Federal Court  Cour fédérale

Date: 20170419

Docket: T-219-17

Citation: 2017 FC 382

Ottawa, Ontario, April 19, 2017

PRESENT: THE CHIEF JUSTICE

Docket: T-219-17

BETWEEN:

RAKUTEN KOBO INC.

Applicant

and

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

Respondents

ORDER AND REASONS

I. Introduction

[1] In this Motion, Rakuten Kobo Inc. [Kobo] seeks three principal types of relief.

[2] First, it seeks an Order staying its Application for Judicial Review [the Application] in the within proceeding pending the final disposition of another motion, brought by HarperCollins Publishers L.L.C. and HarperCollins Canada Limited [collectively, HarperCollins], before the Competition Tribunal [the Tribunal]. In that motion, HarperCollins requests, among other things, that an application filed by the Commissioner against it pursuant to section 90.1 of the *Competition Act*, RSC 1985, c C-34 [the Act], be dismissed summarily [the Motion for Summary Dismissal].

[3] Second, Kobo seeks an Order requiring the Commissioner of Competition [the Commissioner] to produce unredacted versions of all documents that the Commissioner has disclosed in connection with Kobo's Application, pursuant to Rule 317 of the *Federal Courts Rules*, SOR 98/106. As explained in greater detail below, that Application concerns consent agreements [the CAs] that the Commissioner has entered into with the other Respondents identified in the style of cause above [the Respondent Publishers].

[4] Third, Kobo seeks an Order varying the timetable in its Application to permit it to file amended or supplemental materials, once the above-mentioned unredacted documents have been produced.

[5] For the reasons that follow, this Motion will be granted in part. Kobo's Application will be stayed until the Tribunal has issued its decision in respect of the Motion for Summary Dismissal. Given that the parties' submissions will have been served and filed by that time, it is expected that the hearing of the Application will take place very shortly after the issuance of the

Tribunal's decision, unless Kobo withdraws the Application, following the issuance of the Tribunal's decision and any steps that may be taken as a consequence thereof, in relation to the CAs.

[6] Kobo's requests for an Order requiring the Commissioner to produce to Kobo unredacted versions of all of the documents in respect of which he continues to assert a claim of privilege, and for leave to file amended or supplementary material, will be denied**.**

II. **Background**

[7] The CAs relate to a change by the Respondent Publishers of general interest fiction and non-fiction electronic books [E-books] from a wholesale distribution model to an agency distribution model. As a result of that change, retail price competition in the markets for E-books in Canada is alleged to have been restricted. The CAs were registered with the Tribunal in February of this year. Each of the Respondent Publishers has entered into a separate CA with the Commissioner.

[8] In its underlying Application in this proceeding, Kobo seeks to challenge the CAs on jurisdictional grounds.

[9] On March 8, 2017, I issued an Order, on consent, staying the implementation of the CAs until the fifth business day following this Court's determination of Kobo's Application.

[10] 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, in relation to the sale of E-books in both of those countries [the Arrangement]. Among other things, those recitals also state that the Commissioner has concluded that the Arrangement included provisions that restricted 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 section 90.1 of the Act.

[11] Broadly speaking, the CAs are directed towards distribution agreements that the Respondent Publishers have entered into with retailers of E-books. Among other things, 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.

[12] 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 years from the date of the registration of the CA.

[13] 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.

[14] 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 in 2014 [the Initial CA]. However, the Initial CA was rescinded by the Tribunal after it was found to have been deficient in certain respects.

[15] In this latter regard, the Initial CA did not provide the Tribunal with a sufficient understanding of the subject matter of the impugned Arrangement to satisfy itself that the prohibitions in the Initial CA pertained to terms of the Arrangement, as contemplated by paragraph 90.1(1)(a) of the Act. It also did not sufficiently address whether the Arrangement was existing or proposed at that time; whether two or more parties to that Arrangement were competitors; or whether that Arrangement prevented or lessened, or was likely to prevent or lessen, competition substantially. In this latter regard, the Initial CA simply referred to competition having been substantially prevented or lessened in the past.

[16] 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 Respondent Publishers, based on *conclusions* that he may reach regarding the six elements of the reviewable conduct described in subsection 90.1(1) of the Act.

[17] The CAs that are the subject of the within Application by Kobo presumably were intended to respond to the above-mentioned deficiencies in the Initial CA. However, 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.

