

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 (as amended);

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act*, relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
REGISTERED/ENREGISTRÉ
FILED / PRODUIT
Date: January 19, 2017
CT-2017-005
Andrée Bernier for / pour
REGISTRAR / REGISTRARE

OTTAWA, ONT.

1

APPLE INC., AND APPLE CANADA INC.

Respondents

CONSENT AGREEMENT

WHEREAS pursuant to section 10 of the *Competition Act* (the “Act”), the Commissioner of Competition (the “Commissioner”) commenced an inquiry relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

AND WHEREAS the Commissioner has concluded that:

- a) in or about January 2010, Apple Inc. and certain publishers, whose identities are known to the Commissioner and who are competitors in the market for E-books (collectively, “the Publishers”), entered into an arrangement, within the meaning of s. 90.1 of the Act, in the United States in relation to the sale of E-books at retail in the United States and Canada (defined as the “Arrangement”);
- b) Apple Inc. is a party to the Arrangement, and Apple Canada Inc. is the Canadian Subsidiary of a party to the Arrangement and implemented the Arrangement in Canada;
- c) the Arrangement provided that the Publishers, either directly or through their Affiliates or Subsidiaries, would enter into agreements with E-book Retailers in Canada which included provisions that restricted the ability of E-book Retailers to discount the Retail Price for E-books;

- d) the Arrangement provided that the Publishers, either directly or through their Affiliates or Subsidiaries, would include a “most favoured nation” clause in their agreements with Apple Inc. or its Subsidiary;
 - e) the Arrangement with respect to Canada continues to exist; and
 - f) the Arrangement prevents or lessens, or is likely to prevent or lessen, competition substantially in the retail market for E-books in Canada
- (collectively, the “**Commissioner's Conclusions**”);

AND WHEREAS the Commissioner and Apple have reached an Agreement to resolve the Commissioner’s concerns;

AND WHEREAS the Commissioner and Apple agree to the registration by the Commissioner of this Agreement with the Tribunal, pursuant to section 105 of the Act;

AND WHEREAS IT IS AGREED AND UNDERSTOOD THAT Apple does not admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation, rescission, or any judicial review, contest the Commissioner’s Conclusions, and nothing in this Agreement will be taken as an admission or acceptance by Apple of any facts, liability, wrongdoing, effects, impacts, submissions, legal argument or the Commissioner’s Conclusions for any other purpose, nor shall it derogate from or limit any rights or defences of Apple against third parties, including defences under the Act.

NOW THEREFORE the Parties agree as follows:

I. DEFINITIONS

1. For the purposes of this Agreement, the following terms shall have the respective meanings set out below and any grammatical variations of those terms shall also have the corresponding meanings:
 - (a) “**Act**” means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
 - (b) “**Affiliate**” means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the Act;
 - (c) “**Agency Agreement**” means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers in Canada through the E-book Retailer and the E-book Retailer is paid a commission in connection with the Sale of one or more of the E-book Publisher’s E-books to consumers in Canada;
 - (d) “**Agreement**” means this Consent Agreement entered into by Apple and the Commissioner pursuant to section 105 of the Act;

- (e) “**Apple**” means Apple Inc. and Apple Canada Inc., and (if any and wherever located) their Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (f) “**Commissioner**” means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;
- (g) “**E-book**” means an electronically formatted book designed to be read on a computer, a handheld device or any other electronic device capable of visually displaying E-books. For the purposes of this Agreement, the term E-book does not include (i) an audio book, even if delivered and stored digitally; (ii) a standalone specialized software application or “app” sold through an “app store” rather than through an E-book store and not designed to be executed or read by or through a dedicated E-book reading device; (iii) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; (iv) the electronically formatted version of a book marketed for use primarily in connection with academic coursework; (v) a magazine, journal or other periodic publication; or (vi) “self-published” electronically formatted books.
- (h) “**E-book Publisher**” means any Person that, by virtue of a contract or other relationship with an E-book’s author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book within Canada to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in Canada. For the purposes of this Agreement, Apple is not an E-book Publisher;
- (i) “**E-book Retailer**” means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in Canada or through which an E-book Publisher under an Agency Agreement Sells E-books to consumers in Canada. For the purposes of this Agreement, Apple is an E-book Retailer;
- (j) “**including**” means “including, but not limited to” and “include” means “includes, but is not limited to”;
- (k) “**Major E-book Publisher**” means collectively and individually, together with their parents, Affiliates, and Subsidiaries that are engaged in the E-book publishing business:
 - (i) Hachette Book Group Canada Ltd., Hachette Book Group, Inc., and Hachette Digital, Inc.;
 - (ii) HarperCollins Canada Limited;
 - (iii) Holtzbrinck Publishers LLC, doing business as Macmillan;
 - (iv) Penguin Random House Canada Limited; and

