CT-2011-003

THE COMPETITION TRIBUNAL

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

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 multiple listing service of the Toronto Real Estate Board.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION FOR TREB'S MOTION TO STAY OR ADJOURN

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PART I – OVERVIEW

1. The Competition Tribunal deals with matters as "expeditiously as the circumstances and considerations of fairness permit".[1] On February 3, 2014, the Federal Court of Appeal directed the Tribunal to reconsider the Commissioner's application, which has been under reserve or appeal since October 2012. TREB moves to stay or adjourn that reconsideration from October 2014 to sometime in 2015. Its motion should be dismissed.

2. TREB has not even tried to meet the Tribunal's long-standing test for adjourning a hearing pending appeal: the tripartite test from *RJR-MacDonald Inc. v. Canada (Attorney General)*. Instead, TREB advances a lesser (and incorrect) test. Even applying that lesser test, TREB has not demonstrated any compelling reason to adjourn the reconsideration hearing scheduled to begin on October 14, 2014.

3. The potential for costs thrown away cannot overcome the real and substantial prejudice that further delay of the Commissioner's case will produce. Any risk of costs thrown away is speculative: the Supreme Court of Canada refuses leave to appeal in nearly 90% of cases. In any event, TREB may claim its costs in the usual way if successful. In contrast, delaying the Tribunal's reconsideration past October 2014 risks at least six months of continued economic inefficiency, increased prices for thousands of home buyers and sellers, and reduced service quality and innovation – none of which are compensable in costs.

4. Speculation that the Supreme Court of Canada could grant leave to appeal and the uncertainty concerning the timing of its decision does not justify further delay of the Tribunal's reconsideration of the Commissioner's application.

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[1] *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), ss. 9(2).

PART II – FACTS

5. In May 2011, the Commissioner commenced an application alleging, among other things, that TREB's conduct substantially lessened or prevented competition. The hearing began fifteen months later (the "**Initial Hearing**").

> Notice of Application, Exhibit A to the Affidavit of S. Paige sworn May 30, 2014 ("**Paige Affidavit**"), Commissioner's Responding Record at Tab 2A

6. Evidence at the Initial Hearing revealed that TREB's conduct had significant detrimental effects on businesses and home buyers and sellers in the Greater Toronto Area ("**GTA**"). Witnesses testified about how TREB's conduct reduced service quality and innovation. Others testified about the reduced attractiveness of their business and the higher costs they incurred. Based on the evidence, the Commissioner conservatively estimated annual price savings to home buyers and sellers of at least $29 million "but for" TREB's conduct.

> Excerpts from the Commissioner's Closing Submissions, Exhibit B to the Paige Affidavit, Commissioner's Responding Record at Tab 2B

7. After sixteen months under reserve or under appeal, the Federal Court of Appeal referred the Commissioner's application back to the Tribunal for reconsideration on the merits. Owing to the inability of the panel members who presided over the Initial Hearing to continue, reconsideration has already been significantly delayed. On April 7, 2014, knowing that TREB had sought leave to appeal to the Supreme Court of Canada, the Tribunal ordered the reconsideration hearing to begin on October 14, 2014 (the "**Further Hearing**") – eight-and-a-half months after the Federal Court of Appeal's decision.

> Excerpts from the transcript of the case conference held February 26, 2014, Exhibit C to the Paige Affidavit, Commissioner's Responding Record at Tab 2C
>
> Scheduling Order of Madam Justice Simpson dated April 7, 2014, Exhibit G to the Affidavit of L. Alexiou sworn May 23, 2014 ("**Alexiou Affidavit**"), TREB's Motion Record at Tab 2G

8. On April 23, 2014, the Tribunal issued an order setting a schedule leading up to the Further Hearing. The schedule reflects the uncertainty created by TREB's application for leave to appeal to the Supreme Court. The first deadline is in mid-July 2014 and applies to the Commissioner. TREB does not need to file any evidence until the middle of August 2014, by which time it can be expected that the Supreme Court will have issued its decision on leave.

