promotion. Kobo may also discount the price of the e-book to highlight the affordability of e-books to a consumer.[21]

24. In contrast to the wholesale model, Kobo has a more limited ability to compete on price under the agency model. Kobo admits that it often cooperates with the Settling Publishers to provide price incentives that encourage consumers to purchase particular titles of e-books.[22] Unlike the wholesale model, the Settling Publishers can, however, vary the price of the e-book independently of Kobo's advice.[23]

25. As a result of the "agency" agreements with the Settling Publishers, Kobo is guaranteed a commission of 30% on each book sold. Under the wholesale model, it has no such guarantee. It is not surprising therefore that Kobo seeks to protect its "agency" agreements.

**(iii) Kobo's evidence of loss is speculative**

26. Kobo admits that: (i) under the status quo [redacted]; (ii) following the Consent Agreement it expects that the retail price of e-books sold to Canadian consumers will fall

[20] Tamblyn Affidavit at para. 7, Kobo's Motion Record, Tab 2, p. 14.
[21] Tamblyn Cross-Examination, pp 41-42, qq 136.
[22] *Ibid*, pp 42-43, qq 138.
[23] *Ibid*, pp 43, qq 140.
[redacted].

because of increased price competition;[25] and (iii) its central concern is to [redacted]

27. Consequently, any financial harm Kobo may suffer will be because of how it chooses to respond to the exigencies of a competitive market.

28. Even then, Kobo's projected reductions in revenue are speculative and based on the following questionable assumptions:

    a. Kobo admits that its forecasts did not consider the customer base in Canada that Kobo acquired from Sony following its exit from the US e-reader market;[27]

    b. significantly, Kobo's forecasts assume that regardless of how much Kobo discounts the retail price of the e-books it sells to consumers, the volume of sales will not increase but remain constant.[28] Basic economic theory suggests that when the price is lowered, the volume of sales will increase;[29] and

    c. Kobo's forecasts speculate as to how Kobo's competitors will respond to the Consent Agreement.

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[25] *Ibid*, pp 57, qq 184.
[redacted]
[27] *Ibid*, pp 70, qq 225.
[28] *Ibid*, pp 71-72, qq 227.
[29] *Ibid*. pp71 qq. 227; pp. 72 qq. 229.

29. Kobo's methodology also fails to account for historical variations in discounting over time and only considers discounts applied over a very short period. [30] This cannot be considered a representative sample.

30. Kobo's projected losses are thus based on flawed assumptions. It has not, therefore, established that it will lose money because of the Consent Agreement.

**(vi) Kobo is in discussions with the Settling Publishers and has prepared a contingency plan**

31. Kobo admits that it is at various stages in its discussions with the Settling Publishers.[31] Kobo has also developed a contingency plan based on its previous experiences in the US.[32]

## PART III ~ SUBMISSIONS

32. A stay is an exceptional remedy that should only be awarded where the interests of justice require it and in the "clearest of cases".[33] In the case of stays of government authority, the Supreme Court Canada recognized in *Manitoba (A.G.) v Metropolitan Stores Ltd* that stays are exceptional because: "[t]oo ready availability of interlocutory relief against government and its agencies could disrupt the orderly functioning of government."[34]

33. This is not a case where such an exceptional remedy should be granted. Kobo fails to raise serious issues and to demonstrate that it will suffer

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[30] *Ibid*, pp 58, qq 187; pp 61, qq 195.
[31] Tamblyn Affidavit at para. 28, Kobo's Motion Record, Tab 2, pp 17; Tamblyn Cross-Examination, pp 43-50, qq 141-165.
[32] Tamblyn Affidavit at para. 30, Kobo's Motion Record, Tab 2, pp 15
[33] *Taylor v. Ontario Securities Commission*, 2013 ONSC 6495 at para. 63.
[34] *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd*., [1987] S.C.J. No. 6, at para. 89. [***Metropolitan Stores***]; *RBC DS Financial Services Inc. v. Life Insurance Council* (1994) 31 C.P.C. (3d) 304 at para. 8 (Sask. Q.B.) aff'd [1997] S.J. No. 585 (C.A.).

irreparable harm. Further, the balance of convenience strongly favours the public interest in allowing the Consent Agreement to continue so that Canadian consumers can benefit from open price competition in e-books.