[18] In its Application in the within proceeding, Kobo has raised 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 section 90.1 of the Act, at the time the CAs were entered into.

[19] The first and third of the above-mentioned jurisdictional challenges brought by Kobo have also been advanced by HarperCollins before the Tribunal, in its response to the Commissioner's application as well as in its Motion for Summary Dismissal. However, whereas Kobo asserts that it is *the Commissioner* who acted without jurisdiction, HarperCollins submits that it is *the Tribunal* that lacks jurisdiction.

[20] Given that Kobo's Application is scheduled to be heard on tomorrow, this Motion was heard on an urgent basis last Thursday, on the eve of the Easter holiday period, after the Commissioner filed his response earlier in the week.

[21] HarperCollins' Motion for Summary Dismissal before the Tribunal is scheduled to be heard on May 3, 2017.

III. **Kobo's Request for a Stay of its Application**

A. *Relevant Legislation*

[22] Subsection 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 states:

> 50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter
>
> (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or
>
> (b) where for any other reason it is in the interest of justice that the proceedings be stayed.

B. *General Principles*

[23] This Court will not lightly delay a matter (*Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312, at para 5 [*Mylan*]).

[24] Pursuant to a line of jurisprudence that has developed in relation to paragraph 50(1)(a) and is relied upon by the Commissioner, a stay should only be granted in the clearest of circumstances. Among other things, that jurisprudence holds that the party seeking the stay must

demonstrate that the continuance of the proceeding in respect of which the stay is sought would cause prejudice or injustice to that party, and would not cause an injustice to the other party or parties to the proceeding. In addition, unless there is a risk of imminent adjudication in two different forums, the Court will be reluctant to issue a stay where the parties to parallel proceedings are not identical, the jurisdiction of the two courts in question is different, or where the causes of action being asserted are different (*GDC Gatineau Development Corporation v Canada (Public Works and Government Services)*, 2009 FC 1295, at paras 4–7; *Jazz Air LP v Toronto Port Authority*, 2009 FC 253; *Advanced Emissions Technologies Ltd v Dufort Testing*, 2006 FC 794, at paras 9–10; *White v EBF Manufacturing Ltd*, [2001] FCJ No 1073 (QL), at para 3 (FCTD)).

[25] However, more recent jurisprudence involving parallel proceedings in different courts holds that the Court must simply ask itself "whether, in all of the circumstances, the interests of justice support the [proceeding] being delayed" (*Mylan*, above, at para 14). Indeed, the Commissioner himself stated that the "interests of justice" would be "best served if this Court resolves [the issues that Kobo has raised in its Application] in accordance with the original timetable."

[26] In any event, the Court has broad discretion in considering a request for a stay of its proceedings, and is not limited to considering the factors mentioned in paragraph 24 above (*1395804 Ontario Ltd (Blacklock's Reporter) v Canada (Attorney General)*, 2016 FC 719, at paras 38–41 [*Blacklock's*]).

C. *Analysis*

[27] Kobo submits that it would be in the interests of justice for the hearing of its Application in the within proceeding to be stayed pending the final disposition of HarperCollins' Motion for Summary Dismissal.

[28] In brief, Kobo asserts that the Tribunal's decision in respect of the Motion for Summary Dismissal will inform one or more of the key jurisdictional issues that have been raised in its Application before this Court, and that to "continue with both proceedings at the same time would give rise to the prospect of inconsistent findings and a waste of resources, both of the Court and the Tribunal, and of the parties." Kobo adds that the Tribunal should be permitted to determine the scope of its jurisdiction, before the Court does so, and that it would be more efficient for the Tribunal to make that determination, because the evidentiary issues in dispute on HarperCollins' Motion for Summary Dismissal are far less than those in dispute in Kobo's Application before this Court. Kobo also maintains that there would be no prejudice to the Commissioner or to the public if the stay is granted.

[29] Given the limited nature of the issues to be resolved on the Motion for Summary Dismissal, Kobo maintains that "it can be anticipated that this is a stay that will be measured in weeks, not years."

[30] The Commissioner opposes Kobo's request for a stay on several grounds.

[31] I am not persuaded that the Commissioner has established the existence of any of those grounds, each of which I will address in order below.

