CT-2011-003

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 residential multiple listing service of the Toronto Real Estate Board

B E T W E E N :

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
FILED / PRODUIT
May 23, 2014
CT-2011-003
Jos LaRose for / pour
REGISTRAR / REGISTRAIRE
OTTAWA, ONT # 261

COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

AND

THE CANADIAN REAL ESTATE ASSOCIATION and REALTYSELLERS REAL ESTATE INC.

Intervenors

MOTION RECORD OF THE TORONTO REAL ESTATE BOARD

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And To: **The Registrar**
Competition Tribunal
Thomas D'Arcy McGee Building
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Tab 1

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NOTICE OF MOTION

TAKE NOTICE THAT The Toronto Real Estate Board ("TREB") will make a motion to the Competition Tribunal, at a date, time, location and in a manner directed by the Competition Tribunal. TREB requests that the motion be heard in writing.

THE MOTION IS FOR:

1. An Order staying or adjourning the reconsideration hearing of this matter before the Competition Tribunal, currently scheduled to commence October 14, 2014;

2. An Order granting TREB its costs of this motion; and

3. Such further and other relief as this Honourable Tribunal may deem just.

THE GROUNDS FOR THIS MOTION ARE:

1. The Tribunal dismissed the Commissioner of Competition's ("Commissioner") Application against TREB by its Reasons for Order and Order dated April 15, 2013.

2. The Federal Court of Appeal allowed the Commissioner's appeal of the Tribunal's Order by its Reasons for Judgment and Judgment dated February 3, 2014. The Federal Court of Appeal ordered this matter back to the Tribunal for reconsideration on the merits.

3. The Tribunal has scheduled the reconsideration hearing in this matter to commence on October 14, 2014, continuing (if necessary) until October 24, 2014.

4. TREB filed an Application for leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada on March 31, 2014. As of May 5, 2014, all leave materials were filed with the Court. The leave application has yet to be assigned to a leave panel.

5. Depending on the resolution of this matter before the Supreme Court, a reconsideration hearing may prove to be completely unnecessary.

6. TREB will have to expend significant resources to prepare for the reconsideration hearing. Preparation for the reconsideration hearing will have to commence in the middle of June 2014.

7. It is unclear when the Supreme Court of Canada will render its decision on leave, and a decision on leave may not be rendered until the eve of the reconsideration hearing, or after the date the reconsideration hearing is scheduled to commence.

8. If leave to appeal is granted by the Supreme Court of Canada, any preparatory work for the fall 2014 reconsideration hearing will be completely, or largely wasted. There is a high risk of wasted costs, expenditure of time, and judicial resources if a stay or adjournment is not granted.

9. TREB will suffer prejudice because its wasted costs will be largely (if not totally) uncompensible.

10. If a stay or adjournment is not granted, there is a high risk of wasted judicial resources.

11. There is no prejudice to the Commissioner if a stay or adjournment is granted.

12. There is no urgency in holding the reconsideration hearing.

13. The delay caused by a stay or adjournment (in the event that leave to appeal is denied) would be modest.

14. A stay of proceedings would be appropriate in any event if leave to appeal is granted.

15. TREB has put forward a strong case for leave to appeal.

16. The balance of convenience favours granting a stay or adjournment.

17. Section 9(2) of the *Competition Tribunal Act*, RSC 1985, c. 19 (2nd Supp.).

18. Sections 2(1), 82-88, and 139 of the *Competition Tribunal Rules*, SOR/2008-141.

19. Such other grounds as counsel may advise and the Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The affidavit of Linda Alexiou sworn May 22, 2014; and

2. Such further evidence as counsel may advise and the Tribunal may permit.

DATED AT Toronto, this 23rd day of May, 2014.

Donald S. Affleck

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Counsel for the Applicant

And To:

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CT-2011-003

COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION
Applicant

- and -

THE TORONTO REAL ESTATE BOARD
Respondent

- and –

THE CANADIAN REAL ESTATE ASSOCIATION AND REALTYSELERS REAL ESTATE INC.
Intervenors

NOTICE OF MOTION

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Counsel for The Toronto Real Estate Board

Tab 2

CT-2011-003

COMPETITION TRIBUNAL

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

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B E T W E E N :

COMMISSIONER OF COMPETITION

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THE TORONTO REAL ESTATE BOARD

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THE CANADIAN REAL ESTATE ASSOCIATION and REALTYSELLERS REAL ESTATE INC.

Intervenors

AFFIDAVIT OF LINDA ALEXIOU (SWORN MAY 23, 2014)

I, Linda Alexiou, of the City of Burlington, in the Regional Municipality of Halton,

MAKE OATH AND SAY:

1. I am a legal assistant at Affleck Greene McMurtry LLP, counsel to The Toronto Real Estate Board ("TREB"), as such I have personal knowledge of the matters to which I depose. Where I do not have personal knowledge, I have stated the source of my information, all of which I believe to be true.

2. Attached to my affidavit as **Exhibit "A"** are the Tribunal's Reasons for Order and Order dated April 15, 2013 dismissing the Application of the Commissioner of Competition ("Commissioner").

3. Attached to my affidavit as **Exhibit "B"** are the Federal Court of Appeal's Reasons for Judgment and Judgment dated February 3, 2014 allowing the appeal of the Commissioner.

4. Attached to my affidavit as **Exhibit "C"** is a portion of the transcript for the case conference in this matter held February 26, 2014 wherein Madam Justice Simpson advised the parties that the Tribunal was considering the weeks of October 13th and 20th for the reconsideration hearing.

Leave to Appeal

5. TREB filed an application for leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada on March 31, 2014. Attached to by affidavit as **Exhibit "D"** is TREB's Notice of Application. Attached to my affidavit as **Exhibit "E"** is TREB's Memorandum of Argument.

6. The Commissioner filed his response on April 28, 2014, and TREB filed its reply on May 5, 2014. The parties are now awaiting a decision on the leave application. The leave application has yet to be assigned to a leave panel. Attached to my affidavit as **Exhibit "F"** is the case print-out from the Supreme Court of Canada website.

Scheduling Orders

7. Attached to my affidavit as **Exhibit "G"** is the Scheduling Order of Madam Justice Simpson dated April 7, 2014.

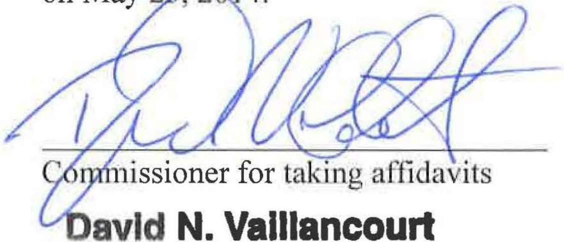
8. Attached to my affidavit as **Exhibit "H"** is the Scheduling Order of Madam Justice Simpson dated April 23, 2014.

Preparation for reconsideration hearing

9. I am advised by David Vaillancourt that if the reconsideration hearing is not stayed or adjourned, TREB's lawyers will be required to commence preparation for that hearing by the middle of June 2014 at the latest. Preparation will have to be commenced this far in advance on account of the requirement to update evidence for the reconsideration hearing, including the update of TREB's expert evidence. TREB's expert will have to obtain TREB's updated fact evidence with sufficient time to review and consider that evidence in updating his own expert evidence.

10. I am advised by David Vaillancourt that as part of the updating process, TREB's lawyers will have to review thousands of pages of transcript evidence, witness statements, expert reports, and documentary evidence, and hundreds of pages of argument.

11. I make this affidavit for no improper purpose.

SWORN BEFORE ME at the City of Toronto, Province of Ontario on May 23, 2014.	
 Commissioner for taking affidavits **David N. Vaillancourt**	LINDA ALEXIOU

CT-2011-003

COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION
Applicant

- and -

THE TORONTO REAL ESTATE BOARD
Respondent

- and –

THE CANADIAN REAL ESTATE ASSOCIATION AND REALTYSELERS REAL ESTATE INC.
Intervenors

AFFIDAVIT OF LINDA ALEXIOU
(SWORN MAY 23, 2014)

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Fiona Campbell LSUC # 60383V
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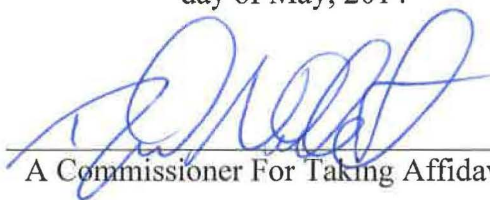
Counsel for The Toronto Real Estate Board

This is **Exhibit "A"** referred to in the
Affidavit of Linda Alexiou
sworn before me, this
23rd day of May, 2014



A Commissioner For Taking Affidavits

Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. The Toronto Real Estate Board,* 2013 Comp. Trib. 9
File No.: CT-2011-003
Registry Document No.: 238

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 and Realtysellers Real Estate Inc.
(intervenors)

Before: Simpson J. (presiding), Scott J., Mr. H. Lanctôt
Date(s) of hearing: 20120910 to 20120914, 20120918 to 20120919, 20120924 to 20120925, 20120927 to 20120928, 20121002 to 20121003, 20121009 to 20121010, and 20121017 to 20121018
Date of reasons for order and order: April 15, 2013
Reasons for order and order signed by: Madam Justice S. Simpson, Mr. Justice A. Scott, Mr. H. Lanctôt

REASONS FOR ORDER AND ORDER

THE APPLICATION

[1] The Commissioner of Competition has applied pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34, as amended (the "Act"), for orders prohibiting the Toronto Real Estate Board ("TREB") from engaging in a practice of anti-competitive acts in the Greater Toronto Area (the "GTA") and requiring TREB to take steps which will overcome the effects of that practice.

[2] In the amended application (the "Application"), the Commissioner of Competition (the "Commissioner") alleges, *inter alia,* that TREB is the dominant firm and that it is using its control of its Multiple Listing Service ("MLS") to enforce rules, policies and agreements (together, the "Restrictions") which, broadly speaking, limit the use TREB's members can make of the MLS listings and related data on the internet. The Restrictions are alleged to prevent and lessen competition substantially in the market for the supply of residential real estate brokerage services to vendors and purchasers in the GTA (the "Market"). The alleged harm is said to be experienced primarily by TREB's more web-centric members who wish to maximize use of the internet in the conduct of their real estate businesses.

THE PARTIES

[3] The Commissioner is appointed by the Governor in Council under section 7 of the Act and is responsible for its enforcement and administration.

[4] TREB is a not-for-profit corporation and Canada's largest real estate board. It serves more than 35,000 real estate brokers and salespeople ("Members"). Though TREB's Members are concentrated in the GTA, TREB accepts Members from across Ontario and from other jurisdictions. TREB operates with a permanent staff and a 16-Member Board of Directors. TREB is essentially a trade association and does not offer real estate services to residential purchasers and vendors.

THE INTERVENORS

[5] The Canadian Real Estate Association ("CREA") and Realtysellers Real Estate Inc. were granted leave to intervene.

[6] CREA is Canada's national real estate industry trade association. Membership is open to real estate boards and associations, and their members in good standing are automatically members of CREA. Accordingly, TREB's Members belong to CREA. CREA intervened in this proceeding on the basis, *inter alia,* that it would neither pay nor seek costs.

