



Reference: *The Commissioner of Competition v. The Toronto Real Estate Board*, 2012 Comp. Trib. 19

File No.: CT-2011-003

Registry Document No.: 218

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)



Decided on the basis of the written record.

Before Judicial Member: Simpson J.

Date of Order: August 30, 2012

Order signed by: Justice Sandra J. Simpson

CONFIDENTIALITY ORDER

[1] **FURTHER TO** the application filed by the Commissioner of Competition (the "Commissioner") against the respondent, The Toronto Real Estate Board ("TREB"), for an order pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act");

[2] **AND FURTHER TO** the draft confidentiality order filed on behalf of the Commissioner, TREB and the intervenors.

THE TRIBUNAL ORDERS THAT:

[3] For purposes of this Order,

- (a) **"Document"** means any document whatsoever, whether in physical or electronic form, including the things defined as "records" in subsection 2(1) of the Act;
- (b) **"Document Review Vendor"** means a professional service provider that facilitates the review of documents, both digital and paper, by legal professionals;
- (c) **"Expert"** means an individual retained by a Party or an Intervenor to provide expert assistance in relation to this Proceeding who (i) is not a current employee of a Party or an Intervenor, and (ii) has not been an employee of a Party or Intervenor within two (2) years prior to the date of this Order;
- (d) **"Intervenors"** means The Canadian Real Estate Association and Realtysellers Real Estate Inc. and **"Intervenor"** has a corresponding meaning;
- (e) **"Parties"** means the Commissioner and TREB, and **"Party"** has a corresponding meaning;
- (f) **"Proceeding"** means the section 79 application commenced by the Commissioner against TREB on May 27, 2011 and any motions, applications or appeals related thereto;
- (g) **"Protected Document"** means a Document in the Proceeding, including a document listed in affidavits of documents, excerpts from transcripts of an examination for discovery, answers to undertakings, documents produced with answers to undertakings, expert reports, pleadings, affidavits, submissions, and lay witness statements, in respect of which a Party or Intervenor has provided notice under section 5 that has not been withdrawn in writing, or that the Tribunal has determined is confidential. Every Protected Document shall be designated as **Level A** or **Level B** as set out in paragraph 6 hereof; and

(h) **"Tribunal"** means the Competition Tribunal and, where necessary, its staff.

[4] This Order shall apply to all persons, to the extent that they acquire access to Protected Documents through the steps in this Proceeding, provided that information that is acquired independently of this Proceeding and information that is or becomes available in the public domain (other than inadvertently or through any breach of this Order) shall not be considered a Protected Document under this Order.

[5] Protected Documents shall be identified and addressed in the following manner for the purpose of this Proceeding:

- (a) A Party or Intervenor that claims confidentiality, or recognizes or seeks to protect a claim of confidentiality, over a Document shall provide counsel for the Parties and Intervenors with written notice identifying that Document as a Protected Document, and shall designate the Protected Document as Level A or Level B, as set out in paragraph 6 hereof;
- (b) A Party or Intervenor may comply with section 5(a) by providing notice:
 - (i) with its Affidavit of Documents in respect of its Documents listed in the Affidavit of Documents,
 - (ii) with its list(s) of documents to be relied on at the hearing in this Proceeding (a "List") in respect of its documents contained in its List(s), or
 - (iii) as soon as practicable after receipt of a List from another Party or Intervenor or a list of Documents proposed to be provided to Realtysellers pursuant to the Tribunal's Reasons and Order dated November 2, 2011;
- (c) If a Party or Intervenor seeks to disclose a Document of another Party or Intervenor that has not been designated as confidential in an Affidavit of Documents or a List, or in response to a List, that other Party or Intervenor shall have a reasonable opportunity to make a claim for confidentiality in respect of that Document before the Document is disclosed to anyone other than those persons described in paragraph 6, "Level A", below. Such claims for confidentiality shall be made promptly after notice of such disclosure is made.

- (d) The requirements in paragraph 5(c) apply to the disclosure of Documents in this Proceeding, including to Realtysellers pursuant to the Tribunal's Reasons and Order dated November 2, 2011, to a witness or potential witness in this Proceeding and to the public, subject to any future direction or order of the Tribunal regarding the process to be followed during the hearing in this Proceeding;
- (e) All Documents designated as Protected Documents shall be treated as a Protected Document according to its designation as Level A or Level B, until any further determination by the Tribunal.

