# PUBLIC VERSION

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
(Moving Party)

- 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
(Responding Parties)

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**MEMORANDUM OF ARGUMENT OF KOBO INC.**

**(Motion for a Stay of Consent Agreement)**

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Date: March 10, 2014

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# PUBLIC VERSION

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- *Konrad von Finckenstein, then-Commissioner of Competition, explaining to the Parliamentary Committee in 2001 how s. 106(2) was meant to work*

## KOBO'S POSITION IN A NUTSHELL

1. Kobo's application raises fundamental issues about the function and application of s. 106(2) of the Act.[1] Kobo does not gainsay the Commissioner's right to file consent agreements. But by filing a *pro forma* consent agreement that does not properly allege, let alone particularize, a violation of the Act, the Commissioner frustrates the Act and the safety valve function that s. 106(2) is meant to play. The public, affected parties, and the Tribunal are prevented from understanding how the Act is being enforced and ensuring the consent agreement is within the scope of the Act.

2. The Tribunal has a clear duty on a s. 106(2) application: determine whether the terms of the consent agreement could be terms ordered under the section of the Act invoked. Under s. 90.1, any prohibition order must relate to an activity that flows from an existing or proposed agreement or arrangement among competitors. Without any details about the agreement or arrangement, it is impossible for the Tribunal to be satisfied of the connection between the prohibitions and the alleged conduct. This Consent Agreement is invalid and must be rescinded because, in its current form, it frustrates the Act. Section 106(2) is designed to remedy precisely such situations.

3. Without a stay, Kobo will be irreparably harmed. Its contracts with four of the largest E-book publishers in Canada will be terminated or fundamentally altered. Kobo – not the Consenting Publishers – will bear the financial losses arising from these changes. Its s. 106 Application will be moot, its losses unrecoverable, and important questions of the Commissioner's and the Tribunal's respective obligations will go unanswered. The public interest is best served by bringing clarity to obligations of the Commissioner and the Tribunal under the consent agreement regime. Kobo must have a meaningful opportunity to demonstrate why and how the Consent Agreement is inconsistent with the Act. If the stay is denied, the public – and the Tribunal – will be left in the dark.

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[1] All defined terms have the same meaning as in the Notice of Motion and Affidavit of Michael Tamblyn [**Tamblyn Affidavit**].

## PART 1 - OVERVIEW

4. Section 106(2) of the Act is meant to be a safety valve to ensure that, in appropriate circumstances, the Tribunal can satisfy itself that the Commissioner's consent agreements are consistent with the Act. In filing a consent agreement that invokes s. 90.1 but neither alleges an agreement or arrangement[2] among competitors, nor identifies the purported terms of the 90.1 agreement, the Commissioner frustrates the Tribunal's ability to exercise its statutory duty to ensure that the consent agreement is based on terms that could be ordered by the Tribunal.

5. The Commissioner has studiously avoided identifying what 90.1 agreement is at issue, including by putting forward as his witness on this motion a Bureau employee who has no substantive involvement or knowledge of the file. In doing so, the Commissioner keeps the public, affected third parties, and the Tribunal in the dark. We do not know what 90.1 agreement is at issue, who is said to be a party to it, whether it is a horizontal or vertical agreement, when it was entered into, and what conduct, if any, it contemplated. As such, it is impossible for the Tribunal to be satisfied that the terms of the Consent Agreement relate to conduct that flows from the 90.1 agreement. The only thing we actually know about the 90.1 agreement is that the Consenting Publishers deny its existence.

6. When the Act was amended in 2002 from a consent order regime to a consent agreement regime, the Parliamentary Committee heard concerns that the new regime would place too much unsupervised power in the Commissioner's hands. Although streamlining the settlement process was an important goal, Parliament recognized that the streamlining had to be balanced by a mechanism for third parties to bring to the Tribunal's attention situations where the Commissioner appeared to have overstepped. It amended the proposed Bill to add such a safety valve – s. 106(2).

7. Since that enactment, only one s. 106(2) application has been brought against the Commissioner, by certain minority shareholders in the 2006 *Burns Lake*

[2] While s. 90.1 applies to both agreements or arrangements between competitors, for ease of reference in this factum we will refer only to the "**90.1 agreement**" from this point forward, although we have no knowledge as to whether it is an agreement or arrangement that is purported to be alleged.

case.[3] The application was never heard, as the Commissioner brought a reference to determine issues that were ultimately dispositive of that application. The very narrow questions posed in the *Burns Lake* reference dealt only with (a) what "directly affected" means, and (b) whether the Commissioner must file **evidence** at the time he registers a consent agreement. Nonetheless, the case left the overall impression that the bar to succeed on a s. 106(2) application had been set impossibly high. The safety valve was effectively switched off and, until this Application, s. 106(2) has not since been invoked.

8. At the time of *Burns Lake*, commentators identified that the reference left unresolved many important issues, such as whether s. 106(2) allows a third party "to challenge a registered consent agreement on its merits"; whether the need for "certainty and finality" should be balanced by the need for scrutiny; and the extent of the evidence that a third party would have to advance to show that the consent agreement is "deficient or improper".[4] Kobo's s. 106 Application poses these very questions, and brings into sharp relief the question of whether Parliament intended to vest the Commissioner with the power to file *pro forma* consent agreements that are effectively immune from Tribunal scrutiny.

9. The s. 106 Application, however, hinges on the issuance of a stay. Kobo meets the three-part test:

(a) *Kobo raises serious issues*: As said above, Kobo's s. 106 Application raises important unanswered questions about the Consent Agreement and the operation of s. 106(2). The Act contemplates Kobo having a meaningful chance to demonstrate that the Consent Agreement is inconsistent with the Act and that there is no existing or proposed agreement or arrangement among competitors.

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[3] *Burns Lake Native Development Corporation v Commissioner of Competition and West Fraser Timber Co Ltd*, 2006 Comp Trib 16 at paras 21, 52-55 [***Burns Lake***].
[4] Mark J Nicholson, Chris Hersh & Yana Ermak, "Challenges to Consent Agreements After *Burns Lake*" (Fall 2006) Can Comp Rec 102 at 103. 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 549-55.

(b) *Kobo will suffer irreparable harm*: In his Press Release, the Commissioner predicts that the price of e-books could fall by about 20% as a result of the Consent Agreement. Kobo's internal forecasts bear this out. What the Commissioner fails to publicize is that the entirety of any price discounting will come out of the pocket of retailers like Kobo, not the Consenting Publishers who are the ostensible wrongdoers. It is indisputable that Kobo will suffer immediate losses. The Federal Court of Appeal has recognized that parties cannot recover losses or damages from the Bureau, warranting the issuance of a stay.

(c) *Balance of convenience favours a stay*: The public interest in clarity and transparency favours granting a stay so that the s. 106 Application may proceed. Without a stay, the s. 106 Application will be moot by the time it is determined, Kobo will have suffered unrecoverable losses, its customer base will have shifted, and the 18-month prohibitory term will be near-over. Kobo should not be put to the time and cost of litigation, while it suffers irreparable harm, only to discover that it helped clarify the law at the expense of its own legal and pecuniary rights. If a stay is issued, but the s. 106 Application is ultimately dismissed, the Consent Agreement can still be implemented just as effectively. After an 18-month investigation, there is no principled reason why its implementation cannot await the outcome of the s. 106 Application.

