Docket No.: CT-2014-

**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:**

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

**FILED / PRODUIT**

CT-2014-001
February 7, 2014

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT | # 1

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**- AND –**

**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.**

**Respondents**

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**CONSENT AGREEMENT**

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**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 alleges that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act;

**AND WHEREAS** the Commissioner and the Respondents have reached an agreement to resolve the Commissioner's concerns regarding the Respondents' alleged conduct;

**AND WHEREAS** the Commissioner and the Respondents 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** the Respondents do not accept or admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation or rescission, contest the Commissioner's allegations, and nothing in this Agreement will be taken as an admission or acceptance by the Respondents of any facts, liability, wrongdoing, submissions, legal argument or conclusions for any other purpose.

**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) "**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;

   (c) "**Agreement**" means this Consent Agreement entered into by the Respondents and the Commissioner pursuant to section 105 of the Act;

   (d) "**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;

   (e) "**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; or (v) a magazine, journal or other periodic publication;

(f) "**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, each Respondent is an E-book Publisher, and E-book Retailers are not E-book Publishers;

(g) "**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, the Respondents and any Persons whose primary business is book publishing are not E-book Retailers;

(h) "**Hachette**" means Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, 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;

(i) "**HarperCollins**" means HarperCollins Canada Limited and (if any and wherever located) its 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;

(j) "**including**" means "including, but not limited to" and "include" means "includes, but is not limited to";

(k) "**Macmillan**" means Holtzbrinck Publishers, LLC, doing business as Macmillan, and (if any and wherever located) its 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;

(l) "**Parties**" means the Commissioner and the Respondents;

(m) "**Penguin**" means Penguin Group (USA), LLC, Pearson Canada Inc. and Penguin Canada Books 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;

(n) "**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;

(o) "**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 with any other E-book Retailer, 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 subsection (iii) of this definition if a Respondent 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 Respondent to meet all requests by the E-book Retailer for more favourable pricing within the terms of the agreement;

(p) "**Purchase**" means the acquisition by a consumer in Canada of one or more E-books as a result of a Sale;

(q) "**Respondents**" means Hachette, HarperCollins, Macmillan and Simon & Schuster collectively, and "**Respondent**" means any one of them. Where this Agreement imposes an obligation on a Respondent to engage in or refrain from engaging in certain conduct, that obligation shall apply to any joint venture or other business arrangement established by the Respondent and one or more other Respondents or by the Respondent and Penguin;

(r) "**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;

(s) "**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.

(t) "**Simon & Schuster**" means Simon & Schuster Canada, a division of CBS Canada Holdings Co., and (if any and wherever located) its 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;

(u) "**Subsidiary**" has the meaning as defined in subsection 2(3) of the Act;

(v) "**Tribunal**" means the Competition Tribunal, as established by the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended; and

(w) "**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 THE RESPONDENTS

2. Subject to paragraph 5, the Respondents shall not, for the period commencing forty (40) days following the date of registration of this Agreement and ending 18 months thereafter, directly or indirectly:

(a) restrict, limit or impede 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 promotions to encourage consumers in Canada to Purchase one or more E-books; or

(b) enter into an agreement with any E-book Retailer that has the effect described in paragraph 2(a).

3. The Respondents shall not, for a period of four years and six months from the date of the registration of this Agreement, enter into any agreement with an E-book Retailer relating to the Sale of E-books to consumers in Canada that contains a Price MFN.

4. For each agreement between a Respondent and an E-book Retailer relating to the Sale of E-books to consumers in Canada in force at the date of registration of this Agreement that directly or indirectly:

(a) restricts, limits or impedes the 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 promotions to encourage consumers in Canada to Purchase one or more E-books; or

(b) contains a Price MFN with respect to the Sale of E-books to consumers in Canada;

the Respondent 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. The Respondent may, in lieu of termination, satisfy its obligations under this paragraph 4 as follows:

(c) with respect to any such agreement that contains a Price MFN with respect to the Sale of E-Books to consumers in Canada, by entering into an amendment to the agreement, effective no later than forty (40) days after the registration of this Agreement, either (i) making the agreement inapplicable to the Sale of E-books in Canada or (ii) removing the Price MFN; and

(d) with respect to any such agreement that does not contain a Price MFN, including as a result of an amendment entered into pursuant to subparagraph 4(c) above, by notifying the E-book Retailer within ten (10) days of the date of registration of this Agreement that during the period commencing forty (40) days after registration of this Agreement and ending 18 months thereafter, the Respondent will not enforce any term or terms in any agreement with an E-book Retailer that restrict, limit or impede 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 promotions to encourage consumers in Canada to Purchase one or more E-books except to the extent permitted by paragraph 5 of this Agreement.