> Scheduling Order of Madam Justice Simpson dated April 23, 2014, Exhibit H to the Alexiou Affidavit, TREB's Motion Record at Tab 2H

9. On average, the Supreme Court issues decisions on leave applications four months after the applicant files the leave application. As TREB filed its application for leave on March 31, 2014 and the Commissioner filed his response on April 28, 2014, a decision on leave can be expected by mid-summer. The Supreme Court dismisses almost 90% of all leave applications.

> The Commissioner's Responding Memorandum of Fact and Law & Statistics from the Supreme Court of Canada website &, Exhibits D and G to the Paige Affidavit, Commissioner's Responding Record at Tabs 2D, and 2G

10. The Further Hearing is scheduled for October 2014 in part because the new panel members are available during the week of October 6, 2014 to prepare for the Further Hearing and to review the evidence and submissions filed during the Initial Hearing.

> Excerpts from transcript of the case conference held February 26, 2014, Exhibit C to the Paige Affidavit, Commissioner's Responding Record at Tab 2C

PART III – LAW AND ARGUMENT

The Tribunal has Jurisdiction to grant an Adjournment, not a Stay

11. The Commissioner does not dispute that the Tribunal has jurisdiction to grant or deny an adjournment.

12. To the extent that TREB seeks a stay rather than an adjournment, it seeks relief that should properly be brought before the Federal Court of Appeal. An indeterminate stay of the Tribunal's scheduling orders in this case is in substance a stay of the Federal Court of Appeal's Judgment that the Tribunal reconsider the Commissioner's application. That motion is properly brought before the Federal Court of Appeal or the Supreme Court pursuant to section 65.1 of the *Supreme Court Act*.

> *Supreme Court Act*, R.S.C., 1985, c. S-26, s. 65.1
>
> *Sawridge Band v. Canada*, 2006 FC 1218 at paras 67-72, Commissioner's Brief of Authorities at Tab 1

The Test for an Adjournment is the *RJR-MacDonald* Test

13. The Tribunal has long applied the tripartite test from *RJR-MacDonald Inc. v. Canada (Attorney General)* when requested to adjourn a hearing pending appeal. The *RJR-MacDonald* test requires the moving party to demonstrate that:

(a) its application for leave to appeal raises a serious issue to be tried in that there is an arguable issue of law which could qualify for leave to appeal;

(b) it will suffer irreparable harm if an adjournment is not granted; and

(c) the balance of convenience favours an adjournment.

> *D & B Companies of Canada Ltd. v. Canada (Director of Investigation and Research*, [1994] CCTD No 17 at 2, TREB's Brief of Authorities at Tab 2
>
> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, Commissioner's Brief of Authorities at Tab 2
>
> *Minister of Community Services v. B.F.*, 2003 CarswellNS 612 (CA) at para 11 per Cromwell J.A. (as he then was), Commissioner's Brief of Authorities at Tab 3

14. In *D & B*, the respondent moved to adjourn the scheduled hearing pending its appeal to the Federal Court of Appeal. The appeal concerned the scope of the Commissioner's public interest privilege, the adequacy of the Commissioner's pre-trial production, and, thus, the evidence available for the hearing. As TREB does on this motion, D & B argued that the Tribunal had the power to control its own procedure, thus the *RJR-MacDonald* test did not apply.

> *D & B*, *supra*, at 2, TREB's Brief of Authorities at Tab 2

15. Justice Rothstein (as he then was) rejected D & B's argument and held that the Tribunal would only adjourn a hearing pending appeal if the moving party met the *RJR-MacDonald* test:

> 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**.
>
> *D & B*, *supra*, at 3 (emphasis added), TREB's Brief of Authorities at Tab 2

16. Justice Rothstein's reasons were adopted on appeal.

> *D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research)*, 1994 CarswellNat 1844 (FCA) at para 18, Commissioner's Brief of Authorities at Tab 4

17. Contrary to TREB's argument, *Mylan Pharmaceuticals* has not "overtaken" Justice Rothstein's approach in *D & B*. *Mylan Pharmaceuticals* identified the factors the Federal Court of Appeal considers when asked to adjourn a proceeding before it pending appeal. The Federal Court of Appeal recognized that *D & B* represents the Tribunal's different – but entirely valid – determination of what factors the Tribunal considers when asked to adjourn a hearing before it. Stratas J.A. held that *D & B* was "a decision by a specialist administrative tribunal" about "what factors ought to apply to such matters before it..."