## A. Kobo Fails to Raise Serious Issues

34. While the threshold to demonstrate that a serious issue exists is a low one, a party seeking a stay must nevertheless demonstrate that the "matter is not destined to fail".[35]

35. Kobo has failed to meet this threshold. Kobo seeks to rescind or vary the Consent Agreement pursuant to section 106(2) of the Act on grounds that are destined to fail.

### (i) There is no requirement that the Consent Agreement, on its face, prove the existence of the alleged anti-competitive conduct

36. Rule 106(2) of the Tribunal Rules sets out three statutory requirements for a valid consent agreement:

(a) the sections of the Act under which the agreement is made;
(b) the name and address of each person in respect of whom the agreement is sought; and
(c) the terms of the agreement.

37. The Recitals simply put the agreement into context. It is the terms of the Consent Agreement that set out how to address the anti-competitive conduct. Tellingly, while Kobo takes issue with the Recitals, Kobo does not allege that any of the specific terms could not normally be included in a Consent Agreement pursuant to s. 90.1.

[35] *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at para 11 [***Laperrière***]

38. To claim that terms must be rescinded because recitals lack particularity goes beyond the requirements of the Tribunal Rules. Further, it implies that any third party who fails to understand a consent agreement can turn it into a protracted contested proceeding. This leads to the conclusion that the Commissioner must always be in a position to provide the Tribunal with evidence sufficient to prove the allegations set out in the Consent Agreement, as if the Commissioner were seeking an Order in accordance with the applicable section of the Act. This too goes further than what is required, as discussed below.

**(ii) The Tribunal does not have jurisdiction under section 106(2) to find that, without filed evidence, it must necessarily conclude that "the terms [of this Consent Agreement] could not be the subject of an Order of the Tribunal"**

39. As Kobo acknowledges, sections 105 and 106 of the Act were explicitly amended in 2002 to streamline the consent agreement process and limit the Tribunal's role where the parties are agreed on the terms.[36]

40. As this is a consent agreement filed under the post-2002 section 105, rather than a consent order, the Commissioner respectfully submits that Kobo's suggested course of action falls well beyond the Tribunal's jurisdiction under section 106(2).

41. This is supported by this Tribunal's Reasons for Consent Order in *Air Canada*. In that ruling, as part of the justification for its in-depth analysis required to approve the proposed Order, the Tribunal explained that:

> [The *Competition Act*], for example, does not provide for the automatic filing by the Director of settlements which he reaches with respondents so that they automatically become orders of the Tribunal…It is clear that Parliament intended

[36] *Memorandum of Argument of Kobo Inc.* at para. 6. [**Kobo Factum**]

> the Tribunal to exercise an independent judgment with respect to such orders.[37]

42. The Act now does provide for the automatic filing described above. It follows that the Tribunal should not be undertaking an extensive examination of the underlying merits of the Agreement, as Kobo is suggesting.

43. In fact, this Tribunal has already considered the Commissioner's evidentiary burden when filing a consent agreement in *Burns Lake*.[38] The Respondents had been seeking to set aside a consent agreement filed in respect of a merger transaction. Rather than undertake protracted litigation, the Commissioner filed as a Reference two questions with the Tribunal, which ultimately resolved the Application. After first determining that the Respondents did not have standing under s. 106(2), as they were not "directly affected", the Tribunal considered the second issue.

44. We include Question 2 in its entirety, to highlight the similarities between Kobo's application and the question previously addressed by the Tribunal:

> Question 2 reads as follows:
>
> At the time a consent agreement is registered under section 105 of the Act, are the parties required to file evidence to substantiate that the merger or proposed merger is likely to substantially lessen or prevent competition without the remedial terms in the consent agreement? If so, <u>is the absence of such filed evidence sufficient to support a finding that "the terms could not be the subject of an order of the</u>

[37] *Canada (Director of Investigation and Research, Competition Act) v. Air Canada* [1989] C.C.T.D. No. 29 at page 29. [***Air Canada***]

[38] *Burns Lake Native Development Corporation et al. v. Commissioner of Competition and West Fraser Timber Co. Ltd. et al.* 2006 Comp. Trib. 16 [***Burns Lake****]*

> Tribunal" as required to be established by an applicant under subsection 106(2) of the Act? [*emphasis added*][39]

45. The Tribunal in *Burns Lake* dismissed this question in three paragraphs.

46. First, the Tribunal disregarded the Applicants' submission that "in a contested hearing, an order could not have been made without a finding of [a substantial lessening of competition] or [a substantial prevention of competition]" as being correct but "not helpful" since "a consent agreement is not an order of the Tribunal and never becomes one."[40]

47. Next, the Tribunal clarified that subsection 105(3) of the Act says that a consent agreement is to be filed "for immediate registration". Since the Tribunal has no time or mandate to review a consent agreement and since the Act does not require a filing, there is no reason to conclude that any evidence must be submitted when a consent agreement is filed for registration with the Tribunal.[41]

48. Finally, having concluded that the Commissioner was not required to include or present any evidence at the time of filing a Consent Agreement, the Tribunal concluded that the second part of Question II did not need to be addressed.

