Federal Court  Cour fédérale

Date: 20180201

Docket: T-219-17

Citation: 2018 FC 64

Ottawa, Ontario, February 1, 2018

PRESENT: THE CHIEF JUSTICE

BETWEEN:

RAKUTEN KOBO INC.

Applicant

and

THE COMMISSIONER OF COMPETITION, HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HACHETTE DIGITAL, INC., HOLTZBRINCK PUBLISHERS, LLC AND SIMON & SCHUSTER CANADA, A DIVISION OF CBS CANADA HOLDINGS CO.

Respondents

PUBLIC JUDGMENT AND REASONS

I. Introduction

[1] In this Application, Rakuten Kobo Inc. [**Kobo**] seeks various types of relief in relation to three consent agreements [**CAs**] that the Commissioner of Competition entered into with the other

Respondents identified in the style of cause above [**the Respondent Publishers**] and filed with the Competition Tribunal in January 2017. Among other things, Kobo has requested a declaration that the CAs are unlawful and invalid, and an order quashing them.

[2] In support of its Application, Kobo asserts three jurisdictional grounds of review. First, it submits that the Commissioner acted without jurisdiction by entering into the CAs to remedy a conspiracy that was entered into in the U.S., not in Canada, and that was resolved by U.S. Courts and antitrust enforcers in 2012–2013. Second, Kobo asserts that the Commissioner acted without jurisdiction by entering into the CAs to remedy "an arrangement" that never existed. Third, Kobo maintains that, if such arrangement did once exist, it was no longer "existing or proposed," as required by s. 90.1 of the *Competition Act*, RSC 1985, c C-34 [**the Act**], at the time the CAs were entered into.

[3] The Commissioner opposes Kobo's jurisdiction challenges and further submits that this Court should decline to consider this Application because Kobo has an adequate alternative remedy under subs. 106(2) of the Act. That provision permits third parties who are directly affected by a consent agreement to apply to the Competition Tribunal [**the Tribunal**] to have one or more of the agreement's terms rescinded or varied. The Commissioner maintains that Kobo should not be permitted to use the Court's judicial review process to defeat Parliament's clear choice to create a limited right of review of consent agreements based on grounds that a third party may raise.

[4] For the reasons that follow, this Application will be denied.

II. **The Parties**

[5] Kobo is a retailer of electronic books [**E-books**]. It is based in Toronto, Ontario, and has agreements with authors, publishers, and distributors that grant it rights to sell E-books in Canada.

[6] The Commissioner is a statutory authority who is responsible for the administration and enforcement of the Act. In carrying out those responsibilities, the Commissioner is supported by staff in the Competition Bureau.

[7] The Respondent Publishers are three of the five major publishers of general interest fiction and non-fiction E-books and hard copy books.

III. **The CAs**

[8] The Commissioner entered into separate, and virtually identical, CAs with each of (i) Hachette Book Group Canada Ltd and the two related Hachette affiliates identified above [collectively, **Hachette**], (ii) Holtzbrinck Publishers, LLC (doing business as Macmillan) [**Macmillan**], and (iii) Simon & Schuster Canada, a division of CBS Canada Holdings Co. [**Simon & Schuster**].

[9] Broadly speaking, the CAs address restrictions on price competition in the sale of E-books in Canada that the Commissioner asserts resulted from a change by the Respondent Publishers from a wholesale distribution model to an agency distribution model.

[10] Pursuant to the wholesale model, the Respondent Publishers set a suggested retail price for E-books, and were paid a pre-determined percentage (typically 50%) of that suggested price for each book sold, regardless of the price actually charged to the consumer by the retailer. By contrast, under the agency model, retailers were appointed as the non-exclusive agent for the marketing and delivery of E-books on behalf of the publishers, who set the price at which the books must be sold. Retailers are then paid a commission (typically 30%) for each book sold.

[11] The recitals in each of the CAs state that the Commissioner has concluded that the Respondent Publisher in question implemented in Canada an arrangement that was entered into in the United States with at least one other competing publisher, relating to the sale of E-books in both of those countries [**the Arrangement**]. Those recitals also state that the Commissioner has concluded that the Arrangement includes provisions that restrict the ability of E-book retailers to discount the retail prices of E-books; and that the Arrangement prevents or lessens, or is likely to prevent or lessen, competition substantially in the retail market for E-books in Canada, within the meaning of s. 90.1 of the Act.

[12] To address those alleged anticompetitive effects of the collective shift to agency agreements, the CAs prohibit the Respondent Publishers from directly or indirectly restricting, limiting or impeding an E-book retailer's ability to set, alter or reduce the retail price of any E-book for sale to consumers in Canada, or to offer price discounts or any other form of promotion to encourage consumers in Canada to purchase one or more E-books. The CAs also prohibit the Respondent Publishers from entering into an agreement with any E-book retailer that has one of those effects. These prohibitions apply for nine (9) months, commencing no later than

120 days following the registration of the CAs. During the hearing of this Application, the Commissioner described these prohibitions as being the "centrepiece" of the CAs, and as having been designed to "ignite the flames of competition" in the E-book market in Canada. Kobo and other industry participants refer to these prohibitions as creating an "Agency Lite" model of distribution.

[13] Certain other terms in the CAs prohibit the Respondent Publishers from entering into agreements with E-book retailers relating to the sale of E-books to consumers in Canada that contain particular types of most-favoured nation clauses [**Price MFN Clauses**] for a period of three (3) years from the date of the registration of the CA.

[14] In addition, the CAs require the Respondent Publishers to take steps to terminate, and not renew or extend, existing agreements with E-book retailers that restrict price discounting or contain a Price MFN Clause. In lieu of such action, the CAs permit the Respondent Publishers to take certain alternative steps to address the Commissioner's concerns.

[15] In March of 2017, I issued an Order, on consent, staying the implementation of the CAs until the fifth business day following this Court's determination of this Application (*Rakuten Kobo Inc v Canada (Commissioner of Competition)*, 2017 FC 382, at para 8 [***Kobo 2017***]).

[16] Kobo asserts that if the CAs are implemented, it will suffer significant financial harm, as its contractual relationships with the Respondent Publishers will be radically altered. In response,

the Commissioner maintains that Kobo simply wishes to avoid competing by cutting its retail prices.

IV. **Background**

[17] The prohibitions in the CAs are essentially the same as the prohibitions that were contained in an earlier single consent agreement that the Commissioner entered into with the Respondent Publishers and HarperCollins Canada Limited [**HarperCollins]** in 2014 [**the Initial CA**], except that they are now of shorter duration. Those prohibitions are also similar to prohibitions that were contained in final judgments that were issued in the United States in 2012.

[18] The Initial CA was rescinded by the Tribunal after it was found to have been deficient in certain respects (*Rakuten Kobo Inc v The Commissioner of Competition*, 2016 Comp Trib 11 [***Kobo 2016***]). On their face, the CAs address those deficiencies.

[19] The Tribunal's rescission of the Initial CA was without prejudice to the ability of the Commissioner to enter into a new consent agreement with the publishers in question, based on conclusions he may reach regarding the elements of the reviewable conduct under subs. 90.1(1) of the Act.

[20] While HarperCollins was a party to the Initial CA, it apparently declined to enter into a revised consent agreement. As a consequence, the Commissioner filed a contested application before the Tribunal against HarperCollins. HarperCollins then filed a Motion for Summary

Dismissal of that application, on the basis of the first and third of the three jurisdictional grounds that Kobo has raised in this Application.

[21] In *Kobo 2017*, above, I stayed the hearing of this Application until the Tribunal had issued its decision on HarperCollins' above-mentioned Motion. I did so after concluding that it was preferable for the Court to have the benefit of the Tribunal's determinations regarding the jurisdictional issues that have been raised in both proceedings before addressing those issues itself (*Kobo 2017*, above, at para 39).

[22] A short while later, in a decision written by Justice Gascon, the Tribunal dismissed HarperCollins' motion, after concluding that it was not plain and obvious that (i) the Tribunal did not have jurisdiction to grant the relief sought by the Commissioner in respect of the Arrangement; and (ii) the Arrangement is no longer "existing or proposed" (*The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10 [***HarperCollins***]). Subsequently, HarperCollins entered into a separate consent agreement with the Commissioner and filed a Notice of Discontinuance in relation to its appeal of Justice Gascon's decision. This separate consent agreement has not been challenged by Kobo in this Application.

[23] Whereas HarperCollins submitted that it is the Tribunal that lacks jurisdiction to grant the relief requested by the Commissioner in the contested application that he filed against HarperCollins, Kobo asserts that it is the Commissioner who lacks the jurisdiction to enter into the CAs. Nothing turns on this, as I consider that the Commissioner's jurisdiction under s. 90.1 is

co-extensive with the Tribunal's jurisdiction, such that if the Tribunal has no jurisdiction in respect of particular conduct, neither does the Commissioner (*Kobo 2017*, above, at para 41).

[24] At the time the three CAs were filed with the Tribunal, the Commissioner also filed a fourth consent agreement that he had entered into with Apple Inc. and Apple Canada Inc. [collectively, **Apple**]. That consent agreement has not been challenged by Kobo and therefore will not be further discussed in these reasons for judgment.

[25] Although Kobo succeeded in persuading the Tribunal to rescind the Initial CA, it was less successful in a prior reference proceeding that concerned the scope of issues that may be raised by a third party who challenges a consent agreement under subs. 106(2) of the Act (*Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 14 [***Kobo 2014***]). In particular, the Tribunal found that it was not open to Kobo to attempt to establish, whether by factual evidence or otherwise, that one or more of the substantive elements set forth in s. 90.1 of the Act are not met. This specifically included whether there is an agreement or arrangement – whether existing or proposed – between persons, two or more of whom are competitors. The Tribunal held that disputes with respect to these and other substantive elements, such as whether an agreement is likely to prevent or lessen competition substantially, are beyond the scope of subs. 106(2). That decision was upheld by the Federal Court of Appeal in *Rakuten Kobo Inc v Canada (Commissioner of Competition)*, 2015 FCA 149, leave to appeal to SCC refused, 36554 (14 January 2016) [***Kobo FCA***].

[26] Notwithstanding that the Tribunal rejected Kobo's position regarding the scope of issues that may be raised by third parties in proceedings initiated under subs. 106(2) of the Act, the Tribunal observed that "it would be potentially open to a party to raise [issues] before the Federal Court on an application for judicial review brought pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 …" (*Kobo 2014*, above, at para 73 (citations omitted)). A similar observation was also made by the Federal Court of Appeal (*Kobo FCA*, above, at para 10).