5. Notwithstanding paragraphs 2 and 4 of this Agreement, a Respondent may enter into agreements and amend agreements with E-book Retailers, and may enforce terms in agreements with E-book Retailers in force as of the date of registration of this Agreement, under which price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more of the Respondent's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to the Respondent's E-books) are restricted, provided that:

(a) such restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers in Canada to Purchase the Respondent's E-books by an aggregate amount (the "Agreed Funds") equal to the total commissions the Respondent pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of the Respondent's E-books to consumers in Canada;

(b) the Respondent shall not restrict, limit or impede the E-book Retailer's use of the Agreed Funds to offer price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more of the Respondent's E-books; and

(c) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit or impede the E-book Retailer from engaging in any form of retail activity or promotion.

6. Nothing in this Agreement shall prohibit a Respondent from unilaterally compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

7. The Respondents shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that the Respondents are prohibited by paragraph 2 of this Agreement from restricting, limiting or impeding in any agreement with an E-book Retailer. After the expiration of the prohibitions in paragraph 2 of this Agreement, this paragraph 7 shall not prohibit a Respondent from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits or impedes the E-book Retailer from setting, altering or reducing the Retail Price of any of the Respondent's E-books for Sale to consumers in Canada or from offering price discounts or any other form of promotions to encourage consumers in Canada to Purchase any of the Respondent's E-books.

8. Each Respondent shall furnish to the Commissioner:

   (a) within thirty (30) days from the date of the registration of this Agreement, one complete copy of each agreement, executed, renewed, amended or extended on or after 1 January 2012, between the Respondent and any E-book Retailer relating to the Sale of the Respondent's E-books to consumers in Canada (unless same has previously been provided); and

   (b) thereafter, on a quarterly basis, any new agreement or amendment between the Respondent and any E-book Retailer relating to the Sale of the Respondent's E-books to consumers in Canada.

9. 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 four years and six months from the date of registration of this Agreement.

## III. GENERAL

10. The Recitals of this Agreement are integral to, and deemed to be a part of, this Agreement.

11. Unless the context otherwise requires, words importing the singular include the plural and vice versa, and words importing gender include all genders.

12. 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.

13. The Commissioner shall file this Agreement with the Tribunal for registration in accordance with section 105 of the Act. The Respondents hereby consent to such registration.

14. The Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein.

15. If a Respondent becomes aware that there has been or likely has been a breach of any of the terms of this Agreement, the Respondent shall promptly notify the Commissioner thereof, and shall provide details sufficient to describe the nature and date of said breach.

16. 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.

17. Nothing in this Agreement precludes the Respondents 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. The Respondents do not accept or admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation or rescission, contest the Commissioner's allegations that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act.

18. The Respondents attorn 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 the Respondents to rescind or vary any of the provisions of this Agreement.

19. 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.

20. 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.

21. The headings in this Agreement are for convenience of reference only and shall not affect the construction or interpretation thereof.

22. In the event of a dispute as to the interpretation or application of this Agreement, either the Commissioner or the Respondents may apply to the Tribunal for an order interpreting any of the provisions of the Agreement.

## IV. NOTICES

23. Notices and other communications required or permitted by the Commissioner or the Respondents 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) Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc.

Carol Ross
Executive Vice President, Business Affairs & General Counsel
Hachette Book Group, Inc.
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With a copy to:

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Toronto, Ontario M5X 1B8
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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 23. The Commissioner and the Respondents may also consent to accept notices or other communications required or permitted pursuant to this Agreement by electronic mail.

DATED this 6th day of February, 2014

[ORIGINAL SIGNED BY "John Pecman"]

John Pecman

Commissioner of Competition

Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc.

[ORIGINAL SIGNED BY "Carol Ross"]

I/We have authority to bind the corporation
Name: Carol Ross
Title: Executive Vice President, Business Affairs & General Counsel Hachette Book Group, Inc

HarperCollins Canada Limited

[ORIGINAL SIGNED BY "Wayne Playter"]

I/We have authority to bind the corporation
Name: Wayne Playter
Title: VP Finance HarperCollins Canada Limited

Holtzbrinck Publishers, LLC

[ORIGINAL SIGNED BY "Paul J. Sleven"]

I/We have authority to bind the limited liability company
Name: Paul J. Sleven
Title: General Counsel

Simon & Schuster Canada, a division of CBS Canada Holdings Co

[ORIGINAL SIGNED BY "Kevin Hanson"]

I/We have authority to bind the corporation
Name: Kevin Hanson
Title: President of Simon & Schuster Canada (a division of CBS Canada Holdings Co)