[7] Prior to the hearing, the Tribunal was advised that Realtysellers Real Estate Inc. was no longer represented by counsel but was reserving its intervention rights. However, no one appeared on its behalf and no written submissions were filed.

THE ISSUE

[8] We have concluded that the determinative issue is the fundamental question of whether the Application meets the requirements of section 79 of the Act. Since, for the reasons given below, we have answered that question in the negative, it is unnecessary to deal with the balance of the issues raised in the Application.[1]

DISCUSSION OF SUBSECTION 79(1)

[9] Subsection 79(1) reads as follows:

79.(1) Where, on application by the Commissioner, the Tribunal finds that	79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :
(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,	*a*) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and	*b*) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;
(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,	*c)* la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

[10] It is undisputed that the requirements of paragraphs (a), (b) and (c) must all be satisfied. Accordingly the paragraphs must be read together to determine whether subsection 79(1) applies. In our view, on the facts of this case, the discussion logically starts with paragraph 79(1)(b).

PARAGRAPH 79 (1)(b)

[11] These are three reasons why the Tribunal has concluded that the requirements of paragraph 79(1)(b) have not been met in the present Application. They are listed here and will be discussed below:

i) The Application does not follow the Federal Court of Appeal's decision in Canada Pipe (cited below);
ii) The Application does not fall under the 2012 Abuse of Dominance Guidelines;
iii) The Application is inconsistent with subsection 79(4) of the Act.

[12] The starting point is the decision of the Federal Court of Appeal in *Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233, 268 DLR (4th) 193, leave to appeal to SCC refused, 31637 (May 10, 2007) ("Canada Pipe"). The Court concluded that, for the purposes of paragraph 79(1)(b) the dominant firm must compete with the firm(s) harmed by the dominant firm's practice of anti-competitive acts (the "Canada Pipe Rule").

[13] The relevant paragraphs in the decision read as follows:

> (1) The legal test under paragraph 79(1)(*b*)
>
> [63] The Act does not provide an express definition of "anti-competitive act". Section 78 provides a list of 11 anti-competitive acts, expressly "without restricting the generality of the term". These examples are thus illustrative only, and indeed the Tribunal has recognized in its previous decisions that conduct not specifically mentioned in section 78 can constitute an anti-competitive act (*NutraSweet*, at page 34; *Laidlaw*, at pages 331-332; *D & B*, at page 257; *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) (Comp. Trib.), 1 at page 180 (*Tele-Direct*)). While clearly non-exhaustive, the illustrative list in section 78 provides direction as to the type of conduct that is intended to be captured by paragraph 79(1)(*b*): reasoning by analogy, a non-enumerated anti-competitive act will exhibit the shared essential characteristics of the examples listed in section 78.
>
> [64] In *NutraSweet*, the Tribunal applied this interpretive approach to paragraph 79(1)(*b*), and suggested (at page 34) the following working definition of "anti-competitive act":
> A number of the acts [mentioned in section 78] share common features but . . . only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in paragraph 78(*f*), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. [our emphasis]
>
> [65] I adopt the above definition, which is very close in substance to the core characteristic of the enumerated list of section 78, save at paragraph 78(1)(*f*). This exception was noted by the Tribunal in *NutraSweet*.
>
> [66] Two aspects of this definition should be noted. First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary or disciplinary negative effect on a competitor. I will elaborate on each of these aspects in turn. [our emphasis]
>
> [...]
>
> [68] The second aspect describes the type of purpose required in the context of paragraph 79(1)(*b*): to be considered "anti-competitive" under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor. The paragraph 79(1)(*b*) inquiry is thus focused upon the intended effects of the act on a competitor. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(*b*), if these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(*b*). While, for the Act as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(*b*), "anti-competitive" refers to an act whose purpose is a negative effect on a competitor. [our emphasis]

[14] By bringing a case in which the facts pleaded in the Application fall outside the Canada Pipe Rule, the Commissioner is asking the Tribunal to revisit the Canada Pipe decision. In other words, since TREB admits and the Commissioner and CREA agree that TREB does not compete with its Members, TREB's Restrictions cannot have the negative effect on a competitor required by the Canada Pipe Rule.

[15] The Commissioner challenges Canada Pipe's reliance on section 78 of the Act and for the following two reasons submits that the list of anti-competitive acts in section 78 should not be used to suggest that the Canada Pipe Rule is binding. First, because the list is not exhaustive and second, because the list includes paragraph 78(1)(f) which does not specify that a competitor must be harmed.

[16] It is our view, that section 78 of the Act is a powerful indicator that the Canada Pipe Rule is the correct approach. The section defines the term anti-competitive acts to include nine examples of conduct on the part of a dominant firm and in eight of the examples the harm is expressly described as experienced by a competitor. With regard to paragraph 78(1)(f), although the term "competitor" is not used, it is possible to imagine a dominant firm buying product to prevent the erosion of existing price levels caused by a competitor's lower or sale prices. In other words, paragraph 78(1)(f) is not necessarily inconsistent with the Canada Pipe Rule.

[17] The Tribunal has also concluded that the fact that section 78 uses the word "includes", and therefore does not provide an exhaustive list of anti-competitive acts, does not support the Commissioner's view that section 79 covers abusive conduct by entities other than competitors. Given the strong theme already present in the examples in section 78, we have concluded that it is unreasonable to speculate that the requirement for harm to a competitor would not be present if other anti-competitive acts were to be identified in the future.

[18] The Tribunal agrees with the decision in Canada Pipe and notes that there is no reason to think that its conclusions were restricted to its facts. In our view, given that leave to the Supreme Court of Canada was denied, Canada Pipe serves as a binding precedent.

[19] The Tribunal has also considered the Commissioner's Abuse of Dominance Guidelines of September 20, 2012 (the "Guidelines"). They specifically state that the dominant party must intend to negatively impact a competitor. The relevant passage is found in section 3.2. It reads:

> Section 78 of the act enumerates a non-exhaustive list of acts that are deemed to be anti-competitive in applying section 79. The Federal Court of Appeal has stated that an anti-competitive act is defined by reference to its purpose, and the requisite anti-competitive purpose is an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary. However, the Federal Court of Appeal and Tribunal have acknowledged that paragraph 78(1)(f) is an exception to this standard in that it does not contain a reference to a purpose vis-à-vis a competitor. In any event, while many types of anti-competitive conduct may be intended to harm competitors, the Bureau considers that certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose. [our emphasis]

[20] The Guidelines make it clear that the Commissioner accepts and works on the premise that section 79 applies in cases that meet the Canada Pipe Rule. However, the Guidelines also suggest that the Commissioner is not happy with the decision in Canada Pipe to the extent that it limits anti-competitive acts to those intended to harm a competitor. The Guidelines focus on the victim of the dominant party's conduct and indicate that certain acts not directed at competitors might also have an anti-competitive objective. The interesting point for present purposes is that the Commissioner does not clearly state that the dominant party need not compete in the market. This means, in our view, that this Application not only seeks to extend the reach of section 79 beyond the Canada Pipe Rule, it also seeks to extend it beyond the Guidelines.

[21] Finally, in our view, subsection 79(4) makes it clear that paragraph 79(1)(b) applies only if the dominant firm is a competitor.

[22] Subsection 79(4) states:

79. (1) Where, on application by the Commissioner, the Tribunal finds that	**79.** (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :
(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,	*c)* la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,
(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance. [our emphasis]	(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur. [notre emphase]

[23] For all these reasons the Tribunal has concluded that the Application does not meet the requirements of paragraph 79(1)(b) of the Act. This finding alone is fatal to the Application.

PARAGRAPH 79(1)(a)

[24] In *Canada (Director of Investigation and Research, Competition Act) v NutraSweet Co.* (1990), 32 CPR (3d) 1 (Comp Trib) (appeal and cross-appeals discontinued) the Tribunal held at pages 28 and 32 that "control" means market power. The Commissioner's case is that TREB has market power in the Market because it uses its control of MLS to restrict the display and use of the MLS data on the internet. Without commenting on whether this activity could constitute market power, it is the Tribunal's view that even if market power were established on these facts it would not meet the requirements of paragraph 79(1)(a) because that market power would not be exercised by a firm that competes in the Market.

PARAGRAPH 79(1)(c)

[25] The issue under this paragraph is whether the dominant firm's practice of anti-competitive acts has created, preserved or enhanced its market power. However, since for the reasons given above, there are no anti-competitive acts under paragraph 79(1)(b), the requirements of this paragraph have not been met.

AN OBSERVATION

[26] The Tribunal observes that, although section 79 does not apply, section 90.1 of the Act might give the Commissioner a means to apply to the Tribunal. We realize that the remedies are less extensive under section 90.1 but nevertheless the Commissioner might be able to seek an order prohibiting the members of TREB's Board of Directors (who are competitors) from enforcing the Restrictions. This conclusion is supported by the Commissioner's Competitor Collaboration Guidelines of December 2009 which deal in part with applications under section 90.1. Section 3.3 reads as follows:

> Agreements between members of a trade or industry association may also constitute agreements between competitors for the purpose of section 90.1. The Bureau considers that rules, policies, by-laws or other initiatives that prevent or lessen competition substantially, and that are enacted and enforced by an association with the approval of members who are competitors, constitute agreements between competitors for the purpose of section 90.1.

However, we note that this observation is not intended to suggest whether such an application in this case would succeed on the merits.

CONCLUSION

[27] The Tribunal has concluded that subsection 79(1) does not apply on the facts of this case.

THEREFORE, THE TRIBUNAL ORDERS THAT:

ORDER

[28] The Application is dismissed with costs payable by the Commissioner to TREB in accordance with Column III of Tariff B of the *Federal Court Rules, 1998*, SOR/98-106.

DATED at Ottawa, this 15th day of April, 2013.

SIGNED on behalf of the Tribunal by the panel members.

(s) Sandra J. Simpson

(s) André F. Scott

(s) Henri Lanctôt

2 p.

APPEARANCES:

For the applicant:

The Commissioner of Competition

John F. Rook
Andrew D. Little
Emrys Davis
William J. Miller

For the respondent:

The Toronto Real Estate Board

Donald S. Affleck, Q.C.
David N. Vaillancourt
Fiona Campbell

For the intervenor:

The Canadian Real Estate Association

Sandra A. Forbes
James Dinning

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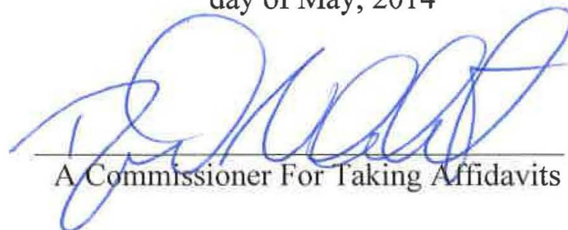
[1] We note that, where the words "Tribunal", "we" or "our" are used and the decision relates to a matter of law alone, that decision was made by the judicial members.