[32] First, the Commissioner submits that Kobo has not adduced any evidence to demonstrate that it will be harmed if a stay of the hearing of its Application is not granted. In addition, the Commissioner maintains that the issuance of the stay would cause harm to the public interest because it would delay the resolution of the matters at issue in the judicial review proceedings before this Court. The Commissioner states that such delay will "deprive the public of at least the possibility of a market where E-book retailers have the ability to compete on the basis of price," for months, and potentially longer.

[33] On the particular facts of this case, those considerations do not merit significant weight in favour of denying the stay that Kobo has requested. With respect to prejudice to Kobo, it is readily apparent that, in the absence of a stay of the hearing of its Application, Kobo and the Commissioner would have to incur significant time and expense associated with proceedings before the Court and the Tribunal that are scheduled to be heard within a very short period of time of each other—less than two weeks. The taxpaying public would also have to incur the significant expense associated with hearings before the Court and the Tribunal. In my view, requiring both proceedings to proceed almost simultaneously would not be an effective use of scarce public and judicial resources and would not be consistent with the spirit of Rule 3 of the *Federal Courts Rules*, which refers to the desirability of securing the just, most expeditious and least expensive determination of every proceeding on its merits (*Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143, at paras 12–13; *Turmel v Canada*, 2016 FCA 9, at para 17;

Blacklock's, above; *Korea Data Systems (USA), Inc v Aamazing Technologies Inc*, [2012] OJ No 5195 (QL), at para 19 (CA)).

[34] Insofar as the harm to the public that the Commissioner alleges would be associated with a granting of the stay is concerned, it is important to note that the prohibitions in the CAs are time-limited and of very short duration. As noted at paragraphs 11 and 12 above, the prohibitions with respect to the restriction of discounting by E-book retailers would be in force for only nine months, while the prohibitions with respect to Price MFN Clauses would be in force for three years. That will not change if the implementation of the CAs is deferred. Stated differently, in contrast to a situation in which *the period of time* during which the public would benefit from a remedy under the Act would be reduced by a stay, the period of time during which the prohibitions set forth by the CAs would be in force would not change whatsoever. I note that this was one of the reasons why Rennie J., as he then was, declined to find that the balance of convenience favoured the Commissioner, when he considered Kobo's request for a stay of the implementation of the Initial CA (*Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 2, at para 43).

[35] The Commissioner further submits that the parties to the proceedings before the Tribunal and the Court are different, and that the relief being sought before the Tribunal and the Court is also different. As a result, he asserts that the risk of inconsistent findings being reached by the Tribunal and the Court is very low. I disagree.

[36] Notwithstanding the differences that the Commissioner has identified in the proceedings before the Tribunal and the Court, respectively, there is a non-speculative risk of findings being made in respect of one or more issues in those proceedings that could well be perceived by the parties or the public to be inconsistent or difficult to reconcile (*Blacklock's*, above, at paras 52–53). For example, it is objectively possible that the Tribunal could determine that there is no genuine issue for trial because the anti-competitive arrangement to which HarperCollins is alleged to have been a party was entered into in the United States; while the Court could conclude that it was not unreasonable for the Commissioner to have entered into the CAs, even though the impugned Arrangement was entered into outside Canada.

[37] In my view, the parties and the public could very well have difficulty reconciling such apparently differing conclusions. This is so even though the parties' legal counsel would understand that the Court's determination of the *reasonableness* of the Commissioner's interpretation of his jurisdiction in respect of foreign arrangements would not represent the Court's view of the *correctness* of that interpretation.

[38] In providing the example set forth above, I should not be taken to have accepted the Commissioner's submission that this Court should review the issues that Kobo has raised in its Application on a reasonableness standard.

[39] It is 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 (*Alberta (Information and Privacy Commissioner) v Alberta Teachers'*

Association 2011 SCC 61, at paras 24–25; *Alberta (Education) v Access Copyright*, 2010 FCA 198, at para 70, rev'd on other grounds, 2012 SCC 37, at paras 10–11, 59–60; *Ontario (Liquor Control Board) v Vin de Garde Wine Club*, 2013 ONSC 5854, at para 48). Among other things, this may well facilitate the Court's determination of these issues, and reduce the scope for determinations that are perceived to be inconsistent or difficult to reconcile. To the extent that this is ultimately achieved, it should, in turn, reduce the potential for additional litigation in respect of the CAs.