V. **Relevant Legislation**

[27] Section 105 of the Act provides for the entering into consent agreements and the registration of those agreements by the Tribunal. It states:

105. (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.	105. (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite de l'ordonnance provisoire prévue à l'article 103.3 — peuvent signer un consentement.
(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.	(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par le Tribunal.
(3) The consent agreement may be filed with the Tribunal for immediate registration.	(3) Le consentement est déposé auprès du Tribunal qui est tenu de l'enregistrer immédiatement.
(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.	(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures.

[28] Pursuant to subs. 106(2), third parties may apply to the Tribunal to vary or rescind a consent agreement. That provision states:

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.	(2) Toute personne directement touchée par le consentement — à l'exclusion d'une partie à celui-ci — peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

[29] Section 90.1 gives the Tribunal the jurisdiction to issue two types of orders in respect of certain agreements or arrangements between competitors. That provision states:

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	90.1 (1) Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :
(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or	a) interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout acte au titre de l'accord ou de l'arrangement;
(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.	b) enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

VI. **Preliminary Issue**

[30] The Commissioner submits that this Court should decline to consider this Application because Kobo has an adequate alternative remedy and forum under subs. 106(2) of the Act. The Commissioner maintains that Kobo should not be permitted to use the Court's judicial review process to do an "end run" around the limited right of review of consent agreements that Parliament created for the Tribunal on applications brought by third parties in subs. 106(2) of the Act.

[31] I agree. However, I do so primarily for reasons other than the adequacy of the remedies available to Kobo under that provision.

[32] In *Strickland v Canada (Attorney General)*, 2015 SCC 37 [***Strickland***], the Supreme Court of Canada recalibrated the framework applicable to a court's determination of whether to exercise discretion to hear an application for judicial review. That decision was issued shortly after the Federal Court of Appeal agreed with the Tribunal's observation that judicial review would be potentially available to third parties such as Kobo who may seek to challenge a consent agreement filed by the Commissioner (*Kobo FCA*, above).

[33] The central issue in *Strickland* was whether the Federal Court erred in exercising its discretion to decline to hear an application for a declaration that the *Federal Child Support Guidelines*, SOR/97-175, are unlawful. In reaching that conclusion, Justice Gleason (as she then was) emphasized the minor role played by this Court in issues under the *Divorce Act*, RSC, 1985,

c 3 (2nd Supp), and the broader jurisdiction and expertise of the provincial superior courts in matters related to divorce and child support.

[34] In its assessment of the issue, the Supreme Court identified a number of considerations that are relevant to a court's determination of whether to exercise its discretion to refuse to hear a judicial review application. Those considerations are:

> i. The purposes and policy considerations underpinning the legislative scheme in issue;
>
> ii. The nature of the other forum which could deal with the issue, including its remedial capacity;
>
> iii. The relative expertise of the alternative decision-maker;
>
> iv. The nature of the error alleged;
>
> v. The existence of adequate and effective recourse in the forum in which litigation is already taking place;
>
> vi. Expeditiousness;
>
> vii. The convenience of the alternative remedy;
>
> viii. The economic use of judicial resources; and
>
> ix. Cost.
>
> (*Strickland*, above, at para 42)

[35] The Court emphasized that the categories of relevant factors are not limited, and that it is for the courts to identify and balance the relevant factors in the context of a particular case. Elaborating, the Court stated:

> The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is

> appropriate. Ultimately, this calls for a type of balance of convenience analysis.
>
> (*Strickland*, above, at para 43)

[36] In the result, the Court relied upon considerations that were "appropriately concerned more with the unsuitability of judicial review in the Federal Court in this case than with the narrower question of whether a remedy comparable to that sought by the appellants is available elsewhere" (*Strickland*, above, at para 46). In this regard, the Court found that the appellants' judicial review proceedings in the Federal Court were "deeply inconsistent with fundamental parliamentary choices about where important family law issues will be determined" (*Strickland*, above, at para 51).

[37] A similar result was reached in the subsequent case of *797175 Alberta Ltd v Calgary (City)*, 2017 ABQB 18 [***797175***]. There, the issue was whether the Court should hear an application for judicial review of a decision of the Calgary Composite Assessment Review Board regarding a property assessment. The parties were in agreement that the application concerned issues of fact and mixed fact and law which were not appealable under the relevant section of the *Municipal Government Act*, RSA 2000, c M-26. In deciding to dismiss the application without assessing those issues, the Court held as follows:

> [35] There are strong policy reasons for the Court to not usurp the intention of the legislature by reviewing the factual merits of assessment board decisions. Section 470 provides an important gate-keeping function by regulating access to the appeal process, partly for reasons of efficiency and judicial economy. The City and the Board emphasize this represents a real "flood-gates" concern because of: the number of assessment complaint hearings each year; the substantial volume of evidence and materials that are often filed in these hearings; and, since tax-payers can challenge assessments for each and every year.

> [36] Having regard to the foregoing, the discretion of the Court should be exercised against the granting of judicial review where the questions raised are those of fact or mixed fact and law, except in extraordinary circumstances, which were not argued in this instance and are not before this Court.
>
> [37] In my view, the right to constitutionally protected review of administrative decision-making is discretionary and is not absolute and must be balanced against important legislative and policy considerations, as was set out in *Strickland*.

[38] In reaching the foregoing conclusion, the Court was guided by the following comments of the Alberta Court of Appeal in *Real Estate Council of Alberta v Henderson*, 2007 ABCA 303 [***Henderson***]:

> [26] […] Judicial review should not generally be used as an end run around statutory restrictions on appeal rights. Thus, we would be disinclined to grant judicial review even if it appeared to us that the conclusion reached by the hearing panel was wrong if its decision was made in the course of a process that had been conducted according to law. Otherwise, an application for judicial review could be used to do indirectly what cannot be directly done – obtain an appeal not intended by the Legislature. […]

[39] In my view, the reasoning adopted in *Strickland*, *797175* and *Henderson* leads to a similar result in the case at bar. Stated differently, an assessment of the factors that were identified and given particular emphasis in those cases leads to the conclusion that I should exercise my discretion to decline to consider the present Application on its merits.

[40] Based on the particular circumstances surrounding this Application, the most relevant of the factors identified in *Strickland* are the first three in the list set forth at paragraph 34 above. However, I will briefly assess all of the factors in that list below. The parties did not identify additional factors that warrant consideration. In my view, one such factor could be said to be the

Commissioner's broad discretion to settle matters by way of consent agreements (*Kobo 2014*, above, at paras 3, 32 and 95). I consider that this factor can be taken into account in an assessment of the purpose and objectives underpinning ss. 105 and 106 of the Act.

i. *The purposes and policy considerations underpinning the legislative scheme in issue*

[41] This factor was exhaustively canvassed in *Kobo 2014*, above, at paras 35-79. For the present purposes, the most relevant information is set forth in the following passages:

> [50] It is common ground between the parties that the "mischief" which Parliament sought to address in 2002 in establishing the consent agreement process that is now enshrined in sections 105 and 106 included the significant cost, delay and uncertainty associated with the former consent order process. Those problems arose primarily because that process "created too many incentives, too many ways for third parties to get involved and to lengthen the process …" (Kobo's oral submissions, Transcript, at pp. 101-2, and 166).
>
> [51] It is not disputed that these problems deterred businesses from participating in the consent order process, led to a practice of negotiating "undertakings" with the Commissioner that may not have been enforceable, and gave rise to a widespread consensus that the consent order process was "broken and needed to be fixed."
>
> […]
>
> [70] In my view, it is very clear from the legislative history, including Mr. von Finckenstein's testimony, that Parliament did not intend to confer upon the Tribunal the jurisdiction to hear and adjudicate upon factual disputes with respect to the basis for the conclusions reached by the Commissioner regarding either the substantive elements of reviewable trade practices, or the defences and exceptions set forth in the Act in respect of those trade practices.
>
> [71] As Kobo recognizes, the 2002 amendments to sections 105 and 106 were designed to, among other things, streamline the settlement process and make it faster and more predictable (*Rona Inc. v Commissioner of Competition*, 2005 Comp. Trib. 18, at para 77).

> […]
>
> [74] The effect of the two amendments proposed by Mr. von Finckenstein, and accepted by the Committee, was to remove the ability of the Commissioner to include in consent agreements terms that could not be imposed by the Tribunal, and to add a very limited ability for third parties to apply to the Tribunal to have one or more terms of the agreement rescinded or varied. The Tribunal's jurisdiction under subsection 106(2) to grant the application was confined to circumstances where the applicant "has established that the terms could not be the subject of an order of the Tribunal."
>
> [75] The best evidence of what was meant by the latter language is Mr. von Finckenstein's testimony, as it was he who proposed that language, and indeed the initially proposed text of sections 105 and 106, when Bill C-23 was introduced at First Reading.
>
> [76] In my view, it is clear from that testimony of Mr. von Finckenstein that the words "has established that the terms could not be the subject of an order of the Tribunal" were intended to mean "has established that the terms of the consent agreement are not within the scope of the type of order(s) that the Tribunal is permitted to issue in respect of the reviewable trade practice in question." In other words, when Parliament enacted Mr. von Finckenstein's proposals word for word after hearing his very specific testimony, it appears to have simply intended that terms which are not within the purview of one or more specific types of orders in respect of a particular reviewable trade practice can not be the subject of an order of Tribunal, within the meaning of subsection 106(2). In my view, the legislative record does not support the more expansive interpretation of that provision that has been advanced by Kobo.
>
> (Emphasis in original.)

[42] In summary, the purposes and policy considerations underpinning the consent agreement scheme that is now included in ss. 105 and 106 of the Act were to "streamline the settlement process and make it faster and more predictable." This was achieved by eliminating the Tribunal's prior ability to hear and adjudicate upon factual disputes raised by third parties such as those that are at the root of the second and third "jurisdictional" challenges that have been raised by Kobo in

the present Application. Parliament ultimately decided to confine the rights of third parties to solely raising issues with respect to whether the terms of a consent agreement "are not within the scope of the type of order(s) that the Tribunal is permitted to issue in respect of the reviewable trade practice in question."

[43] In my view, the foregoing purposes and policy considerations weigh strongly in favour of declining to hear the present Application.

ii. *The nature of the other forum which could deal with the issue, including its remedial capacity*

[44] The Tribunal is a specialized administrative body that has been recognized as being "especially well suited to the task of overseeing a complex statutory scheme whose objectives are peculiarly economic" (*Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at para 49; *Canada (Commissioner of Competition) v Superior Propane*, 2001 FCA 104, at para 57 [***Superior Propane***]).