This is **Exhibit "B"** referred to in the
Affidavit of Linda Alexiou
sworn before me, this
23rd day of May, 2014



A Commissioner For Taking Affidavits

Federal Court of Appeal Cour d'appel fédérale

Date: 20140203

Docket: A-174-13

Citation: 2014 FCA 29

CORAM: **SHARLOW J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Appellant

and

THE TORONTO REAL ESTATE BOARD

Respondent

REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The Commissioner of Competition is appealing the decision of the Competition Tribunal that dismissed his application for a remedial order under subsection 79(1) of the *Competition Act*, R.S.C. 1985, c. C-34, against the respondent the Toronto Real Estate Board (2013 Comp. Trib. 9). The application was based on the Commissioner's allegation that a certain rule adopted by the Board is anti-competitive because it substantially lessens competition among realtors in the Greater Toronto Area who are members of the Board. The Tribunal dismissed the application without considering the merits, on the basis that subsection 79(1) cannot apply to the Board because it does not compete with its members. The Tribunal considered itself bound to reach that conclusion because of the decision of this Court in *Canada (Commissioner of Competition) v. Canada Pipe*

Co., 2006 FCA 233, [2007] 2 F.C.R. 3. For the following reasons, I would allow the appeal and refer the Commissioner's application back to the Tribunal for determination on the merits.

Factual allegations

[2] The Board disputes many factual and legal aspects of the Commissioner's application, but the Tribunal did not resolve any those disputes because it dismissed the application solely on a question of law. For that reason I have assumed without deciding, solely for the purpose of this appeal, that the Commissioner's allegations as summarized below are substantially true. Nothing in these reasons is intended to preclude the Commissioner or the Board from alleging any fact or maintaining any argument before the Tribunal in this matter, except the point of statutory interpretation addressed below.

[3] The Board is an incorporated trade association. Its membership consists of more than 35,000 competing realtors, including the vast majority of realtors who operate in the Greater Toronto Area. The Board operates a multiple listing service for the Greater Toronto Area. That service employs a database of active and past residential property listings, including the agreed sale prices of residential properties from past listings (in these reasons referred to as "historical data"). Access to the information on that database, and the ability to communicate that information to clients and potential clients, is valuable to Board members because it enables them to attract and provide services to clients.

[4] Some realtors who are members of the Board conduct their business in the traditional manner, which involves interacting with clients and potential clients in person. Recently some

members have adopted a different model in which their business is conducted online through a virtual office website (VOW). The resulting efficiencies enable those realtors to offer their services at a lower cost to clients.

[5] All members of the Board have access to the Board's multiple listing service database, including the historical data. They are permitted to disclose the historical data to their clients in person, by fax, by mail or by email. However, the Board has adopted a rule prohibiting members from posting historical data on a virtual office website. The effect of that rule is that a member who operates through a virtual office website cannot enable clients to access the historical data online.

[6] The impugned rule is binding on all members. Breach of a rule may have serious consequences for a member. The consequences may include being barred from access to the Board's multiple listing service, or from being a member of the Board.

Statutory framework

[7] Subsection 79(1) of the *Competition Act* reads as follows:

79. (1) Where, on application by the Commissioner, the Tribunal finds that	**79.** (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :
(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,	*a)* une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and	*b)* cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

[8] The term "anti-competitive act" is explained in subsection 78(1) as follows:

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant

78. (1) Pour l'application de l'article 79, « agissement anti-concurrentiel » s'entend notamment des agissements suivants :

a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

b) l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;

c) la péréquation du fret en utilisant

of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

(f) buying up of products to prevent the erosion of existing price levels;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent.

[9] The act of the Board that forms the basis of the Commissioner's application is not mentioned in subsection 78(1). However, it is undisputed that by virtue of the opening words of subsection 78(1), the list comprised by paragraphs 78(1)(*a*) to (*i*) is not intended to be exhaustive.

[10] The Tribunal may make an order under subsection 79(1) only if the conditions in paragraphs 79(1)(*a*), (*b*) and (*c*) are met. Paragraph 79(1)(*a*) requires the Tribunal to determine the relevant market and to determine whether the person who is the target of the subsection 79(1) order substantially controls that market. Then, paragraph 79(1)(*b*) requires the Tribunal to determine whether the impugned act of the target is an anti-competitive act. If it is, then paragraph 79(1)(*c*) requires the Tribunal to determine whether the anti-competitive act has, is having, or is likely to have the effect of preventing or lessening competition substantially in the relevant market.

<u>The Commissioner's case against the Toronto Real Estate Board</u>

[11] At the risk of oversimplifying, and without intending to limit the scope of this case in the event it goes further, I summarize as follows the allegations made by the Commissioner under each of paragraphs 79(1)(*a*), (*b*) and (*c*):

(a) With respect to paragraph 79(1)(*a*), the Board substantially controls the residential real estate services business in the Greater Toronto Area in two ways. First, the Board can and does make rules governing the business conduct of its members. They comprise the vast majority of realtors in that area, and they compete with one another. Second, the Board is the sole supplier to its members of the information on

its multiple listing service database. That information is of significant value to the members in attracting and serving clients.

(b) With respect to paragraph 79(1)(*b*), the Board's rule that prohibits its members from posting historical data online is an anti-competitive act because its purpose is exclusionary. It intentionally limits the permitted use of the Board's database, a valuable resource for members, in a manner that substantially and negatively affects only members who operate through a virtual office website.

(c) With respect to paragraph 79(1)(*c*), the impugned rule has had, is having or is likely to have the effect of preventing or lessening competition substantially between members of the Board.

Standard of review

[12] The Board dismissed the Commissioner's application based solely on its interpretation of the scope of subsection 79(1). As indicated above, the Tribunal held that it is bound by *Canada Pipe* to conclude that the Board can never engage in an anti-competitive act in respect of the market for residential real estate services in the Greater Toronto Area, because the Board is not a competitor in that market. The Commissioner argues in this appeal that the Board's conclusion is based on a misinterpretation of subsection 79(1). That is a question of statutory interpretation for which the standard of review is correctness.

Discussion

[13] The Commissioner takes the position that a person that is not a competitor in a particular market nevertheless may control that market substantially within the meaning of paragraph 79(1)(*a*) by, for example, controlling a significant input to competitors in the market, or by making rules that effectively control the business conduct of those competitors. In my view, the Commissioner's position reflects an interpretation of paragraph 79(1)(*a*) that its words can reasonably bear, given the statutory context.

[14] *Canada Pipe* is a leading authority on the meaning of subsection 79(1). In analyzing in that case what acts might be considered anti-competitive acts within the meaning paragraph 79(1)(*b*) and subsection 78(1), the Court focused on acts that have as their purpose a negative effect <u>on a competitor</u> that is predatory, exclusionary or disciplinary. However, I do not interpret *Canada Pipe* to mean that as a matter of law, a person who does not compete in a particular market can never be found to have committed an anti-competitive act against competitors in that market, or that a subsection 79(1) order can never be made against a person who controls a market otherwise than as a competitor.

[15] The Tribunal in this case concluded the contrary based on the following passages from *Canada Pipe* (the emphasis is in the original *Canada Pipe* report):

> [63] The Act does not provide an express definition of "anti-competitive act". Section 78 provides a list of 11 anti-competitive acts, expressly "without restricting the generality of the term". These examples are thus illustrative only, and indeed the Tribunal has recognized in its previous decisions that conduct not specifically mentioned in section 78 can constitute an anti-competitive act [citations omitted]. While clearly non-exhaustive, the illustrative list in section 78 provides direction as to the type of conduct that is intended to be captured by paragraph 79(1)(*b*): reasoning by analogy, a non-enumerated anti-competitive act

will exhibit the shared essential characteristics of the examples listed in section 78.

[64] In [*Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990) 32 C.P.R. (3d) 1 (Comp. Trib.)], the Tribunal applied this interpretive approach to paragraph 79(1)(*b*), and suggested (at page 34) the following working definition of "anti-competitive act":

> A number of the acts [mentioned in section 78] share common features but ... only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in paragraph 78(*f*), is an intended negative effect on a competitor that is [...] predatory, exclusionary or disciplinary. [Emphasis added.]

[65] I adopt the above definition, which is very close in substance to the core characteristic of the enumerated list of section 78, save at paragraph 78(1)(*f*). This exception was noted by the Tribunal in *NutraSweet.*

[66] Two aspects of this definition should be noted. First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary or disciplinary negative effect on a competitor. I will elaborate on each of these aspects in turn.

...

[68] The second aspect describes the type of purpose required in the context of paragraph 79(1)(*b*): to be considered "anti-competitive" under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor. The paragraph 79(1)(*b*) inquiry is thus focused upon the intended effects of the act on a competitor. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(*b*), if [...] these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(*b*). While, for the Act as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(*b*), "anti-competitive" refers to an act whose purpose is a negative effect on a competitor.

[16] The Tribunal interpreted *Canada Pipe* as authority for the proposition that by necessary implication, an anti-competitive act must be the act of a person who competes in the relevant

market. The Tribunal reasoned from that proposition that because the Board does not compete with its members, none of the statutory conditions for the subsection 79(1) order sought by the Commissioner can be met. The condition in paragraph 79(1)(*b*) cannot be met as there can be no anti-competitive act by the Board against its members, which necessarily means that the condition in paragraph 79(1)(*c*) cannot be met either. By the same reasoning, the condition in paragraph 79(1)(*a*) cannot be met because a person who does not compete in a market cannot exercise market power.

[17] The Tribunal's conclusion is rooted in its interpretation of the passages from *Canada Pipe* quoted above. Specifically, the Court interpreted "competitor" in those passages to mean "competitor of the person who is the target of the Commissioner's application for a subsection 79(1) order". However, I see nothing in the language or context of the *Competition Act* to justify the addition of those qualifying words.

[18] Nor can the addition of those qualifying words be justified by the facts as found in *Canada Pipe*. Given the factual context in which *Canada Pipe* was decided, I do not accept that *Canada Pipe* is intended to preclude the application of subsection 79(1) to the Board in respect of a rule it makes that is binding on its members.

[19] The Court stated in *Canada Pipe* that a common element of the anti-competitive acts listed in subsection 78(1) is that they are acts taken by a person against that person's own competitor. But in the same reasons the Court recognizes, correctly in my view, that paragraph 78(1)(*f*) describes an

act that is not necessarily taken by a person against that person's own competitor. The inconsistency is not explained in *Canada Pipe* or in any other authority to which the Court was referred.

[20] In my view, paragraph 78(1)(*f*) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to the Board in this case. If the Court in *Canada Pipe* intended to narrow the scope of subsection 79(1) as the Tribunal held, then I would be compelled to find that aspect of *Canada Pipe* to be manifestly wrong because it is based on flawed reasoning (specifically, the unexplained inconsistency in the reasons).

[21] The Tribunal in this case found support for its conclusion in certain guidelines of the Competition Bureau. The guidelines indicate at most that the Commissioner's understanding of the scope of subsection 79(1) has changed over time. In my view, they provide no useful guidance to the Court in interpreting that provision.

[22] The Tribunal also found support for its position in subsection 79(4). In my view, there is merit to the submission of the Commissioner that subsection 79(4) says only that for purposes of applying paragraph 79(1)(*c*), the Tribunal is obliged to consider whether the alleged anti-competitive act is the result of superior competitive performance. That consideration may be of critical importance in some cases, and of no importance in others. I see no reason to infer from subsection 79(4) that as a matter of law, a subsection 79(1) order cannot be made against the Board simply because it does not compete with its members.