[40] In an apparent effort to reduce the mischief that would be associated with the issuance of decisions by the Court and the Tribunal that are inconsistent or difficult to reconcile, the Commissioner suggested that the Court could elect to withhold its decision pending the issuance of the Tribunal's ruling on HarperCollins' Motion for Summary Dismissal. However, I am not persuaded that it would be prudent to proceed down a path where there would remain a non-speculative possibility that the Court would still wind up being in a position of issuing a decision that would give rise to this very mischief. If the Commissioner's thought is that the Court could, at that point in time, avoid the mischief in question by permanently refraining from issuing its decision, I consider that this would be unfair to Kobo and the Respondent Publishers, who would by then have incurred the time and expense of participating in a hearing on Kobo's Application.

[41] I will simply add in passing that I agree with Kobo that the Commissioner's jurisdiction under section 105 of the Act is derivative of the Tribunal's jurisdiction, such that if the Tribunal has no jurisdiction in respect of a particular conduct, neither does the Commissioner (*Kobo Inc v Commissioner of Competition*, 2014 Comp Trib 14, at paras 76–77, 91, 124). As a result, I do not

attribute much significance to the fact that it is *the Tribunal's jurisdiction* that is at issue in the Motion for Summary Dismissal, whereas it is *the Commissioner's jurisdiction* that is at issue in Kobo's Application before this Court.

[42] In summary, after balancing the all of considerations discussed above, I have concluded that it would be appropriate to stay the hearing of Kobo's Application in the within proceeding for the short period of time that it is likely to take the Tribunal to hear and issue a decision in respect of HarperCollins' Motion for Summary Dismissal.

[43] In my view, the potential adverse consequences on the Commissioner and the public that may be associated with a short delay in the resolution of the issues that Kobo has raised in its Application are very minor in nature. Those consequences are much less significant than, and are considerably outweighed by, the potential adverse consequences that may be associated with this Court proceeding to a hearing of Kobo's Application less than two weeks before the Motion for Summary Dismissal will be heard by the Tribunal. The latter consequences include the potential for inconsistent or difficult to reconcile decisions of the Court and the Tribunal, the potential waste of scarce public and judicial resources, and the loss of an opportunity for the Court and the parties to benefit from the Tribunal's consideration of the two jurisdictional issues that are common in the two proceedings. In aggregate, these potential adverse consequences considerably outweigh the very minor potential adverse consequences that would be associated with failing to proceed to a hearing on Kobo's Application tomorrow.

[44] Stated differently, this is a clear case for the issuance of a short stay. It would also be in the interests of justice that the hearing of Kobo's Application be stayed for a short period of time.

[45] In its Notice of Motion and written submissions, Kobo requested that its Application be stayed pending the "final" disposition of HarperCollins' Motion for Summary Dismissal. This suggests that Kobo may be seeking to have its Application stayed until a determination has been made in respect of any appeal(s) that may be taken of the Tribunal's decision.

[46] However, Kobo did not refer in its written or oral submissions to potential appeals of the Tribunal's decision. On the contrary, Kobo repeatedly emphasized the "temporary" nature of the stay that it is seeking, and it stated that "it can be anticipated that this is a stay that will be measured in weeks, not years." During the hearing of this Motion, Kobo's counsel also undertook to make himself available for a hearing of Kobo's Application within that time frame, and in any event before the end of June.

[47] Another consideration that must be taken into account in determining the duration of the stay is that the Commissioner and the Respondent Publishers consented to the underlying stay of the implementation of the CAs. They did so in order to proceed directly to a hearing of Kobo's Application on an accelerated basis, and thereby avoid the time and costs that would have been associated with having a separate hearing in respect of Kobo's request for that stay. With that in mind, I consider that it would be unfair to them to now stay the hearing of Kobo's Application for more than a very short period of time.

[48] With all of the foregoing in mind, and upon determining that the hearing of Kobo's Application would not be proceeding tomorrow, I revised the schedule for the serving and filing of Responding Records and any Reply that the Commissioner may wish to file in respect of the Respondent Publishers' submissions. I did so to ensure that the hearing of Kobo's Application can be scheduled expeditiously, after the Tribunal has issued its decision in respect of HarperCollins' Motion for Summary Dismissal.