49. It is submitted that there is no principled difference between the standard to review a consent agreement filed with respect to a proposed merger, and a consent agreement filed with respect to reviewable conduct.[42]

50. Although *Burns Lake* did not directly address the question of whether evidence was required to be filed under s. 106(2), it is respectfully

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[39] *Burns Lake*, at para 5.
[40] *Burns Lake*, at para 77.
[41] *Burns Lake*, at para 78.
[42] *Burns Lake*, at para 54.

submitted that the Tribunal should adopt the approach taken by Madam Justice Simpson in *Burns Lake* and "respect Parliament's intention to give greater expedition and certainty to parties to a settlement" by adopting a restrictive interpretation of s. 106(2).[43]

51. To do otherwise would negate all the advantages of encouraging parties to settle, and would be a step backwards into the "time consuming, unpredictable, and expensive" consent order approval process that Parliament, and this Tribunal, has sought to avoid.[44]

**(iii) Nevertheless, the Consent Agreement, on its face, does comply with the requirements of s. 90.1**

52. In the alternative, if the Tribunal determines that the Consent Agreement must, on its face, establish the elements of the alleged anti-competitive conduct – a proposition with which the Commissioner disagrees - the Commissioner submits that the Consent Agreement nevertheless complies with the requirements of s. 90.1(1)(b).

53. Section s. 90.1(1)(b) provides that:

> 90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order
>
> [….]

[43] *Burns Lake,* at para 49.
[44] *Burns Lake,* at para 28.

> (b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

54. Section 90.1(1)(b) does not require establishing that any given Publisher is a party to this agreement, nor that the prohibited actions be directly related to the alleged agreement. It simply requires that the parties consent to requirements to take actions described in the Consent Agreement, which Kobo does not deny has occurred.

55. Kobo's application is therefore beyond the jurisdiction of what was contemplated by Parliament for s. 106(2), and is "destined to fail".

**B. Kobo Fails to Demonstrate That It Will Suffer Irreparable Harm**

56. The party seeking a stay must demonstrate harm that is in the nature of harm that justifies the granting of a stay.[45]

57. That party must also demonstrate that the harm suffered cannot be remedied.[46] As numerous courts have recognized: "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by the evidence, carry no weight."[47] There must be "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted."[48] (*emphasis added*)

58. Kobo has failed to demonstrate both as a matter of law and fact that the harm it asserts it will suffer because of the Consent Agreement justifies

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[45] *Polesystems Inc. v. Martec Manufacturing Ltd.*, [1989] A.J. No. 486 at para 27: harm "must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice."
[46] *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 at para 58. [***RJR***]
[47] *Gateway City Church v. Canada (National Revenue),* 2013 FCA 126 at para. 15. [**Gateway**]
[48] *Gateway*, at para. 16.

the granting of a stay of the Consent Agreement and that this harm cannot be remedied.

59. Kobo asserts that as a result of the Consent Agreement it will suffer financial harm from having to compete on the price of e-books sold to Canadian consumers. More specifically, Kobo asserts that the Consent Agreement will result in competitive discounting by Kobo's competitors that will lower the price of e-books sold to Canadian consumers. Kobo will therefore suffer losses in revenue because it will have to lower its prices to compete.

60. First, as a matter of law and policy, Kobo's characterization of the harm it will suffer, if accepted as a basis for granting a stay of the Consent Agreement, would be wholly at odds with the purpose of the Act. Section 1.1 of the Act states:

> **1.1** The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

The purpose of the Act is thus to promote and protect competition, not the business interests of individual competitors.[49] The Commissioner thus has a statutory duty to ensure that consumers receive the benefits of price competition.

61. In accordance with the Commissioner's mandate to protect and promote competition, the Commissioner filed the Consent Agreement with the

[49] *Canada (Commissioner of Competition) v. Superior Propane Inc*., 2001 FCA 104 at para. 14.