## PART 2 - FACTS

10. The Commissioner commenced an investigation into the E-book industry in Canada in or around August 2012. Following 18 months of investigation, the Commissioner entered into a Consent Agreement on February 6, 2014 with the Consenting Publishers. The Consent Agreement was filed on February 7, 2014.[5]

11. Within two weeks, Kobo brought an application under s. 106(2) of the Act to rescind or vary the terms of the Consent Agreement.[6] As corollary relief, Kobo brings this motion to stay the registration of the Consent Agreement pending determination of the s. 106 Application.[7]

12. The Motion Record ("**Record**"), and in particular the Affidavit of Michael Tamblyn, sets out the underlying facts regarding Kobo; its business operations; the investigation and case brought by the United States DOJ resulting in the US Settlement Agreements, which are substantially similar to the Consent Agreement; the market impact of the US Settlement Agreements; the Commissioner's investigation in Canada and the impact that the 40-day switch over deadline will have on Kobo's business. Additional facts are contained in the Transcripts.[8] While we refer to the location of the relevant facts in the Record, we do not repeat them at length here.

13. Instead, we turn directly to the issues to be determined on this Motion.

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[5] Tamblyn Affidavit at paras 24-25, Kobo's Record, Tab 2, p 17; Consent Agreement, Exhibit "I" to the Tamblyn Affidavit, Kobo's Record, Tab 2-I, pp 122-33.
[6] Notice of Application in *Kobo Inc v Commissioner of Competition et al*, CT-2014-002/002.
[7] Notice of Motion, Kobo's Record, Tab 1, pp 1-10.
[8] See Transcript of the Cross-examination of Michael Tamblyn held March 6, 2014 [**Tamblyn Cross-Examination**] and Transcript of the Cross-examination of Hollie Felix held March 6, 2014 [**Felix Cross-Examination**], Transcripts and Exhibits of Cross-Examinations (confidential brief filed).

## PART 3 - ISSUES AND LAW

14. The issue is whether the Tribunal should stay the registration of the Consent Agreement pending the disposition of Kobo's s. 106 Application. The Tribunal has jurisdiction to grant a stay in the same manner as the Federal Court.[9]

15. The test for a stay is well-established[10] and is satisfied in this case:

(a) there are serious issues to be tried;

(b) Kobo will suffer irreparable harm if the stay is not granted; and

(c) the balance of convenience favours granting the stay.

16. The remainder of this Memorandum proceeds as follows. Section A addresses the first branch, illustrating why there is a serious issue to be tried. Although this is not the forum in which to fully argue how s. 106(2) should be interpreted and applied, Kobo foreshadows here the arguments it intends to advance if it obtains the stay and is allowed to proceed with its application. Section A(1) sets out the legislative history of s. 106. Section A(2) shows that Kobo is a party whose legal and pecuniary rights are directly affected in a way that relates to competition and is not speculative. Section A(3) summarizes why the Consent Agreement is based on terms that could not be the subject of a Tribunal Order.

17. Section B addresses the second branch, showing that the losses that Kobo will suffer constitute irreparable harm. There is no principled reason to ignore those losses or treat them as anything but unrecoverable damages.

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[9] *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 8(2); *Federal Courts Act*, RSC 1985, c F-7, s 4; *Federal Courts Rules*, SOR 98/106, r 372(1). See eg, *Canadian Standard Travel Agent Registry v International Air Transport Association*, 2008 Comp Trib 12.

[10] *RJR-Macdonald Inc v Canada (AG)*, [1994] 1 SCR 311 at 334 [***RJR-MacDonald***]. See also *Tervita Corp v Canada (Commissioner of Competition)*, 2012 FCA 223, [2012] FCJ No 1093 at para 9 [***Tervita***]; *Canada (Commissioner of Competition) v Canadian Waste Services Holdings Inc*, 2004 FCA 273, [2004] FCJ No 1301 [***Canadian Waste***].

18. Section C addresses the third branch, identifying why the balance of convenience favours Kobo, and why the public interest is best served by the issuance of a stay.

## (A)
## ON EACH ELEMENT OF S. 106(2), KOBO RAISES SERIOUS ISSUES TO BE TRIED

19. The threshold to establish a "serious question to be tried" is low. The Tribunal must make a preliminary assessment only to satisfy itself that the application is not frivolous or vexatious. If there is a serious issue to be tried, the test is met.[11]

20. In this case, Kobo's s. 106 Application is neither frivolous nor vexatious. To the contrary, Kobo is invoking s.106(2) in the exact manner that Parliament intended. If the variation/rescission provision is to have any utility, it is in circumstances like these. The history of the section is addressed below, before turning to Kobo's *prima facie* case on each element.

### *(1)*
### *Legislative History: Section 106(2) is meant to act as a meaningful safety valve*

21. Principles of statutory interpretation require consideration of the context surrounding the provision in question, including consideration of the Act as a whole, related legislation, and extrinsic aids like legislative evolution and history.[12] The modern approach to statutory interpretation requires that s. 106(2) be interpreted by this Tribunal in a manner that gives effect to the intention of Parliament.[13]

22. The legislative history of s.106(2) provides important context to show the legitimacy of Kobo's challenge. It demonstrates that while the shift from consent orders to consent agreements was meant to streamline the settlement process, Parliament nonetheless intended for the process to be subject to meaningful scrutiny.

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[11] *RJR-MacDonald*, *ibid* at 337-38; *Tervita*, *ibid* at paras 9, 14; *Canadian Waste*, *ibid* at paras 9, 16.
[12] Ruth Sullivan, *Sullivan on the Construction of Statutes*, (Markham: LexisNexis, 2008) at 353. Previously, it was thought that one should only turn to extrinsic context in the face of an ambiguity. This is a dated approach. Although the law in this area is evolving, where the interpretive problem may be assisted by reference to legislative history, such evidence should be considered (Sullivan, *ibid* at 357).
[13] Sullivan, *ibid* at 353.