[49] Accordingly, I will issue a stay of the hearing of Kobo's Application until the issuance of the Tribunal's decision in respect of HarperCollins' Motion for Summary Dismissal.

IV. **Kobo's Request for Unredacted Versions of Documents**

A. *The Parties' Positions*

[50] The day before the Commissioner was scheduled to cross-examine the affiant who swore the affidavit filed by Kobo in the within Application, the Commissioner sent revised copies of four documents to Kobo's counsel on an "outside counsel only" basis. Those revised copies revealed newly unredacted information [the Additional Information], in respect of which the Commissioner had previously asserted privilege.

[51] Kobo asserts that the Commissioner deliberately proceeded in that manner in order to unfairly benefit from disclosing information that he considered to be helpful to his case after Kobo had filed its affidavit evidence and after the Commissioner had had an opportunity to

prepare for the cross-examination of Kobo's affiant, Mr. Michael Tamblyn. Kobo maintains that this will give rise to "a manifestly unfair" hearing of its Application.

[52] Kobo submits that, when the Commissioner waived privilege over some of the Additional Information, he waived privilege over the rest of the privileged information in the four documents in question, as well as over all the other information in respect of which he has asserted a claim of privilege.

[53] In support of its position, Kobo relies on the principle that "waiver of privilege as to part of a communication will be held to be waiver as to the entire communication" (*S & K Processors Ltd v Campbell Avenue Herring Producers Ltd* (1983), 45 BCLR 218, at para 6 (SC) [*S&K*]). Kobo maintains that "[a] party cannot disclose part of the content of a privileged document and unfairly withhold the rest of it" (*Slansky v Canada (Attorney General)*, 2013 FCA 199, at para 261).

[54] The Commissioner maintains that he did not expressly or impliedly waive privilege over any of the other information, beyond the Additional Information, in respect of which he has asserted privilege. In addition, he denies that he has disclosed only those parts of the four documents in question that are favourable to him.

[55] The Commissioner submits that, in the absence of a demonstration by Kobo that the Additional Information is misleading, the Court should not conclude that he has impliedly waived privilege over any other information in respect of which he has asserted privilege.

B. *Applicable legal principles*

[56] The onus of establishing waiver of privilege rests with the party asserting the waiver (*Smith v Jones*, [1999] 1 SCR 455, at para 46; *Canada (National Revenue) v Thornton*, 2012 FC 1313, at para 26).

[57] The privileges that the Commissioner has asserted are solicitor-client privilege, investigative techniques privilege and public interest privilege, which extends to "a class of documents, created or obtained during the course of a Competition Bureau investigation" (*Canada (Commissioner of Competition) v Air Canada*, 2012 Comp Trib 21, at para 3 [*Air Canada*]).

[58] It is "plainly not the law that production of one document from a file waives the privilege attaching to other documents in the same file" (*Transamerica Life Insurance Co of Canada v Canda Life Assurance Co*, [1995] OJ No 3886 (QL), at para 41 (Gen Div) [*Transamerica*]). The same principle applies to the waiver of privilege in respect of some, but not all, of the information in a single document in respect of which privilege has been asserted (*Stevens v Canada (Prime Minister)*, [1997] 2 FC 759, at para 34 (FCTD)).

[59] In relying on the passage from *S&K* reproduced above, Kobo omits to mention that Justice McLachlin, as she then was, made it clear that, in cases of partial waiver, the issue of whether there has been an involuntary waiver of further, undisclosed, information turns on whether "fairness and consistency so require" (*S&K*, above, at paras 6, 10).

[60] Accordingly, "[t]he issue in a 'fairness and consistency' analysis is whether the partial disclosure of privileged information can result in unfairness to the other side" (*Merck & Co Inc v Apotex Inc*, 2009 FCA 27, at para 13 [*Merck*]).

[61] In this regard, "the presence of an intent to mislead the court or another litigant is of primary importance" (*Stevens v Canada (Prime Minister)*, [1998] FCJ No 794 (QL), at para 51 (FCA) [*Stevens*]). However, the Court must also consider whether, as an objective fact, the Court or another litigant is likely to be misled by the partial disclosure. That is to say, it must be demonstrated that, without the further information in respect of which privilege has not been waived, the disclosed information is somehow misleading (*Transamerica*, above; C*ommissioner of Competition v United Grain Growers Limited*, 2002 Comp Trib 35, at para 82; *KF Evans Ltd v Canada (Minister of Foreign Affairs)*, [1996] FCJ No 30 (QL), at paras 22–24 (FCTD)).