> *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc*., [2011] FCJ No 1607 at para 10 (FCA), TREB's Brief of Authorities at Tab 1

18. That the Tribunal has adopted a high test and will not lightly adjourn hearings before it pending appeal makes sense. Parliament has specifically directed it to deal with matters as "expeditiously as the circumstances and considerations of fairness permit" because industry and consumers require swift determination of competition matters. The Tribunal must exercise its discretion in the context of Parliament's direction.

> *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), ss. 9(2)

19. That rule 139 of the *Competition Tribunal Rules* did not exist in 1994 when Justice Rothstein decided *D & B* is of no moment. Rule 139 did not change the Tribunal's jurisdiction to vary its own scheduling orders. The Tribunal always had that jurisdiction. *D & B* sets out the

circumstances in which the Tribunal will exercise that jurisdiction to adjourn a scheduled hearing pending appeal. None of the cases TREB relies on hold otherwise.

Competition Tribunal Rules, SOR/2008-141, r. 139

20. TREB has not even tried to meet the *RJR-MacDonald* test. It has led no evidence of irreparable harm: Ms. Alexiou's affidavit speaks of TREB's pre-hearing preparation but is silent on whether it can be compensated for that preparation if the Supreme Court grants leave. Absent evidence of any harm – let alone the "persuasive, detailed and concrete evidence of irreparable harm" the *RJR-MacDonald* test requires – the Tribunal must dismiss TREB's motion.

Mylan Pharmaceuticals, *supra*, at para 5, TREB's Brief of Authorities at Tab 1

TREB has not demonstrated Compelling Reasons to justify an Adjournment

21. Even if the Tribunal departs from the *RJR-MacDonald* test, TREB has not met the lesser "compelling reasons" standard it advances in its submissions to justify an adjournment.

22. First, circumstances have not changed since April 7, 2014 when the Tribunal scheduled the Further Hearing to begin on October 14, 2014. When it made its order, the Tribunal was aware that TREB had applied for leave to appeal to the Supreme Court and that the Court was short one judge, just as it is today. Given its average time to decide leave applications, it could be expected that the Supreme Court would decide the leave application by mid-summer 2014. Absent new evidence or a change in circumstances, the Tribunal should not vary its existing order.

23. Second, an adjournment will not save judicial resources. The Commissioner advised the Supreme Court of the date of the Further Hearing in his leave response. It will likely release its

decision on leave well before October 6, 2014 when the new panel begins to prepare for the Further Hearing.

24. The current schedule contemplates using case management resources no earlier than mid-July 2014, by which time the Supreme Court may have rendered a decision. In any event, case management resources are only necessary in July and August if the parties seek to file new evidence. TREB has led no evidence that such new evidence is certain or even likely. To date, neither party has proposed to adduce any and it is speculative whether either party will oppose such evidence and whether the Tribunal will grant leave to introduce it.

> Scheduling Order of Madam Justice Simpson dated April 23, 2014, Exhibit H to the Alexiou Affidavit, TREB's Motion Record at Tab 2H

25. Third, the only prejudice TREB alleges is speculative. It cannot justify further delay of this proceeding.

> Scheduling Direction of Strathy J. dated September 20, 2011 at para 5, Commissioner's Brief of Authorities at Tab 5

26. If TREB begins to prepare for the Further Hearing and the Supreme Court later grants leave to appeal, TREB argues that some of its preparation will be wasted and thus it will suffer costs thrown away.

27. There is little actual risk to TREB of costs thrown away. The Commissioner has argued in his response that TREB's application raises no issues of national or public importance sufficient to grant leave. In addition, the Supreme Court rejects nearly 90% of all leave applications it receives. Thus, there is a substantial likelihood that the Supreme Court will

dismiss TREB's leave application and that TREB will suffer no costs thrown away at all. Even if the Supreme Court does grant leave, TREB may claim its costs in the usual way if successful.

