Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Toronto Real Estate Board*, 2014 Comp. Trib. 10
File No.: CT-2011-003
Registry Document No.: 274

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

Canadian Real Estate Association
(intervenor)

Decided on the basis of the written record.
Before Judicial Member: Simpson J.
Date of Reasons and Order: June 18, 2014
Reasons and Order signed by: Madam Justice Sandra J. Simpson

REASONS FOR ORDER AND ORDER REGARDING A MOTION TO STAY OR ADJOURN THE RECONSIDERATION HEARING SCHEDULED TO START ON OCTOBER 14, 2014

I. THE MOTION

[1] The Toronto Real Estate Board ("TREB") has moved to stay or adjourn the Competition Tribunal's (the "Tribunal") scheduling orders of April 7 and April 23, 2014 pending the Supreme Court of Canada's decision on TREB's application for leave to appeal a decision of the Federal Court of Appeal dated February 3, 2014 and, if leave is granted, pending a decision on the appeal. TREB has asked that the motion be dealt with in writing.

[2] The Commissioner of Competition (the "Commissioner") has opposed the motion but has agreed that it should be considered on the written record.

[3] The Intervenor, the Canadian Real Estate Association, did not file motion material but has advised by e-mail dated June 9, 2014, that it supports TREB's motion.

II. THE BACKGROUND FACTS

[4] The facts set out below are not in dispute and, with some modifications, are taken from TREB's Memorandum of Fact and Law dated May 23, 2014.

[5] The Commissioner commenced an application against TREB in May 2011 (the "Application") seeking a remedy from the Tribunal pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34.

[6] The Application was heard over six weeks in the fall of 2012 (the "Initial Hearing"). The Tribunal dismissed the Application in Reasons for Order and Order dated April 15, 2013.

[7] The Commissioner appealed the Tribunal's decision to the Federal Court of Appeal. The Federal Court of Appeal allowed the Commissioner's appeal in Reasons for Judgment and Judgment dated February 3, 2014. The Federal Court of Appeal ordered that the Application be reconsidered by the Tribunal on its merits (the "Reconsideration Hearing").

[8] On February 26, 2014, Madam Justice Simpson convened a case conference to address, in a preliminary manner, the logistics of the Reconsideration Hearing. During that call, Madam Justice Simpson advised that the Tribunal was considering a Reconsideration Hearing which would last two weeks and commence on October 14, 2014. However, the Tribunal needed to know whether counsel were available.

[9] On March 31, 2014, TREB filed an application for leave to appeal to the Supreme Court of Canada (the "Leave"). The Commissioner filed his response on April 28, 2014, and TREB filed its reply on May 5, 2014.

[10] In its Application for Leave, TREB has raised the following two issues of national and public importance to be considered by the Supreme Court:

(a) Given the inconsistent rulings of the Federal Court of Appeal in *Commissioner of Competition v. Canada Pipe Company Ltd.*, and the TREB case, what is the appropriate test for identifying a "practice of anti-competitive acts" for the purposes of paragraph 79(1)(b) of the *Competition Act*?

(b) Must a firm compete in the relevant market in order for that firm to control that market for the purposes of paragraph 79(1)(a) of the *Competition Act*?

[11] A further case conference for the Reconsideration Hearing was held before Madam Justice Simpson on April 1, 2014, the day after TREB filed its Leave Application. Following that case conference, Madam Justice Simpson issued two Scheduling Orders. The first, dated April 7, 2014, was based on the fact that counsel were available and established October 14, 2014 as the start date for the Reconsideration Hearing. The second, dated April 23, 2014, was made on consent and set out in detail the schedule and the procedures for the Reconsideration Hearing.

III. THE ISSUES

[12] What is the proper test to be applied to a request for a stay/adjournment of the scheduling orders (which will, in effect, operate as a stay or adjournment of the Reconsideration Hearing) pending the Leave and a possible appeal?

[13] When the proper test is applied, should the stay/adjournment be granted?

(i) ISSUE I THE APPROPRIATE TEST

[14] In *D & B Companies of Canada Ltd. v. Canada (Director of Investigation and Research)*, [1994] C.C.T.D. No. 17, ("D & B Companies"), Mr. Justice Rothstein, then sitting as a Judicial Member of the Tribunal, held that the party moving for an adjournment was required to satisfy the tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 before the Tribunal would adjourn its hearing of the Commissioner's application. The adjournment had been sought pending an appeal to the Federal Court of Appeal from an interlocutory order of the Tribunal which dealt with pre-hearing disclosure.

[15] Mr. Justice Rothstein gave the following reasons at page 3 of his decision. His ruling was later upheld by the Federal Court of Appeal in *D & B Co. of Canada Ltd. v. Canada (Director of Investigation and Research)* (1994), 58 C.P.R. (3d) 342 (F.C.A.).

> […] While not every request for an adjournment would be decided by application of the principles governing a stay of proceedings, certainly an adjournment pending appeal has exactly the same result as a stay pending appeal. Counsel for the respondent conceded that an alternative open to him is to seek a stay from the Federal Court of Appeal. I do not understand why the Tribunal, in considering this adjournment application, would apply different principles than the Federal Court of Appeal on the stay application, both relating to the same proceedings. I am of the view that the principles applicable to stays of proceedings, which themselves are the same as the principles applicable to interlocutory injunctions, are to be applied in the case of an application for an adjournment pending appeal.

[16] The Commissioner relies on this authority and says that TREB has failed to satisfy the tripartite test which requires it to show that there is a serious issue, that TREB will suffer irreparable harm and that the balance of convenience favours TREB. In particular, the Commissioner says that TREB has failed to establish irreparable harm.