[6] Subject to a further Order of the Tribunal, the consent of the Parties or as required by law, and subject to section 14 below, copies of Protected Documents may only be produced as follows:

- Level A - Protected Documents designated as Level A may be produced to (i) external counsel for the Parties and the Intervenors and their respective staff; (ii) Experts retained by the Parties or an Intervenor, and their staff, who have executed Confidentiality Undertakings in substantially the same form as attached hereto as Schedule "A"; (iii) the Commissioner and the Commissioner's staff, including legal counsel; (iv) third party document review vendors who have agreed to keep Documents confidential in substantially the same manner as the Confidentiality Undertaking attached hereto; and (v) the Tribunal.
- Level B - Protected Documents designated as Level B may be produced to (i) external counsel for the Parties and the Intervenors and their staff; (ii) Experts retained by the Parties or an Intervenor, and their staff, who have executed Confidentiality Undertakings in substantially the same form as attached hereto as Schedule "A"; (iii) the Commissioner and the Commissioner's staff, including legal counsel; (iv) the representatives of TREB and an Intervenor designated under section 7 who have executed Confidentiality Undertakings in the form of Schedule "A" hereto; (v) third party document review vendors who have agreed to keep Documents confidential in substantially the

same manner as the Confidentiality Undertaking attached hereto; and (vi) the Tribunal.

[7] TREB may designate up to five (5) individuals and an Intervenor may designate up to three (3) individuals, both inclusive of in-house legal counsel and administrative personnel, as their representative(s) who will be permitted access to Level B Protected Documents in accordance with the terms of this Order. Such designation shall be made by written notice to the Tribunal, with copies sent to counsel for the Parties and Intervenors. The Commissioner, TREB or an Intervenor may make a motion to the Tribunal objecting to such designation. Nothing in this paragraph shall, however, give any Intervenor the right to receive copies of any Protected Documents that it is not otherwise entitled to receive.

[8] A Party or an Intervenor may, at any time and with prior reasonable notice to the other Party and Intervenors, change the confidentiality designations of any of its Protected Documents or re-designate any of its Documents as confidential or non-confidential. Protected Documents redesignated as non-confidential shall cease to be confidential and shall form part of the public record if introduced into evidence at the hearing of this application, unless the Parties and Intervenors agree otherwise or the Tribunal orders otherwise. If a Party changes the designation of a Document to confidential, a prior disclosure of it shall not constitute a breach of this Order.

[9] The Parties and the Intervenors shall use best efforts to resolve any issues that may arise between them concerning a claim of confidentiality or appropriate level of confidentiality for a Protected Document. In the event of a disagreement regarding the confidentiality or appropriate confidentiality designation for any Document, the Document in issue shall be treated as though it were correctly designated under section 5 by the Party or Intervenor, pending the resolution of that disagreement. If agreement cannot be reached, then any of the Parties and Intervenors may apply to the Tribunal to determine the confidentiality or appropriate level of confidentiality of any Document.

[10] No Protected Document shall be disclosed, except with the prior written consent of the Party or Intervenor that claimed confidentiality over the Protected Document or in accordance with this Order or any further order of the Tribunal. The confidentiality of Protected Documents shall be maintained up to and throughout the hearing in this Proceeding and thereafter, as required by this Order. Protected Documents shall not form part of the public record in the Proceeding unless the Parties (or, in respect of Intervenors' Protected Documents, the Parties and that Intervenor) agree otherwise or the Tribunal orders otherwise after hearing submissions of the Parties (or, if applicable, the Parties and the Intervenor). If a Party or Intervenor incorporates information from a Protected Document into another Document that is introduced into evidence at the hearing in this Proceeding, the Document shall be redacted before being placed on the

public record or treated as a Protected Document having the same level of confidentiality as the Protected Document from which the information came.

[11] If a Party, an Intervenor or an individual who has signed an Undertaking under this Order is required by law to disclose or deliver up a Protected Document to a person not authorized by this Order to receive it, or if a Party receives written notice from a person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law or may be compelled to disclose or deliver up a Protected Document to a person not authorized by this Order to receive it, that Party, Intervenor or individual who has signed an Undertaking under this Order shall give prompt written notice to the Party or Intervenor that delivered a notice under section 5 above so that a protective Order or other appropriate remedy may be sought.

[12] Experts and designated representatives shall not disclose or deliver Protected Documents directly or indirectly to any other person, except for persons permitted to receive such Protected Documents by this Order or other Order of the Tribunal.

[13] Counsel for TREB and their staff, counsel for the Intervenors and their respective staff, and the Commissioner, her counsel and their respective staffs may make copies of the Protected Documents as they require in connection with the Proceeding.

[14] Nothing in this Order prevents a Party or Intervenor from having full access to and use of Protected Documents that originated from, or were designated under section 5 by, that Party or Intervenor, or from otherwise disclosing them voluntarily during or after this Proceeding. Notwithstanding any provision of this Order, the Commissioner may disclose the Protected Documents designated by the Commissioner under section 5 to any person for the purpose of preparing for the hearing of this application, subject to the limits prescribed in section 29 of the Act.

[15] Each of the Parties and Intervenors shall provide the Tribunal with redacted versions of the Protected Documents that each of them has respectively designated as confidential under paragraph 5 above, at the time of filing the Protected Document or as soon as practicable thereafter.

