

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v The Canadian Real Estate Association*, 2010  
Comp Trib 11  
File No.: CT-2010-002  
Registry Document No.: 0062

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

**Lawrence Mark Dale**  
(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 DENYING MR. DALE'S MOTION FOR LEAVE TO  
INTERVENE**

[1] Mr. Lawrence Mark Dale is moving for leave to intervene in 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.

## 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 them 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] Mr. Dale, the applicant for intervenor status, is a co-founder of Realtysellers (Ontario) Limited (“Realtysellers”) and was involved in its senior management. He is also a former member of CREA. Although he is a lawyer, he has indicated that he will be represented by counsel if he is permitted to intervene.

[6] The Commissioner has referred to Realtysellers in paragraph 44 of her Notice of Application:

The MLS Restrictions have caused at least one broker to exit the relevant market. In November 2006, Realtysellers of Toronto suspended its operations in anticipation of the introduction of the MLS Restrictions. Prior to that time, Realtysellers offered differentiated service packages to consumers, including an “MLS-only listing” service.

[7] Mr. Dale states in his motion for leave to intervene that he “faced concerted efforts by CREA and its members” to drive Realtysellers out of business. If the Tribunal grants the relief

sought by the Commissioner, Mr. Dale deposes that he intends to re-enter the industry with non-traditional brokerages offering services in a number of areas that will compete directly with members of CREA.

[8] Mr. Dale supports the Commissioner's position generally and he asks to be allowed to participate in the proceeding as follows: (i) participate in the proceedings by attending and making representations at motions, pre-hearing conferences and the hearing of the application; (ii) review the discovery transcripts and access discovery documents; (iii) inspect and make copies of the documents listed in any affidavit of documents, (iv) adduce his own factual evidence at the hearing after the Commissioner; (v) cross-examine witnesses after the Commissioner, and (vi) make oral and written final arguments and submissions.

[9] The Commissioner does not oppose Mr. Dale's motion for leave to intervene, but takes issue with the extent of his proposed participation. CREA opposes the request. CREA asserts that Mr. Dale is not directly affected by the matters at issue and that he has no unique or distinct perspective on the matters at issue that would assist the Tribunal.

[10] CREA submits, in the alternative, and the Commissioner agrees, that Mr. Dale's participation should be restricted because Realtysellers and Mr. Dale have a protracted history of litigation against CREA and the Toronto Real Estate Board. However, in view of the Tribunal's decision to deny leave, it is not necessary to set out the restrictions which CREA and the Commissioner have suggested.

## II. THE LAW

[11] 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.

[12] 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

[13] The material filed by Mr. Dale does not satisfy the Tribunal that he has unique or distinct perspective that will assist the Tribunal to decide this case. He merely says that he has a different interest in and perspective on the case because he is a businessman in the private sector and the Commissioner is a public servant with a focus on the public interest. This bald statement is not sufficient to meet part (d) of the test described above. Mr. Dale also acknowledges that he is generally supportive of the Commissioner’s case and provides no examples of topics on which their positions differ.

[14] In any event, the Tribunal will have the benefit of Mr. Dale’s evidence. During oral argument, counsel for Mr. Dale and counsel for the Commissioner indicated that the Commissioner will be calling Mr. Dale as a witness.

[15] In all these circumstances, the Tribunal has exercised its discretion to deny Mr. Dale’s request to intervene.

#### **FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:**

[16] Mr. Dale’s request for leave to intervene is dismissed.

[17] There is no order as to costs.

[18] Mr. Dale's witness statement may include evidence from a business perspective about the effectiveness of the Commissioner's proposed order.

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 L. Kay  
Mark E. Walli

For the applicant for leave to intervene:

Lawrence Mark Dale

Mark Nicholson  
Chris Hersh