Conclusion

[23] For these reasons, I conclude that the Tribunal erred in law in its interpretation of *Canada Pipe* and consequently in its interpretation of paragraphs 79(1)(*a*), (*b*) and (*c*). It follows that the Tribunal erred in dismissing the Commissioner's application solely on the basis that subsection 79(1) cannot apply to the Board because it does not compete with its members.

[24] I would allow the appeal with costs, set aside the order of the Tribunal, and refer the Commissioner's application back to the Tribunal for reconsideration on the merits.

"K. Sharlow"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-174-13

(APPEAL FROM AN ORDER OF THE COMPETITION TRIBUNAL DATED APRIL 15, 2013)

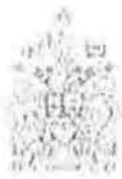
STYLE OF CAUSE:	THE COMMISSIONER OF COMPETITION v. THE TORONTO REAL ESTATE BOARD
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 22, 2014
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	(WEBB, NEAR JJ.A.)
DATED:	FEBRUARY 3, 2014

APPEARANCES:

John F. Rook, Q.C. Andrew D. Little Emrys Davis	FOR THE APPELLANT
Donald S. Affleck, Q.C. David N. Vaillancourt Fiona Campbell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bennett Jones LLP Toronto, Ontario	FOR THE APPELLANT
Affleck Greene McMurtry LLP Toronto, Ontario	FOR THE RESPONDENT

Federal Court of Appeal  Cour d'appel fédérale

Date: 20140203

Docket: A-174-13

Ottawa, Ontario, February 3, 2014

CORAM: SHARLOW J.A.
WEBB J.A.
NEAR J.A.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Appellant

and

THE TORONTO REAL ESTATE BOARD

Respondent

JUDGMENT

The appeal is allowed with costs. The order of the Competition Tribunal is set aside and the application of the Commissioner of Competition is referred back to the Tribunal for reconsideration on the merits.

"K. Sharlow"

J.A.

This is **Exhibit "C"** referred to in the
Affidavit of Linda Alexiou
sworn before me, this
23rd day of May, 2014

A Commissioner For Taking Affidavits

File No. / Dossier no. CT-2011-003

COMPETITION TRIBUNAL

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 residential 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
REALTYSELLERS REAL ESTATE INC.

Intervenors

BEFORE:

The Honourable Madam Justice Simpson **Chairperson**

HELD AT:

Case Management Conference Call
26 February 2014

APPEARANCES

Mr. John F. Rook Mr. Emrys Davis	For the Applicant (Commissioner of Competition)
Mr. Donald S. Affleck Mr. David N. Vaillancourt Ms Fiona Campbell	For the Respondent (Toronto Real Estate Board)
Ms Sandra A. Forbes	For the Intervenor (Canadian Real Estate Association)
Ms Kristin Johansson	Court Reporter (StenoTran Services Inc.)
Mr. Joseph (Jos) LaRose	Court Registrar

1 hear that, as I go along, I'm going to number the discussion
2 points, so that when we reconvene we can talk about things
3 by number just so everyone will know what's being discussed.
4 And to that end, I had asked that we have
5 a reporter on the call, and so there will be a transcript
6 available as well, so that you can feel comfortable with
7 what I say if your notes aren't quite up to scratch.
8 The thing to tell you that I think will
9 come as a surprise, but it is the fact of today, is that
10 none of the Panel Members who initially heard the case are
11 available to work on it further, and this is for a variety
12 of reasons which I'm not going to go into.
13 But the bottom line is that we are
14 thinking that there will need to be a further hearing with a
15 new Panel, chaired by Mr. Justice Rennie.
16 My role at this point and through the
17 summer, if need be, is to be your case management Judge.
18 The Tribunal is thinking that the further
19 hearing will be quite limited and is looking to offer you a
20 week or two in October, and if you could consider the week
21 of October 13th and 20th, and the thinking would be that we
22 wouldn't probably need that whole period, but that is the
23 period that we were going to suggest and that is, of course,
24 subject to further discussion because we haven't consulted
25 you on your availability at all.

4 e.

This is **Exhibit "D"** referred to in the

Affidavit of Linda Alexiou

sworn before me, this

23rd day of May, 2014

A Commissioner For Taking Affidavits

Court File number: ________________

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE TORONTO REAL ESTATE BOARD

Applicant
(Respondent)

and

THE COMMISSIONER OF COMPETITION

Respondent
(Appellant)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
Pursuant to section 40(1) of the *Supreme Court Act* and rule 25 of the *Rules of the Supreme Court of Canada*

TAKE NOTICE that the Applicant, The Toronto Real Estate Board, hereby applies for leave to appeal to the Court pursuant to section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended, and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended, for an Order granting leave to appeal from the Judgment of the Federal Court of Appeal dated February 3, 2014 in File No. A-174-13, or such further or other Order that the Court may deem appropriate.

AND TAKE FURTHER NOTICE that this application for leave is made on the following grounds:

1. Following the February 3, 2014 decision of the Federal Court of Appeal in this case, uncertainty has enshrouded both the reach and meaning of the abuse of dominance provisions of the *Competition Act*, RSC 1985, c C-34. Consequently, the Federal Court of Appeal's reasons have been the subject of considerable commentary and criticism within the competition bar, particularly concerning the state of confusion and lack of guidance now confronting the Canadian business community regarding the abuse of dominance provisions.

2. This case presents the Court with an opportunity to bring certainty and clarity to the abuse of dominance provisions of the *Competition Act*, and to interpret the terms "anti-competitive act" and "control of a market" in the context of an abuse of dominance proceeding. The correct interpretation of these terms raise issues of both public and national importance, as these terms are fundamental elements to any abuse of dominance proceeding.

3. The Applicant's proposed appeal raises two issues of national and/or public importance that warrant granting it leave to appeal:

> **Issue 1:** Given the inconsistent rulings of the Federal Court of Appeal in *Commissioner of Competition v. Canada Pipe Company Ltd*,[1] and in the decision under appeal, 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*?

> **Issue 2:** 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*?

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[1] (2006), [2007] 2 FCR 3.

DATED at Toronto, Ontario, this 24th day of March, 2014.

SIGNED BY:

Donald S. Affleck

David N. Vaillancourt

Fiona F. Campbell
Counsel for the Applicant

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Counsel to the Commissioner of Competition

NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the Supreme Court Act.

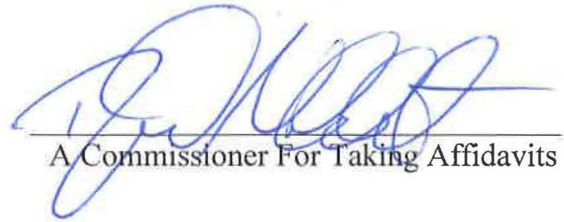
46.

This is **Exhibit "E"** referred to in the

Affidavit of Linda Alexiou

sworn before me, this

23rd day of May, 2014



A Commissioner For Taking Affidavits

COURT FILE NUMBER: ________________

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE TORONTO REAL ESTATE BOARD

Applicant
(Respondent)

and

THE COMMISSIONER OF COMPETITION

Respondent
(Appellant)

MEMORANDUM OF ARGUMENT OF THE APPLICANT
Pursuant to section 40(1) of the *Supreme Court Act* and rule 25 of the *Rules of the Supreme Court of Canada*

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PART I - CONCISE OVERVIEW AND STATEMENT OF FACTS

Overview

1. Following the February 3, 2014 decision of the Federal Court of Appeal in this case (the "Appeal Decision"),[1] uncertainty has enshrouded both the reach and meaning of the abuse of dominance provisions of the *Competition Act* (the *"Act"*).[2]

2. This case presents the Court with an opportunity to bring certainty and clarity to the abuse of dominance provisions of the *Act*, and to interpret the terms "anti-competitive act" and "control of a market" in the context of an abuse of dominance proceeding. The correct interpretation of these terms raise issues of both public and national importance, as these terms are fundamental elements to any abuse of dominance proceeding.

3. The abuse of dominance provisions have now been considered on two occasions by the Federal Court of Appeal ("Court of Appeal"); for the first time in *Commissioner of Competition v. Canada Pipe Company Ltd* ("*Canada Pipe*"),[3] and for the second time in the Appeal Decision. Both decisions called on the Court of Appeal to interpret the meaning of an "anti-competitive act" within the context of paragraph 79(1)(b) of the *Act*.

4. In *Canada Pipe*, the Court of Appeal held that in order to qualify as "anti-competitive," an act had to be targeted at a firm's competitor. The Appeal Decision, on the other hand, held that an act could be "anti-competitive" even if it was not targeted at a firm's competitor.

5. The Court of Appeal's interpretation of "anti-competitive act" in the Appeal Decision is in direct conflict with the Court of Appeal's interpretation of "anti-competitive act" in *Canada Pipe*. If leave is not granted by this Court, the conflict between the Appeal Decision

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[1] Reasons for Judgment of the Federal Court of Appeal dated February 3, 2014 ["Appeal Decision"], Leave Application ("LA") at tab 3.
[2] RSC 1985, c C-34, as amended.
[3] (2006), [2007] 2 FCR 3 (CA); and (2006), [2007] 2 FCR 57 (CA); leave to appeal to the Supreme Court of Canada refused [2006] SCCA No. 366, LA at tabs 6D and 6E.

and *Canada Pipe* will create uncertainty and confusion. As the law stands now, there is no reliable guidance on the definition of "anti-competitive act".

6. On the issue of control of the market within the meaning of paragraph 79(1)(a) of the *Act*, the Appeal Decision fundamentally expands the scope of "control of the market" beyond the existing jurisprudence, thereby changing the nature of the abuse of dominance provisions. It does so in a single paragraph without any analysis whatsoever, and without any consideration of prior abuse of dominance jurisprudence, the legislative history of the section, academic commentary, or policy considerations. At the same time, the Appeal Decision fails to state what the new test is to determine whether a firm controls a market.

7. The *Act* is at the core of the regulation of the Canadian economy, and is central to Canadian public policy in the economic sector.[4] The *Act* provides the rules of the road for competition among firms in Canada. Abuse of dominance is one of the three main pillars of the *Act*, along with merger review and prohibitions on conspiracy.[5]

8. As noted by the Competition Bureau, "[t]he Canadian economy is based on vigorous and fair competition with well-defined rules in place to govern acceptable corporate behaviour."[6] It is crucial for the proper functioning of the economy that there be clear guidance as to the parameters of abuse of dominance. Considering the serious consequences that can accompany a finding of abuse of dominance, fairness dictates that firms know the types of conduct that can attract sanction. This is not the case in the wake of the Appeal Decision. Leave to appeal ought to be granted.

[4] *R v. Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 648, LA at tab 6L.
[5] Competition Bureau, "Abuse of Dominance: a Serious Anti-Competitive Offence," online: Competition Bureau of Canada <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03379.html>, LA at tab 6P.
[6] Competition Bureau, "Abuse of Dominance: a Serious Anti-Competitive Offence," online: Competition Bureau of Canada <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03379.html>, LA at tab 6P.