Settling Publishers. The terms of the Consent Agreement resolve the Commissioner's concerns with respect to the alleged conduct of these Settling Publishers to restrict e-book retail price competition in Canada. The authorities in the US and the EU reached similar settlements to address related anti-competitive conduct.

62. Even if it is accepted that Kobo will suffer losses in revenue because of the Consent Agreement (which it is not), any such loss is the result of Kobo no longer being able to profit from an anti-competitive market that supported artificially high prices for e-books. In other words, but for the alleged anti-competitive conduct that the Consent Agreement seeks to remedy, Kobo would not suffer the losses it asserts it will suffer. Indeed, Kobo admits that under the status quo it (and other e-book retailers) [redacted] Consequently, if Kobo's claim is accepted, it is tantamount to recognizing a right for Kobo to be free from price competition. Neither Kobo, nor other e-book retailers, have such a right. To recognize such a right would frustrate the purpose of the Act; and therefore, Kobo has failed to demonstrate that it has suffered irreparable harm that justifies the granting of a stay.

63. Second, Kobo's position, if recognized, would make stays of Consent Agreements a matter of course. Kobo's claim that it will suffer losses from having to compete in a way it did not have to compete before is a "general assertion" that could be raised by any competitor, any time the Commissioner negotiates a settlement with market participants to remove barriers to open competition.[51] If recognized as a basis for granting a stay, the result would be to frustrate the purpose of the Act by creating

[redacted]

[51] *Gateway*, at paras. 14.

uncertainty about the finality of negotiated settlements and by preventing the Commissioner from exercising his mandate to enforce the Act. Kobo's position does not therefore justify the granting of a stay.

64. Third, Kobo has failed to demonstrate that it will actually suffer losses in revenue because of the Consent Agreement. Kobo's evidence is speculative and hypothetical:

a. Kobo relies on internal forecasts that project losses in revenue on the basis of arguable assumptions (as described at paragraph 28).[52] One of those assumptions is that as the price of e-books drops, Kobo's volume of sale will remain constant. This assumption is contrary to basic economic theory, which recognizes that as the price of a good drops, the volume of sales increases. Consequently, Kobo's forecasts about the losses in revenue it will suffer are inflated at the least. It may even be the case that Kobo will increase its revenue from discounting its prices; and

b. Kobo makes "assumptions, speculations and hypotheticals" about the loss it will suffer in Canada based on its experiences in the US.[53] For example, it relies on the following arguable assumptions: (i) that the US and Canada are analogous despite key differences in Kobo's market presence in both jurisdictions. Kobo is a small e-book retailer in the US but the largest e-book retailer in Canada; (ii) Kobo also admits that there were various factors (the loss of its major retail partner (no such loss has occurred or is likely to occur in Canada) and the loss of functionality within the Kobo app) that contributed to its experience in the US;[54] and (iii) Kobo expanded

[52] Tamblyn Cross-Examination pp 55, qq 180; pp 57, qq 184; pp 58, qq 187; pp. 61, qq 195; pp 67, qq 215; pp 70, qq 225; pp 71, qq 227; pp 72, qq 229; pp 73, qq 231.
[53] Tamblyn Cross-Examination pp 55, qq 180.
[54] Tamblyn Cross-Examination, pp 21, qq 62; pp 23, qq 71; pp 25, qq 79; pp 80, qq 252.

its business after the US Settlement, presumably because it was profitable to do so.[55] In any case, Kobo cannot rely on the harm that Kobo asserts it or others have suffered in a different jurisdiction to establish that it will suffer irreparable harm in Canada. Kobo must prove that it will suffer this harm, and it has not done so.[56]

65. Fourth, Kobo has failed to demonstrate based on clear – and not speculative – evidence that any losses in revenue Kobo says it will suffer are "unavoidable irreparable harm." Indeed, the evidence demonstrates the opposite: that the harm is reparable and avoidable:

a. Kobo was aware of both the US and EU Settlements and had considered what changes it needed to make to adapt in Canada if the Commissioner were to adopt similar remedies here. Consequently, Kobo expected competitive discounting in Canada;[57]

[redacted] and

c. Kobo has prepared [redacted]

66. The fact that there is no right to claim damages from the Commissioner does not mean any financial loss that a party asserts when seeking a stay of the Commissioner's exercise of his statutory authority is therefore

[55] *Ibid*, pp 70 qq 225.
[56] *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25 at para 12.
[57] Tamblyn Cross-Examination, pp 99-102 qq 321-329.
[redacted]

irreparable. In *Tervita,*[60] which is relied upon by Kobo, Manville J.A., writing for the Federal Court of Appeal, made clear that the harm was irreparable because as a practical matter CCS could not reacquire its assets once it was compelled to dispose of the assets. Kobo has failed to prove that the losses in revenue it claims it will suffer cannot be repaired or are unavoidable. That Kobo does not want to compete on retail price competition does not make those losses irreparable.

