

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. The Toronto Real Estate Board*, 2014 Comp. Trib. 20
File No.: CT-2011-003
Registry Document No.: 283

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

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain rules, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

The Toronto Real Estate Board
(respondent)

and

The Canadian Real Estate Association
(intervenor)



Decided on the basis of the written record.
Presiding Judicial Member: Rennie J. (Chairperson)
Date of Order: November 12, 2014

ORDER ON CONSENT WITH RESPECT TO PRODUCTION OF MLS DATA

[1] **FURTHER TO** the application filed by the Commissioner of Competition (the "Commissioner") against the respondent, The Toronto Real Estate Board ("TREB"), for an order pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act");

[2] **AND FURTHER TO** the Commissioner's request that TREB produce an update of the data in TREB's multiple listing service ("MLS") system and membership data in electronic format for use in this proceeding;

[3] **AND UPON READING** the Order on Consent dated 20 March 2012 (the "MLS Data Order") concerning the production to the Commissioner of MLS Data and Membership Data (as defined in that Order) for the period from January 1, 2007 to February 1, 2012;

[4] **AND UPON READING** the Confidentiality Order dated August 30, 2012 (the "Confidentiality Order");

[5] **AND UPON READING** subsection 7(3) of the *Personal Information and Protection of Electronic Documents Act* S.C. 2000, c. 5;

THE TRIBUNAL ORDERS THAT:

[6] For purposes of this Order, "**Independent Expert**", "**Parties**", "**Party**", "**Proceeding**", and "**Tribunal**" have the meanings given in the MLS Data Order.

[7] Within two business days of the issuance of this Order, TREB shall produce to the Commissioner an electronic copy, in compliance with paragraph 8 below, of:

- (a) the information in TREB's MLS system in the fields listed in Schedule "A" to this Order for the period February 1, 2012 to October 1, 2014 (the "MLS Data");
- (b) membership data in TREB's electronic files, being members names, original licence or membership date and name of employing brokerage and its address

(where that address exists in the database for the particular member) for the period February 1, 2012 to October 1, 2014 (the "Membership Data").

[8] The MLS Data and the Membership Data shall include such additional tool, legend, instructions or other information as may be needed, and shall be in an electronic format (to be discussed and agreed between counsel and their technical advisors prior to production, in sufficient time to ensure production occurs in accordance with this Order), so that the MLS Data and the Membership Data may be read, used and correlated by the Commissioner and/or one or more Independent Experts engaged for this Proceeding.

[9] TREB shall not provide any additional data in the MLS system to its own Independent Expert unless, within two business days after providing it to its own Independent Expert, TREB also provides the additional data available to the Commissioner's Independent Expert.

[10] Prior to producing the MLS Data and Membership Data to the Commissioner, TREB may designate specific field(s) in the MLS Data to be confidential under the Confidentiality Order, by providing counsel for the Commissioner with written notice identifying the specific field(s) as "Confidential – Level A" or "Confidential – Level B" and explaining the reasons for the designation of each field.

[11] Following the production of the MLS Data and Membership Data, the Commissioner and TREB shall use their best efforts to agree as to whether the information in the fields so designated by TREB (or portions thereof) is to be treated as "Confidential – Level A" or "Confidential – Level B" and how to address such confidentiality designation as concerns the Intervenors and the public, through the subsequent steps in this Proceeding up until its final disposition.

[12] Notwithstanding the Confidentiality Order, the information in the fields designated by TREB under this Order is to be treated as "Confidential -- Level A" may only be produced to (i) counsel for the Commissioner and TREB and their respective staffs; (ii) Independent Experts and their respective employees retained by one of the Parties who have executed Confidentiality

Undertakings in the form attached hereto as Schedule "B" pursuant to the MLS Data Order, the Confidentiality Order, or this Order; (iii) the Commissioner and the Commissioner's staff; and (iv) the Tribunal.

[13] If a Party in receipt of the MLS Data or Membership Data is required by law to disclose or deliver up some or all of the MLS Data or Membership Data to a person that is not subject to this Order, or if a Party receives written notice from a person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law or may be compelled to disclose or deliver up some or all of the MLS Data or Membership Data to a person that is not subject to this Order, that person or Party shall give prompt written notice to TREB so that a protective Order or other appropriate remedy may be sought by TREB prior to such MLS Data or Membership Data being disclosed or delivered up.