Background

9. The Toronto Real Estate Board ("TREB") is an incorporated not-for-profit association and is Canada's largest real estate board. TREB's membership consists of real estate brokers and salespeople. TREB's members are primarily concentrated in the Greater Toronto Area.[7]

10. The Commissioner of Competition commenced this proceeding against TREB advancing the theory that TREB had abused its alleged dominant position within the market for residential real estate services in the Greater Toronto Area (the market defined by the Commissioner), even though TREB is not a participant in that market. The Commissioner alleged that TREB used its control of its Multiple Listing Service® ("MLS®") to enforce rules, policies, and agreements which the Commissioner claimed limits the use TREB's members can make of certain MLS® data on the internet. It was alleged by the Commissioner that TREB's alleged practices prevented and lessened competition substantially in the market for residential real estate services in the Greater Toronto Area.[8]

11. While TREB's members offer residential real estate services to both home buyers and home sellers, TREB itself does not. TREB does not compete in the market for residential real estate services in the GTA, and it is not in competition with any of its members.[9]

12. Pursuant to subsection 79(1) of the *Act*, in order to prove his case, the Commissioner was required to prove that (a) TREB substantially or completely controlled the market for residential real estate services in the Greater Toronto Area, (b) TREB had engaged in, or was engaging in a practice of anti-competitive acts, and (c) such practice had had, was likely to have, or was having the effect of preventing or lessening competition substantially in the market.[10]

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[7] Reasons for Order and Order of the Competition Tribunal dated April 15, 2013 ["Tribunal Decision"] at para. 4, LA at tab 2; Reasons for Judgment of the Federal Court of Appeal dated February 3, 2014 ["Appeal Decision"] at para. 3, LA at tab 3.
[8] Tribunal Decision at para. 2, LA at tab 2.
[9] Tribunal Decision at paras. 4, 14, 24, LA at tab 2.
[10] *Competition Act*, RSC 1985, c C-34, as amended, s. 79(1).

The Tribunal's Decision

13. After a 17-day hearing, the Competition Tribunal ("Tribunal") dismissed the Commissioner's application in its entirety by way of reasons released on April 15, 2013. The Tribunal held that because TREB did not compete in the relevant market, the Commissioner was unable to prove any of the elements of the abuse of dominance test found in subsection 79(1) of the *Act*.

14. The Tribunal commenced its analysis with paragraph 79(1)(b) – had TREB committed an anti-competitive act? The Tribunal considered the Court of Appeal's decision in *Canada Pipe*, wherein the Court of Appeal concluded that, for the purposes of paragraph 79(1)(b), the dominant firm must compete with the firm(s) harmed by the dominant firm's practice of anti-competitive acts.[11] The Tribunal applied the *Canada Pipe* decision, holding that since TREB did not compete with its members, the conduct raised in the application could not have the negative effect on a **competitor** that was required based on the test set out in *Canada Pipe*.[12]

15. The Tribunal considered and rejected the Commissioner's argument that the definition of "anti-competitive act" in *Canada Pipe* should be revisited and expanded in light of paragraph 78(1)(f) of the *Act*.

16. Subsection 78(1) of the *Act* defines "anti-competitive act", setting out a non-exhaustive list of such acts.[13] One of the acts defined, at paragraph 78(1)(f), is "buying up products to prevent the erosion of existing price levels."[14] The Commissioner argued that paragraph 78(1)(f) did not expressly state on its face that a competitor must be targeted by the conduct; therefore, the definition of "anti-competitive act" stated in *Canada Pipe* was too narrow.[15] In rejecting this argument, the Tribunal noted that although the term "competitor" is not used, it is possible to imagine a case where a dominant firm would buy up product to

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[11] Tribunal Decision at para. 12, LA at tab 2.
[12] Tribunal Decision at para. 14, LA at tab 2.
[13] Tribunal Decision at para. 17, LA at tab 2.
[14] *Competition Act*, RSC 1985, c C-34, as amended, s. 78(1)(f).
[15] Tribunal Decision at para. 15, LA at tab 2.

prevent the erosion of existing price levels caused by a competitor's lower or sale prices – in other words, 78(1)(f) was not inconsistent with the rule set out in *Canada Pipe*.[16]

17. The Tribunal further held that the concept of "anti-competitive act" being advocated by the Commissioner went even beyond the scope of "anti-competitive act" as described in the Commissioner's Abuse of Dominance Enforcement Guidelines, which only contemplates situations where the dominant firm is a competitor in the relevant market.[17]

18. Finally, the Tribunal observed that paragraph 79(4) of the *Act* required it to consider whether the challenged anti-competitive practice was the result of superior competitive performance, a concept that only makes sense in the context of a respondent being a competitor in the market. Therefore, paragraph 79(4) reinforced for the Tribunal that paragraph 79(1)(b) could only apply where the respondent was a competitor in the market.[18]

19. With respect to paragraph 79(1)(a), the Tribunal noted that control of a market means market power. The Commissioner's case was that TREB had market power in the residential real estate services market because TREB controlled the MLS®. Without commenting on whether the alleged control of the MLS® could give TREB market power in the residential real estate services market, the Tribunal concluded that even if market power were established on the facts, such market power would not meet the requirements of paragraph 79(1)(a) because that market power would not be exercised by a firm that competes in the relevant market.[19]

20. With respect to paragraph 79(1)(c), the Tribunal held that since the existence of an anti-competitive act was a prerequisite for the Commissioner proving a substantial lessening or prevention of competition, the requirements of this paragraph were also not met.[20]

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[16] Tribunal Decision at para. 16, LA at tab 2.
[17] Tribunal Decision at para. 20, LA at tab 2.
[18] Tribunal Decision at paras. 21-23, LA at tab 2.
[19] Tribunal Decision at para. 24, LA at tab 2.
[20] Tribunal Decision at para. 25, LA at tab 2.

The Appeal Decision

21. The Court of Appeal allowed the Commissioner's appeal, and referred the application back to the Tribunal "for reconsideration on the merits."[21]

22. The Court of Appeal noted that the Commissioner took the position that it was possible for a non-competitor in a market to nevertheless control that market substantially within the meaning of paragraph 79(1)(a). Such control could be effected by, for example, controlling a significant input to competitors in the market, or by making rules that effectively control the business conduct of those competitors.[22] The Court of Appeal held that the Commissioner's position "reflects an interpretation of paragraph 79(1)(a) that its words can reasonably bear."[23] In coming to this conclusion, the Court of Appeal did not consider any prior jurisprudence or commentary regarding the scope of paragraph 79(1)(a).

23. With respect to paragraph 79(1)(b) and the existence of an anti-competitive act, the Court of Appeal held that the Tribunal had misapplied *Canada Pipe*. The Court of Appeal held that *Canada Pipe* did not stand for the proposition that an anti-competitive act could only be carried out by a competitor in the relevant market.[24] The Court of Appeal stated that given the factual context in which *Canada Pipe* was decided, *Canada Pipe* was not intended to preclude the application of subsection 79(1) to TREB.[25]

24. The *Canada Pipe* decision held that a common element of the anti-competitive acts listed in subsection 78(1) is that they are acts taken by a person against that person's own competitor.[26] The Appeal Decision panel took the position that such a holding was inconsistent with paragraph 78(1)(f) of the *Act*, and that if the panel in *Canada Pipe* intended

[21] Appeal Decision at para. 24, LA at tab 3.
[22] Appeal Decision at para. 13, LA at tab 3.
[23] Appeal Decision at para. 13, LA at tab 3.
[24] Appeal Decision at para. 18, LA at tab 3.
[25] Appeal Decision at para. 18, LA at tab 3.
[26] Appeal Decision at para. 19, LA at tab 3.

to narrow the definition of "anti-competitive act" in the manner held by the Tribunal, then the court in *Canada Pipe* was "manifestly wrong."[27]

25. The Court of Appeal refused to give any consideration to the Commissioner's Enforcement Guidelines in interpreting the abuse of dominance provisions, holding that those guidelines "provide no useful guidance to the Court in interpreting [subsection 79(1)]."[28] The Court of Appeal also refused to find that subsection 79(4) of the *Act* supported the interpretation that subsection 79(1) only applied to firms that compete in the relevant market.[29]

Reaction to the Appeal Decision

26. The Appeal Decision was the subject of some immediate and considerable criticism within the competition bar. It has been written that:

- The Appeal Decision "leaves the business community in some confusion. It is now far from clear how broad or narrow the abuse of dominance provisions may be."[30]
- If leave to appeal to the Supreme Court of Canada is not granted, or if TREB's appeal is not successful, "the question of the breadth of the abuse of dominance provisions – and their application to wide swaths of activity in the economy – will remain open for some considerable period of time. When the Tribunal decided the *Toronto Real Estate Board* case we offered the view that it provided a level of certainty and predictability in the area. The Federal Court of Appeal's decision meaningfully reduces such predictability."[31]
- "The FCA decision in TREB casts uncertainty over who can be the subject of an abuse of dominance application by the Commissioner. [...] The uncertainty created by this decision is troublesome, particularly in view of the fact that administrative monetary

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[27] Appeal Decision at para. 20, LA at tab 3.
[28] Appeal Decision at para. 21, LA at tab 3.
[29] Appeal Decision at para. 22, LA at tab 3.
[30] James Musgrove and Eric Vallieres (McMillan LLP), "Toronto Real Estate Board Abuse of Dominance Case Overturned on Appeal," McMillan Competition Bulletin February 2014 at 3, LA at tab 6T. See also George Addy *et al* (Davies Ward Phillips & Vineberg LLP), "Canadian Federal Court of Appeal Expands Scope of Competition Act's Abuse of Dominance Provisions," February 4, 2014, LA at tab N.
[31] James Musgrove and Eric Vallieres (McMillan LLP), "Toronto Real Estate Board Abuse of Dominance Case Overturned on Appeal," McMillan Competition Bulletin February 2014 at 5, LA at tab 6T.

penalties (AMP) of up to $10 million are now available in abuse of dominance cases."[32]

- "[T]o the extent that conduct need not be directed at a person's own competitor, the decision opens the bounds of section 79 in ways that may not be consistent with previous jurisprudence."[33]

PART II - CONCISE STATEMENT OF THE QUESTIONS IN ISSUE

27. The Applicant's proposed appeal raises two issues of national and public importance that warrant granting it leave to appeal:

Issue 1: Given the inconsistent rulings of the Court of Appeal in *Canada Pipe* and in the Appeal Decision, what is the appropriate test for identifying a "practice of anti-competitive acts" for the purposes of paragraph 79(1)(b) of the *Act*?

Issue 2: 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 *Act*?

28. The abuse of dominance provisions of the *Competition Act* are central to the regulation of competition in the Canadian economy. The Appeal Decision has created uncertainty with respect to the correct test for determining the existence of an "anticompetitive act," and has radically departed from the legislative purpose and history of the abuse of dominance provisions in its expansive and overly inclusive holding on "control of a market." Clarity is required on these issues of national and public importance, and such clarity can only come from this Court.

[32] Donald Houston, Jonathan Bitran, Michele Siu (McCarthy Tetrault LLP), "Federal Court of Appeal Allows Competition Bureau Appeal in Toronto Real Estate Board Case," February 7, 2014, at 2, LA at tab 6Q.
[33] Blakes Bulletin, "Federal Court of Appeal Not Sold on Realtors' Defence," February 4, 2014, LA at tab 6O.