[62] Thus, there can be no unfairness to the party asserting waiver if that party would be left in exactly the same position or, in any event, no worse off in its litigation with the other party, relative to the position in which that party would have been in if the partial disclosure had not been made (*Merck*, above, at para 17).

[63] In the absence of an intention to mislead the Court or another party to the proceeding, or a finding that the Court or another party is likely to be misled as a matter of fact, the disclosure, in the interest of transparency, by a public authority of more information than is legally required to be disclosed is commendable and in no way detracts from the protection afforded by privilege (*Stevens*, above, at para 52).

C. *Analysis*

[64] The first of the four documents in respect of which Additional Information was provided is document # 12 on the Amended Index of Relevant Documents that the Commissioner disclosed to Kobo [the Amended Index]. That document is an internal briefing memorandum from the Senior Deputy Commissioner to the Commissioner. The Additional Information that was disclosed in this document is the text of footnote 3, which states: "This recommendation is consistent with the Bureau's approach described where parties demonstrate a continuing commitment to a [sic] resolving a matter. See Competition Bureau, 'Communication during Inquiries' June 26, 2014, at page 6." Kobo maintains that fairness and consistency require that it have the opportunity to know the nature of the recommendation in question, and indeed to know the rest of the undisclosed information in the document.

[65] I disagree. Having reviewed an unredacted version of document #12, I am satisfied that the disclosure of the text quoted immediately above did not result in any unfairness to Kobo. Kobo is not now in a position of having been misled by the Commissioner, either by virtue of not having access to the remaining unredacted information in that document, or by virtue of not knowing the nature of the recommendation referenced in the quote above. Moreover, it is difficult to see how the Commissioner could benefit in his litigation with Kobo in any way, based on the fact that this disclosure was made. Considerations of fairness and consistency do not require the disclosure of any additional information to Kobo, as a consequence of the Commissioner's disclosure of the Additional Information in document #12.

[66] The second document in respect of which Additional Information was provided is document # 15 on the Amended Index. The Additional Information that was disclosed in this document was on the second, fourth and fifth pages, and pertains to an issue that Kobo itself has raised in its Application. That issue is that "if 'an arrangement' within the meaning of s. 90.1 of the Act, did once exist, the Commissioner acted without jurisdiction by entering into the [CAs] to remedy 'an arrangement' that was not 'existing or proposed' at the time he entered into [the CAs], given the passage of time and the resolutions of the U.S. courts and antitrust enforcers."

[67] The Additional Information that was disclosed on the second and fourth pages of document #15 (including in a sentence that extends onto the fifth page) simply reveals that this argument has been advanced by one or more parties. In my view, neither the Court nor Kobo could be misled by the disclosure of this information.

[68] The only other Additional Information that is disclosed in document #15 is a passage on the fifth page which notes that, despite certain (unredacted) arguments that have been made to the Commissioner, the case 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 U.S. Final Judgments in Canada ..."

[69] Once again, I do not consider that the Court or Kobo could be misled by the disclosure of this information, including the fact that certain unknown arguments were made to the Commissioner by one or more persons. The relevant alleged facts that were disclosed by the

Commissioner in this passage were that the publishers in question continue to operate with agency agreements that prevent discounting in Canada, that some of those agreements contain Price MFN Clauses, and that therefore those publishers have not adopted the substantive terms of the U.S. Final Judgments in Canada. Having reviewed the unredacted contents of the entire document, I am satisfied that fairness and consistency do not require that additional disclosures of other information contained in that document, or contained in other documents in respect of which the Commissioner has claimed privilege be made.

[70] The third document in respect of which Additional Information was provided is document # 16 on the Amended Index. The Additional Information that was disclosed in that document consists of the following four categories of information: (i) the identities of the previously unidentified sources of information that was voluntarily provided to the Commissioner, namely, the Respondent Publishers and HarperCollins; (ii) certain information that was provided by HarperCollins regarding the origins and launch of the agency form of distribution in the United States and Canada, and regarding a contemporaneous meeting that the five principal book publishers had with one or more representatives of Apple Inc.; (iii) information obtained from Apple Inc. and from Apple Canada Inc. in that regard, including in respect of issues that remained to be resolved and options that were being considered in Canada at that time; and (iv) an explanation of what may have caused Amazon to delay implementing the agency approach to E-book distribution in Canada.