[45] Pursuant to subs. 8(2) of the *Competition Tribunal Act*, RSC 1985, c 19, the Tribunal "has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record."

[46] The Tribunal also has the remedial capacity under subs. 106(2) of the Act to rescind or vary consent agreements. However, as Kobo emphasized during the hearing of this Application, the Tribunal may not do so based on grounds such as the second and third "jurisdictional challenges" that it is now raising. Although Kobo and the Commissioner interpret my decision in *Kobo 2014* as also precluding Kobo from advancing the first jurisdictional issue that it has raised in the present Application, I disagree. In my view, the issue of whether anticompetitive agreements entered into outside Canada are within the purview of s. 90.1 is an issue that raises a question with respect to whether the consent agreement is "something [that] the Tribunal couldn't have done," or that is "outside the purview of the Tribunal" (*Kobo 2014*, above, at para 77). Accordingly, this is an issue that could legitimately be raised before the Tribunal by a third party under subs. 106(2) of the Act. However, Kobo failed to do so in respect of either the Initial CA or the CAs.

[47] Nevertheless, given that Kobo is precluded by the terms of subs. 106(2), as interpreted in *Kobo 2014* and *Kobo FCA*, above, from raising before the Tribunal the other two "jurisdictional" issues that it has raised in this Application, I consider that this factor weighs in favour of hearing this Application on its merits.

iii. *The relative expertise of the alternative decision-maker*

[48] Kobo submits that because the judges of this Court who are also members of the Tribunal tend to be assigned to hear matters brought before this Court that involve issues under the Act, this factor should be considered to be neutral. Although that may be true at the present time, it has not always been so, and it may not be so in the future.

[49] Judges of this Court who are also members of the Tribunal "can be expected to have a level of expertise or experience in this area of the law over and above that acquired by a judge in the ordinary course of judicial work" (*Superior Propane*, above, at para 56). This is in part because, when sitting as a judicial member of the Tribunal, they have the assistance of lay members.

[50] Given the foregoing, I consider that this factor weighs in favour of declining to hear the present Application.

iv. *The nature of the error alleged*

[51] The three grounds upon which Kobo has based the present Application have each been characterized as being "jurisdictional" challenges. However, as further discussed in Part VIII of these reasons below, I consider that only the first of those challenges raises a true question of jurisdiction. As noted above, that question concerns the issue of whether anticompetitive agreements entered into outside Canada fall within the purview of s. 90.1 of the Act. The other two "jurisdictional" challenges that Kobo has raised are rooted largely in factual disputes about (i) whether the shift from the wholesale model of E-book distribution to the agency model of distribution in Canada occurred as result of the implementation of the U.S. Arrangement that is described in the recitals of the CAs, and (ii) whether the Arrangement was "existing or proposed" at the time the CAs were executed and filed with the Tribunal.

[52] In my view, the fact that one of the issues that Kobo has raised is a true jurisdictional issue ordinarily should weigh in favour of this Court exercising its jurisdiction to hear the present

Application. However, given my view that this issue may also be raised before the Tribunal, I consider that this factor weighs in favour of not granting discretion to hear the present Application (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at paras 24-25 [***Alberta Teachers***]; *Alberta (Education) v Access Copyright*, 2010 FCA 198, at para 70 [***Access Copyright***], rev'd on other grounds 2012 SCC 37, at paras 10-11 and 59-60). This is particularly so given that this issue has been the subject of active debate for many years, both here and abroad, such that it could benefit from the Tribunal's recognized expertise.

[53] The fact that the other two "jurisdictional" challenges that Kobo has raised are rooted largely in factual disputes also weighs in favour of not exercising my discretion to hear the present Application.

v. *The existence of adequate and effective recourse in the forum in which litigation is already taking place*

[54] As I have noted previously, the first and third of the three issues that Kobo has raised in this Application have been litigated before the Tribunal in *HarperCollins*, above. However, the CAs are not being challenged in that proceeding, or in any other proceeding of which I am aware. Accordingly, this factor weighs in favour of exercising my discretion to hear the present Application on its merits.

vi. *Expeditiousness*

[55] In my view, this factor has no independent relevance in the present context because Kobo's inability to raise two of the three "jurisdictional" challenges that it is advancing in this Application has already been considered and weighed above. There is no separate issue as to whether the relief that Kobo is seeking could be more expeditiously obtained in this forum, relative to another forum. The fact that judicial review proceedings may be more expeditious than a subs. 106(2) proceeding before the Tribunal is considered separately below.

vii. *The convenience of the alternative remedy*

[56] Kobo submits that this factor weighs in favour of exercising my jurisdiction to hear its Application, because it is unlikely to succeed in raising these issues before the Tribunal, and the Commissioner has stated that he will oppose any attempt that Kobo may make to raise those issues in that forum. I agree. However, given that I have already weighed in Kobo's favour its inability to raise before the Tribunal two of the three "jurisdictional" issues that it is advancing in this Application, this factor does not merit any significant additional weighting in my assessment.

viii. *The economic use of judicial resources*

[57] The nature of judicial review proceedings is such that they can often be determined more expeditiously, and with fewer judicial resources, than proceedings before the Tribunal, which frequently involve two judicial members. In any event, given that judicial review proceedings in this Court are heard by a single judge, whereas a proceeding under subs. 106(2) of the Act would

require a panel of three members of the Tribunal, I consider that this factor weighs in favour of hearing this Application on its merits.

ix. *Cost*

[58] As noted in *Kobo 2014*, above, at para 50, the "mischief" that Parliament sought to address when it established the current consent agreement framework in ss. 105 and 106 of the Act included the significant cost that was associated with the former consent order process. (See quote reproduced at paragraph 41 above.) As also noted in *Kobo 2014*, above, at para 42: "[i]f one or more of the Commissioner's conclusions with respect to the elements of the relevant restrictive trade practice were subject to dispute under subs. 106(2), this would open up a potentially far broader range of complex issues in the average proceeding under that provision than was ever in dispute under the former consent order process." The same would be true if those same types of issues were subject to dispute in judicial review proceedings before this Court, as Kobo now requests. Stated differently, the public and private costs associated with judicial review proceedings in this Court would be potentially very significant, including for private parties who enter into settlements with the Commissioner, by way of consent agreements.

[59] Accordingly, I consider that this factor weighs in favour of declining to hear the present Application.

x. *Summary*

[60] In summary, the factors that weigh in favour of declining to hear the present Application are: (i) the purposes and policy considerations underpinning the consent agreement scheme that is set forth in the Act, (ii) the expertise of the Tribunal, relative to that of the Court, (iii) the nature of the errors that the Commissioner is alleged to have made, and (iv) the public and private costs that would likely be associated with permitting third parties to seek judicial review of conclusions reached by the Commissioner with respect to either the substantive elements of reviewable trade practices, or the defences and exceptions set forth in the Act in respect of those trade practices.

[61] By comparison, the factors that weigh in favour of hearing this Application on its merits are (i) the nature of the other forum which could deal with the issue, including its remedial capacity, (ii) the existence of adequate and effective recourse in the forum in which litigation is already taking place, and (iii) the economic use of judicial resources.

[62] To avoid double counting, the factors that do not merit any additional weight in the particular circumstances of this case are the convenience of the alternative remedy and expeditiousness.

[63] Balancing the various considerations discussed above, I consider that it would not be appropriate for me to exercise my discretion to hear Kobo's Application on the merits. This is particularly so given that the contrary conclusion would be "deeply inconsistent with fundamental parliamentary choices" about the scope of third party rights with respect to consent agreements

filed by the Commissioner with the Tribunal (*Strickland*, above, at para 51; see also *797175*, above, at paras 35-37, and *Henderson*, above, at para 26).

[64] Based on the foregoing assessment, I consider that judicial review applications brought by third parties in respect of consent agreements filed with the Tribunal should only be heard in exceptional cases. Although it is always difficult to identify such cases in advance, they would include those where the grounds for review concern (i) constitutional issues, (ii) issues that are of central importance to the legal system as a whole and outside the Tribunal's specialized area of expertise (such as alleged bias or bad faith on the part of the Commissioner), (iii) true questions of jurisdiction or *vires*, or (iv) issues relating to the jurisdictional lines between the Commissioner (or the Tribunal) and another specialized tribunal. I note that these grounds are so important that they are reviewable by courts on a "correctness" standard, when decisions in respect of them are made by administrative tribunals or other decision-makers (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, at para 24 [***Edmonton East***]).

[65] For the reasons I have provided, while the first of the three jurisdictional issues that have been raised by Kobo in this Application may properly be characterized as a true question of jurisdiction or *vires*, I consider that this issue would be best dealt with by the Tribunal (*Alberta Teachers*, above; *Access Copyright*, above).

[66] Turning to the other two issues that Kobo has raised, while Kobo characterizes them as "jurisdiction," they are largely factual in nature. Given the clear choice that Parliament made to place strict limits on the ability of third parties to challenge consent agreements in subs. 106(2) of

the Act, I consider that the Court should not exercise its discretion to review the Commissioner's determinations in respect of such issues. Indeed, absent exceptional circumstances, the same logic would apply in respect of questions of mixed fact and law.

[67] Nevertheless, in the event that I may be found to have erred in concluding that it would be inappropriate to exercise my discretion to hear Kobo's Application on its merits, I will proceed to consider those merits below, rather than exposing the Commissioner and the Respondent Publishers to the possibility of having to deal with these issues at an uncertain point in the future. Given that I have now heard that Application, and I am very familiar with the specific issues that Kobo has raised, I consider that dealing with those issues below would also be in the interests of judicial economy. I am also mindful that the Commissioner and the Respondent Publishers have been attempting to resolve these matters since the Initial CA was filed in early 2014, and that Kobo has so far succeeded in forestalling those efforts, which have been designed to provide the Canadian public with more competitive prices for E-books.

VII. **Issues**

[68] The remaining issues raised by Kobo in this Application are as follows:

i. Did the Commissioner act without jurisdiction by entering into the CAs to remedy a conspiracy that was entered into in the U.S. and that was previously resolved by U.S. Courts and antitrust enforcers?

ii. Did the Commissioner act without jurisdiction by entering into the CAs to remedy "an arrangement," within the meaning of s. 90.1 of the Act, that never existed?

iii. Did the Commissioner act without jurisdiction by entering into the CAs to remedy "an arrangement" that was not "existing or proposed" at the time the CAs were executed?