(vi) Simon & Schuster Canada, a division of CBS Canada Holdings Co.;

and all directors, officers, employees, agents and representatives of the foregoing;

- (l) **“Parties”** means the Commissioner and Apple;
- (m) **“Person”** means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental;
- (n) **“Price MFN”** means a term in an agreement between an E-book Publisher and an E-book Retailer for the Sale of E-books to consumers in Canada under which:
 - (i) the Retail Price at which an E-book Retailer, or an E-book Publisher under an Agency Agreement, Sells one or more E-books to consumers in Canada depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer, or the E-book Publisher under an Agency Agreement, Sells the same E-book(s) to consumers in Canada;
 - (ii) the Wholesale Price at which the E-book Publisher sells one or more E-books to an E-book Retailer for Sale to consumers in Canada depends in any way on the Wholesale Price at which the E-book Publisher sells the same E-book(s) to any other E-book Retailer for Sale to consumers in Canada; or
 - (iii) the revenue share or commission that an E-book Retailer receives from an E-book Publisher in connection with the Sale of one or more E-books to consumers in Canada depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers in Canada, or (b) the E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher’s E-books to consumers in Canada. For the purposes of this Agreement, it will not constitute a Price MFN under subsections (i-iii) of this definition if an E-Book Publisher agrees, at the request of an E-book Retailer, to meet more favourable pricing, discounts or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional benefit, so long as that agreement is not or does not result from a pre-existing agreement that requires the E-Book Publisher to meet all requests by the E-book Retailer for more favourable pricing within the terms of the agreement;
- (o) **“Purchase”** means the acquisition by a consumer in Canada of one or more E-books as a result of a Sale;
- (p) **“Retail Price”** means the price at which an E-book Publisher under an Agency Agreement or an E-book Retailer Sells an E-book to a consumer in Canada;

- (q) “**Sale**” or “**Sell**” means delivery of access to a consumer in Canada to read one or more E-books in exchange for payment. Delivery of access to an educational institution or a library is not a Sale.
- (r) “**Subsidiary**” has the meaning as defined in subsection 2(3) of the Act;
- (s) “**Tribunal**” means the Competition Tribunal, as established by the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended; and
- (t) “**Wholesale Price**” means:
 - (i) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers in Canada; or
 - (ii) the Retail Price at which an E-book Publisher under an Agency Agreement Sells an E-book to consumers in Canada through an E-book Retailer minus the commission or other payment that the E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

II. OBLIGATIONS OF APPLE

- 2. Apple shall not, for a period of three years from the date of the registration of this Agreement, enter into any agreement with a Major E-book Publisher that contains a Price MFN with respect to the Sale of E-books to consumers in Canada.
- 3. For each agreement between Apple and a Major E-book Publisher in force at the date of registration of this Agreement that contains a Price MFN with respect to the Sale of E-books to consumers in Canada, Apple shall, as soon as permitted under the agreement, take steps required under the agreement to cause the agreement to be terminated and not renewed or extended. Apple may, in lieu of termination, satisfy its obligations under this paragraph 3 as follows:
 - (a) by entering into an amendment to the agreement, effective no later than fifty (50) days after the registration of this Agreement, either (i) making the agreement inapplicable to the Sale of E-books to consumers in Canada or (ii) removing the Price MFN with respect to the Sale of E-books to consumers in Canada; or
 - (b) by notifying the Major E-book Publisher within twenty-five (25) days of the date of registration of this Agreement that during the period of three years from the date of registration of this Agreement, Apple will not enforce any Price MFN with respect to the Sale of E-books to consumers in Canada in any such agreement between Apple and the Major E-book Publisher.
- 4. Apple shall furnish to the Commissioner:

- (a) within fifty (50) days of the date of registration of this Agreement, a copy of any notice provided to a Major E-book Publisher pursuant to subsection 3(b) of this Agreement;
 - (b) within fifty (50) days from the date of the registration of this Agreement, one complete copy of each agreement, executed, renewed, amended or extended on or after March 6, 2015, between Apple and any Major E-book Publisher relating to the Sale of E-books to consumers in Canada (unless same has previously been provided); and
 - (c) thereafter, on a yearly basis, any new agreement or amendment between Apple and any Major E-book Publisher relating to the Sale of E-books to consumers in Canada.
5. Unless otherwise provided herein or agreed to in writing by the Parties, the terms of this Agreement shall become effective on the date of registration of this Agreement and end three years from the date of registration of this Agreement.