23. Prior to 2001, settlements between the Commissioner and private parties were subject to a lengthy and uncertain process of approval. Proposed settlements were subject to a hearing to obtain the approval of the Tribunal.[14] The process proved unworkable, especially in the context of mergers, as intervenors used it as a backdoor method to disrupt commercial deals.[15]

24. In 2001, Parliament introduced amendments to the Act, including the shift to a consent agreement regime that did not require Tribunal preapproval. The goal was to streamline the settlement process, especially for time-sensitive mergers.[16]

25. The Bill initially contained no provision for third party involvement at any stage in the consent agreement process. Only the Commissioner or a consenting party could apply for variation or rescission.[17] Several prominent witnesses pressed the Parliamentary Committee to address this gap. Former Commissioner George Addy warned, "The process improvement, if I can characterize it that way, I think goes too far by eliminating any opportunity for third-party intervention…".[18]

26. Professor Tom Ross, who was generally supportive of the new consent agreement regime, stated, "… in 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 commissioner's staff was overworked, or missed some important bits of information, or whatever."[19]

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[14] See Nicholson, Hersh & Ermak, *supra* note 4 at 105-06. See also Goldman & Joneja, *supra* note 4 at 549-52.
[15] *House of Commons Debates (Standing Committee on Industry, Science and Technology)*, 37th Parl, 1st Sess, No 48 (6 November 2001) at 1010 (Robert Russell) [***Debates***]. See also Goldman & Joneja, *ibid* at 551.
[16] 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).
[17] *Ibid*.
[18] *Debates*, *supra* note 15, No 38 (16 October 2001) at 0930 (George Addy).
[19] *Ibid*, No 41 (23 October 2001) at 0930 (Thomas W Ross) [emphasis added].

27. Stanley Wong (who was recently retained by this Tribunal as an expert in the *CCS* case[20]) was more broadly critical of the original amendments, stating that "the 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 …."[21] Those comments were then "strongly endorse[d]" by Professor Michael Trebilcock, who said that it was "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."[22]

28. Acknowledging the criticisms, the Competition Bureau advanced an amendment that would still grant it broad powers to automatically register consent agreements, but provided the safety valve that the critics of the amended process identified as necessary. That amendment was s.106(2).[23]

29. In explaining the rationale, the then-Commissioner stated:

> "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**."[24]
>
> …
>
> "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

[20] *Canada (Commissioner of Competition) v CCS Corporation*, 2012 Comp Trib 14, aff'd *Tervita Corp v Canada (Commissioner of Competition)*, 2013 FCA 28, 360 DLR (4th) 717, leave to appeal to SCC granted, [2013] SCCA No 153 [***CCS***].
[21] *Debates*, *supra* note 15, No 48 (6 November 2001) at 0910 (Stanley Wong).
[22] *Ibid*, No 48 (6 November 2001) at 0910 (Michael J Trebilcock).
[23] *Ibid*, No 50 (7 November 2001) at 1630 (Konrad von Finckenstein). In this respect, Parliament struck a balance between two competing visions: see the debate between Robert Russell and Stanley Wong, *ibid*, No 48 (6 November 2001) at 1010 (Robert Russell and Stanley Wong).
[24] *Ibid*, No 50 (7 November 2001) at 1720 (Konrad von Finckenstein) [emphasis added].

> inconsistent with the act has 60 days to go to the tribunal and **challenge the consent agreement**."[25]

30. As the above history shows, Parliament intended for s. 106(2) to act as a meaningful check on the Commissioner's otherwise wide discretion to resolve competition cases. The section strikes a balance between the cumbersome process that existed before 2001 and the blank cheque process that was originally proposed: now, only directly affected parties can bring an application; the time in which to file such an application is short (just 60 days); and the burden is on directly affected parties to demonstrate the s. 106(2) allegation (under the consent order regime, the burden was on the Commissioner).[26]

31. Section 106(2), as amended, reads:[27]

> 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.

32. In the *Burns Lake* reference, the Tribunal interpreted "person directly affected" to mean "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. The impact must be definite and concrete (i.e. not speculative or hypothetical) and must be caused by the consent agreement".[28]

33. With the above context in mind, we now turn to the elements of s. 106(2).

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[25] *Ibid*, No 60 (4 December 2001) at 1655 (Konrad von Finckenstein) [emphasis added].
[26] *Canada (Director of Investigation) v Imperial Oil Ltd* (1989), CT-1989-003/390 at 14 (Comp Trib): "The burden of proof in a consent order application is on the parties **and particularly on the [Commissioner]**." [Emphasis added].
[27] *Competition Act*, RSC 1985, c C-4 (as amended), s. 106(2)
[28] *Burns Lake*, *supra* note 3 at paras 21, 52-55.

### *(2)*
### *Kobo's legal and pecuniary rights are directly affected in a manner that relates to competition*

#### (a)
#### Kobo will suffer legal and pecuniary direct effects

34. As a party to the Agency Agreements that the Consent Agreement orders be terminated or varied, Kobo's legal rights are directly affected. Kobo has already been directly affected. In the days following the Consent Agreement filing, Kobo received termination/amendment notices from most of the Consenting Publishers ("**Termination/Amendment Letters**").[29] These make it clear that those terminations/amendments are being made directly because of the Consent Agreement.[30] One of the Termination/Amendment Letters states that the publisher is "writing to implement a consent agreement between [the publisher] with the Commissioner of Competition."[31] Another, which unilaterally amends its contract with Kobo, states that the notice is being given "as provided in the Consent Agreement between the Commissioner and [the publisher]."[32]

35. Kobo is equally directly affected on a pecuniary level. The Commissioner's Press Release itself makes this clear. There, the Commissioner states:

- "Canadian consumers will benefit from the agreement registered with the Competition Tribunal today, in that the Bureau expects that competition among **retailers** will increase, resulting in lower prices for ebooks."

- "The four publishers have agreed to remove or amend clauses in their distribution agreements with individual ebook retailers that the Bureau

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[29] Tamblyn Affidavit at para 28, Kobo's Record, Tab 2, p 17.
[30] At the time the Record was prepared, Kobo had received two letters. At the time of cross examinations, Kobo had received three: from [redacted] imposing amendments to Kobo's contracts with these publishers, further to the Consent Agreement. See Letter dated February 18, 2014 from [redacted] to Kobo, enclosing "Amendment to Kobo Agency Agreement – Canada", Exhibit "J" to the Tamblyn Affidavit, Kobo's Record, Tab 2-J, p 135 [redacted]; Letter dated February 18, 2014 from [redacted] to Kobo, Exhibit "J" to the Tamblyn Affidavit, Kobo's Record, Tab 2-J, p 138 [redacted]; Tamblyn Cross-Examination, pp 47-50, qq 152-64.
[31] [redacted], *ibid*.
[32] [redacted], supra note 30, Kobo's Record, Tab 2-J, p 138.

believes have the effect of restricting retail price competition, which will **allow retailers to offer discounts** on ebooks."

- "Similar settlements reached in the United States in 2012 and 2013 resulted in lower prices for ebooks in the US. The Bureau's monitoring of the effects of the US settlement shows **that discounts of 20 per cent, and sometimes higher, can now be found on certain bestselling ebooks**."[33]

36. The Press Release illustrates that the Consent Agreement is not meant to saddle the Consenting Publishers – the ostensible wrongdoers – with the pecuniary burden: they can continue to set the price of E-books as they see fit. Rather, any discounts will come out of the **retailers'** share of the sale revenue. There can be no question that Kobo will suffer direct pecuniary losses as a result of the Consent Agreement. The Consent Agreement is designed to achieve precisely that aim.