[69] In its Notice of Application and written submissions, Kobo also appeared to raise a fourth issue, when it alleged that the Commissioner had erroneously concluded that the CAs would remedy the competition concerns identified by the Commissioner. However, during the hearing of this Application, Kobo confirmed that it was not advancing this allegation as a further ground for seeking judicial review.

VIII. **Standard of Review**

[70] As I have discussed, notwithstanding Kobo's characterization of the three issues that it has raised in this Application as being issues of "jurisdiction," I consider that only the first of those issues truly is so.

[71] The Commissioner characterizes that first issue as a question of statutory interpretation, which attracts a reasonableness standard of review (*Alberta Teachers*, above, at paras 34 and 39; *Edmonton East*, above, at paras 22 and 26).

[72] However, the issue of whether an enforcement authority or an adjudicative body in Canada is able to deal here with conduct that occurs outside this country has long been considered to be a question of jurisdiction (namely, "subject matter" or "substantive" jurisdiction).

[73] As the Supreme Court of Canada noted in *R v Hape*, 2007 SCC 26, at para 57 [***Hape***]: "Broadly speaking, jurisdiction refers to a state's power to exercise authority over individuals, conduct and events, and to discharge public functions that affect them" (emphasis added). At paragraph 59 of its decision, the Court observed that "[t]he primary basis for jurisdiction is

territoriality" (quoting *Libman v The Queen*, [1985] 2 SCR 178, at 183 [***Libman***] (emphasis added)).

[74] In *Libman*, above, La Forest J. reviewed the historical approach of Canadian courts to criminal matters and concluded that "as time went on the courts began to interpret their territorial jurisdiction more liberally," including "when the impact of a crime was felt in Canada" (at 206 (emphasis added)). Later in his decision, he observed that "Canadian courts (like those in England and other countries for that matter) frequently took jurisdiction over transnational offences that occurred partly in Canada where they felt this country had a legitimate interest in doing so" (at 209 (emphasis added)). Ultimately, he concluded that "all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada … it is sufficient that there be a "real and substantial link" between an offence and this country…" (at 212-213 (emphasis added)).

[75] Likewise, in *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, at para 63 [***SOCAN***], the Supreme Court observed: "Generally speaking, this Court has recognized as a sufficient "connection" for taking jurisdiction, situations where Canada is the country of transmission … or the country of reception" (citations omitted, emphasis added).

[76] Similarly, in *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30, at para 25 [***Lapointe***], the Supreme Court observed: "Before a court can assume jurisdiction over a claim, a "real and substantial connection" must be shown between the

circumstances giving rise to the claim and the jurisdiction where the claim is brought…" (citations omitted, emphasis added). A similar observation was made by the Court in *Sun-Rype Products Ltd v Archer Daniels Midland Co*, 2013 SCC 58, at para 45 [***Sun-Rype***] (see also, *Airia Brands Inc v Air Canada*, 2017 ONCA 792, at para 52.)

[77] I recognize that the Supreme Court of Canada has repeatedly observed that true questions of jurisdiction or *vires* are rare (*Edmonton East*, above, at para 26; *Alberta Teachers*, above, at paras 33-34). However, I consider this to be one of those rare situations. Indeed, if the ability of an agent of the state such as the Commissioner to address conduct occurring outside Canada's borders that is considered to have effects within those borders is not an issue of true jurisdiction, it is difficult to conceive of what would constitute such an issue. As counsel to the Commissioner observed, in making a different point, this issue concerns "the fundamental jurisdiction or reach of the *Competition Act*."

[78] As a true question of jurisdiction or *vires*, the issue of the territorial reach of s. 90.1 is subject to review on a standard of correctness (*Alberta Teachers*, above, at para 30; *Edmonton East*, above, at para 24).

[79] Turning to the second and third issues that Kobo has raised in this Application, as I have discussed, although they have been characterized as being "jurisdictional," they are at their root largely factual in nature. They are not true questions of jurisdiction or *vires*. Kobo does not take issue with the Commissioner's interpretation of the word "arrangement" or with the words "existing or proposed" in s. 90.1 of the Act. Rather, Kobo takes issue with the Commissioner's

factual conclusions and his alleged failure to consider certain information that it had provided to the Competition Bureau, in reaching those conclusions.

[80] As issues that are largely questions of fact, the second and third issues that have been raised by Kobo are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 53-54). This is so even if those issues may also be said to involve an element of statutory interpretation (*Alberta Teachers*, above, at 33-34, and 39; *Edmonton East*, above, at paras 22-26), and even if it is alleged that an administrative decision-maker erred by reaching its decision without regard to the material before it (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paras 45-46).

IX. **Assessment**

A. *Did the Commissioner act without jurisdiction by entering into the CAs to remedy a conspiracy that was entered into in the U.S. and that was previously resolved by U.S. Courts and antitrust enforcers?*

(1) The Parties' submissions

[81] Kobo submits that the Commissioner acted outside his jurisdiction by entering into the CAs to remedy an arrangement that the CAs state was entered into in the U.S. and that he acknowledges was entered into there.

[82] Kobo maintains that the Commissioner's jurisdiction is limited to what has been set forth in the Act, and that the words of s. 90.1 do not provide him with any jurisdiction in respect of agreements or arrangements that are entered into outside Canada.

[83] Kobo further asserts that the presumption against the extraterritorial application of federal legislation such as the Act may only be rebutted by express wording or necessary implication, both of which are absent and cannot be inferred (*SOCAN*, above, at para 54). In this regard, Kobo submits that the language employed in ss. 46 and 83 of the Act indicates that when Parliament intends a provision to apply extraterritorially, it uses express language. In Kobo's view, the absence of similar express language from s. 90.1 implies that Parliament did not intend that provision to be applied to arrangements entered into outside Canada.

[84] Kobo also states that the "real and substantial connection" test has no application in the present context, because it only applies when it is unclear whether Parliament intended a statute to apply extraterritorially or when it is unclear whether the facts fall within the territorial ambit of a statute. Kobo maintains that neither of these pre-conditions apply, because it is clear that Parliament did not intend s. 90.1 to apply extraterritorially, and that the Commissioner has acknowledged that the impugned Arrangement was entered into outside Canada.

[85] Finally, Kobo maintains that records of legislative debates indicate that Parliament was aware, well before it enacted s. 90.1, that the "civil" provisions of the Act did not provide extraterritorial jurisdiction.

[86] I will pause to address this latter point now, as it can be dispensed with relatively quickly. In brief, the records to which Kobo refers are not particularly helpful in the present context. This is because they concern international enforcement cooperation and the difficulties that can arise in relation to obtaining evidence abroad when instruments such as a mutual legal assistance treaty do

not extend to civil matters. Those records make no mention of s. 90.1 or any other particular provision of the Act. (In fact, they pre-date its addition to the Act by several years.) Accordingly, I will not further address this particular submission.

[87] In response, the Commissioner submits that interpreting s. 90.1 in the manner suggested by Kobo would not be consistent with the scheme of the Act and would lead to an absurdity or an outcome that is at odds with the Act. In such circumstances, the Commissioner maintains that the implied exclusion rule of statutory interpretation that Kobo appeared to be relying on when making inferences based on the wording in ss. 46 and 83 of the Act has no application.

[88] In addition, the Commissioner states that the fact that the impugned arrangement was formed in the U.S. does not, by itself, imply that the Commissioner applied s. 90.1 in an extraterritorial manner. The Commissioner submits that while the arrangement was formed beyond Canadian borders, it specifically contemplated, was implemented, and had an impact on competition in Canada. The Commissioner notes that the Act has regularly been applied in these and similar circumstances in the past.

[89] Moreover, the Commissioner asserts that even if the application of s. 90.1 may be said to have been extraterritorial in the present circumstances, the presumption against the extraterritorial application of the Act is rebutted by necessary implication. That necessary implication can be found in the practical reality that commercial dealings and antitrust markets do not respect national boundaries. In addition, the Commissioner submits that, insofar as the territorial issue is concerned, s. 90.1 is no different from the merger and other provisions of the Act that have long

been applied to economic actors and conduct which has its origins beyond Canada's borders, but which contemplates, has been implemented, and has had an impact on Canada.

(2) Analysis

(a) *Framework*

[90] The issue that Kobo has raised regarding the Commissioner's jurisdiction over arrangements formed outside Canada is essentially the same as the issue that was raised in *HarperCollins*, above, with respect to the Tribunal's jurisdiction over such arrangements. Given that the Commissioner's jurisdiction under s. 90.1 is co-extensive with the Tribunal's jurisdiction in relation to agreements and arrangements contemplated by that provision, I consider that Justice Gascon's thorough analysis in that case provides a helpful point of departure for the present purposes. This is so notwithstanding that the focus of Justice Gascon's analysis was not upon the correct interpretation of s. 90.1. Rather, it was upon whether it was plain and obvious that s. 90.1 does not provide the Tribunal with any jurisdiction in respect of foreign arrangements or agreements.

[91] At the outset of his analysis of this issue, Justice Gascon noted that it is important to distinguish between the territorial and the extraterritorial subject-matter jurisdiction that may be conferred by a statute (*HarperCollins*, above, at paras 68-70).

[92] Unless implicitly or explicitly provided otherwise in a statute, territorial jurisdiction is presumed to exist in respect of "persons, property, juridical acts and events within the territorial

boundaries of" the relevant legislative body's jurisdiction (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2013) at 212 [**Côté**]).

[93] For example, pursuant to the objective territorial principle, a state may claim jurisdiction over conduct that commences or occurs outside its borders in two general types of situations. The first is where the conduct is completed within those borders. The second is where a constituent element of a statutory provision directed towards the conduct takes place within those borders. In each of those situations, the state may legitimately claim territorial jurisdiction because of the existence of a "sufficiently strong link" connecting the conduct in question to the state (*Hape*, above, at para 59).

[94] Notwithstanding the foregoing, a federal statute may implicitly or explicitly indicate that its territorial reach is narrower than, or extends beyond, the national borders. Where a statute is ambiguous in this regard, the courts have applied what is known as the "real and substantial connection" test (*Libman*, above, at 212-213; *SOCAN*, above, at paras 58-60; *AT v Globe24h.com*, 2017 FC 114, at para 50 [***Globe24h***]). Generally speaking, it is only where no such connection exists that a statute may be said to have extraterritorial effect:

> In summary then, and at the risk of oversimplifying, a statute of a given State will be said to have an extraterritorial effect if it governs persons, property, juridical acts or facts which do not have a 'real and important link' with that State.
>
> (Côté, above, at 216)

[95] The "real and substantial connection" test was developed in *Libman*, above, at 213, after the Supreme Court observed that "[t]his country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here" (at 209).