Competition Tribunal Act, *supra*, ss. 8.1

Federal Courts Rules, SOR/98-106, r. 400

28. Fourth, weighing against TREB's speculative position is the real, substantial, and irreparable harm caused by further delay of the Commissioner's application. Further delay of this matter prolongs the effects of TREB's anti-competitive conduct in the GTA. If the Commissioner's application is furthered delayed but ultimately successful, an adjournment will have produced at least five to six months[2] of continued economic inefficiency, increased prices for thousands of home buyers and sellers, and reduced service quality and innovation. None of those effects are compensable in costs.

29. TREB asserts that there is "no urgency in holding the reconsideration hearing". The Commissioner strongly disagrees. If there were no urgency to hearings before the Tribunal:

(a) Parliament would not have directed the Tribunal to deal with matters as "expeditiously as the circumstances and considerations of fairness permit";

(b) the Federal Court of Appeal would not have described subsection 9(2) of the *Competition Tribunal Act* as a "mandatory provision" which "influenced to a great extent" its decision on the balance of convenience in *D & B*; and

[2] October 2014 to March 2015. The Tribunal is scheduled to hear the Commissioner's application in *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, CT-2012-002 beginning on January 12, 2015: Exhibit F to the Paige Affidavit, Commissioner's Responding Record at Tab 2F.

(c) the Tribunal would not have recognized in denying D & B's request for an adjournment that a strong case may exist that "there is irreparable harm if the [Commissioner] is restrained from proceeding with [his] action."

Competition Tribunal Act, *supra*, ss. 9(2)

D & B (FCA), *supra*, at para 18, Commissioner's Brief of Authorities at Tab 4

D & B, *supra*, at 5, TREB's Brief of Authorities at Tab 2

30. Finally, TREB has disregarded the parties' and the Tribunal's time and resources in the past. On the eve of the Initial Hearing and contrary to the Tribunal's scheduling order, TREB delivered a Notice of Constitutional question which threatened to derail the Initial Hearing. An adjournment was avoided only because the Tribunal rejected TREB's Notice. Had an adjournment resulted, however, the parties and the Tribunal would have wasted significant resources preparing for the Initial Hearing.

Hearing Transcript Excerpt, Exhibit E to the Paige Affidavit, Commissioner's Responding Record at Tab 2E

31. TREB's new-found concern about the waste of judicial resources and the parties' costs thrown away is simply another attempt to further delay determination of the Commissioner's application on the merits.

PART IV – RELIEF REQUESTED

32. The Commissioner requests that the Tribunal dismiss TREB's motion and grant the Commissioner costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2014.

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SCHEDULE "A" – AUTHORITIES CITED

1. *Sawridge Band v. Canada*, 2006 FC 1218

2. *D & B Companies of Canada Ltd. v. Canada (Director of Investigation and Research*, [1994] CCTD No 17

3. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311

4. *Minister of Community Services v. B.F.*, 2003 CarswellNS 612 (CA)

5. *D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research)*, 1994 CarswellNat 1844 (FCA)

6. *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc*., [2011] FCJ No 1607

7. Scheduling Direction of Strathy J. dated September 20, 2011

SCHEDULE "B" – STATUTORY REFERENCES

***Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.)**

8.1 (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the Competition Act on a final or interim basis, in accordance with the provisions governing costs in the Federal Court Rules, 1998.

(2) The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

(3) The Tribunal may award costs against Her Majesty in right of Canada.

(4) Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from Her Majesty in right of Canada in respect of the services so rendered.

(5) Any money or costs awarded to Her Majesty in right of Canada in a proceeding in respect of which this section applies shall be paid to the Receiver General.

9. (2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

***Competition Tribunal Rules*, SOR/2008-141**

139. (1) The dates set and other requirements established by case management orders are firm.

(2) A request for a variation must be made by motion showing that compelling reasons exist for a change in the order.

(3) If the Tribunal is satisfied that compelling reasons exist for a change in the order, it may amend it.

***Supreme Court Act,* R.S.C., 1985, c. S-26)**

65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.

(3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.

***Federal Courts Rules*, SOR/98-106**

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

File No. CT-2011-003

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