37. The Consenting Publishers themselves recognize that the retailers, not the publishers, will bear the financial losses flowing from the Consent Agreement. As one publisher states in its Termination/Amendment Letter: "if you elect to offer and/or supply any price reductions or discounts or any of the foregoing forms of promotions, **the value of such shall reduce the commission to you by [the publisher] per the Agreement dollar for dollar and the revenue remitted by you to [the publisher] per the Agreement shall at all times remain 70% of the customer price provided by [the publisher] to you.**"[34] The letter from another publisher states: "All Discounts shall be at Agent's **sole expense and shall not reduce the total revenue due to Publisher** (70% of the [retail price determined by the publisher])".[35]

38. The Commissioner clearly believes that the Consent Agreement will have a pecuniary effect in the form of lower prices. What he de-emphazises is that every

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[33] Competition Bureau, Press Release, "Competition Bureau Takes Action to Promote Competition for ebooks" (7 February 2014), Exhibit "H" to the Tamblyn Affidavit, Kobo's Record, Tab 2-H, p 119 [emphasis added].

[34] [redacted], supra note 30, Kobo's Record, Tab 2-J, p 138 [emphasis added].

[35] [redacted], supra note 30, Kobo's Record, Tab 2-J, p 136 [emphasis added].

dollar of that effect will be a dollar out of the pocket of retailers like Kobo. The Consenting Publishers come out of this process whole. No wonder, then, their willingness to sign onto a Consent Agreement in which they admit no wrongdoing (and, indeed, in which no specific wrongdoing is even alleged).

39. Kobo's burden on this motion is not to quantify the harm it will suffer: the question is the nature (here, financial), not the magnitude.[36] Nonetheless, in addition to the evidence of the Commissioner's statements, above, Kobo has prepared internal forecasts that it is relying on to plan its operations. Basing its forecasts on the crippling effects it experienced in the US after similar remedies affected its contracts, Kobo predicts that to the end of 2014 alone, it would suffer up to [redacted] in losses, depending on its response to discounting strategies.[37] It will also sustain an impact to its customer base and operational burdens to implement these changes.[38]

40. The post-Agency losses Kobo suffered in the US were devastating on Kobo, and on competition more generally. One rival, Sony, was so harmed that it had to exit the North American E-books market.[39] In a bid to maintain some market share in the US, Kobo acquired Sony's E-book customers.[40] Meanwhile, Barnes & Noble's NOOK E-book division has reported revenue declines in the range of 20.2% - 32.2% from the previous year, and EBITDA losses of nearly half a *billion* dollars for the 2013 fiscal year.[41] These events occurred after implementation of the Settlement Agreements

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[36] *RJR-MacDonald*, *supra* note 10 at 341: "'Irreparable' refers to the nature of the harm suffered rather than its magnitude."
[37] Tamblyn Affidavit at para 30, Kobo's Record, Tab 2, p 18; Tamblyn Cross-Examination, pp 50- 59, qq 166-187.
[38] Tamblyn Cross-Examination, pp 112-113, qq 358-359.
[39] Tamblyn Affidavit, *ibid* at paras 20-21, p 16; Media reports of Sony's exit of the US market, Exhibit "E" to the Tamblyn Affidavit, Kobo's Record, Tab 2-E, pp 92-100; Tamblyn Cross-Examination, p 65-67, q 207.
[40] Tamblyn Cross-Examination, pp 65-67, qq 207-214 (as Mr. Tamblyn explained at q 214, [redacted]
[41] Tamblyn Affidavit at paras 20, 22-23, Kobo's Record, Tab 2, pp 16-17; Barnes & Noble Press Releases dated 25 June 2012, 20 August 2013, 26 November 2013, Exhibit "F" to the Tamblyn Affidavit, Kobo's Record, Tab 2-F, pp 102-114; Brad Stone, "Barnes & Noble's Nook Nightmare Stars Amazon and the DOJ", *Bloomberg Businessweek* (9 January 2014), online: Bloomberg Businessweek <www.businessweek.com>, Exhibit "G" to the Tamblyn Affidavit, Kobo's Record, Tab 2-G, pp 116-17.

in the US. The evidence is clear that those agreements had a profoundly negative effect on the state of competition in the US.[42]

41. The Commissioner's Response seeks to brush off these negative effects of the Consent Agreement. The Commissioner suggests that Kobo cannot look to the US experience to predict Canadian effects. The Commissioner's position cannot stand:

(a) The Commissioner himself points to the US experience in his Press Release, implying that he anticipates similar effects to take place in Canada. The Commissioner cannot have it both ways.

(b) The US is the most analogous market to draw on and pricing patterns can be empirically assessed and reviewed, as Kobo maintains data for that jurisdiction.[43]

(c) The US experience is the one that Kobo's executives are using to determine how to transition to "Agency Lite" in the event the stay is not obtained. That Kobo is using these models for business forecasts is a clear indication of the reliability of these figures.[44]

42. To this end, the US is as close to a natural experiment as is available. Had the US not been a proper comparator market, the Commissioner would not have relied on it in his Press Release. The Tribunal has previously accepted the use of natural experiments as evidence to predict future effects.[45] There is no reason not to accept the US as a proper *prima facie* comparator in this case.

**(b)**

**The effects relate to competition and are not speculative**

43. The Commissioner posits the argument, accepted by the Tribunal in *Burns Lake*, that "directly affected" means that Kobo's legal and pecuniary rights must be

[42] Tamblyn Cross-Examination, p 60, q 193.
[43] *Ibid*, p 60, q 193; p 61, q 195; p 78, q 249.
[44] *Ibid*, pp 50-51, qq 166-71; pp 73-74, qq 231-233.
[45] *CCS*, *supra* note 20 at paras 293, 296.

affected in a way that relates to the competitive concerns identified by the Bureau. Although this qualification appears nowhere in the Act, insofar as it is a test for standing, it is obvious that Kobo meets it.

44. The legal rights that will be affected are the exact same legal rights that Consent Agreement seeks to prohibit. This is not a case of Kobo having ancillary agreements with settling parties that may be tangentially impacted by a consent agreement. This is distinguishable, for example, from a divestiture scenario where the Consent Agreement has an ancillary impact on a customer of one of the merging parties. Here, the very rights the Commissioner seeks to modify in the name of competition are the rights that Kobo seeks to preserve in the name of competition.

45. The pecuniary interest at issue also relates to competition. In the US experience, the result of the settlements is that the number of E-book retailers has diminished significantly, and those who remain are diminished in their ability to compete and remain viable. By endorsing a model that encourages certain retailers to price below their cost of acquisition, at rates unsustainable by other competitors, the Bureau negatively affects not only Kobo, but competition and the competitive landscape more broadly.[46]

46. These effects are neither speculative nor uncertain. To the contrary, they are immediate and have recently played out in an analogous jurisdiction. Kobo has already been put on notice by Consenting Publishers of their intention to terminate and vary their contracts, and Kobo will have to make these adjustments within days of this hearing if the stay is not granted. As stated above, the notices make it clear that the losses to be incurred will be suffered by Kobo; the Consenting Publishers remain whole.