[96] This followed the Supreme Court's recognition in *Moran v Pyle National (Canada) Ltd*, [1975] 1 SCR 393, at 409, that a state also has an "important interest … in injuries suffered by persons within its territory." In the intervening years, it has been increasingly recognized that courts in Canada may have jurisdiction over tort actions brought by persons alleging that they have suffered harm in this country as a result of foreign anticompetitive agreements amongst defendants who have then sold their products in Canada, either directly or through their subsidiaries (*Sun-Rype*, above, at para 46; *Fairhurst v De Beers Canada Inc*, 2012 BCCA 257, at paras 32 and 43-45 [***Fairhurst***]; *VitaPharm Canada Ltd v F Hoffman-La Roche Ltd*, 2002 CarswellOnt 235, at paras 58-62 and 96-97, [2002] OJ No 298 [***VitaPharm***]; *Bouchard v Ventes de Véhicules Mitsubishi Du Canada Inc et al*, 2010 CF 56, at paras 69-70 [***Bouchard***]). Whether such jurisdiction exists will depend on the particular framework that has been developed in tort law for recognizing the existence of a "real and substantial connection" between the litigation and the forum (*Club Resorts Ltd v Van Breda*, 2012 SCC 17, at paras 80-90 [***Van Breda***]).

[97] When it is determined that a statute implicitly or explicitly confers territorial jurisdiction upon a court, tribunal or regulatory authority, or where such jurisdiction is found to exist as a result of the application of the "real and substantial connection" test, it is not necessary to consider the presumption against extraterritorial effect. Stated differently, where an application of the real and substantial connection test establishes that a statute applies to persons or conduct

outside Canada, there is no violation of the presumption against extraterritoriality (*R v Stucky*, 2009 ONCA 151, at paras 27 and 32 [***Stucky***]). This is because jurisdiction exists as a result of a real and substantial connection with the territory of Canada.

[98] Based on the foregoing, and contrary to what is contended by Kobo, there are three principal steps to be followed in determining whether s. 90.1 of the Act confers jurisdiction in respect of agreements and arrangements that are made outside Canada:

i. Assess whether s. 90.1 explicitly or implicitly provides the Commissioner with jurisdiction in respect of arrangements entered into outside Canada.

ii. If not, assess whether there is a "real and substantial connection" between the impugned agreement and Canada.

iii. If not, assess whether the presumption against the extraterritorial application of s .90.1 can be rebutted.

(b) *Does s. 90.1 explicitly or implicitly provide the Commissioner with jurisdiction in respect of arrangements entered into outside Canada?*

[99] The wording of s. 90.1 simply refers to "an agreement or arrangement – whether existing or proposed – between persons two or more of whom are competitors." In contrast to certain other provisions of the Act (e.g., ss. 1.1, 9, 45(5), 46(1), 76(1), 82 and 83(1)), there is no reference to "Canada." Likewise, there is no mention of the section not applying in respect of persons or certain things done outside Canada, as there is in subs. 48(2). Accordingly, it is readily apparent that s. 90.1 does not explicitly provide the Commissioner with jurisdiction in respect of an arrangement entered into outside Canada.

[100] Therefore, it is necessary to consider whether s. 90.1 implicitly contemplates agreements or arrangements entered into outside Canada.

[101] Unfortunately, it appears that there are no potentially helpful Parliamentary debates that shed light on this issue (*HarperCollins*, above, at paras 115 and 117).

(i) The purposes of the Act

[102] Section 12 of the *Interpretation Act*, RSC 1985, c I-21 [**the *Interpretation Act***] states: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[103] The objects, or purposes, of the *Competition Act* are set forth in s. 1.1, which 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.	1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[104] In my view, interpreting the words "agreement or arrangement" in s. 90.1 in a large and liberal manner, so as to contemplate any agreements or arrangements that undermine the purposes

of the Act (whether entered into inside or outside Canada), would best ensure the attainment of those purposes.

[105] The purposes set forth in s. 1.1 are also of assistance in applying the modern principle of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, at para 23 [***Tran***]; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at para 21 [***Rizzo***]).

[106] More specifically, interpreting the words "agreement or arrangement" in the manner that I have described above would yield a result that is more harmonious with the scheme of the Act contemplated by s. 1.1, than interpreting them to exclude agreements or arrangements entered into outside Canada. This is because the former interpretation would permit the Commissioner to seek remedies under s. 90.1 in respect of foreign anticompetitive agreements and arrangements that undermine one or more of the objectives set forth in s. 1.1, whereas the latter interpretation would preclude the Commissioner from doing so. To the extent that this latter interpretation would expose Canadian businesses and consumers to paying higher prices for a potentially broad range of inputs and final products than would otherwise be the case, it would undermine and frustrate an important purpose of the Act.

[107] Such an interpretation would also produce an absurd result that is to be avoided (*R v McIntosh*, [1995] 1 SCR 686, at para 36; *Tran*, above, at para 31; *Rizzo*, above, at para 27). To the

extent that such anticompetitive effects can also seriously undermine the attainment of the other purposes enunciated in s. 1.1, the frustration of the Act's purposes and the related absurdity to be avoided is even greater (*Stucky*, above, at paras 37 and 48). These problems are further compounded when it is considered that, under the interpretation advanced by Kobo, parties wishing to enter into agreements or arrangements that are contemplated by s. 90.1 would be able to avoid the operation of that provision by simply driving across the border and concluding their agreement in the U.S.

(ii) Patterns of expression in the Act

[108] Notwithstanding the foregoing, Kobo submits that other provisions in the Act undermine the view that the words "agreement or arrangement" in s. 90.1 should be interpreted broadly to include those entered into outside Canada. In particular, Kobo suggests that the wording of subs. 46(1) and paragraph 83(1)(b) indicates that Parliament did not intend the words "agreement or arrangement" in s. 90.1 to apply to agreements or arrangements entered into outside Canada. Stated differently, Kobo asserts that by including subs. 46(1) and paragraph 83(1)(b) in the Act, Parliament established a pattern of including express language in the Act when it intended to grant extraterritorial jurisdiction over arrangements entered into outside Canada. Kobo asserts that the absence of similar language in s. 90.1 makes it clear that Parliament did not intend to grant such jurisdiction under that provision.

[109] Subsection 46(1) states as follows:

46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in	46 (1) Toute personne morale, où qu'elle ait été constituée, qui exploite une entreprise au Canada et qui

whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.	applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par la personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.
(Emphasis added.)	(Je souligne.)

[110] Kobo maintains that the underlined words above reflect Parliament's view that conspiracies entered into outside Canada do not violate s. 45 of the Act, and that therefore the addition of s. 46 was necessary, to provide a means to address the implementation of those conspiracies in Canada. Kobo asserts that Parliament's implicit decision not to include similar language in s. 90.1 demonstrates that it did not intend that provision to be applied to arrangements outside Canada.

[111] Kobo advances the same position with respect to paragraph 83(1)(b), which states:

83 (1) Where, on application by the Commissioner, the Tribunal finds that a decision has been or is about to be made by a person in Canada or a company incorporated by or pursuant to an Act of Parliament or of the legislature of a province	83 (1) Lorsque à la suite d'une demande du commissaire, le Tribunal conclut qu'une décision a été ou est sur le point d'être prise par une personne qui se trouve au Canada ou par une personne morale constituée aux termes ou en application d'une loi fédérale ou provinciale :
[…]	[…]
(b) as a result of a directive, instruction, intimation of policy or other communication to that person or company or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or company, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45,	b) par suite d'une directive, d'une instruction, d'un énoncé de politique ou d'une autre communication à cette personne, à cette personne morale ou à toute autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par cette personne ou cette personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'extérieur du Canada qui, s'il était intervenu au Canada, aurait constitué une contravention à l'article 45,
the Tribunal may, by order, direct that	le Tribunal peut rendre une ordonnance qui :
(c) in a case described in paragraph (a) or (b), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication, or	c) dans un cas visé à l'alinéa a) ou b), interdit à cette personne ou à cette personne morale de prendre au Canada des mesures d'application de la règle de droit, de la directive, de l'instruction, de l'énoncé de politique ou de l'autre communication;
[…]	[…]
(Emphasis added.)	(Je souligne.)

[112] As is readily apparent, the underlined wording in paragraph 83(1)(b) is similar to the underlined wording in subs. 46(1).

[113] There are two possible interpretations of what Parliament intended to achieve by including ss. 46 and 83 in the Act. The first, advanced by Kobo, is that Parliament wished to extend the Act to apply to agreements or arrangements entered into outside Canada in the circumstances that are described in those two sections. In so doing, it used the following words to reveal its view that s. 45 does not extend to agreements or arrangements entered into outside Canada: "for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45" (emphasis added). Under this interpretation, the parties to agreements or arrangements described in s. 45, but entered into abroad, would not be criminally liable under s. 45 for directly or indirectly implementing their agreements in Canada. However, the third parties described in s. 46 would face criminal liability, in the circumstances described in that provision.

[114] The second interpretation of what Parliament intended to achieve by including ss. 46 and 83 in the Act is that it simply wished to extend the Act in the manner that I have just described, without intending to imply anything whatsoever about its understanding of the scope of s. 45. That is to say, Parliament simply wished to create a new offence in s. 46, for persons who are not parties to the agreement or arrangement in question and who implement communications from persons outside Canada, for the purpose of giving effect to a foreign conspiracy, agreement or arrangement that has not yet been implemented in Canada, at least not by one or more of the parties thereto. Likewise, Parliament simply wished to create a new power in s. 83, to enable the

Tribunal to order or direct that no measures be taken by a person or company in question to implement communications from persons outside Canada of the type that I have just described. Under this interpretation, the parties to agreements or arrangements described in s. 45, but entered into abroad, may well be criminally liable for directly or indirectly implementing their agreements in Canada. And third parties would also be criminally liable, in the circumstances described in s. 46.

[115] It is not necessary for me to take a position as to which of these two interpretations of ss. 46 and 83, and by implication s. 45, is the correct one. For the present purposes, it will suffice for me to conclude that it is by no means clear that those sections should be interpreted as Kobo suggests. In other words, it is by no means clear that (i) s. 45 does not apply to agreements or arrangements that are entered into outside Canada and that are implemented in Canada by the parties thereto, and (ii) Parliament established a pattern in the Act of including express language (in subs. 46(1) and paragraph 83(1)(b)) when it intends to grant extraterritorial jurisdiction over agreements or arrangements that are entered into outside Canada.