PART III - CONCISE STATEMENT OF ARGUMENT

ISSUE 1: Given the inconsistent rulings of the Court of Appeal in *Canada Pipe* and in the Appeal Decision, what is the appropriate test for identifying a "practice of anti-competitive acts" for the purposes of paragraph 79(1)(b) of the *Act*?

The Appeal Decision is in conflict with *Canada Pipe*

29. The Court of Appeal has considered the abuse of dominance provisions of the *Act* on two occasions - in *Canada Pipe*, and in the present case. A central issue in both cases was the definition of "anti-competitive act" within the meaning of paragraph 79(1)(b) of the *Act*. The panel in the Appeal Decision held that the panel in *Canada Pipe* was "manifestly wrong" in its interpretation of "anti-competitive act".[34]

30. The *Canada Pipe* panel observed that section 78 of the *Act* defined certain types of anti-competitive acts for the purposes of paragraph 79(1)(b), and held that a non-enumerated anti-competitive act would have to exhibit the shared essential characteristics of the examples listed in paragraph 78.[35] Based on its analysis of the section 78 examples, the panel concluded that in order for an act to be considered "anti-competitive" within the meaning of paragraph 79(1)(b), "an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor. [...] It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(b)."[36] [emphasis added]

31. The Appeal Decision panel disagreed with the analysis of the *Canada Pipe* panel, writing:

> The Court stated in *Canada Pipe* that a common element of the anti-competitive acts listed in subsection 78(1) is that they are acts taken by a person against that person's own competitor. But in the same reasons the Court recognizes, correctly in my view,

[34] Appeal Decision, paras. 19-20, LA at tab 3.
[35] *Commissioner of Competition v. Canada Pipe Company Ltd* (2006), [2007] 2 FCR 3 (CA) at para. 63, LA at tab 6D.
[36] *Commissioner of Competition v. Canada Pipe Company Ltd* (2006), [2007] 2 FCR 3 (CA) at para. 68, LA at tab 6D.

> that paragraph 78(1)(f) describes an act that is not necessarily taken by a person against that person's own competitor. The inconsistency is not explained in Canada Pipe or in any other authority to which the Court was referred.
>
> In my view, paragraph 78(1)(f) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to the Board in this case. If the Court in *Canada Pipe* intended to narrow the scope of subsection 79(1) as the Tribunal held, then I would be compelled to find that aspect of *Canada Pipe* to be manifestly wrong because it is based on flawed reasoning (specifically, the unexplained inconsistency in the reasons).[37] [emphasis added]

32. The above passage from the Appeal Decision is in direct conflict with *Canada Pipe*, and defies economic logic.

33. Paragraph 78(1)(f) of the *Act* defines one example of an anti-competitive act as "buying up products to prevent the erosion of existing price levels."[38] From an economic perspective, paragraph 78(1)(f) only makes sense if it reduces the ability of a competitor to compete, for example, a competitor in a downstream market purchasing an excess of inputs from an upstream supplier in order to artificially inflate the price of that input supplied to its competitor(s). Without an effect on competitors of a dominant firm, there is no incentive for the dominant firm to buy up products to prevent the erosion of existing price levels.

34. In its reasons, the panel in *Canada Pipe* considered the fact that paragraph 78(1)(f) did not expressly mention the word "competitor."[39] Even with the wording of paragraph 78(1)(f) as it is, that panel held that based on the enumerated list of anti-competitive acts in section 78, for the purposes of paragraph 79(1)(b), an anti-competitive act must have a intended predatory, exclusionary or disciplinary negative effect on a competitor.

35. The Appeal Decision couches its criticism of *Canada Pipe* with the qualifier that the criticism only applies "if the Court in *Canada Pipe* intended to narrow the scope of subsection

[37] Appeal Decision paras. 19-20, LA at tab 3.
[38] *Competition Act*, RSC 1985, c C-34, as amended, s. 78(1)(f).
[39] *Commissioner of Competition v. Canada Pipe Company Ltd* (2006), [2007] 2 FCR 3 (CA) at paras. 64-65, 68, LA at tab 6D.

79(1) as the Tribunal held."[40] *Canada Pipe* arrived at its definition of "anti-competitive act" based on its analysis of section 78. The section 78 analysis is foundational to *Canada Pipe*'s statement that an anti-competitive act must be targeted at a firm's competitor. The *Canada Pipe* decision clearly intended to restrict the reach of subsection 79(1) as the Tribunal held.

36. The panel in the Appeal Decision held that the *Canada Pipe* panel came to its conclusion on "anti-competitive act" based on a "manifestly wrong" reasoning process. These two decisions cannot co-exist. The Appeal Decision is in conflict with *Canada Pipe*.

The Appeal Decision will create uncertainty within the Canadian economy

37. The Appeal Decision's holding on paragraph 79(1)(b) will create uncertainty in the Canadian economy for three reasons.

38. First, while the Appeal Decision holds that the *Canada Pipe* test for an "anti-competitive act" is manifestly wrong, it does not provide a new definition of "anti-competitive act" in its place. In other words, the Appeal Decision states what the test for an anti-competitive act *is not*, but it fails to state what the test *is*. There is simply no guidance as to what qualifies as an anti-competitive act.

39. Second, while the Appeal Decision states that the definition of anti-competitive act as set out in *Canada Pipe* is wrong, it does not expressly overrule *Canada Pipe*. These two inconsistent decisions will therefore be binding on the Tribunal in both this case and future cases unless this Court clarifies the law.

40. Third, and related to the second point, the panel in the Appeal Decision created uncertainty in the law by failing to follow the approach outlined in its own decision in *Miller v. Canada* with respect to prior decisions that a later panel deems to be wrongly decided. In *Miller* the Court of Appeal held that one Court of Appeal panel ought not to depart from a decision of another panel of that court merely because it considers the first case was wrongly

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[40] Appeal Decision at para. 20, LA at tab 3.

decided.[41] The *Miller* Court noted that the Supreme Court of Canada will normally be the appropriate forum for correcting the errors of intermediate courts of appeal.[42]

41. The *Miller* Court held that in the interests of certainty and consistency, intermediate courts of appeal should follow their prior decisions unless the previously decision is manifestly wrong, meaning that the prior panel "overlooked a relevant statutory provision, or a case that ought to have been followed."[43]

42. The Appeal Decision states that the reasoning in *Canada Pipe* was "manifestly wrong." However, the Appeal Decision does not raise any new statutory provisions or binding cases in its critique of *Canada Pipe*. There is no support in the Appeal Decision for the position that *Canada Pipe* was "manifestly wrong" as that term has been defined by the Court of Appeal in *Miller*. Rather, the Appeal Decision panel is of the view that *Canada Pipe* was wrongly reasoned. The panel in *Canada Pipe* did consider paragraph 78(1)(f) in coming to its conclusion that an anti-competitive act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor.[44]

43. Two panels of the Court of Appeal have considered identical provisions of the *Act* and reached opposite conclusions as to the import of those provisions. As the Court of Appeal cautioned in *Miller*, such a result creates a situation of uncertainty and inconsistency in the law.

Clarity is required from the Supreme Court of Canada

44. The Tribunal has exclusive original jurisdiction over abuse of dominance proceedings.[45] The Court of Appeal is the sole court with jurisdiction to hear appeals from decisions of the Tribunal.[46] The Court of Appeal is the only intermediate appellate court that will ever interpret paragraph 79(1) of the *Act*, and there are now two inconsistent decisions

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[41] *Miller v. Canada* (2002), 220 DLR (4th) 149 (FCA) at para. 8, LA at tab 6K.
[42] *Miller v. Canada* (2002), 220 DLR (4th) 149 (FCA) at para. 8, LA at tab 6K.
[43] *Miller v. Canada* (2002), 220 DLR (4th) 149 (FCA) at paras. 9-10, LA at tab 6K.
[44] *Commissioner of Competition v. Canada Pipe Company Ltd* (2006), [2007] 2 FCR 3 (CA) at paras. 64-65, LA at tab 6D.
[45] *Competition Act*, RSC 1985, c C-34, as amended, s. 79 (1).
[46] *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), as amended, s. 13.

from that Court as to the definition of "anti-competitive act." The issue is ripe for consideration by this Court, particularly given the limited number of abuse of dominance cases that are litigated through trial, let alone reach the Court of Appeal.[47]

45. On an application alleging abuse of dominance, the Tribunal has broad discretion to fashion a remedy in order to restore competition in the relevant market, including the discretion to make an order against a respondent to "take such actions [...] as are reasonable and necessary to overcome the effects of the practice in that market."[48] The Competition Tribunal also has the jurisdiction to impose an administrative monetary penalty of up to $10 million for a first infraction, and up to $15 million for each subsequent infraction.[49] A finding of abuse of dominance can have significant and severe consequences for a target of such a proceeding.

46. In the face of the Appeal Decision, the Canadian business community and the Tribunal are left with no reliable guidance as to what constitutes an anti-competitive act under the abuse of dominance provisions of the *Act*. The Appeal Decision replaces judicial certainty with judicial confusion.

47. It is a matter of national and public interest that the Court clarify the definition of an "anti-competitive act."

ISSUE 2: 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 *Act*?

The Appeal Decision has radically expanded the abuse of dominance doctrine

48. The Appeal Decision endorses the Commissioner's position that a firm that does not compete in a market may nevertheless control that market by "controlling a significant input

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[47] Prior to the TREB matter, 5 cases before the Tribunal, one of which (*Canada Pipe*) went to the Court of Appeal. Cases enumerated *infra* at notes 52 and 53.
[48] *Competition Act*, RSC 1985, c C-34, as amended, s. 79 (2).
[49] *Competition Act*, RSC 1985, c C-34, as amended, s. 79 (3.1).

to competitors in the market, or by making rules that effectively control the business conduct of those competitors."[50]

49. The pronouncement on control of the market in the Appeal Decision represents a radical expansion of the doctrine of abuse of dominance and a departure from prior jurisprudence.