[16] At the hearing of the Proceeding:

- (a) Protected Documents referred to at the hearing of the Proceeding shall be identified as such and clearly marked as such, including their designation as Level A or Level B; and

- (b) Protected Documents, including information contained in those Documents and references to such information during testimony made *in-camera*, shall not form part of the public record, subject to the consent of the Parties or further Order of the Tribunal.

[17] Subject to section 20, this Order applies to all Documents that have already been disclosed and produced in the Proceeding. This Order shall not apply to a Party's or Intervenor's use or disclosure of any copies, whether in paper or electronic format, of any Protected Documents that came into the possession of that Party or Intervenor (or their outside counsel) independent of or prior to the discovery procedure in this Proceeding.

[18] Upon completion or final disposition of the Proceeding and any appeals, all Protected Documents and any copies of Protected Documents, with the exception of Protected Documents in the possession of the Commissioner and her staff, shall be destroyed or returned to the Party or Intervenor that produced them unless the Party or Intervenor that produced the Protected Documents states, in writing, that they may be disposed of in some other manner, provided that counsel may keep one set of Protected Documents in their files.

[19] The termination of this Proceeding shall not relieve any person to whom Protected Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Documents in accordance with the provisions of this Order, subject to any further order of the Tribunal.

[20] This Order shall not affect the Order of the Tribunal made on consent of the Parties dated March 20, 2012 in relation to the production of certain data and its use in this proceeding.

[21] For greater certainty, all persons who obtain access to Documents, including Protected Documents, through the discovery process in this Proceeding are subject to the deemed undertaking in Rule 62 of the *Competition Tribunal Rules* not to use the Documents and information for any purposes other than the purposes of this Proceeding.

[22] Documents over which no confidentiality claim has been asserted in accordance with this Order shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record if introduced into evidence at the hearing in this Proceeding or otherwise placed on the record.

[23] This Order does not determine the admissibility of any Document as evidence at the hearing. For greater certainty, this Order is without prejudice to any rights the Parties or the Intervenor may have to object to the filing or production of Documents at the hearing.

[24] This Order shall be subject to further direction of the Tribunal and may be varied by Order of the Tribunal.

DATED at Ottawa this 30th day of August, 2012.

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

(s) Sandra J. Simpson

SCHEDULE "A"

Confidentiality Undertaking

IN CONSIDERATION of being provided with documentation in connection with the application in *Commissioner of Competition v. The Toronto Real Estate Board*, Competition Tribunal File No. CT-2011-003, prior to the issuance of a Confidentiality Order by the Tribunal or a further agreement between the parties to that proceeding relating to confidentiality (the "Confidential Information"), I, _____, of the City of _____, in the _____ of _____, hereby agree to maintain the confidentiality of the Confidential Information so obtained until such a Confidentiality Order or further agreement is reached that may supersede or amend this Undertaking.

I will not copy or disclose the Confidential Information so obtained to any other person, except, as applicable, (a) my staff who are directly involved in this matter who have signed an Undertaking in substantially the same form as this one; (b) counsel for the Party on whose behalf I have been retained, members of counsel's firm who are directly involved in this application and, in the case of the Commissioner, the Commissioner's staff directly involved in the application; (c) other experts retained by or on behalf of the Party on whose behalf I have been retained and who have signed a similar confidentiality Undertaking; and (d) persons permitted by order of the Competition Tribunal. Nor will I use the Confidential Information so obtained for any purpose other than in connection with this application and any related proceedings.

Upon completion of this application and any related proceedings, I agree that the Confidential Information, and any copies of same, shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by order of the Competition Tribunal. I acknowledge and agree that the completion of this application and any related proceedings shall not relieve me of the obligation of maintaining the confidentiality of the Confidential Information in accordance with the provisions of this Undertaking, subject to any further order of the Tribunal.

I acknowledge that I am aware of the Confidentiality Order granted by the Competition Tribunal in this matter and agree to be bound by same. I further acknowledge and agree that any Party

shall be entitled to injunctive relief to prevent breaches of this Undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.

In the event that I am required by law to disclose any of the Confidential Information, I will provide counsel for the Party on whose behalf I have been retained with prompt written notice so that the Party that claimed confidentiality over such Confidential Information may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Confidential Information that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to the Confidential Information.

I will promptly, upon the request of the person providing the Confidential Information, advise where such material is kept. At the conclusion of my involvement, I will, upon the request and direction of the person providing the Confidential Information, destroy, return or otherwise dispose of all Confidential Information received or made by me having been duly authorized and directed to do so.

I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this Undertaking.

DATED this _____ day of _____, 2012.

SIGNED, SEALED & DELIVERED

in the presence of:

Witness

COUNSEL:

For the applicant:

The Commissioner of Competition

John Rook
Andrew D. Little
Emrys Davis

For the respondent:

The Toronto Real Estate Board

Donald Affleck Q.C.
Fiona Campbell

For the intervenors:

Realtysellers Real Estate Inc.

Chris Hersh

The Canadian Real Estate Association

Sandra A. Forbes