Federal Court of Appeal  Cour d'appel fédérale

Date: 20150618

Docket: A-401-14

Citation: 2015 FCA 149

CORAM: **DAWSON J.A.**
RYER J.A.
WEBB J.A.

BETWEEN:

RAKUTEN KOBO INC.

Appellant

and

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

Respondents

Heard at Toronto, Ontario, on June 18, 2015.
Judgment delivered from the Bench at Toronto, Ontario, on June 18, 2015.

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on June 18, 2015).

DAWSON J.A.

[1] In 2012, the Commissioner of Competition commenced an investigation into the e-book industry in Canada. The investigation resulted in the Commissioner entering into a Consent

Agreement with the four publishers who are respondents to this appeal. The Consent Agreement recites that the agreement resolves the Commissioner's concerns that the respondent publishers had engaged in conduct that substantially lessened or prevented competition.

[2] Subsection 106(2) of the *Competition Act*, R.S.C. 1985, c. C-34 (Act) allows a person directly affected by a consent agreement to apply to the Competition Tribunal to have the consent agreement rescinded or varied. The Tribunal may grant the application if it finds that the applicant establishes that "the terms [of the consent agreement] could not be the subject of an order of the Tribunal".

[3] The appellant, Rakuten Kobo Inc., is an e-book retailer which alleges that it was directly affected by the Consent Agreement because the Consent Agreement altered existing contractual relationships between Kobo and the respondent publishers. As such, it applied under subsection 106(2) of the Act for an order rescinding or varying the Consent Agreement. One ground asserted by Kobo to justify rescission was that there was no jurisdiction to enter into the Consent Agreement because there had been no violation of the Act.

[4] Kobo's application therefore raised an issue of statutory interpretation: does the phrase "the terms [of the consent agreement] could not be the subject of an order of the Tribunal" permit an inquiry into the merits of the underlying case so as to determine whether the merits would justify the making of an order? In the alternative, is the Tribunal limited to, among other things, an inquiry into whether the terms of the Consent Agreement are terms the Tribunal has jurisdiction to order?

[5] Accordingly, the Commissioner referred a question of law to the Tribunal for determination. The question was:

> What is the nature and scope of the Tribunal's jurisdiction under subsection 106(2) and, in that connection, what is the meaning of the words "the terms could not be the subject of an order of the Tribunal" in subsection 106(2) of the Act?

[6] For reasons cited as 2014 Comp. Trib. 14, the Tribunal concluded, among other things, that subsection 106(2) allows the Tribunal to determine whether the terms of a consent agreement are within the purview of one or more specific types of order that may be made by the Tribunal. This is an appeal brought by Kobo from that judgment.

[7] We are all of the view that the appeal should be dismissed, substantially for the reasons given by the Tribunal. In reaching this conclusion, we have considered each of the errors asserted by Kobo. For the following reasons, we have concluded that the Tribunal did not err as Kobo alleges.

[8] First, the Tribunal did not ignore Parliament's purpose for inserting subsection 106(2) into the new consent agreement regime. The Tribunal carefully and comprehensively reviewed the legislative history and the testimony given before the relevant parliamentary committee. That history and testimony amply supported the Tribunal's conclusion that the amendments to sections 105 and 106 of the Act were intended to streamline the Tribunal's oversight role and to avoid the necessity of a trial. The Tribunal did not err by interpreting subsection 106(2) through that lens.

[9] Second, the Tribunal did not fail to take into account what Kobo characterizes to be the high threshold for standing and the requirement for an applicant to prove its case, when considering the scope of review under subsection 106(2). The concepts of standing, burden of proof and the justiciability of an issue are distinct questions. As well, the Tribunal made no error when it contrasted the scope of review provided to a directly affected person with the scope of review expressed in paragraph 106(1)(*a*) and subsection 106.1(6) of the Act.

[10] Third, we are not persuaded Parliament intended to have all third-party challenges addressed under subsection 106(2). Even where the Tribunal has review powers under the Act, the possibility of judicial review exists (*Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C.R. 598, at paragraph 40).

[11] Fourth, the Tribunal did not take judicial notice of facts that do not lend themselves to judicial notice. The Tribunal was entitled to rely on its own experience with the prior legislative regime and to draw logical inferences from that experience. Similarly, the Tribunal was entitled to draw logical inferences as to the consequences that would flow from interpreting subsection 106(2) as sought by Kobo. Additionally, the legislative history before the Tribunal included commentary to the effect that the old consent order process was slow, uncertain and costly, such that a chill was cast on its use.

[12] Finally, the Tribunal did not err when, as part of its contextual analysis, it found Kobo's interpretation of subsection 106(2) could allow a party to circumvent the bar to private access contained in subsection 103.1(4) of the Act. In essence, a party who could seek leave to pursue

relief against certain restrictive trade practices, but instead complains to the Commissioner, is then barred from seeking leave to pursue its own relief if the Commissioner commences an inquiry into the complaint, discontinues an inquiry into the complaint or submits an application to the Tribunal in respect of the complaint. On Kobo's reading of subsection 106(2), the complainant would be entitled to seek a broad-based review if the Commissioner resolved the complaint by means of a consent agreement. It is not a rebuttal of the Tribunal's contextual analysis that relief under subsection 106(2) is discretionary.

[13] For these reasons, the appeal will be dismissed with costs.

"Eleanor R. Dawson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-401-14
STYLE OF CAUSE:	RAKUTEN KOBO INC. v. THE COMMISSIONER OF COMPETITION, HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HACHETTE DIGITAL INC., HARPERCOLLINS CANADA LIMITED, HOLTZBRINCK PUBLISHERS, LLC, AND SIMON & SCHUSTER CANADA, A DIVISION OF CBS CANADA HOLDINGS CO.
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REASONS FOR JUDGMENT OF THE COURT BY:	DAWSON J.A. RYER J.A. WEBB J.A.
DELIVERED FROM THE BENCH BY:	DAWSON J.A.

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