50. The Tribunal in *Laidlaw* explained that "control of the market" in the context of paragraph 79(1)(a) means determining whether a firm has market power in the economic sense, which means the ability of a firm to earn supra-normal profits by reducing output and charging more than the competitive price for a product.[51] The "market power" approach to control of the market has been applied in every abuse of dominance case before the Tribunal,[52] and also by the Court of Appeal in *Canada Pipe*.[53]

51. The "market power" approach is consistent with the purpose of the abuse of dominance provisions, as explained by the Minister of Consumer and Corporate Affairs at the time of the 1985 amendments to the *Act* that created the abuse of dominance provisions: "[t]he proposed abuse of dominance provision will ensure that dominant firms compete with other firms on merit, not through abuse of their market power."[54]

52. An input supplier does not have market power in the downstream market.[55] To use an example from a prior abuse of dominance proceeding,[56] NutraSweet may have market power in the market for aspartame (it can earn supra-competitive profit by raising the price of aspartame, which is an input into the production of diet soft drinks), but it does not have

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[50] Appeal Decision at para. 13, LA at tab 3.
[51] *Director of Investigation and Research v. Laidlaw Waste Systems* (1992) 40 CPR (3d) 289 (Comp Trib) at 325, LA at tab 6G.
[52] *Director of Investigation & Research v. NutraSweet Co.* (1990), 32 CPR (3d) 1 (Comp Trib) at 28, LA at tab 6H; *Director of Investigation and Research v. Laidlaw Waste Systems* (1992) 40 CPR (3d) 289 (Comp Trib) at 325, LA at tab 6G; *Director of Investigation and Research v. D & B Companies of Canada* (1995), 64 CPR (3d) 216 (Comp Trib) at 254, LA at tab 6F; *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1997), 73 CPR (3d) 1 (Comp. Trib.) at 82-83, LA at tab 6I.
[53] *Commissioner of Competition v. Canada Pipe Co.* (2006), [2007] 2 FCR 57 (CA) at para. 6 (Cross-Appeal) , LA at tab 6E.
[54] Minister of Consumer and Corporate Affairs, Competition Law Amendments – A Guide (December 1985) at 21, LA at tab 6S.
[55] Unless that input supplier also competes in the downstream market – in other words, a vertically integrated company that is involved in more than one stage of the production chain.
[56] *Director of Investigation & Research v. NutraSweet Co.* (1990), 32 CPR (3d) 1 (Comp Trib), LA at tab 6H.

market power in the market for diet soft drinks (it does not set the price of diet soft drinks). Clearly it is the soft drink manufacturers that potentially have market power and control over the diet soft drink market – this market power is not shared with NutraSweet.

53. The problem with equating market power in an input with control in the downstream market is that doing so does not recognize the key distinction between the exercise of market power, and conduct that creates, enhances, or maintains market power. It is only conduct that creates, enhances, or maintains market power that can result in the substantial lessening or prevention of competition required under the third branch of the abuse of dominance test.[57] When a monopolist input supplier charges a higher price to its customers, it is exercising its market power in the upstream market. This mere exercise of market power does not create, maintain, or enhance the supplier's market power in either the upstream market (such a practice does not give it a competitive advantage against its competitors), or in the downstream market (in which it does not compete and has no market power).

54. Applying the Court of Appeal's remarks on control of the market, dominant suppliers/purchasers would not only face abuse of dominance exposure for actions aimed at their own competitors (for example, NutraSweet's actions vis-à-vis its competitors in the aspartame market aimed at creating, enhancing, or maintaining its market power in the aspartame market), but they may also face abuse of dominance exposure for actions aimed at their customers/suppliers in markets in which the supplier does not compete (for example, NutraSweet's actions vis-à-vis its diet soft drink producing customers, namely its ability to exercise its market power in the aspartame market by charging a high price for aspartame to its customers).

55. Based on the law as stated in the Appeal Decision, if NutraSweet charged Coca-Cola more for aspartame than it charged Pepsi-Cola, such differential pricing might create abuse of dominance exposure because such conduct has an effect on competitors in the market for diet

[57] *Canada (Commissioner of Competition) v. CCS Corp.*, [2012] CCTD No. 14., per Chief Justice Crampton (concurring) at paras. 367-368, aff'd 3013 FCA 28, leave to appeal to the Supreme Court of Canada granted July 11, 2013 [2013] SCCA No. 153, LA at tab 6C.

soft drinks. This is not the type of conduct intended to be addressed by the abuse of dominance provisions.

56. The Appeal Decision risks undermining the very purpose of the abuse of dominance sections of the *Act* and is contrary to the intent of Parliament. In acceding to the Commissioner's position, the Appeal Decision has detached the test for control of the market from the concept of market power.

The Appeal Decision is inconsistent with the American position on monopoly/control of the market

57. In the United States, monopoly offences are prosecuted under Section 2 of the *Sherman Act*.[58] The Canadian abuse of dominance provisions are roughly comparable to the concept of monopolization under Section 2 of the *Sherman Act*, although there are some differences between the two regimes.[59]

58. In order to attract monopoly liability under the *Sherman Act*, a defendant has to compete in the relevant market.[60] "Essential to a claim for monopolization or attempted monopolization is a requirement that the defendant be a participant of the relevant market and have a share in it."[61]

59. In *Hackman v. Dickerson Realtors Inc.*, the plaintiff realtor brought an anti-trust suit against several defendants, including the Rockford Area Association of Realtors ("RAAR"), and RAAR's President. The plaintiff raised section 2 monopolization claims against RAAR and its President. The monopolization claims were dismissed by the District Court on a

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[58] 15 USC s. 2.
[59] B McDonald and L Johnston, "Abuse of Dominant Position" (1987) 8 Canadian Competition Policy Record 3 at 60, LA at tab 6R.
[60] *Aquatherm Industries Inc. v. Florida Power & Light Company*, 1998-1 Trade Cas. (CCH) P72,206 (11th Circ) at 82,337 – 82,338, LA at tab 6A; *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc.*, 2004-1 Trade Cas. (CCH) P74,469 (11th Circ.) at 99,613, LA at tab 6M; *Hackman v. Dickerson Realtors Inc.*, 2009-1 Trade Cas. (CCH) P76,669 (N.D. Ill. Dist Ct) at 114,591, LA at tab 6J; *Banxcorp v. Apax Partners*, 2011-1 Trade Cas. (CCH) P77,424 (N.J. Dist Ct) at 120,301, LA at tab 6B.
[61] *Banxcorp v. Apax Partners*, 2011-1 Trade Cas. (CCH) P77,424 (N.J. Dist Ct) at 120,301, LA at tab 6B.

preliminary motion because neither RAAR nor its President competed in the relevant market.[62]

60. The American position is consistent with the abuse of dominance jurisprudence that pre-dates the Appeal Decision, and with the position TREB has taken in these proceedings. The Appeal Decision endorses a concept of anti-trust liability that has been considered and rejected in the United States.

The Appeal Decision's holding on control of the market is under-reasoned and creates uncertainty

61. The expansionary consequences of the Court of Appeal's remarks on control of the market are particularly alarming given the lack of analysis on this issue.

62. The Appeal Decision notes that the Commissioner's position reflects an interpretation of paragraph 79(1)(a) "that its words can reasonably bear, given the statutory context."[63] However, there is no further explanation for this remark. There is no discussion whatsoever of the role of market power, or any consideration of the prior abuse of dominance jurisprudence in the one paragraph of the decision that addresses paragraph 79(1)(a).

63. The Court of Appeal's analysis on control of the market is seriously wanting. The abuse of dominance provisions should not be so dramatically recast in the absence of careful consideration of the jurisprudence, legislative history, academic commentary, and policy considerations.

64. Furthermore, just as it does with "anti-competitive act," the Appeal Decision replaces certainty with uncertainty with respect to control of the market. Is market power still a consideration in a control of the market analysis? If control can be exercised by a firm that does not compete in a market, what type of connection is required between the firm and the market as a prerequisite for control? More generally: what is the test to be applied by the Tribunal to determine whether a firm controls the market? The Appeal Decision has

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[62] *Hackman v. Dickerson Realtors Inc.*, 2009-1 Trade Cas. (CCH) P76,669 (N.D. Ill. Dist Ct) 114,591, LA at tab 6J.
[63] Appeal Decision at para. 13, LA at tab 3.

dramatically expanded the scope of control of the market, but given no practical guidance as to how to apply the concept to this case, or future cases.

65. It is in the national and public interest for the Court to clarify the test for control of the market in abuse of dominance proceedings.

PART IV - SUBMISSIONS WITH RESPECT TO COSTS

66. The Applicant requests its costs of this Application.

PART V - ORDER SOUGHT

67. The Applicant seeks an order granting it leave to appeal the judgment of the Federal Court of Appeal dated February 3, 2014 in Court File No. A-174-13.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of March, 2014.

Donald S. Affleck

David N. Vaillancourt

Fiona F. Campbell

Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

	CASES	
Tab	**Name**	**Cited in paras.**
6A	*Aquatherm Industries Inc. v. Florida Power & Light Company*, 1998-1 Trade Cas. (CCH) P72,206 (11th Circ)	58
6B	*Banxcorp v. Apax Partners*, 2011-1 Trade Cas. (CCH) P77,424 (N.J. Dist Ct)	58
6C	*Canada (Commissioner of Competition) v. CCS Corp.*, [2012] CCTD No. 14	53
6D	*Commissioner of Competition v. Canada Pipe Company Ltd* (2006), [2007] 2 FCR 3 (CA) (Appeal)	3, 30, 34, 42
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6F	*Director of Investigation and Research v. D & B Companies of Canada* (1995), 64 CPR (3d) 289 (Comp Trib)	50
6G	*Director of Investigation and Research v. Laidlaw Waste Systems* (1992) 40 CPR (3d) 289 (Comp Trib)	50
6H	*Director of Investigation & Research v. NutraSweet Co.* (1990), 32 CPR (3d) 1 (Comp Trib)	50, 52
6I	*Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1997), 73 CPR (3d) 1 (Comp. Trib.)	50
6J	*Hackman v. Dickerson Realtors Inc.*, 2009-1 Trade Cas. (CCH) P76,669 (N.D. Ill. Dist Ct)	58, 59
6K	*Miller v. Canada* (2002), 220 DLR (4th) 149 (FCA)	40, 41, 42, 43
6L	*R v. Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606	7
6M	*Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc.*, 2004-1 Trade Cas. (CCH) P74,469 (11th Circ.)	58

70.

	SECONDARY SOURCES	
Tab	**Name**	**Cited in paras.**
6N	George Addy *et al* (Davies Ward Phillips & Vineberg LLP), "Canadian Federal Court of Appeal Expands Scope of Competition Act's Abuse of Dominance Provisions," February 4, 2014	26
6O	Blakes Bulletin, "Federal Court of Appeal Not Sold on Realtors' Defence," February 4, 2014	26
6P	Competition Bureau, "Abuse of Dominance: a Serious Anti-Competitive Offence," online: Competition Bureau of Canada <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03379.html>	7, 8
6Q	Donald Houston, Jonathan Bitran, Michele Siu (McCarthy Tetrault LLP), "Federal Court of Appeal Allows Competition Bureau Appeal in Toronto Real Estate Board Case," February 7, 2014	26
6R	B McDonald and L Johnston, "Abuse of Dominant Position" (1987) 8 Canadian Competition Policy Record 3	57
6S	Minister of Consumer and Corporate Affairs, Competition Law Amendments – A Guide (December 1985)	51
6T	James Musgrove and Eric Vallieres (McMillan LLP), "Toronto Real Estate Board Abuse of Dominance Case Overturned on Appeal," McMillan Competition Bulletin February 2014	26

PART VII – STATUTES

Competition Act (R.S., 1985, c. C-34)

Abuse of Dominant Position

Definition of "anti-competitive act"

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(*a*) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(*b*) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(*c*) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(*d*) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(*e*) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(*f*) buying up of products to prevent the erosion of existing price levels;

(*g*) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(*h*) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

(*i*) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

(*j*) and (*k*) [Repealed, 2009, c. 2, s. 427]

Loi sur la Concurrence (L.R., 1985, ch. C-34)

Abus de position dominante

Définition de « agissement anti-concurrentiel »

78. (1) Pour l'application de l'article 79, « agissement anti-concurrentiel » s'entend notamment des agissements suivants :

a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

b) l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;

c) la péréquation du fret en utilisant comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent.

j) et *k*) [Abrogés, 2009, ch. 2, art. 427]

72.

