

Competition Tribunal



Tribunal de la concurrence

Reference: *The Commissioner of Competition v. The Canadian Real Estate Association*, 2014
Comp. Trib. 15
File No.: CT-2010-002
Registry Document No.: 0088

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 the filing and registration of a consent agreement pursuant to
section 105 of the *Competition Act*;

AND IN THE MATTER OF a motion by the Canadian Real Estate Association seeking
directions regarding a consent agreement;

AND IN THE MATTER OF a motion by the Commissioner of Competition about the
interpretation and enforcement of certain terms in the consent agreement.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

The Canadian Real Estate Association
(respondent)



Date of case management conference: 20141006
Before Judicial Member: Rennie J. (Chairperson)
Date of Order: October 6, 2014

ORDER FOLLOWING THE CASE MANAGEMENT CONFERENCE OF OCTOBER 6

2014

[1] This case conference arises in the context of two motions scheduled to be heard November 18th. The subject of the motions is a dispute between the Commissioner of Competition (the “Commissioner”) and CREA with respect to the interpretation of the Consent Agreement reached by the parties and registered with the Tribunal on October 25, 2010. Two issues have arisen in the interlocutory proceedings in advance of the hearing, and have come before the Tribunal for direction. The first concerns the confidentiality of certain documents to be produced by the Commissioner. The second concerns the admissibility of two supplementary affidavits to be filed by the Commissioner. As cross-examinations are scheduled to commence tomorrow and in the interests of ensuring that the scheduling order agreed to by counsel be maintained, the reasons that follow will be very brief, and are in essence, conclusions.

[2] The question of confidentiality of business documents of Mr. Logue agreed to be produced has been resolved by counsel. On receipt of a draft confidentiality order, together with particulars with respect to the title and date of the document, together with confirmation of the Bureau that the undertaking of CREA’s in house counsel not to disclose the documents to CREA is acceptable to it and Mr. Logue, the Tribunal will issue the necessary order.

[3] The Commissioner seeks to file two supplementary affidavits. The first, that of Mr. Herr, would produce documents requested by CREA in August. CREA contends that it requested the documents for the purpose of cross-examination, and that this does not trigger an opportunity for the Bureau to file a supplementary affidavit by Mr. Herr. I agree. The request of counsel to produce documents, to which no objection is taken on the basis of relevancy, does not, in and of itself, give rise to a right to file a supplementary affidavit. Simply put, in these circumstances, the affidavit is responding to nothing in the record. In reaching this conclusion I note as well the period of time that has elapsed since the request and the fact that no draft affidavit was provided to either counsel or the Tribunal. The Herr affidavit will not be received in the record.

[4] Objection is taken by CREA to the reply affidavit of Mr. Logue, addressing particular points in the supplementary affidavit of Mr. Simonsen sworn September 29, 2014. In that affidavit, Mr. Logue responds to specific points raised by Mr. Simonsen. A draft of the Logue

affidavit was provided to counsel for CREA. The cross examination of Mr. Logue is to start tomorrow, October 7th.

[5] The reply affidavit of Mr. Logue is admissible. I am not satisfied that it addresses matters that necessarily ought to have been addressed in his initial affidavit, but rather is directed to specific points, newly arising, made in the Simonsen affidavit. The Commissioner cannot be said to be splitting his case. Two additional factors weigh in favour of receipt of the affidavit. First, given the nature of the ultimate question before the Tribunal, namely the question of interpretation of the Consent Agreement, the fair adjudication of the case on its merits requires that the Tribunal have all relevant evidence before it as it may frame, or provide context to, the interpretation exercise. Secondly, I do not see any prejudice to CREA. Counsel will, I am confident, be able to cross-examine on the content of this affidavit. Counsel for the Commissioner is required to provide a sworn version of the affidavit at least 4 hours prior to the commencement of cross-examination or such shorter time as counsel for CREA may agree to.

[6] To conclude, should CREA decide to file a reply affidavit to the second Logue affidavit, it must be served no later than Tuesday, October 14th. Costs of this hearing can be addressed within the envelope of the motion itself.

DATED at Ottawa, this 6th day of October, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

APPEARANCES

For the applicant:

The Commissioner of Competition

Andrew D. Little
Tara DiBenedetto

For the respondent:

The Canadian Real Estate Association

Sandra Forbes
Andrea Burke