[46] Media reports of Sony's exit of the US market, Exhibit "E" to the Tamblyn Affidavit, Kobo's Record, Tab 2-E, pp 92-100; Barnes & Noble Press Releases, supra note 41, Exhibit "F" to the Tamblyn Affidavit, Kobo's Record, Tab 2-F, pp 102-114; Stone, supra note 41, Exhibit "G" to the Tamblyn Affidavit, Kobo's Record, Tab 2-G, pp 116-17. See Also Brief of Economists as *Amici Curiae* in Support of Appellant Apple and Urging Reversal at p 19 (March 4, 2014) (available online: http://fortunebrainstormtech.files.wordpress.com/2014/03/economist-amicus-brief1.pdf).

47. In sum, there can be no question that Kobo raises serious issues about how it is directly affected by the Consent Agreement in a manner that relates to competition. These effects are neither speculative nor uncertain.

***(3)***
***The Consent Agreement is not based on terms that could be the subject of an order of the Tribunal***

48. If Kobo, as a directly affected party, can show that the Consent Agreement is based on terms that could not be the subject of an order of the Tribunal, the s. 106 Application should be granted. Again, on this Motion, Kobo need not prove its case, and the Tribunal is not asked to decide the issues raised by Kobo's Application. The Tribunal must only be satisfied that Kobo's Application is not frivolous or vexatious. If Kobo raises triable issues, the stay should be granted so that the merits of Kobo's arguments can be properly tested.[47]

49. Indeed, despite being at a disadvantage due to the Commissioner's failure to articulate a 90.1 agreement, Kobo raises two important triable issues:

(a) the Tribunal lacks threshold jurisdiction to make any order under s. 90.1 in the absence of an existing or proposed agreement or arrangement among competitors (or even an allegation of such an agreement); and

(b) the Tribunal lacks the remedial jurisdiction to make an order under s. 90.1 with the prohibitory terms of the Consent Agreement because there is no link made to a 90.1 agreement contemplating that the publishers must enter into Agency Agreements and Price MFNs.

50. In examining these triable issues, there are two aspects of the Commissioner's case that must be borne in mind. Before expanding on the triable issues, we will first comment on how they are affected by the Commissioner's failure to make s. 90.1 allegations, and his anticipated argument that the Tribunal may not assess facts or merits in a s. 106(2) application.

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[47] *RJR-MacDonald*, *supra* note 10 at 337-38.

*(i)*
*Commissioner Has Not Made s. 90.1 Allegations*

51. Kobo is somewhat hampered on this element, as the Commissioner has studiously avoided providing particulars of his theory. Not only is the Consent Agreement silent on the theory, so too were the Commissioner's Response and the witness the Commissioner put forward to be cross examined on this motion. The witness the Commissioner chose, a paralegal named Hollie Felix, played "no investigative role", "no advisory role", did not "sit in on briefing meetings to discuss the substance of the Bureau's case" and had no role in negotiating or drafting the Consent Agreement.[48] By her own admission, she is therefore "in no better position than the general public to [describe] what the substance of the case is".[49]

52. Having had no prior exposure to the *substance* of the matter, however, Ms. Felix stands as a perfect proxy for what the public can understand from the Commissioner's filings and Press Release. In cross-examination, she was taken to the Commissioner's Press Release and the Consent Agreement, and asked what she understood to be the allegations underpinning the Commissioner's s. 90.1 case.[50]

53. Ms. Felix was given the opportunity to review the documents, confirmed that she understood the difference between E-book Publishers like Macmillan on the one hand and E-book Retailers like Kobo on the other hand, and was told to take her time before answering questions.[51] On reading the Press Release and the Consent Agreement, Ms. Felix could not identify:

(a) what conduct of the Consenting Publishers was being referred to in the Press Release;[52]

(b) how the unspecified conduct in the Press Release relates to an agreement or an arrangement among publishers;[53]

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[48] Felix Cross-Examination, pp 9-10, qq 24-25, 27, 290-30.
[49] *Ibid*, pp 10-11, q 35.
[50] *Ibid*, p 16, qq 61-63; pp 17-21, qq 68-84.
[51] *Ibid*, p 13, qq 48-49; p 17, q 65; pp 13-14, qq 51-52; p 7, q 14.
[52] *Ibid*, p 16, q 61.

(c) whether the unspecified conduct relates to an agreement or an arrangement among publishers, if it does at all;[54]

(d) what the terms of the alleged agreement or arrangement were;[55]

(e) whether the agreement or arrangement was still in force;[56]

(f) whether the agreement or arrangement at issue is actually the vertical Agency Agreements (referred to in cross examination as distribution agreements) between publishers and retailers;[57]

(g) whether the agreement or arrangement at issue is between publishers, or between publishers and retailers;[58]

(h) what conduct of the Consenting Publishers (referred to in cross examination as the Respondents) was being referred to in the recitals of the Consent Agreement;[59]

(i) whether that conduct relates to an agreement or arrangement;[60] or

(j) whether the agreement or arrangement required publishers to engage in conduct.[61]

54. None of this represents a failing on Ms. Felix's part. Rather, it is a failing on the part of the Consent Agreement. Ms. Felix simply confirms what is clear from the document itself: neither the public, nor affected third parties, nor the Tribunal can know from reading the Consent Agreement whether there actually is an existing or proposed agreement or arrangement among competitors; whether that agreement required publishers to engage in conduct; and whether the prohibition orders contained in the

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[53] *Ibid*, p 16, q 62.
[54] *Ibid*, p 16, q 63.
[55] *Ibid*, p 20, q 77.
[56] *Ibid*, p 20, q 78.
[57] *Ibid*, pp 20-21, q 79.
[58] *Ibid*, p 21, qq 80-81.
[59] *Ibid*, p 21, q 82.
[60] *Ibid*, p 21, q 84.
[61] *Ibid*, p 21, q 83.

Consent Agreement actually relate to conduct taken "under the agreement or arrangement".[62] These failings are fatal.

*(ii)*
*Correct Analytical Approach to s. 106(2)*

55. Kobo anticipates that the Tribunal may be urged by the Commissioner to take an exceedingly narrow interpretation of s. 106(2), such that the Tribunal's analysis would strictly be confined to looking at the terms the Consent Agreement and, without any consideration of facts or merits, determine whether the Tribunal would have jurisdiction to make orders *of that nature*. That is an incorrect interpretation of s. 106, but even on that interpretation, the Consent Agreement is flawed.

