

Reading Between The Lines: Kobo's Challenge to the E-Books Consent Agreement

Two recent decisions of the Competition Tribunal in the e-books case shed light on the type of a challenge which can be brought in relation to a Consent Agreement negotiated between the Commissioner of Competition (the "**Commissioner**") and parties targeted by the Competition Bureau. The Commissioner of Competition investigated the activities of certain book publishers related to the digital books or "e-books". This paralleled a U.S. investigation into the same type of activities. To resolve his concerns, the Commissioner entered into a consent agreement (the "**Consent Agreement**") with Hachette Book Group, Inc., Hachette Digital, Inc., HarperCollins Canada Limited, Holtzbrinck Publishers, LLC, and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (collectively, the "Consenting Publishers").

The Consent Agreement calls on the Consenting Publishers to terminate or amend their contracts with e-book distributors, and prohibits the agency mode of e-book sales. While Kobo was not the focus of the investigation, the Consent Agreement had an impact on many of Kobo's Canadian e-books contracts.

Kobo is not a party to the Consent Agreement, but it challenged the agreement on the basis of s. 106(2) of the *Competition Act* (the "**Act**"), which permits a person directly affected by a consent agreement to apply to the Competition Tribunal (the "**Tribunal**") to have the terms of the agreement rescinded or varied. Kobo alleged that it was directly affected because the Consent Agreement significantly alters the terms of the contracts it has with the

Consenting Publishers and will have a significant impact on its business and profitability.

Initially, Kobo was successful in obtaining from the Tribunal a stay order halting the implementation of the Consent Order pending the outcome of its s. 106(2) application (the "**Stay Decision**"). More recently, the Tribunal rendered a decision (the "**Scope Decision**") that limits the scope of a potential challenge under s. 106(2) by Kobo or any other party wishing to invoke the section to challenge other consent agreements.

The Stay Decision

On March 18, 2014, Kobo successfully obtained a stay order from the Tribunal pending the outcome of its application challenging the terms of the Consent Agreement.¹ In its reasons for awarding the stay,² Rennie J. of the Tribunal applied the test for granting a stay that was established by the Supreme Court of Canada in its 1994 decision in *RJR-MacDonald*.³

The Tribunal found that there was a serious issue to be tried because Kobo raised serious issues as to the application of s. 106(2) of the Act. The Tribunal may grant an application under s. 106(2) if it finds that the terms of a consent agreement "could not be the subject of an order of the Tribunal". The Tribunal found that there is uncertainty as to the scope of the review permitted by the Tribunal in a s. 106(2) application. Moreover, the Tribunal agreed that Kobo raised a serious issue in asking whether a consent agreement that purports to be obtained in a s. 90.1 investigation requires that the Commissioner satisfy the substantive requirements of s. 90.1. The Tribunal found that this issue was a novel issue that the Tribunal had not dealt with before.

¹ *Kobo Inc v the Commissioner of Competition* (18 March 2014), CT-2014-02.

² *Kobo Inc v the Commissioner of Competition* (27 March 2014), CT-2014-02, [Stay Reasons].

³ *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [RJR-MacDonald].

The Tribunal also agreed that as a result of the impact of the Consent Order on its contractual relationships Kobo would suffer irreparable financial harm if its requested stay was not granted. The Tribunal was convinced that Kobo would be unable to claim damages from the Commissioner even if its s. 106(2) application were to be successful.

The Tribunal decided that the balance of convenience favoured granting the stay. The Tribunal highlighted that even though not granting the stay might result in depriving consumers of lower e-book prices in the short term, granting a stay would have a "profound impact" on the usefulness of Kobo's s. 106(2) application. Without a stay, even if Kobo were to be successful, the Tribunal found that it would be too late to "wind back the clock".⁴

The Tribunal's Decision on the Scope of a s. 106(2) Challenge

Following the Stay Decision, the Commissioner brought a reference question under s. 124.2(2) of the Act asking that the Tribunal provide guidance on the scope of a third-party's right to challenge a consent agreement.⁵ In determining this reference, Crampton C.J. ruled in the Scope Decision that the Tribunal does not have the right to review the circumstances of the alleged conduct underlying the consent agreement. Instead, Crampton C.J.'s reasons render a s. 106(2) challenge comparable to a jurisdictional challenge.

The Tribunal found that it may only assess the following three items in the context of a s. 106(2) challenge:

- (a) whether the terms of a consent agreement are the "type of order" that the Tribunal is permitted to issue in respect of the reviewable conduct in question;

⁴ *Stay Reasons*, *supra* note 2 at para 48.

⁵ *Kobo Inc v the Commissioner of Competition* (8 September 2014), CT-2014-02, [*Kobo Reference Decision*].

- (b) whether the consent agreement identifies each of the substantive elements of the reviewable conduct in question and contains either an explicit agreement between the Commissioner and the respondent(s) that each of those elements has been met or a statement by the Commissioner concluding that each of those elements has been met together with a statement by the respondent(s) that this conclusion is not contested; and
- (c) whether the terms of the consent agreement are unenforceable or would lead to no enforceable obligation.

In discussing the first type of review permitted under s. 106(2), the Tribunal found that it is only permitted to confirm that the terms of a consent agreement are within the "purview" of the type of order that the Tribunal would be able to issue in respect of the particular reviewable conduct at issue.⁶ In other words, so long as the terms mandated by the consent agreement are within the scope of the orders permitted under the Act for the applicable reviewable conduct, those terms will be permitted in the consent agreement.

In relation to the second type of review permitted under s. 106(2), the Tribunal found that it may confirm that the elements of the alleged reviewable conduct have been identified and confirmed. To meet this requirement, either both the Commissioner and the respondent(s) can list the elements of the reviewable conduct and agree that the elements have been met, or the elements can be listed with the Commissioner concluding that the elements have been met together with a statement by the respondent(s) that this conclusion is not contested.

For the third type of review permitted under s. 106(2), the Tribunal found that applicants may seek to establish that the terms of a Consent Agreement are unenforceable or would lead to no enforceable obligation. One example of such a result would occur if

⁶ *Ibid* at para 76.

the terms were too vague. In other words, the Tribunal stated the terms of a Consent Agreement must be certain enough that a person will know with "tolerable certainty" whether conduct would either contravene or not contravene the Consent Agreement.⁷

Impact of Kobo Decision

Despite the narrowing of the scope of s. 106 (2) reviews, Kobo has not discontinued its application and has appealed the Scope Decision to the Federal Court of Appeal. As a result, the full impact of the Kobo Decision is still uncertain. That said, the two decisions rendered by the Tribunal do provide guidance to parties looking to enter Consent Agreements and to parties wanting to challenge them.

For parties looking to enter into Consent Agreements with the Commissioner, they will now need to be wary of the impact on third parties. Affected third parties can challenge the decisions, and based on the Stay Decision, have a good chance of satisfying the requirements of the test for a stay, provided they advance grounds of challenge that fall within the parameters of the Scope Decision. In other words, the implementation of Consent Agreements that unduly impact third parties risk being delayed by third party challenges.

The Scope Decision, for its part, defines a fairly narrow set of grounds that parties can put forward in a potential challenge to a Consent Order. It also provides a bit of a roadmap for the Commissioner in drafting Consent Agreements. Third parties contemplating a challenge must now carefully consider whether the narrow grounds available to them can be successfully argued.

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⁷ *Ibid* at para 128.

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[a cautionary note](#)

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