[14] Independent Experts shall not discuss with, disclose, deliver or otherwise reveal MLS Data or Membership Data directly or indirectly to any other person, except

- (a) to persons permitted to receive such MLS Data or Membership Data by this Order or other further Order of the Tribunal;
- (b) in an expert report filed in this Proceeding with the "Confidential – Level A" information aggregated or redacted in accordance with the terms of this Order or other further Order of the Tribunal, or in testimony at the hearing in this Proceeding; or
- (c) as may be permitted by further Order or other ruling of the Tribunal;

[15] Nothing in this Order shall prevent any of the following applications to the Tribunal:

- (a) Any application for a Confidentiality Order to cover the MLS Data or Membership Data designated as "Confidential – Level A" under this Order;
- (b) Any application for an Order re-designating any field(s) designated by TREB as "Confidential – Level A" under this Order, or removing any designation or re-designation; or

- (c) Any application for an Order, ruling or other determination that all or any part of an expert report or other evidence should be designated as "Confidential – Level A";
- (d) Any application for an Order, ruling or other determination with respect to the process to be adopted with respect to the service and filing of any expert report or other evidence that contains material designated as “Confidential – Level A”, including with respect to the rights of the Intervenors to receive such expert reports or other evidence in non-redacted form;

and the terms of this Order shall be without prejudice to any arguments on such applications and at the hearing in this Proceeding.

[16] Designation of a field in the MLS Data as "Confidential -- Level A" under this Order shall not of itself have the effect of designating any property listing, an entire expert report or expert testimony, that is otherwise produced or filed in this Proceeding into a “Confidential -- Level A” document.

[17] Any filings of documents, expert reports or compendia with the Tribunal which include MLS Data or Membership Data designated as “Confidential – Level A” shall be filed with redacted versions that may be distributed to the public. Prior to serving such evidence on a person other than a Party, or filing such evidence publicly with the Tribunal, the Commissioner and TREB shall take steps to redact parts of any document containing information designated under this Order, or to aggregate such information, to address the reasons for the designation provided by TREB under paragraph 10 above so that the evidence may be filed publicly with the Tribunal.

[18] Upon completion or final disposition of the Proceeding and any appeals:

- (a) all MLS Data and Membership Data in its original format as produced to the Commissioner under this Order, with the exception of MLS Data and Membership Data in the possession of the Commissioner and his staff, shall

be destroyed or returned to TREB unless TREB states, in writing, that it may be disposed of in some other manner;

- (b) all datasets and documents containing disaggregated raw data from the MLS Data and Membership Data produced under this Order, with the exception of such information in the possession of the Commissioner, his staff or counsel, shall be destroyed;
- (c) the non-public versions of any reports, analysis or other written information containing any Membership Data or MLS Data designated as "Confidential – Level A" under this Order shall continue to be treated as "Confidential – Level A" in accordance with this Order, subject to any further Tribunal or court Order.

[19] This Order shall be subject to further direction of the Tribunal and may be varied by Order of the Tribunal.

DATED at Ottawa this 12th day of November, 2014.

(s) Donald J. Rennie

SCHEDULE "A"

1. MLS Number
2. Sold/Leased Price
3. Last Status
4. % Sold (or Leased) Price to List Price
5. Days on Market
6. Bathroom Total
7. Sold/Leased Date
8. Closing Date
9. Date Last Updated
10. Original Price
11. Co-operating Brokerage
12. Co-operating Salesperson 1
13. Co-operating Salesperson 2
14. Escape Clause Flag (Y/N)
15. Escape Clause (Hours)
16. Sold/Leased Conditional (Condition-text box)
17. Sold/Leased Conditional Expiry Date
18. Leased Term (text box)
19. PIN#
20. Area
21. Municipality
22. Community
23. Out of Area Municipality
24. Street Number
25. Street Name
26. Street Abbreviation
27. Street Direction (East, North, South, West)
28. Apt/Unit
29. Postal Code
30. Fronting On (NSEW)
31. Legal Description
32. Lot Front
33. Lot Depth
34. Lot Size Code
35. Lot Irregularities
36. Acreage
37. Zoning
38. Directions/Cross Streets
39. Map Page
40. Map Column
41. Map Row
42. Province
43. List Price
44. Taxes
45. Tax Year
46. Assessment
47. Assessment Year
48. Contract Date
49. Expiry Date
50. Possession Date
51. Holdover Days
52. Type
53. Style
54. Exterior
55. Additional Monthly Fees
56. Garage Type
57. Garage Spaces
58. Drive
59. Parking Spaces
60. Pool
61. Water
62. Sewers
63. Retirement
64. Physically Handicapped Equipped
65. Special Designation
66. Approximate Age
67. Approximate Square Footage
68. Property Features
69. Other Structures
70. Water Supply Types
71. Farm/Agriculture
72. Waterfront
73. Utilities Cable
74. Utilities Hydro
75. Utilities Sewers
76. Utilities Gas
77. Utilities Municipal Water
78. Utilities Telephone
79. Rooms
80. Rooms + (below grade)
81. Bedrooms
82. Bedrooms + (below grade)
83. Kitchens
84. Kitchens + (below grade)