56. Section 106 permits consideration of the merits. Any argument that s. 106 is meant to engage in analysis devoid of any consideration of the facts, the allegations, or the merits, fails to take into account the meaningful safety valve role that s. 106(2) is meant to play. As the legislative history shows, Parliament's intention was to allow for these sorts of matters to be raised. If they could not be raised, then there would really be no role for third parties to play in the process. The legislative record shows that, rather than denying affected parties the right to raise issues, Parliament actually took steps to address that gap in the proposed amendments.[63]

57. Second, such a narrow interpretation does not square with the Commissioner's own practices. In every consent agreement that has been filed since July 2009, the Commissioner has obtained from consenting parties a waiver of their right to contest the Commissioner's allegations in any subsequent application to enforce, vary or amend the consent agreement.[64] In the Consent Agreement, the specific language appears twice:

> [From Recitals] AND WHEREAS IT IS AGREED AND UNDERSTOOD THAT the Respondents do not accept or admit, but will not for the purposes of this Agreement only, including execution, registration,

[62] *Competition Act*, *supra* note 27, s 90.1(1)(a).
[63] *Debates*, *supra* note 15, No 50 (7 November 2001) at 1630 (Konrad von Finckenstein).
[64] See Consent Agreement, recitals at 2, Exhibit "I" to the Tamblyn Affidavit, Kobo's Record, Tab 2-I, p 123; Recitals of various consent agreements, Kobo's Book of Authorities, Tab 17.

> interpretation, enforcement, variation or rescission, contest the Commissioner's allegations…[65]
>
> …
>
> 17. Nothing in this Agreement precludes the Respondents or the Commissioner from bringing an application under section 106 of the Act (or successor or equivalent provision under the Act) to rescind or vary this Agreement. The Respondents do not accept or admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation or rescission, contest the Commissioner's allegations that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act.[66]

58. If the Commissioner believed, as is set out in his Response,[67] that s. 106 could not be used to turn a consent agreement into a contested proceeding on the merits, then there would be no need for the Commissioner to include such a wide-ranging waiver in each and every one of its last 16 consent agreements.[68] Clearly, the Commissioner sees it as possible that a motion to vary could lead to a challenge on the merits.

59. It must be recalled that the Tribunal has never had to answer the question of whether the merits of a Consent Agreement can be challenged, and if so, how. The questions the Commissioner submitted in the *Burns Lake* reference only dealt with the definition of directly affected parties and whether evidence needs to be filed along with a s.105 consent agreement.[69] The Commissioner did not ask the Tribunal to explain how a party in a s.106 case is to "establish that the terms could not be the subject of an order of the Tribunal", or what is meant by "terms could not be the subject of an order." The Tribunal certainly did not consider the provision in relation to consent agreements invoking s. 90.1, as that provision was added to the Act in 2009.

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[65] *Ibid* at 2, p 123.
[66] *Ibid* at para 17, p 129.
[67] Commissioner of Competition's Response at para 6, p 3.
[68] Recitals of various consent agreements, Kobo's Book of Authorities, Tab 17.
[69] *Burns Lake*, *supra* note 3 at paras 2-5.

**(a)**
**Tribunal Lacks Threshold Jurisdiction to make any Order**

60. Without a 90.1 agreement to analyze – if even in the form of allegations – the Tribunal cannot be satisfied that it would have the jurisdiction to make orders with the terms contained in the Consent Agreement.

61. At a threshold level, the Tribunal is only entitled to make orders under s. 90.1 if it is satisfied that there is an existing or proposed agreement or arrangement among competitors.[70] Here, there is no such allegation. The only agreements that are referred to in the Press Release and in the Commissioner's Response are the vertical agreements between E-book Retailers like Kobo and E-book Publishers like the Consenting Publishers.

62. Section 90.1 is meant to apply to agreements between competitors, not agreements between principles and agents or suppliers and distributors. Kobo's affiant, Michael Tamblyn, provided evidence that was clear and went unchallenged in cross-examination: Kobo does not compete with publishers, and it negotiated each of its agreements with publishers one-on-one.[71] If the Commissioner takes issue with Mr Tamblyn's view, he ought to have cross-examined on this point. He did not. Section 90.1 cannot and does not apply to the Agency Agreements themselves.

63. Nor can the Commissioner claim that the 90.1 Agreement was one whereby the Consenting Publishers imposed on Canadian E-book Retailers the agency model. Mr. Tamblyn was not challenged on his sworn evidence that it was Kobo that was driving for Agency with some of the Consenting Publishers.[72] His recollection of pushing for Agency with publishers reticent to adopt Agency in Canada is unchallenged by the Bureau. It is thus uncontested that the entry into Agency contracts in Canada with those Consenting Publishers did not arise from a pre-existing agreement, rather, it resulted from the retailer urging them to make the switch. This is further supported by

[70] *Competition Act*, *supra* note 27, s 90.1.
[71] Tamblyn Affidavit at para 6, Kobo's Record, Tab 2, p 14.
[72] *Ibid* at para 33(d), p 19.

the fact that the contracts Kobo negotiated were staggered; as it took longer to conclude contracts with the reticent publishers.[73]

64. Nor can the Commissioner ask that the Tribunal infer that the switch to agency in Canada arose as a result of a 90.1 agreement that was struck in another country. If that is a theory the Commissioner wanted the Tribunal to consider on this motion, the Commissioner needed to put that position forth in his Response. His position would have had to have been two-fold: (i) that he believes that there was a global conspiracy and Canada was one of the countries contemplated in that conspiracy, and (ii) that he is relying on that conspiracy to underpin his s. 90.1 case. Had that been the case, Kobo could have cross-examined his witness on both fronts. Instead, the Commissioner chose to put forward a witness who could do no more than confirm that Canada was not mentioned in any relevant way in the foreign complaint.[74]

65. The Commissioner cannot now ask the Tribunal to infer the existence of a global conspiracy that encompasses Canada. Where a party has the opportunity to lead evidence in support of a conclusion, but chooses not to, it cannot ask the trier of fact to speculate or draw an inference that the proposed conclusion is correct. In fact, the opposite is correct: the Tribunal is to infer that the Bureau's evidence would have worked against it.[75]

66. Even if the Tribunal wanted to infer such a link – which the case law says it ought not do – Kobo has advanced unchallenged evidence to show why the inference cannot stand.

67. First, none of the foreign documents refer to Canada in any relevant fashion.[76]

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[73] *Ibid* at para 33(a), p 19.
[74] Felix Cross-Examination, p 22, qq 88-90.
[75] *Seatle (Guardian ad item of) v Purvis*, 2007 BCCA 349 at para 72, 68 BCLR (4th) 288, p 72-75.
[76] See Affidavit of Hollie Felix at paras 3-6 [**Felix Affidavit**]; Complaint filed in *USA v Apple Inc* (11 April 2012), US Dist Ct (SDNY), Exhibit "A" to the Felix Affidavit, Tab A; Response of Plaintiff United States to Public Comments on the Proposed Final Judgment filed in the United States District Court for the Southern District of New York on July 23, 2012, Exhibit "B" to the Felix Affidavit, Tab B; European Commission decision of 12 December 2012, Exhibit "C" to the Felix Affidavit, Tab C; Commitments

68. Second, while the shift to agency in the US and Europe occurred near simultaneously in 2010, the adoption of agency in Canada occurred later and in a staggered fashion.[77]

69. Third, even if there were any evidence of a global conspiracy emanating from the alleged agreements struck among the publishers and Apple in 2010 (despite none being proffered on this motion), those agreements definitively came to an end as a result of the remedies obtained in the US. The Final Judgments all state:

> [Each E-book Publisher] shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of
> any E-book or fix, set, or coordinate any term or condition to the Sale of E-books.
>
> …
>
> F. A Settling Defendant (including each officer of each parent of the Settling Defendant who exercises direct control over the Settling Defendant's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a publisher Defendant) any competitively sensitive information, including:
>
> 1. its business plans or strategies;
>
> 2. its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (e.g. print books, E-books, or audio books);
>
> 3. any terms in its agreement(s) with any retailer of books Sold in any format; or
>
> 4. any terms in its agreement(s) with any author.
>
> This section V.F. shall not prohibit a Settling Defendant from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information the Settling Defendant needs to communicate in connection with (i) its enforcement or assignment of its

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offered to the European Commission in respect of Case Comp/39.847 – E-books, Exhibits "D"-"G" to the Felix Affidavit, Tabs D-G. Felix Cross-Examination p. 22, qq 88-90

[77] Tamblyn Affidavit at para 33, Kobo's Record, Tab 2, pp 18-19.

> intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.[78]

70. [redacted][79] The US Settlements Agreement were reached and implemented beginning in April 2012. Even if any US conspiracy could once be linked to Canadian agency terms, that conspiracy is now definitively over and the subject of a binding order of the US courts. That order expressly applies to the subsidiaries of the E-book Publishers, whose Canadian contracts have mostly since turned over.[80]

71. Section 90.1 does not grant the Tribunal jurisdiction over agreements or arrangements that have expired or are no longer in force. It only grants it jurisdiction over agreements that are "existing or proposed".[81] Accordingly, even if the Commissioner sought to have the Tribunal draw an inference of a tenuous link between the US conspiracy and Canada, such a link would still not grant the Tribunal jurisdiction to order the terms contained in the Consent Agreement. The alleged US conspiracy is over and has been for some time.

72. The foregoing demonstrates that Kobo raises serious issues about the Tribunal's threshold jurisdiction to make any order under s. 90.1 in the absence of an existing or proposed agreement or arrangement among competitors.

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[78] Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster in *USA v Apple Inc* (6 September 2012) US Dist Ct (SDNY), s V.E, pp 11-12, Exhibit "C" to the Tamblyn Affidavit, Kobo's Record, Tab 2-C, pp 58-59 [**Hachette, HarperCollins and Simon & Schuster Final Judgment**]; Final Judgment as to Defendants Verlagsgruppe Georg Von Holtzbrinck GMBH & Holtzbrinck Publishers, LLC d/b/a Macmillan in *USA v Apple Inc* (12 August 2013) US Dist Ct (SDNY), s V.E, p 11, Exhibit "D" to the Tamblyn Affidavit, Kobo's Record, Tab 2-D, p 78 [**Macmillan Final Judgment**].

[79] Tamblyn Cross-Examination, p 46, q 146.

[80] Hachette, HarperCollins and Simon & Schuster Final Judgment, supra note 78, ss II.G-H, S, pp 4, 7, Kobo's Record, Tab 2-C, pp 51, 54; Macmillan Final Judgment, supra note 78, s II.J, p 4, Kobo's Record, Tab 2-D, p 71.

[81] *Competition Act*, *supra* note 27, s 90.1.

**(b)**
**Tribunal Lacks Remedial Jurisdiction to make the Specific Orders**

73. Even if the Tribunal rejects all of the foregoing arguments as frivolous and vexatious (though they clearly are not) and performs a purely formalistic analysis of the prohibitory terms to see if orders of that nature are *intra vires* its jurisdiction, the Consent Agreement should still be rescinded or varied. An analysis of the prohibitory terms shows that the Tribunal could not make the orders contemplated (contrary to what the Commissioner states in paragraph 5 of his Response).

74. In a s. 90.1 case, the Tribunal is not able to make whatever prohibition order it wants. Rather the prohibition must relate to the alleged 90.1 agreement:

> 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
>
> (a) prohibiting any person — whether or not a party to the agreement or arrangement — **from doing anything under the agreement or arrangement**; …[82]

75. In the context of the facts of this case, the Consent Agreement contains two prohibition orders: a prohibition on Agency Agreement terms and a prohibition on Price MFNs.[83] By filing the *pro forma* Consent Agreement, the Commissioner frustrates s.106(2) and prevents the Tribunal from testing whether, as is required by s. 90.1(1)(a), the two prohibition orders relate to conduct that was contemplated by an alleged agreement or arrangement.

76. Here, the Tribunal has no indication of any of the terms of the 90.1 agreement, let alone any allegation that the 90.1 agreement contemplated that the publishers must enter into Agency Agreements and Price MFNs. The Tribunal would need to be satisfied of this before making prohibition orders in relation to Agency Agreements and Price MFNs.

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[82] Ibid. [Emphasis added].
[83] Consent Agreement at paras 2-3, Exhibit "I" to the Tamblyn Affidavit, Kobo's Record, Tab 2-I, p 126.

77. There is no indication of any agreement that imposes those two obligations on the Consenting Publishers. Even if the Tribunal rejects Mr. Tamblyn's uncontested account as to how agency came to Canada, what cannot be ignored are the terms of the Agency Agreements themselves.

78. In particular, [redacted] is dispositive proof that there was no such agreement, as it **contains no Price MFN**. As such, either:

(a) there is a 90.1 agreement that the publishers would impose Price MFNs, [redacted] is not a party to the 90.1 agreement (at which point the basis for the Commissioner's case falls away, at least insofar [redacted] is concerned),

(b) or, more likely (given Mr. Tamblyn's uncontested evidence), there is no 90.1 agreement at all.

79. Either way, the Consent Agreement and its terms are *ultra vires*. If there is no 90.1 agreement [redacted] has to enter into Price MFN clauses, then the Tribunal is not entitled to prohibit [redacted] entering into Price MFN clauses, as paragraph 3 of the Consent Agreement seeks to do.

## (B)
## KOBO WILL SUFFER IRREPARABLE HARM

80. As set out in paragraphs 34-42 above, Kobo will suffer irrecoverable losses as a result of the Consent Agreement. The Commissioner's Press Release confirms as much, citing price discounts and the US experience of up to 20% decreases in price. The Termination/Amendment Letters show definitively that the price discounts will come from the revenue of retailers like Kobo, not the Consenting Publishers. Impact will also be sustained to its customer base and by operations and personnel.[84] Kobo repeats and relies on paragraphs 34-42 for this branch of the test.

[84] Tamblyn Cross-Examination, pp 112-113, qq 358-359.

81. As the Federal Court of Appeal has recognized, irreparable harm refers to the nature of the harm suffered, not the quantum.[85] Financial harm that cannot be cured because damages cannot be sought qualifies as irreparable harm.[86] In at least two cases, the Court has issued stays pending decisions in which one factor that favoured the stay was the fact that there is no right to claim damages from the Commissioner.[87]

82. Most of the points the Commissioner raises in his Response (is the harm related to competition, can commercial losses be relied on, and the applicability of the US experience) are addressed at paragraphs 34-42 above, which Kobo repeats and relies on for this branch of the test.