[116] Indeed, it has been found on several occasions that s. 45 does or may apply to foreign agreements that are implemented in Canada (*VitaPharm*, above; *Shah v LG Chem Ltd*, 2015 ONSC 2628, at paras106-121; *Fairhurst*, above, at para 32; *Bouchard*, above, at para 69). In other cases, involving guilty plea agreements, Courts have assumed jurisdiction in connection with alleged contraventions of s. 45 by parties to foreign price fixing conspiracies (see, for example, *R v BASF Aktiengesellschaft*, 1999 CarswellNat 6381 (FC); *R v Daicel Chemical Industries, Ltd*, T-1686-00 (Agreed Statement of Facts (14 September 2000) and Certificate (21 September 2000));

see also Competition Bureau, News Release, "Japanese company to plead guilty and pay US$130M fine for its participation in a bid-rigging scheme" (20 July 2016), online: <www.competitionbureau.gc.ca>).

[117] I pause to add that the Tribunal has also issued several orders, on consent, relating to economic activity originating outside Canada that specifically contemplated and had an impact on competition in Canada (see cases cited in *HarperCollins*, above, at para 155).

[118] Among other things, Kobo's interpretation of s. 45 would suffer from essentially the same shortcomings as its interpretation of s. 90.1, as described at paragraphs 106-107 above. In brief, that interpretation would be inconsistent with the purposes of the Act, as set forth in s. 1.1 of the Act, and it would lead to an absurd result that is to be avoided. That absurd result is exposing Canadian businesses and consumers to paying higher prices for a potentially broad range of inputs and final products than would be the case if s. 45 is interpreted as applying to foreign agreements or arrangements that are implemented in Canada by the parties thereto.

[119] In the absence of any clear or even a reasonably clear pattern by Parliament to include express language in the Act when it intends a provision to apply to agreements or arrangements that are entered into outside Canada, Kobo's position that Parliament did not intend s. 90.1 to apply to such agreements becomes a bald assertion.

[120] I will simply note in passing that there is an entirely reasonable explanation for the absence in s. 90.1 of any language that is similar to that which is set forth in subs. 46(1) and

paragraph 83(1)(b), discussed above. That explanation is that s. 90.1 includes explicit language in paragraphs 90.1(a) and (b) that enables the Tribunal to make the orders described therein against "any person – whether or not a party to the agreement or arrangement." Given the existence of such language, additional language extending the scope of s. 90.1 to third parties who give effect to an agreement or arrangement entered into outside Canada was not necessary.

[121] Moreover, as Justice Gascon explained in *HarperCollins*, above, at paras 103-105, there are other important differences between ss. 90.1 and 45. Given the conclusion that I have reached regarding Kobo's patterns of expression argument, it is not necessary for me to address those differences here.

(iii) Summary

[122] Based on the conclusions that I have reached in Parts IX.A.(2)(b)(i) and (ii) immediately above, I have concluded that it can be inferred from the scheme of the Act as a whole that s. 90.1 applies to all agreements and arrangements that have, or are likely to have, the effect described in that provision, namely, a prevention or lessening of competition in a market. This is so regardless of whether they are entered into within or outside Canada.

[123] Given the conclusion that I have reached, it is not necessary to assess whether there is a real and substantial connection between the impugned Arrangement and Canada. However, in case I have erred in reaching that conclusion, I will proceed to assess whether there is a real and substantial connection between the Arrangement and Canada.

(c) *Is there a "real and substantial connection" between the Arrangement and Canada?*

[124] Generally speaking, a real and substantial connection between Canada and activities that take place outside this country is one that is not weak, hypothetical or tenuous (*Van Breda*, above, at paras 26 and 32). At the other end of the spectrum, it is not necessary to establish "the strongest" possible connection between Canada and such activities (*Lapointe*, above, at para 34).

[125] In the context of s. 90.1, a real and substantial connection between Canada and an arrangement or agreement that is entered into outside this country will exist if "a constituent element [of s. 90.1] takes place" in this country (*Hape*, above, at para 59). If that condition is satisfied in respect of the Arrangement, the Commissioner may be said to have had the territorial jurisdiction to enter into the CAs with the Respondent Publishers, and to file the CAs with the Tribunal. In my view, this is particularly so if the constituent element contemplates substantial harm to competition in Canada.

[126] The constituent elements of s. 90.1 are as follows:

i. an agreement or arrangement;

ii. that is existing or proposed;

iii. between two or more persons who are competitors; and that

iv. prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.

[127] The Commissioner's conclusion that these elements have been met provided a sufficient basis upon which to exercise jurisdiction in respect of the Arrangement, and then enter into the CAs with the Respondent Publishers. This is because one of the constituent elements of s. 90.1, namely the last of the elements in the list above, "took place" in Canada, according to the Commissioner. Indeed, the fact that this element contemplates a substantial adverse impact on competition in Canada provides a strong basis for concluding that this is a "real and substantial connection" between the Agreement and Canada.

[128] This is particularly so for three reasons. First, as Justice Gascon observed in *HarperCollins*, above, at para 152, this element "goes to the very core of s. 90.1." Second, such an adverse impact on competition in this country can be assumed to be associated with material harm to consumers or businesses in Canada. Third, a substantial adverse impact on competition can also be assumed to undermine Canada's ability to achieve the various objectives of the Act set forth in s. 1.1.

[129] Kobo attempts to distinguish the facts in this case from the facts in *SOCAN* and *Globe24h*, above, on the basis that the activity that was at issue in those cases occurred both in Canada and abroad. Specifically, in *SOCAN*, above, at para 59, it was held that a communication between Canada and a foreign state "is both here and there," and in *Globe24h*, above, at para 54, it was held that "the physical location of [a foreign] website operator or host server is not determinative because telecommunications occur 'both here and there'."

[130] However, it is not necessary for the *actus reus* element of a legislative provision to occur wholly or partially in Canada, in order for a real and substantial connection to be found to exist between this country and the activity contemplated by the provision. As I have noted above, it is sufficient if another "constituent element" takes place in this country. If, as the Supreme Court has recognized, an unlawful consequence in Canada or injury in Canada can suffice to establish a real and substantial connection to Canada (see paragraphs 95-96 above), it logically follows that other forms of adverse impact within Canada can also be sufficient for this purpose.

[131] Just as foreign electronic transmissions "which are received and have their impact here" can be found to provide a sufficient connection with Canada to warrant the exercise of jurisdiction in this country (*SOCAN*, above at paras 62-63; *Globe24h*, above, at paras 54-56), the same is true of foreign agreements or arrangements that have a substantial anticompetitive impact in this country.

[132] In such circumstances, the principle of international comity is not offended (*Libman*, above, at 211-214; *HarperCollins*, above, at para 170; *Globe24h*, above, at para 56).

[133] Comity is a flexible concept that "must be adjusted in light of a changing world order" (*Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, at 1097 [***Morguard***]; see also *Van Breda*, above, at para 74). It is generally understood to be "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of

other persons who are under the protection of its laws" (*Morguard*, above, at 1096, quoting *Spencer v The Queen*, [1985] 2 SCR 278, at 283 (emphasis added)).

[134] Within this framework, another nation cannot easily say that the protection of the Canadian public offends the dictates of comity (*Libman*, above, at 209). Indeed, it would be a sad commentary on our law, and undermine public confidence in it, if Canadian laws such as the Act could not be applied so as to protect the domestic economy and its participants from anticompetitive arrangements or other activities engaged in abroad (*Libman*, above, at 212). This is particularly so in the current era of increasing international commerce. In my view, allowing parties to foreign conspiracies that have anticompetitive effects in Canada to avoid the operation of the law in this country would undermine "the promotion of order and fairness" (*SOCAN*, above, at para 57), as well as public confidence in the law.

[135] I will venture to say that it is for these reasons that other jurisdictions, such as the United States and the European Union, extend their antitrust or competition laws to anticompetitive activities that take place outside their respective territories, but that have a particular effect within them. In the case of the U.S., such effect has been defined to be "a direct, substantial and reasonably foreseeable effect on domestic commerce" that is of a nature contemplated by U.S. antitrust laws (see, e.g., *Motorola Mobility LLC v Au Optronics Corp*, 775 F.3d 816, at 818 (2014); *Lotes Co Ltd v Hon Hai Precision Industry Co Ltd*, 753 F.3d 395, at 398, 404 and 411 (2014); *Minn-Chem, Inc v Agrium Inc*, 683 F.3d 845, at 854-861 (2012); and "Section 3.1" in United States Department of Justice and Federal Trade Commission, *Antitrust Guidelines for International Enforcement Cooperation* (13 January 2017), at 19-21, online: <www.justice.gov>).

In the European Union, that effect has been defined to be an "immediate, substantial and foreseeable effect" (*Gencor Ltd v Commission of the European Communities*, Case T-102/96, at para 92 (1999); *Intel Corporation Inc v European Commission*, Case C-413/14 P, at paras 49-50 and 56 (2017)).

[136] A further indication that "the promotion of order and fairness" between nations would not be undermined by the application of the laws of one country towards anticompetitive conduct that occurs in another country is the *Agreement between the Government of Canada and the Government of the United States of America on the application of positive comity principles to the enforcement of their competition laws* (5 October 2014, online: <www.justice.gov> and <www.competitionbureau.gc.ca>). One of the important purposes of that agreement is stated to be to:

> [h]elp ensure that trade and investment flows between the Parties and competition and consumer welfare within the territories of the Parties are not impeded by anticompetitive activities for which the competition laws of one or both Parties can provide a remedy.

[137] Pursuant to that agreement, the competition authorities of a requested party may, at the request of the other party, investigate and, if warranted, remedy anticompetitive activities taking place in the requested party's state in certain circumstances. Those circumstances include where the activities in question occur principally in and are directed principally to the requested party's state, but are adversely affecting the important interests of the requesting party. Among other things, the agreement explicitly states in Article IV that Canada and the United States "recognize that it may be appropriate to pursue separate enforcement activities where anticompetitive activities affecting both territories justify the imposition of penalties within both jurisdictions."

[138] In any event, I am satisfied that the Commissioner had the territorial jurisdiction under s. 90.1 to enter into the CAs with the Respondent Publishers based on his conclusion that the Arrangement prevents or lessens, or is likely to prevent or lessen, competition substantially in the retail market for E-books in Canada. My conclusion in this regard is reinforced by the fact that the Commissioner also concluded that: (i) the Arrangement was implemented in Canada by Macmillan, Simon and Schuster, and one or more of the Hachette entities; (ii) Macmillan sells E-books from the U.S. into Canada, whereas Simon & Schuster does so through a Canadian affiliate (the situation is less clear with respect to Hachette), and (iii) the Arrangement contemplated that it would be implemented in Canada. Collectively, these facts provide a real and substantial connection between the Arrangement and Canada.