[71] Having reviewed a fully unredacted version of document # 16, it is not apparent to me how the disclosure of any of the above-described Additional Information might mislead the

Court or Kobo, or cause any unfairness to Kobo. If anything, the Additional Information places Kobo in a more informed position than it may have been in before it obtained such information. In any event, it is difficult to see how Kobo could be any worse off in its litigation with the Commissioner in the within Application than it was before the disclosure of that information. There is nothing in the remainder of the document that remains redacted and that should be disclosed to Kobo to ensure fairness and consistency.

[72] Finally, the fourth document in respect of which Additional Information was provided is document # 17 on the Amended Index. The Additional Information that was disclosed in this document consists of (i) words that indicate that a certain chart that appears at page 10 of the document is an internal Competition Bureau cost-breakdown chart that includes expenditures that the case team expects to incur; (ii) headings in that chart that make it readily apparent that the chart is in fact an internal cost-breakdown chart; and (iii) a brief statement of the decision of the Competition Bureau's Major Enforcement and Advocacy Committee [MEAC] to attempt to negotiate a new consent agreement with the relevant E-book publishers, together with MEAC's recommendation that the Commissioner provisionally approve the filing of an application with the Tribunal pursuant to s. 90.1 of the Act. In addition, the words "Failing successful negotiation of [a revised consent] agreement," were inserted before the words "MEAC recommends that the Commissioner approve" an undisclosed course of action.

[73] Once again, having reviewed a fully unredacted version of document # 17, it is not apparent to me how the disclosure of any of the above-described Additional Information might mislead the Court or Kobo, or cause any unfairness to Kobo. None of that information appears to

relate in any meaningful way to the issues that Kobo has raised in its Application. I am satisfied that that fairness and consistency do not require the disclosure of any further information in the document, in respect of which the Commissioner continues to assert privilege.

[74] For completeness, I would simply add the following. First, Kobo did not lead any evidence to establish that the Commissioner intended to mislead the Court or Kobo, when it provided the Additional Information to Kobo on an "outside counsel only" basis. Second, with the exception of the Additional Information that is contained in document #16, in respect of which the Commissioner has sought an order of confidentiality, the Commissioner has taken the position that Kobo's counsel is free to disclose the Additional Information to Kobo. Finally, the Commissioner did not cross-examine Kobo's affiant on any of the Additional Information.

V. **Kobo's Request for an Order Varying the Timetable in the Within Application**

[75] Given the conclusions that I have reached in Part IV above, it is unnecessary for me to address this request by Kobo, as it was conditional on the Commissioner being ordered to produce additional information in respect of which he continues to assert privilege.

VI. **Conclusion**

[76] For the reasons set forth in Part III above, the hearing of the Application in the within proceeding will be stayed until the Tribunal releases its decision on HarperCollins' Motion for Summary Dismissal.

[77] For the reasons set forth in Part IV above, Kobo's request for an Order requiring the Commissioner to produce to Kobo unredacted versions of all of the documents in respect of which he continues to assert a claim of privilege will be denied.

[78] Kobo's request for leave to file amended or supplementary material will therefore also be denied

[79] Given that Kobo and the Commissioner have each prevailed on one of the two principal issues on this Motion, no costs will be awarded on this Motion.

ORDER

THIS COURT ORDERS that:

1. The hearing of the Application in the within proceeding is stayed until the Competition Tribunal releases its decision on HarperCollins' Motion for Summary Dismissal.
2. Kobo's request for an Order requiring the Commissioner to produce to Kobo unredacted versions of all of the documents in respect of which he continues to assert a claim of privilege is denied.
3. Kobo's request for leave to file amended or supplementary material is denied.
4. Each of Kobo and the Commissioner shall be responsible for its own costs of this Motion.

"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., HOLTZBRINK PUBLISHERS, LLC AND SIMON & SCHUSTER CANADA, A DIVISION OF CBS CANADA HOLDINGS CO.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 13, 2017
ORDER AND REASONS:	CRAMPTON C.J.
DATED:	APRIL 19, 2017

APPEARANCES:

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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.
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