[17] TREB, on the other hand, submits that the Federal Court of Appeal no longer relies on the tripartite test on motions asking it to adjourn its own proceedings pending another appeal. TREB says that the Court's recent decision in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 F.C.A. 312 ("Mylan") now applies.

[18] In Mylan, AstraZeneca asked the Federal Court of Appeal to adjourn its hearing until the Supreme Court of Canada decided an appeal in another case. Mylan relied on the Federal Court of Appeal decision in D & B Companies and submitted that AstraZeneca was required to satisfy the RJR-MacDonald tripartite test. However, the Court held that that test only applied if the

Court was enjoining the actions of another body. The Court said that when it was deciding whether to delay its own hearings pending an appeal, the "interests of justice" should govern. The question is whether the Tribunal can and should take this approach in this case.

[19] In my view, although the Federal Court of Appeal indicated in Mylan that the Tribunal has the discretion to handle adjournments/stays of its own proceedings pending appeal using whatever test or factors it considers appropriate, including the tripartite test, it also appears that it is open to the Tribunal to follow the Court's lead and consider the interests of justice. I have concluded, in the circumstances of this case, that requiring TREB to demonstrate irreparable harm to secure an adjournment is unduly onerous. I therefore decline to use the tripartite test in exercising my discretion.

(ii) ISSUE II SHOULD AN ADJOURNMENT BE GRANTED?

[20] The Commissioner says that the adjournment/stay should be refused because:

(i) There has been no change in circumstances since the scheduling orders were made. At that time, the Tribunal knew that Leave had been sought.

(ii) TREB has not said it will seek to adduce new evidence so there is no evidence of an undue demand on judicial resources if the adjournment is refused.

(iii) Leave is unlikely to be granted by the Supreme Court of Canada and Leave will be decided by mid-summer 2014.

(iv) Anti-competitive harm is ongoing and a resolution is urgent.

[21] TREB says the adjournment should be granted because the parties' work will be wasted if Leave is granted and because, if Leave is refused, the delay is not significant.

[22] I have considered each topic and have the following observations:

(i) The Change in Circumstances

[23] In my view, nothing turns on the fact that the Reconsideration Hearing was scheduled when the Tribunal was aware that Leave had been sought. The Tribunal was also made aware that an adjournment/stay might be requested and TREB undertook to move promptly and complied with its undertaking.

(ii) Judicial Resources

[24] The scheduling orders contemplate motions during the summer (July 17 and August 21) if new evidence is proposed. It is not yet known whether these motions will be required so it is not clear that judicial resources will be wasted on motions if Leave is granted. However, if the adjournment is refused, I imagine that the judges who plan to sit on the Reconsideration Hearing will undertake some preparatory work during the summer months and it will be wasted if Leave is granted. However, because it is speculative, I have not treated this as an important factor.

(iii) Leave and Timing

[25] In my view, it is reasonable to predict that TREB's Application for Leave will be decided in September 2014. I offer no view on the prospects for success of the request for Leave.

(iv) The Alleged Anti-Competitive Harm and Delay

[26] If Leave is granted and the appeal succeeds, the Commissioner will not be entitled to a remedy under the current legislation so the alleged harm will not be cured.

[27] If Leave is granted and the appeal is dismissed, the Reconsideration Hearing will ultimately proceed. However, it is not known whether the application before the Tribunal will be successful so the harm is currently only "alleged" and has not been established.

[28] If Leave is refused, the Reconsideration Hearing will proceed in early 2015 at the latest. Again the outcome before the Tribunal cannot be predicted. Finally, in my view, the period from October to early 2015 does not constitute a significant delay.

(v) The Parties' Resources

[29] The Commissioner's updated evidence from all his previous witnesses is due on August 1 and TREB and CREA must file updated evidence for their witnesses in early September. This means that all the updated evidence in the form of witness statements from all previous lay and expert witnesses (there are a total of 18) must be prepared during July and August. If Leave is

granted, the Reconsideration Hearing will be postponed and all the evidence will need to be updated a second time if the Supreme Court dismisses the appeal. If the appeal is allowed, the updated evidence will be wasted because there will not be a Reconsideration Hearing.

[30] Having considered all these topics and Tribunal Rule 139 and subsection 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), I have concluded that the alleged continuing harm and delay which the Commissioner says will be experienced if the adjournment is granted, are offset by the significant effort and expense involved in reviewing the transcripts and evidence from the Initial Hearing and preparing updated evidence which may never be used or which may have to be updated a second time. Accordingly, the interests of justice dictate that an adjournment should be granted.

[31] However, this is not a proper case for a costs award against the Commissioner.

ORDER

[32] The Scheduling Order dated April 7, 2014 is hereby set aside and the Reconsideration Hearing scheduled for October 14, 2014 is adjourned *sine die* to be rescheduled if Leave is refused or if the Supreme Court of Canada dismisses TREB's appeal.

[33] The Scheduling Order dated April 23, 2014 is hereby set aside and a fresh but comparable order, will be made if Leave is refused or if the Supreme Court of Canada dismisses TREB's appeal.

DATED at Toronto, this 18th day of June, 2014.

SIGNED on behalf of the Tribunal by the judicial member who is case managing this proceeding.

(s) Sandra J. Simpson

COUNSEL:

For the applicant:

The Commissioner of Competition:

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Andrew D. Little
Emrys Davis

For the respondent:

The Toronto Real Estate Board

Donald S. Affleck
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