[139] I will simply note in passing that each of the CAs states that "the Respondents do not admit, but will not for the purposes of this Agreement only … contest the Commissioner's conclusions …" It is also relevant to note in this context that a shift from the wholesale model to the agency model of distribution of E-books did in fact take place following the shift in the U.S., although there was a delay that I will address further below in these reasons.

(d) *The presumption against the extraterritorial application of s. 90.1*

[140] Given my conclusion that there is a real and substantial connection between the impugned agreement and Canada, there is no need to consider the presumption against the extraterritorial application of s. 90.1. In short, the real and substantial link provides a sufficient basis upon which to conclude that s. 90.1 gives the Commissioner the territorial subject matter jurisdiction to enter into the CAs in respect of the impugned arrangement. In these circumstances, the presumption

against the extraterritorial application of statutes enacted by Parliament is not violated (*Stucky*, above, at para 32).

[141] In any event, I consider that such a real and substantial link would be sufficient to overcome the presumption against extraterritorial effect.

B. *Did the Commissioner act without jurisdiction by entering into the CAs to remedy "an arrangement," within the meaning of s. 90.1 of the Act, that never existed?*

[142] Kobo submits that the Commissioner acted without jurisdiction by entering into the CAs to remedy "an arrangement," within the meaning of s. 90.1 of the Act, that never existed. Kobo maintains that materials it provided to the Commissioner demonstrated the following:

i. Contrary to the collective shift from the wholesale model to the agency model of retailing E-books that simultaneously occurred in the U.S. in early 2010, pursuant to discussions that dated back to December 2009, the corresponding shift in Canada occurred over a period of approximately 23 months, beginning on March 31, 2010 and ending on February 28, 2012.

ii. The driving motivator for the shift in the U.S. was Amazon's pricing of E-books at approximately $9.99. However, Amazon had not begun to sell E-books in Canada prior to the shift that took place here.

iii. The launch of the iPad, which occurred on January 27, 2010, and was a unifying event for the shift to agency in the U.S., had already taken place in Canada several months prior to when Kobo shifted to agency with most of its publishers.

iv. Kobo wanted to enter into agency agreements in Canada, and pushed to enter into them with individual publishers, who were dragging their heels and were reluctant to switch to agency in Canada, as Kobo wanted. It was in Kobo's interest to effect that switch because the agency model provides Kobo with predictable, dependable revenue streams which allow Kobo to focus on investments in research and development particularly in relation to E-book devices.

[143] Based on the foregoing, Kobo maintains that the shift to agency in Canada did not occur as a result of the Arrangement.

[144] Kobo adds that the most pertinent material that it provided to staff in the Competition Bureau was not put before the Commissioner or included in the record that he produced to Kobo pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106. In this regard, Kobo notes that, of the documents listed in the index to that record, only one was provided by Kobo and that, with one exception, neither the Commissioner nor staff in the Competition Bureau questioned Kobo about any of the approximately 160,000 records that it provided to them in the course of their review. The single exception was when Kobo's affiant, Mr. Michael Tamblyn, was cross-examined on his affidavit that was filed in this Application. Among other things, Mr. Tamblyn confirmed in paragraph 55 of that affidavit that "Kobo had to (separately) encourage several Publishers to move to Agency or speed up implementing Agency" in Canada.

[145] There is some support in the record for Kobo's position that it pushed the leading book publishers to shift from the wholesale model to the agency model of E-book distribution. For

example, an internal e-mail written in the fall of 2010 reflects that one of those publishers wanted to move fast, and that another one "is slower but will go if we push them." In another e-mail message that was written around that time, Mr. Tamblyn encouraged a representative of [redacted] to "move ahead for Canada as soon as possible." An additional e-mail message written the same day by Mr. Tamblyn to another one of the major book publishers reflected a similar sentiment. Other documentation from January 2011 indicates that Kobo underscored for [redacted] the importance to Kobo of moving to agency in Canada. In addition, correspondence from Kobo to Indigo Books and Music Inc. [**Indigo**] in March 2011 states that their "shared objective should be to get publishers into Agency or Agency-like paper." Other correspondence from the CEO of Indigo Books to the President of HarperCollins later that month states: "We have been engaging for months in discussions with you regarding the need to move quickly to an agency model."

[146] The Commissioner notes that the fact that the implementation of agency in Canada took longer than in the U.S. is addressed in the record, which includes internal Competition Bureau memoranda that were prepared for the Commissioner. Among other things, those memoranda refer to several documents that the Bureau obtained during its investigation, which reflect that the Arrangement contemplated the U.S. and other countries, including Canada. In one document, dated December 17, 2009, a Vice President of HarperCollins in the U.K. wrote to the [redacted] of HarperCollins' operations in [redacted] to explain that "… the phase one launch will be US and Canada – with UK and AUS/NZ in phase 2, [redacted]

[147] Likewise, specific reference to Canada was made in minutes of a HarperCollins Executive Committee meeting, dated December 21, 2009. Among other things, those minutes state:

> NEW DEVELOPMENTS • Apple Met with all publishers confidentially. Entering eBook business […]
> ○ US and Canada immediately. Europe slightly later.
> The whole thing is built it's a matter of turning it on.
>
> (Emphasis added by the Commissioner.)

[148] In the same memorandum that included the foregoing information, it is stated that Apple's proposed agency agreements that were circulated to the major book publishers on January 11, 2010, expressly included Canada in their defined territory. The memorandum added that, in its written response to an Order for the production of documents and written returns that this Court issued pursuant to s. 11 of the Act:

> … Apple confirmed that it had entered into agency agreements with certain of the publishers for the sale of e-books in the US which included a definition of "Territory" referring to both United States and Canada. [redacted]

[149] The memorandum also stated that Apple confirmed in its written returns that it:

> [redacted]
>
> (Emphasis added by the Commissioner.)

[150] Another document quoted in that memorandum was an e-mail from a Director of Apple Canada to someone at Apple U.S., in which the former expressed his understanding of the draft agency agreements as follows:

[redacted]

[151] According to that memorandum, when the final agency agreements were signed between Apple and "Hachette, HarperCollins, Macmillan and Simon & Schuster, they all continued to reference Canada [redacted]"

[152] With respect to the delay that occurred in effecting the shift to the agency model in Canada, the memorandum states that internal discussions within Apple regarding the practical aspects of how to implement the agency model in Canada "appear to have delayed the roll out of the iBookstore in Canada for several months past the US store." However, towards the end of March 2010, a senior executive of Apple in the U.S. sent an e-mail message to several of the major book publishers stating: "I want to be able to move quickly after the US launch [of the iBookstore] to follow with Canada …"

[153] That memorandum then stated: "Apple's Canadian agency agreements were drafted as amendments to the [main agreements in the U.S.] and incorporated the terms of [the latter agreements] by reference."

[154] Finally, that memorandum identified delays within [redacted] as a further factor that delayed the shift to Agency in Canada, and noted that "[t]he team has evidence to suggest that during this time Kobo was eager to move to agency model attempting to encourage transition by [REDACTED.]" Based on what Kobo has told the Court, I consider it reasonable to assume that the redacted material included the names of at least some of the major E-book publishers in Canada.

[155] I will pause to note that the memorandum in question also summarized what appear to have been the principal sources of information obtained by Competition Bureau staff during the course of their investigation. The bullet-form list that was provided to the Commissioner included mention of "information provided by [Kobo, Indigo, Apple Canada and Apple Inc.]" Later in that memorandum, there was a reference to Kobo's internal analysis of the price increases that it observed from the switch to agency in Canada, and to certain related observations that Kobo made, apparently to the Competition Bureau. Other documentation that was prepared by the case team also mentions that information had been obtained from Kobo, including pursuant to an order under s. 11 of the Act, and that some market participants had maintained that even if the Arrangement as it related to Canada may have existed at one time, it could no longer be "existing" because of the settlements that had been reached in the U.S. That documentation further notes:

> Despite these arguments, the team notes that the publishers that are the subject of the investigation continue to operate with agency agreements that prevent discounting in Canada and many of which contain MFN clauses. That is, none of the publishers have adopted the *substantive* terms of the US Final Judgments in Canada.
>
> (Emphasis in original.)

[156] Kobo maintains that the few above-mentioned very general references to the information that it provided, and to the fact that it attempted to encourage the transition to the agency model in Canada, did not constitute a reasonable summary of all of the evidence that it had provided to the Bureau. Kobo asserts that it was incumbent upon staff in the Competition Bureau to, at the very least, summarize that evidence in a manner similar to which they summarized the evidence that supported their conclusions and recommendations to the Commissioner.

[157] I disagree.

[158] Among other things, the memoranda that were prepared by staff within the Competition Bureau provided the Commissioner with the key facts that Kobo was one of the principal sources of information obtained during the investigation of this matter and that there was evidence indicating the following:

i. During the relevant period, Kobo was eager to move to the agency model and attempted to encourage the transition towards that model;

ii. Canada was contemplated by the Arrangement;

iii. Apple had sound business reasons for wanting the Arrangement to include Canada;

iv. Apple and [redacted] were at least in part responsible for the delay in implementing the Arrangement in Canada, relative to the U.S.;

v. by the end of 2011, all of the major Canadian E-book retailers were operating under the agency model.

[159] In addition, the Commissioner was informed that submissions had been made to the effect that, even if there may have been an Arrangement at one time, it was no longer "existing," as required by s. 90.1.

[160] In brief, the Commissioner was made aware of the essence of Kobo's position. Specifically, he was informed that Kobo had encouraged the transition to the agency model in Canada – the implication being that shift may not have been attributable to the Arrangement. And he was informed that submissions had been made to the effect that, even if the Arrangement had existed at one time, it could no longer be "existing."

[161] In my view, the Commissioner was entitled to rely on staff and senior management in the Competition Bureau to review and provide him with a summary or synthesis of the extensive information that was provided by Kobo and other industry participants during the course of the Commissioner's in-depth inquiry into the Arrangement and its alleged implementation in Canada (*Attorney General of Canada v Inuit Tapirisat et al*, [1980] 2 SCR 735, at 753; *The Queen v Harrison*, [1977] 1 SCR 238, at 245-246).