85. # Washrooms 1
86. # Pieces Washroom 1
87. Level Washroom 1
88. # Washrooms 2
89. # Pieces Washroom 2
90. Level Washroom 2
91. # Washrooms 3
92. # Pieces Washroom 3
93. Level Washroom 3
94. # Washrooms 4
95. # Pieces Washroom 4
96. Level Washroom 4
97. # Washrooms 5
98. # Pieces Washroom 5
99. Level Washroom 5
100. Family Room
101. Basement
102. Fireplace/Stove
103. Heat Source
104. Heat Type
105. Air Conditioning
106. UFFI
107. Central Vac
108. Laundry Level
109. Elevator/Lift
110. Remarks for Clients
111. Extras
112. Listing Brokerage Name
113. List Brokerage Phone #
114. List Brokerage Fax #
115. Salesperson 1
116. Salesperson 1 Phone
117. Salesperson 2
118. Salesperson 2 Phone
119. Commission Co-Op Brokerage
120. Seller Property Information
Statement
121. Energy Certification
122. Certification Level
123. Green Property Information
Statement
124. Permission To Advertise
125. Distribute To Internet Portals
126. Display Address on Internet
127. Contact After Expired

**SCHEDULE "B"****Confidentiality Undertaking**

IN CONSIDERATION of being provided with documentation in connection with the application in *Commissioner of Competition v. The Toronto Real Estate Board*, Competition Tribunal File No. CT-2011-003, (the "Confidential Information"), I, _____, of the City of _____, in the _____ of _____, hereby agree to maintain the confidentiality of the Confidential Information.

I will not copy or disclose the Confidential Information so obtained to any other person, except, as applicable, (a) my staff who are directly involved in this matter who have signed an Undertaking in substantially the same form as this one; (b) counsel for the Party on whose behalf I have been retained, members of counsel's firm who are directly involved in this application and, in the case of the Commissioner, the Commissioner's staff directly involved in the application; (c) other experts retained by or on behalf of the Party on whose behalf I have been retained and who have signed a similar confidentiality Undertaking; and (d) persons permitted by order of the Competition Tribunal. Nor will I use the Confidential Information so obtained for any purpose other than in connection with this application and any related proceedings.

Upon completion of this application and any related proceedings, I agree that the Confidential Information, and any copies of same, shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by order of the Competition Tribunal. I acknowledge and agree that the completion of this application and any related proceedings shall not relieve me of the obligation of maintaining the confidentiality of the Confidential Information in accordance with the provisions of this Undertaking, subject to any further order of the Tribunal.

I acknowledge that I am aware of the order granted by the Competition Tribunal on _____, 2014 in this regard, a copy of which is attached to this agreement and agree to be bound by same. I further acknowledge and agree that any Party shall be entitled to injunctive relief to

prevent breaches of this Undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.

In the event that I am required by law to disclose any of the Confidential Information, I will provide counsel for the Party on whose behalf I have been retained with prompt written notice so that the Party that claimed confidentiality over such Confidential Information may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Confidential Information that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to the Confidential Information.

I will promptly, upon the request of the person providing the Confidential Information, advise where such material is kept. At the conclusion of my involvement, I will, upon the request and direction of the person providing the Confidential Information, destroy, return or otherwise dispose of all Confidential Information received or made by me having been duly authorized and directed to do so.

I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this Undertaking.

DATED this _____ day of _____, 2014.

SIGNED, SEALED & DELIVERED

in the presence of:

Witness

COUNSEL:

For the applicant:

The Commissioner of Competition

John Rook
Emrys Davis

For the respondent:

The Toronto Real Estate Board

Donald Affleck, Q.C.

For the intervenor:

The Canadian Real Estate Association

Sandra A. Forbes