83. One novel argument the Commissioner raises[88] is his assertion that Kobo's losses cannot qualify as "harm" because to credit Kobo for such losses is at odds with the Act, which seeks to protect competition, not competitors. This argument has no basis in the law, nor does it hold up against the facts of this case.

84. From a jurisprudential point of view, there is no case that says that losses resulting from price decreases arising from the imposed change of a pricing model cannot qualify as harm for the purpose of the *RJR-Macdonald* test.

85. Nor does the Commissioner's argument stand up in terms of the facts of this case. The Commissioner's assertions could only hold together if Kobo's pricing were the result of **Kobo** engaging in anticompetitive conduct or enjoying market power. The Commissioner has advanced neither proposition. The Commissioner cannot rely on unsubstantiated allegations in this motion. If the Commissioner believed that Kobo violated the Act to keep its prices artificially and anti-competitively high – which is what paragraph 8 of his Response boils down to – he had to advance this point. He has not.

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[85] *Tervita*, *supra* note 10 at para 9. See also *RJR-MacDonald*, *supra* note 10 at 341.
[86] *RJR-MacDonald*, *ibid* at 341; *Tervita*, *ibid* at para 15; *Canadian Waste*, *supra* note 10 at para 18.
[87] *Tervita*, *ibid*; *Canadian Waste*, *ibid.*
[88] Commissioner of Competition's Response at paras 8, 11, pp 4-5.

86. To this end, it is important to point out that even in the US, where a full trial was held on the alleged US (not Canadian) conspiracy, the Judge had the following to say on agency terms and Price MFNs:

> The Plaintiffs do not argue, and this Court has not found, that the agency model for distribution of content, or any one of the clauses included in the Agreements, or any of the identified negotiation tactics is inherently illegal. Indeed, entirely lawful contracts may include an MFN, price caps, or pricing tiers. Lawful distribution arrangements between suppliers and distributors certainly include agency arrangements. …[89]

87. The Commissioner is putting the cart before the horse when he says that Kobo's losses should be ignored because the price decrease will lead to competition. That view wrongly assumes that price decreases are the only marker of a competitive market.[90] Even if that statement had a basis in law (which it does not), the Commissioner would have to show that the prices as they stand today are the result of anticompetitive conduct on Kobo's part. He has not. He cannot counter Kobo's evidence of irreparable harm by making unsubstantiated allegations about Kobo's pricing being anticompetitive.

88. Given that the Commissioner has neither a legal nor a factual basis for saying that Kobo's losses should not qualify as irreparable harm, this argument has no merit. Kobo has established that it will suffer losses that cannot be recovered in the event it is successful in its application. The second branch of the test is met.

## (C)
## THE BALANCE OF CONVENIENCE FAVOURS THE STAY

89. Determining the balance of convenience requires an assessment of which result causes the greater harm, the granting or the refusal of the stay. The factors to be considered are unique to each individual case.[91]

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[89] *United States v Apple Inc,* 12 Civ 2826 (DLC), 2013 WL 3454986 at 132 (SDNY July 10, 2013). See also *Amici Curiae* Brief supra note 46, pp 2-3, 21-22.
[90] *Amici Curiae* Brief ibid, p 19.
[91] *RJR-MacDonald*, *supra* note 10 at 342.

*(1)*
*No Prejudice if Stay is Granted*

90. There is no prejudice to issuing the stay. If the s. 106 Application is ultimately dismissed, the only possible harm would be a delay in the implementation of the remedy. Given that the remedy contains no permanent ban, but rather a time-limited prohibition, this simply means that the remedy would affect sales and a customer base beginning at a later start date. It will be no less effective, it will just be effective with respect to a later set of customers.

91. Nor is the Commissioner's case one where urgency has been a factor such that a stay is inappropriate. The Commissioner asserts that he has been investigating this matter for 18 months. He had sought no injunctive or interim relief despite being able to do so if he had commenced an application under 90.1.

92. Again, the US Settlement Agreements that the Commissioner relies on in his Press Release are instructive. There, the investigation began in 2010. Unlike here, where the Commissioner has included an unprecedented 40-day deadline on the implementation of the remedy, there, immediate implementation was not an element of the settlement. Each of those three US Settlement Agreements was implemented some six months after the Stipulation consenting to the agreement was filed. Since each Stipulation was filed at a different time, the implementation of the three agreements spanned 16 months. The Commissioner points to the US Settlement Agreements as an effective remedy. It follows that a delay in implementation here would make the Consent Agreement no less effective.

*(2)*
*Prejudice if Stay is Refused*

93. The balance of convenience favours granting the stay. The public interest is best served by having the Tribunal consider the important policy and statutory interpretation issues raised above. Further, without a stay, Kobo's application becomes moot. *Burns Lake* took over a year to resolve, and that case proceeded by reference,

rather than by way of application.[92] Even if Kobo pursues and prevails on its s.106 Application, the damage will be done and there will be no way to turn back the clock. In such circumstances, it would make no sense for Kobo to continue with the s. 106 Application. The result would be that the Commissioner's decision to file a *pro forma* consent agreement will go unchecked. Since the Commissioner now inserts clauses prohibiting the Respondents from contesting the Commissioner's allegations as a matter of course in consent agreements, it is important that s. 106(2) remain effective.

94. The prohibition on Agency Agreements in the Consent Agreement is for a year and a half. It makes no sense for Kobo to take on the risk, cost and uncertainty of a potentially lengthy litigation, to obtain a remedy under s. 106 that will come only after its Agency Agreements have been turned on their heads and it has suffered irrecoverable damages. The likelihood of mootness weighs heavily in favour of a stay.

95. The balance of convenience also favours transparency and clarity. From the *pro forma* Consent Agreement, to the Press Release that only speaks of a vertical agreement, to the Response that avoids identifying an agreement or arrangement among competitors, to the decision to put forward a witness who could not answer substantive questions about the allegations in the Consent Agreement – clarity and transparency have been sacrificed in this case in the name of expediency. The public interest is not served by keeping the public, directly affected third parties, and the Tribunal in the dark.

96. If the stay is not issued, the public will be denied the opportunity to know the basis upon which the Commissioner seeks to alter commercial agreements between private parties. The balance of convenience favours having a hearing to understand what limits apply to the Commissioner's broad power to enter into settlements, especially in the face of vague allegations that are expressly denied by settling parties.

[92] Of the four "recent" contested 106(1) applications, the length of time to progress to hearing has ranged from five months to nearly a year and a half. One would expect 106(1) cases to be shorter than 106(2) cases, because the parties in a 106(1) case already have an understanding of the underlying allegations.

## PART 4 - ORDER SOUGHT

97. Kobo asks this Tribunal to grant an order staying the registration of the Consent Agreement pending the determination of Kobo's s. 106 Application.

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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
(Moving Party)

- 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
(Responding Parties)

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**MEMORANDUM OF ARGUMENT OF KOBO INC.**
**(Motion for a Stay of Consent Agreement)**

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