[162] The case team and senior management in the Competition Bureau were not under any obligation to provide to the Commissioner more detailed accounts of the information that Kobo had supplied during the course of the Bureau's investigation. I note that one of the key briefing memoranda that were provided to the Commissioner and that were included in the Amended Certified Tribunal Record [**CTR**] was 14 pages in length, and appears to have included what the Senior Deputy Commissioner of Competition considered to be the information that was most

important for the Commissioner to know. That information included a synthesis of evidence that came from various sources, some of whom, like Kobo, had provided extensive information pursuant to an Order issued by this Court pursuant to s. 11 of the Act.

[163] Based on the information contained in that 14 page memorandum, as well as in the other materials contained in the CTR, I do not agree that the Commissioner erred in the manner alleged by Kobo. That is to say, I have not been persuaded that the Commissioner ignored the information that Kobo submits contradicted the conclusions and recommendations made by case team and senior management in the Competition Bureau. As I have noted at paragraph 160 above, the Commissioner was informed of the essence of Kobo's position. Kobo has not provided any evidence that indicates or suggests that the Commissioner did not consider that information in reaching his decision to enter into the CAs.

[164] Given the foregoing, I conclude that it was not unreasonable for the Commissioner to have limited his consideration of the information that had been provided by Kobo, to the information described above. The manner in which the Commissioner and staff in the Competition Bureau synthesize the evidence in an investigation, particularly one like this that involved hundreds of thousands of documents, if not more, attracts a high degree of deference. On the particular facts of this case, I consider that it would not be appropriate for this Court to require the Commissioner to give greater consideration than appears to have been given to the information that a particular participant such as Kobo may submit to the Competition Bureau over the course of the Commissioner's inquiry.

[165] For greater certainty, given the information that was made available to the Commissioner regarding the implementation of the Arrangement in Canada, I also find that it was not unreasonable for him to conclude that the Arrangement did in fact extend to Canada and was implemented in Canada.

C. *Did the Commissioner act without jurisdiction by entering into the CAs to remedy "an arrangement" that was not "existing or proposed" at the time the CAs were executed?*

[166] Kobo submits that by the time the Commissioner filed the CAs, there was no Arrangement, existing or proposed, even if it did once exist in respect of Canada.

[167] In support of its position, Kobo notes that the Respondent Publishers settled with the U.S. Department of Justice [**DOJ**] and consented to Final Judgments [**the U.S. Judgments**] in 2012. Kobo asserts that the effect of the U.S. Judgments was to bring an end to the Arrangement. Kobo maintains that from the time the U.S. Judgments took effect, the Respondent Publishers have been expressly prohibited from coordinating their activities in respect of the sale of E-books. Kobo adds that, in accordance with terms of the U.S. Judgments, the Respondent Publishers terminated the agency agreements that they had at the time with E-book retailers.

[168] As further support for its position, Kobo notes that [redacted] Insofar as [redacted] is concerned, Kobo notes that its [redacted]

[redacted]

[169] In response, the Commissioner states that none of the Respondent Publishers adopted the substantive terms of the U.S. Judgments in Canada, and that those publishers continue to operate with the agency agreements contemplated by the Arrangement. He adds that those agency agreements continue to prevent price discounting at retail.

[170] In my view, the Commissioner's conclusions in this regard were not unreasonable.

[171] As Kobo conceded during the hearing of this Application, there is nothing in the U.S. Judgments that terminated the Arrangement insofar as it applied to Canada.

[172] The Complaint that was brought against the major book publishers in the U.S. requested "injunctive relieve to prevent further injury to consumers in the United States" (emphasis added).

[173] Consistent with this, the U.S. Judgments required the settling publishers to take certain actions with respect to their agreements with "E-book Retailers" and imposed certain prohibitions on those publishers in their dealings with E-book Retailers and with other E-book Publishers. In turn, the term "E-book Retailer" was defined to mean "any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the United States, or through which a Publisher Defendant, under an Agency Agreement, Sells E-books to consumers" (emphasis added). The term "E-book Publisher" was also defined by reference to the ownership or control of the

copyright or other authority "sufficient to distribute the E-book within the United States to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the United States" (emphasis added).

[174] In addition, pursuant to Section IV.C. of the U.S. Judgments, the settling publishers were required to provide the U.S. DOJ with advance notice of the formation or the material modification of certain types of transactions relating to the sale, development or promotion of E-books in the United States.

[175] There does not appear to be anything in the U.S. Judgments that in any way extends their operation to Canada, or that was intended to have the effect of terminating the Arrangement in Canada. I note that Justice Gascon reached essentially the same conclusion with respect to the U.S. Judgment to which HarperCollins Publishers LLC is or was subject (*HarperCollins*, above, at paras 179 and 187-190).

[176] Moreover, Kobo has not demonstrated that the U.S. Judgments had any impact on the implementation of the Arrangement in Canada.

[177] Indeed, the shift to the agency model that occurred in Canada over the course of 2010 and 2011 would appear to suggest otherwise. Based on the evidence that was provided to the Commissioner and this Court, it was reasonably open to the Commissioner to conclude that this shift was evidence of the implementation of the Arrangement in Canada (*HarperCollins*, above, at paras 195-204).

[178] Finally, it is not by any means apparent to me that any contractual provisions in Kobo's contracts with [redacted] or any of the other Respondent Publishers precluded the possibility of the Arrangement being implemented in Canada.

[179] During his cross-examination by counsel to the Commissioner, Mr. Tamblyn was asked whether any changes were made, insofar as the Canadian E-book market is concerned, in Kobo's contracts with the major book publishers as a result of the settlements in the U.S. He replied that, with the exception of Kobo's contract with [redacted], he didn't believe that the U.S. settlements resulted in any such changes.

[180] Subsequent to the issuance of the U.S. Final Judgment in respect of [redacted] U.S. parent company and certain other major book publishers, Kobo and [redacted] entered into a short agreement. In essence, that agreement provided that (i) the U.S. territory would be removed from the existing agreement dated March 31, 2010, (ii) the parties would enter into a separate agreement for the sales of digital books in the U.S., and (iii) Kobo would continue serving as [redacted] agent in Canada in accordance with the terms of the above-mentioned 2010 agreement.

[181] In my view, it is clear on the face of that short agreement that it did not terminate the Arrangement as it relates to Canada. On the contrary, it preserved it as it relates to Canada, while providing that a new agreement would be entered into in relation to the sale of E-books in the U.S.

[182] [redacted] It is by no means clear to me that this terminated the Arrangement in Canada, insofar as [redacted] was concerned.

[183] In summary, based on the foregoing, I consider that it was reasonably open to the Commissioner to conclude that the Arrangement remained in force (i.e., that it was "existing") at the time he entered into the CAs with the Respondent Publishers. Put differently, it was reasonably open to the Commissioner to conclude on the evidence that was before him that the Arrangement includes Canada and that the U.S. Judgments did not terminate the Arrangement as it relates to this country. It was also reasonably open to the Commissioner to conclude that the contractual provisions discussed above did not terminate the Arrangement in Canada.

X. **Conclusion**

[184] For the reasons set forth in Part VI above, I have concluded that it would not be appropriate for me to exercise my discretion to hear Kobo's Application on the merits.

[185] However, in the event that I have erred in reaching that conclusion, I have assessed this Application on its merits and have reached the conclusion that it should be dismissed.

[186] With respect to the first issue that Kobo raised, I have concluded that the Commissioner has territorial jurisdiction in respect of the Arrangement. For the reasons set forth in Parts IX.A.(2)(b)(i) and (ii) above, it can be inferred from the scheme of the Act as a whole that s. 90.1 applies to agreements and arrangements that have, or are likely to have, the effect described in that provision, namely, a prevention or lessening of competition in a market, whether they are entered into within or outside Canada. In any event, for the reasons set forth in Part IX.A.(2)(c) above, there is a real and substantial connection between the Arrangement and Canada, such that the Commissioner had territorial jurisdiction to enter into the CAs. Given these conclusions, it is not necessary to address whether the presumption against the extraterritorial application of legislation can be rebutted.

[187] With respect to the second issue that Kobo raised, for the reasons set forth in Part IX.B. above, I have concluded that the Commissioner did not err by failing to give greater consideration to the information provided by Kobo. The Commissioner was made aware of the essence of that information, and Kobo has not provided any evidence to suggest that he did not consider it in reaching his decision to enter into the CAs.

[188] With respect to the third issue that Kobo raised, I consider that it was reasonably open to the Commissioner to conclude that the Arrangement remained in force (i.e., it was “existing”) at the time he entered into the CAs with the Respondent Publishers.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This Application is dismissed with costs payable to the Commissioner.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-219-17
STYLE OF CAUSE:	RAKUTEN KOBO INC. v THE COMMISSIONER OF COMPETITION, HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HACHETTE DIGITAL, INC., HOLTZBRINCK PUBLISHERS, LLC AND SIMON & SCHUSTER CANADA, A DIVISION OF CBS CANADA HOLDINGS CO.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 23, 2017
PUBLIC JUDGMENT AND REASONS:	CRAMPTON C.J.
DATED:	FEBRUARY 1, 2018

APPEARANCES:

Nikiforos Iatrou Scott McGrath	FOR THE APPLICANT, RAKUTEN KOBO INC.
John Syme Katherine Johnson	FOR THE RESPONDENT, THE COMMISSIONER OF COMPETITION
Linda Plumpton James Gotowiec	FOR THE RESPONDENTS, HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC. AND HACHETTE DIGITAL, INC.
Randal Hughes Emrys Davis	FOR THE RESPONDENT, HOLTZBRINCK PUBLISHERS, LLC
Peter Franklyn	FOR THE RESPONDENT, SIMON & SCHUSTER CANADA, A DIVISION OF CBS CANADA HOLDINGS CO.

SOLICITORS OF RECORD:

Nikiforos Iatrou WEIRFOULDS, LLP Toronto, ON	FOR THE APPLICANT RAKUTEN KOBO INC.
John Syme Katherine Johnson DEPARTMENT OF JUSTICE Competition Bureau Legal Services Gatineau, QC	FOR THE RESPONDENT, THE COMMISSIONER OF COMPETITION
Linda Plumpton James Gotowiec TORYS LLP Toronto, ON	FOR THE RESPONDENTS, HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., AND HACHETTE DIGITAL, INC.
Randal Hughes Emrys Davis BENNETT JONES LLP Toronto, ON	FOR THE RESPONDENT, HOLTZBRINCK PUBLISHERS, LLC
Peter Franklyn OSLER, HOSKIN & HARCOURT LLP Toronto, ON	FOR THE RESPONDENT, SIMON & SCHUSTER CANADA, A DIVISION OF CBS CANADA HOLDINGS CO.
Jessica Kimmel GOODMANS LLP Toronto, ON	