67. Fifth, Kobo also asserts that it will suffer operational costs from having to implement the Consent Agreement and there may also be an impact on its customer base. Administrative inconvenience does not establish irreparable harm.[61] Further, any impact on Kobo's customer base is unsupported by the evidence. Kobo asserts that there will be such an effect, but has not proven that it will happen.

68. For the foregoing reasons, therefore, Kobo has, as a matter of law and fact, failed to demonstrate that it will suffer irreparable harm that justifies a stay of the Consent Agreement.

## C. The Balance of Convenience Favours the Public Interest in Continuing the Consent Agreement

69. As the Supreme Court of Canada explained in *RJR-MacDonald,* stays to the authority of a law enforcement agency stand on a different footing than ordinary claims requesting similar relief between private litigants. This is so because in the former case the public interest must be weighed in the balance.[62]

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[60] *Tervita Corp. v. Canada (Commissioner of Competition)* 2012 FCA 223 at para 15.
[61] *Laperrière* at para 20.
[62] *RJR*, at para 64.

70. Where it is the case that a stay is sought to stop persons acting under a statute from carrying out their duties, a "very important" public interest "weighs heavily" in favour of allowing those acting under statutes to carry out their mandates.[63] The reason is that when a law enforcement agency is prevented from exercising its statutory powers, the public interest, which the agency is created to protect, suffers irreparable harm.[64]

71. In this case, the Commissioner is charged with the mandate of administering and enforcing the Act and thus with promoting or protecting the public interest in open competition in Canada. Further to exercising his statutory mandate, the Commissioner filed the Consent Agreement to resolve his concerns about alleged anti-competitive conduct to restrict e-book retail price competition in Canada. If, therefore, the Commissioner is prevented from registering the Consent Agreement, the public interest in ensuring that Canadian consumers receive the benefits of open price competition for e-books would suffer irreparable harm.

72. Kobo has also failed to demonstrate harm that would outweigh the irreparable harm to the public interest that would result from a stay of the Consent Agreement. Kobo argues that postponing the registration of the Consent Agreement would not compromise the effectiveness of the Consent Agreement. In *R.J.R.-Macdonald,* however, the Supreme Court of Canada dismissed this line of reasoning on the basis that it implies that the law enforcement agency, which is the guardian of the public interest, does not have the effect of promoting the public interest.[65]

73. Kobo argues that it will suffer harm because the issues it raises in its application will be moot given that if Kobo succeeds there will be no way to repair the harm it asserts the market will face once the Tribunal renders its

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[63] *Laperrière*, at para. 12.
[64] *RJR*, at para 71.
[65] *RJR*, at para. 72.

decision. The harm to the market that Kobo asserts will follow the registration of the Consent Agreement is based on "general assertions," "assumptions, speculations and hypotheticals". Kobo has failed to demonstrate that this harm will occur and that it is irreparable. Indeed, the harm that Kobo asserts it will suffer (namely the loss of revenue from having to compete on the retail price of e-books) supports the opposite conclusion: that the Consent Agreement continue so that Canadian consumers can receive the benefits of open e-book retail price competition without delay.

74. Kobo also argues that the public interest is better served by having the Consent Agreement stayed because absent a stay Kobo asserts that it will not pursue its application before the Tribunal and its issues will not therefore be raised. Whether Kobo ultimately decides to pursue its application is a strategic decision for it to make. This decision has no bearing on whether Kobo has satisfied the conditions that justify a stay of the Consent Agreement – which it has not.

75. The only irreparable harm is thus to the public interest. The balance of convenience thus favours continuing the Consent Agreement so that Canadian consumers may benefit from open price competition in e-books.

**DATED** AT GATINEAU, QUÉBEC on 13 March 2014.

**"ORIGINAL SIGNED BY PARUL SHAH"**

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# PUBLIC VERSION

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 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**

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**MEMORANDUM OF FACT AND LAW**
**OF THE COMMISSIONER OF COMPETITION**

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