Prohibition where abuse of dominant position

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Ordonnance d'interdiction dans les cas d'abus de position dominante

79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Ordonnance supplémentaire ou substitutive

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'en-

Administrative monetary penalty

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

Sanction administrative pécuniaire

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, de 15 000 000 $.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

(*a*) the effect on competition in the relevant market;

(*b*) the gross revenue from sales affected by the practice;

(*c*) any actual or anticipated profits affected by the practice;

(*d*) the financial position of the person against whom the order is made;

(*e*) the history of compliance with this Act by the person against whom the order is made; and

(*f*) any other relevant factor.

Facteurs à prendre en compte

(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :

a) l'effet sur la concurrence dans le marché pertinent;

b) le revenu brut provenant des ventes sur lesquelles la pratique a eu une incidence;

c) les bénéfices réels ou prévus sur lesquels la pratique a eu une incidence;

d) la situation financière de la personne visée par l'ordonnance;

e) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

f) tout autre élément pertinent.

Superior competitive performance

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Efficience économique supérieure

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

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

APPEAL

Appeal

13. (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court.

Questions of fact

(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

R.S., 1985, c. 19 (2nd Supp.), s. 13; 2002, c. 8, s. 130.

Loi sur le Tribunal de la concurrence (S.R.C., 1985, ch. 19 (2e suppl.))

APPEL

Appel

13. (1) Sous réserve du paragraphe (2), les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale.

Questions de fait

(2) Un appel sur une question de fait n'a lieu qu'avec l'autorisation de la Cour d'appel fédérale.

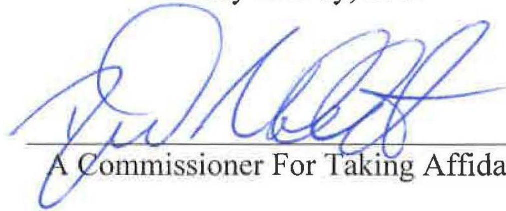
L.R. (1985), ch. 19 (2e suppl.), art. 13; 2002, ch. 8, art. 130.

Sherman Act, 15 U.S.C.

§ **2**Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

This is **Exhibit "F"** referred to in the
Affidavit of Linda Alexiou
sworn before me, this
23rd day of May, 2014



A Commissioner For Taking Affidavits

77.

Supreme Court of Canada Cour suprême du Canada

Supreme Court of Canada

Docket

35799

Toronto Real Estate Board v. Commissioner of Competition

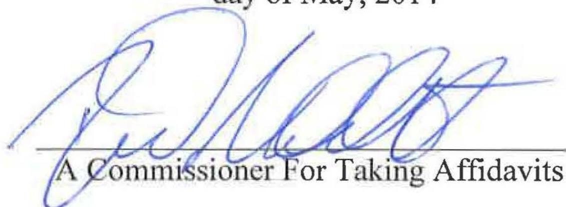
(Federal Court) (Civil) (By Leave)

Proceedings

Date	Proceeding	Filed By (if applicable)
2014-05-05	Applicant's reply to respondent's argument, (Book Form), Completed on: 2014-05-05, (Electronic version filed on 2014-05-12)	Toronto Real Estate Board
2014-04-28	Certificate (on limitations to public access)	Commissioner of Competition
2014-04-28	Respondent's response on the application for leave to appeal, (Book Form), Completed on: 2014-04-28	Commissioner of Competition
2014-04-01	Letter acknowledging receipt of a complete application for leave to appeal	
2014-03-31	Notice of name	Toronto Real Estate Board
2014-03-31	Certificate (on limitations to public access)	Toronto Real Estate Board
2014-03-31	Application for leave to appeal, (Book Form), Completed on: 2014-03-31	Toronto Real Estate Board

Date modified: 2012-12-03

This is **Exhibit "G"** referred to in the
Affidavit of Linda Alexiou
sworn before me, this
23rd day of May, 2014



A Commissioner For Taking Affidavits

Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. The Toronto Real Estate Board,* 2014 Comp. Trib. 3
File No.: CT-2011-003
Registry Document No.: 248

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.

BETWEEN:

The Commissioner of Competition
(applicant)

and

The Toronto Real Estate Board
(respondent)

and

The Canadian Real Estate Association
(intervenor)

Date of case management conference: 20140401
Presiding Judicial Member: Simpson J.
Date of Order: April 7, 2014
Order signed by: Madam Justice S. Simpson

SCHEDULING ORDER

[1] **UPON** meeting with counsel for the Commissioner of Competition, the Toronto Real Estate Board and the Canadian Real Estate Association;

[2] **AND UPON** being advised that all counsel are available for a hearing on the dates set out below for the reconsideration of the Commissioner's application filed on May 27, 2011;

THE TRIBUNAL ORDERS THAT:

[3] The hearing will commence at 9:30 am on Tuesday, October 14, 2014, in the Competition Tribunal hearing room at 600-90 Sparks Street, Ottawa, Ontario.

[4] The hearing will continue on business days until Friday, October 24, 2014.

DATED at Ottawa, this 7th day of April, 2014.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

The Commissioner of Competition

John Rook
Emrys Davis

For the respondent:

The Toronto Real Estate Board

Donald Affleck, Q.C.
David Vaillancourt
Fiona Campbell

For the intervenor:

The Canadian Real Estate Association

Sandra A. Forbes
Jim Dinning

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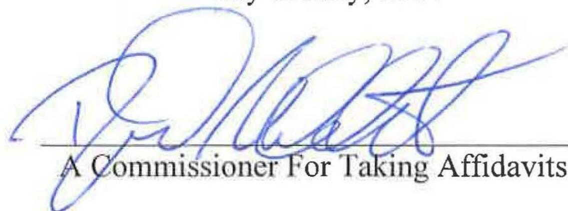
This is **Exhibit "H"** referred to in the

Affidavit of Linda Alexiou

sworn before me, this

23rd day of May, 2014



A Commissioner For Taking Affidavits

Competition Tribunal **Tribunal de la Concurrence**

Reference: *The Commissioner of Competition v. The Toronto Real Estate Board,* 2014 Comp. Trib. 4
File No.: CT-2011-003
Registry Document No.: 255

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)

Date of case management conference: 20140401
Presiding Judicial Member: Simpson J.
Date of Order: April 23, 2014
Order signed by: Madam Justice S. Simpson

CONSENT ORDER REGARDING PROCEDURES ASSOCIATED WITH THE RECONSIDERATION HEARING TO COMMENCE ON OCTOBER 14, 2014

[1] **UPON** meeting with counsel for the Commissioner of Competition, the Toronto Real Estate Board ("TREB") and the Canadian Real Estate Association ("CREA"), in Toronto on April 1, 2014 (the "Meeting"), to discuss the proposals contained in the transcript of a teleconference of February 26, 2014 (the "Proposals");

[2] **AND UPON** receiving a letter filed by counsel for the Commissioner of Competition dated March 31, 2014;

[3] **AND UPON** hearing the submissions of all counsel about the Proposals in the Meeting;

[4] **AND UPON** noting that the Proposals deal with the pre-hearing and hearing procedures which are to apply to the Tribunal's reconsideration of the Commissioner's application filed on May 27, 2011;

[5] **AND UPON** the Tribunal circulating a draft order dated April 9, 2014, for comment (the "Draft"). The Draft was prepared in response to the discussion at the Meeting;

[6] **AND UPON** receiving a letter filed by counsel for the Commissioner of Competition, dated April 17, 2014, commenting on the Draft and advising the Tribunal that the Commissioner of Competition, TREB and CREA will consent to the Draft with certain changes;

[7] **AND UPON** the Tribunal accepting the suggested changes and incorporating them in this Order;

[8] **AND UPON** noting that the Tribunal's hearing held from September 10, 2012, to October 18, 2012 will be described as the "Initial Hearing" and the hearing commencing on October 14, 2014, to conduct the reconsideration will be referred to as the "Further Hearing";

THE TRIBUNAL ORDERS THAT:

[9] All witness statements, expert reports, exhibits, transcripts, and opening and closing submissions from the Initial Hearing will form part of the record of the Further Hearing.

[10] Unless counsel for the Commissioner, TREB, and CREA agree that an updated witness statement from a particular witness is unnecessary, counsel are to use their best efforts to provide updated witness statements from all witnesses who testified at the Initial Hearing (the "Updated Evidence"). It is to be confined to relevant facts and events which occurred after each witness testified at the Initial Hearing.

[11] If a witness refuses to provide Updated Evidence, despite counsel using their best efforts pursuant to paragraph 10, the opposite party or CREA may request that the Tribunal issue a subpoena to compel the witness to attend and be examined on matters which could be the subject of Updated Evidence pursuant to paragraph 10.

[12] All witnesses may be cross-examined without leave on their Updated Evidence and any other matters that have arisen since the Initial Hearing. However, leave of the panel members at

the Further Hearing will be required if counsel wish to cross-examine on evidence given at the Initial Hearing.

[13] Evidence from witnesses who did not testify at the Initial Hearing ("New Evidence") may only be adduced with leave of Simpson J.

[14] Opening statements may refer to evidence given at the Initial Hearing and expected to be given at the Further Hearing. Closing statements may refer to evidence given at both the Initial and Further Hearings.

[15] The pleadings will not be amended.

[16] The economic theory of the case will not change.

[17] TREB's Notice of a constitutional question will not be accepted.

[18] The prehearing schedule is as follows:

Friday July 11, 2014	The Commissioner is to move to file any New Evidence he seeks to adduce. The motion material will include a statement of the New Evidence.
Tuesday July 15, 2014	TREB and CREA may respond to the motion.
Thursday July 17, 2014	The motion will be heard (likely by teleconference).
Friday August 1, 2014	The Commissioner shall file his Updated Evidence and any New Evidence for which leave was given.
Friday August 15, 2014	TREB and CREA are to move to file any New Evidence they seek to adduce. The motion material will include a statement of the New Evidence.
Tuesday August 19, 2014	The Commissioner may respond to the motion.
Thursday August 21, 2014	The motion will be heard (likely by teleconference).
Friday September 5, 2014	TREB shall file its Updated Evidence and any New Evidence for which leave was given.
Friday September 19, 2014	CREA shall file its Updated Evidence and any New Evidence for which leave was given.
Friday October 3, 2014	Commissioner is to serve and file any evidence in reply to any Updated Evidence or New Evidence filed by TREB and CREA.

Tuesday October 14, 2014 Hearing begins.

[19] Once all the evidence has been filed, the Tribunal may revisit the need for a chess clock proceeding.

DATED at Ottawa, this 23rd day of April, 2014.

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

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

The Commissioner of Competition

John Rook
Emrys Davis

For the respondent:

The Toronto Real Estate Board

Donald Affleck, Q.C.
David Vaillancourt
Fiona Campbell

For the intervenor:

The Canadian Real Estate Association

Sandra A. Forbes
Jim Dinning

CT-2011-003

COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION
Applicant

- and -

THE TORONTO REAL ESTATE BOARD
Respondent

- and –

THE CANADIAN REAL ESTATE ASSOCIATION AND REALTYSELERS REAL ESTATE INC.
Intervenors

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- and -

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MOTION RECORD OF THE TORONTO REAL ESTATE BOARD

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