

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. The Canadian Real Estate Association*, 2010
Comp. Trib. 12
File No.: CT-2010-002
Registry Document No.: 0063

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, regulations and policies of the Canadian Real Estate
Association.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

The Canadian Real Estate Association
(respondent)

and

National FSBO Network Inc.
(applicant for leave to intervene)

Date of hearing: 20100630
Before Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: July 8, 2010
Reasons and Order signed by: Madam Justice S. J. Simpson



**REASONS AND ORDER ALLOWING NATIONAL FSBO NETWORK INC.'S MOTION
FOR LEAVE TO INTERVENE**

[1] The National FSBO Network Inc. (the “NFN”) is moving for leave to intervene in these proceedings commenced by the Commissioner of Competition (the “Commissioner”) against the Canadian Real Estate Association (“CREA”) pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”).

I. BACKGROUND

[2] In her application filed on February 8, 2010, the Commissioner alleges that CREA is abusing its dominant position in the market for residential real estate brokerage services. CREA owns the Multiple Listing Service (“MLS”), which provides CREA’s members with a comprehensive computerized listing of homes for sale across Canada. CREA also owns the MLS & Design trademarks (together the “MLS and Related Trademarks”).

[3] The Commissioner further asserts that CREA imposes exclusionary restrictions on the use of the MLS and Related Trademarks when it licences the trademarks to its member real estate boards. These restrictions, according to the Commissioner, lessen or prevent competition substantially by excluding competition from brokers and others wishing to offer a reduced set of services to their customers including “mere postings” or “MLS-only listing” services. The Commissioner seeks an order from the Tribunal prohibiting CREA from directly or indirectly imposing such restrictions.

[4] CREA denies the Commissioner’s allegations. It asserts, *inter alia*, that its rules allow for a range of options for residential real estate brokerage services, including the ability to contract for minimal service offerings, discounted commission rates and fee-for-service products.

[5] The NFN, the applicant for intervenor status, is offering an “MLS” type of service for “for sale by owner” businesses across Canada. Mr. Stephen Skelly, the Vice-President, Operations of the NFN, attests in his affidavit that the NFN was incorporated “to fill a void within the ‘for sale by owner’ (FSBO) market, by creating a national listing network for FSBO businesses, which would be equivalent to and would compliment [sic] the Canadian Real Estate Association’s MLS.”

[6] The NFN asks that it be given leave to intervene only so that it can submit an affidavit of Mr. Skelly regarding the role of FSBO businesses in the Canadian real estate market, the services provided, the fees for such services and information about its market share.

[7] The Commissioner does not support the motion for leave; she asserts that the NFN is not directly affected by this proceeding because it does not participate in the relevant product market. CREA does not oppose the motion and says that, if leave is granted, it should have the right to documentary and oral discovery of the NFN. CREA further submits that if the NFN is permitted to intervene and submit written evidence, the Tribunal should direct that such sworn evidence is to be disclosed by the date on which the parties are required to exchange their witness statements and that CREA will be permitted to examine Mr. Skelly at the hearing.

II. THE LAW

[8] Subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), reads as follows:

Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

[9] The Tribunal held in *Commissioner of Competition v. Canadian Waste Services Holdings Inc.*, 2000 Comp. Trib. 10, that it must be satisfied that all of the following elements are met in order to grant the status of intervenor:

- (a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see *Director of Investigation and Research v. Air Canada* 1992 CanLII 2035 (C.T.), (1992), 46 C.P.R. (3d) 184 at 187, [1992], C.C.T.D. No. 24 (QL)).
- (b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in *Air Canada*, *ibid.*, to mean "directly affects".
- (c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct*, cited above in § [2]).
- (d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Director of Investigation and Research*, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

III. DISCUSSION

[10] The Commissioner's Notice of Application provides in paragraph 2 that "[w]hile other options exist for marketing a home for sale, such as newspaper advertising, they are not adequate substitutes for an MLS listing" as well paragraph 30 reads that "[f]or the majority of home sellers, there are no reasonable substitutes to real estate brokerage services."

[11] It is the Tribunal's view that evidence about the NFN's operations could have a bearing on the question of whether there has been an impact on competition in the market under paragraph 79(1)(c) of the Act. Accordingly tests (a) and (c) described above have been satisfied.

[12] The Tribunal has also concluded that, as a competitor of CREA, the NFN will be directly affected by any order made about the operation of CREA's MLS service. Thus the requirement in part (b) of the test is met.

[13] Finally, the Tribunal is satisfied that the NFN does have a unique perspective which the Commissioner has not addressed. This conclusion satisfies part (d) of the test.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[14] On or before a date to be set in a future order, Mr. Skelly will serve the Commissioner and CREA and file with the Tribunal an affidavit which may describe the business of the NFN and the FSBO businesses and may include any comments he has on the relief sought by the Commissioner. Mr. Skelly is to attach as exhibits to his affidavit any relevant documents.

[15] At a date which may be set in a future order, Mr. Skelly will appear at the Tribunal to be examined on his affidavit.

[16] There is no order as to costs.

DATED at Ottawa, this 8th day of July, 2010

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

APPEARANCES

For the applicant:

The Commissioner of Competition

Andrew D. Little
Roger Nassrallah

For the respondent:

The Canadian Real Estate Association

Katherine Kay
Mark E. Walli

For the applicant for leave to intervene

National FSBO Network Inc.

Stephen J. Skelly