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:

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|---|---|
| 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]
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> [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*.
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> [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]
>
> [ … ]
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> [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:

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|---|---|
| **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

**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.