III. GENERAL

6. The Recitals of this Agreement are integral to, and deemed to be a part of, this Agreement.
7. Unless the context otherwise requires, words importing the singular include the plural and vice versa, and words importing gender include all genders.
8. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, and all of which shall constitute one and the same Agreement.
9. The Commissioner shall file this Agreement with the Tribunal for registration in accordance with section 105 of the Act. Apple hereby consents to such registration.
10. The Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein.
11. If Apple becomes aware that there has been or likely has been a breach of any of the terms of this Agreement, Apple shall promptly notify the Commissioner thereof, and shall provide details sufficient to describe the nature and date of said breach.
12. Computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21. For the purposes of this Agreement, the definition of “holiday” in the *Interpretation Act* shall be deemed to include Saturday.
13. Nothing in this Agreement precludes Apple or the Commissioner from bringing an application under section 106 of the Act (or successor or equivalent provision under the Act) to rescind or vary this Agreement. Apple does not accept or admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation or rescission, or any judicial review, contest the Commissioner’s Conclusions and nothing in this Agreement will be taken as an admission or acceptance

by Apple of any facts, liability, wrongdoing, effects, impacts, submissions, legal argument or the Commissioner's Conclusions for any other purpose, nor shall it derogate from or limit any rights or defences of Apple against third parties, including defences under the Act.

14. Apple attorns to the jurisdiction of the Tribunal for the purposes of the interpretation and enforcement of this Agreement and any proceeding initiated by the Commissioner or to rescind or vary any of the provisions of this Agreement.
15. This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.
16. In the event of any discrepancy between the English language version of this Agreement and the French language version of this Agreement, the English language version of this Agreement shall prevail.
17. The headings in this Agreement are for convenience of reference only and shall not affect the construction or interpretation thereof.
18. In the event of a dispute as to the interpretation or application of this Agreement, either the Commissioner or Apple may apply to the Tribunal for an order interpreting any of the provisions of the Agreement.

IV. NOTICES

19. Notices and other communications required or permitted by the Commissioner or Apple pursuant to this Agreement shall be in writing, and shall be given to the Parties at the following addresses or facsimile numbers:

- (a) The Commissioner
Commissioner of Competition
Competition Bureau
Place du Portage, Phase I
50 Victoria Street
Gatineau, QC K1A 0C9
Telephone: (819) 997-3301
Facsimile: (819) 953-5013

With a copy to:

Executive Director and Senior General Counsel
Competition Bureau Legal Services
Department of Justice
Place du Portage, Phase I
50 Victoria Street
Gatineau, Québec K1A 0C9
Facsimile: (819) 953-9267

(b) Apple Inc.

Kyle Andeer
kandeer@apple.com
Senior Director, Sales & Retail/Competition Law & Policy
Apple Inc.
1 Infinite Loop, MS 169-5CLP
Cupertino, California 95014
kandeer@apple.com
Telephone: (408) 862-9307

With a copy to:

J. Thomas Curry
Lenczner Slaght
130 Adelaide St. W
Suite 2600
Toronto, Ontario
M5H 3P5
Telephone: (416) 865-3096
Fax: (419) 865-9010
tcurry@litigate.com

(c) Apple Canada Inc.

John Hagias
Secretary and Assistant Treasurer
Apple Canada Inc.
120 Bremner Boulevard
Suite 1600
Toronto, Ontario M5J 0A8
hagias.j@apple.com

With a copy to:

J. Thomas Curry
Lenczner Slaght
130 Adelaide St. W
Suite 2600
Toronto, Ontario
M5H 3P5
Telephone: (416) 865-3096
Fax: (419) 865-9010
tcurry@litigate.com

Any Party hereto may from time to time change its address or facsimile number by giving notice to the other Parties hereto in accordance with the provisions of this paragraph 19. The Commissioner and Apple may also consent to accept notices or other communications required or permitted pursuant to this Agreement by electronic mail.

DATED this 19th day of January, 2017

“John Pecman”

John Pecman
Commissioner of Competition

Apple Inc.

“Kyle Andeer”

I/We have authority to bind the corporation
Kyle Andeer
Senior Director, Sales & Retail/Competition Law & Policy

Apple Canada Inc.

“John Hagias”

I/We have authority to bind the corporation
John Hagias
Secretary and Assistant Treasurer