

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

**FILED / PRODUIT**

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CT- 2010-002

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File No. 2010-002

OTTAWA, ONT.

# 32

**THE 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, regulations and policies of the Canadian Real Estate Association.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**THE CANADIAN REAL ESTATE ASSOCIATION**

Respondent

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**REPLY TO THE RESPONSE OF THE COMMISSIONER TO THE REQUEST FOR LEAVE TO INTERVENE ON BEHALF OF LAWRENCE MARK DALE**

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1. In reply to the Response of the Commissioner to Motion to Intervene of Lawrence Mark Dale ("Response"), Lawrence Mark Dale ("Dale") acknowledges that the Commissioner does not oppose his Request for Leave to Intervene ("Request"), and that the Commissioner explicitly recognizes that Dale is in a position to make unique and informed representations on matters before the Tribunal.

Response, paras. 1 and 4

2. In his affidavit sworn April 1, 2010 in support of the Request (“Dale Affidavit”), supplemented by an additional affidavit sworn April 21, 2010, Dale freely admitted that he has been involved in litigation with CREA. The fact that legal proceedings exist does not lead to the conclusion that Dale’s intervention should be limited in the manner proposed by the Commissioner. The *Competition Act* (the “Act”) expressly recognizes that a given course of conduct may give rise to multiple potential causes of action under both the conspiracy (section 45) and abuse of dominance (section 79) provisions of the Act. Indeed, the Act forces the Commissioner to elect to proceed under only one of the provisions in those circumstances. While the Commissioner has decided to proceed under section 79 of the Act in the instant proceedings, there is no provision that restricts a private litigant such as Dale from seeking legitimate redress under section 36 of the Act premised on a breach of section 45. The fact that Dale has legitimately chosen to pursue his individual rights by way of action in another Court (especially given that he cannot obtain relief (in particular damages for harm caused to him by CREA) under section 79 of the Act) is entirely proper and has no legal or rational connection to the instant proceedings.

Dale Affidavit, paras. 6-7

Supplemental Affidavit of Lawrence Mark Dale, sworn April 21, 2010, attached hereto as Schedule “A”

Response, para. 11

*Competition Act*, R.S.C. 1985, c. C-34, as amended, ss. 79(7), 45.1 and 36

3. The argument that Dale’s participation in the instant proceedings should be constrained because of the existence of other proceedings assumes that Dale would or could make improper use of the participation rights granted to him. Dale submits that there is no basis for assuming that he will engage in such conduct. Dale must address the issues specifically raised by the Commissioner and has no right to introduce new issues. Further, Dale’s role as an intervenor will be limited by the scope of the rights granted by the Tribunal. Finally, any concern is negated by the Tribunal’s inherent ability to control its process, including Dale’s participation in these proceedings.

See *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528 (Comp. Trib.) (hereinafter, “*Tele-Direct*”)

4. Dale agrees with the Commissioner’s proposal in paragraphs 11(b) of the Response.
5. Dale sees no material difference between the Commissioner’s proposals in paragraphs 11(d)(i), 11(d)(ii) and 11(d)(iii) of the Response and paragraphs 18(c), 18(d) and 18(e) of the Request. However, to the extent that the Commissioner’s proposals limit Dale’s ability to attend and make representations at motions and to make representations at pre-hearing conferences and the hearing, Dale reiterates his requests as in the Request.

Request, para. 18

6. Dale agrees that he should not be required to produce an affidavit of documents. Dale is not a party to the proceeding; he seeks only to be permitted to intervene to make relevant, non-duplicative representations on the matters that affect him. Even if he is granted all rights that he has sought in the Request, his participation will be quite limited and fall well short of the parties. Under Canadian law, discovery of non-parties is only granted in exceptional circumstances. Granting intervention on the terms sought in the Request does not constitute exceptional circumstances and full discovery rights are not “necessary for the just, expeditious, least expensive, and above all fair disposition of the case”. As such, Dale submits that no Order should be granted requiring him to produce an affidavit of documents, at any time.

Response, para. 11(a)(i)

See *L'hirondelle v. Canada*, 2002 FCT 693 at para. 4 (*sub nom. Sawridge Band v. Canada*) 2002 CarswellNat 1492 (WL)

See *Canada (Director of Investigation and Research) v. Air Canada* (1989), 44 B.L.R. 154, 27 C.P.R. (3d) 476 (Comp. Trib.)

7. Dale currently does not intend to adduce factual evidence (however he requires the requested rights to review the parties’ documents and discovery transcripts to make this determination). In the event that Dale decides to adduce evidence, he is prepared to provide a summary of the evidence he

intends to adduce by a date specified by the Tribunal. To the extent that Dale seeks to adduce evidence, the parties' right to documentary and oral discovery should be limited to the matters specified in his summary of evidence and subject to appropriate confidentiality provisions. Dale submits that the proposed approach is consistent with the requirements of procedural fairness.

8. Dale does not agree with the Commissioner's proposal to deny him the right to inspect documents produced in an affidavit of documents by either the Commissioner or CREA (recognizing that the Commissioner states that the denial would be made without prejudice to Dale's right to "revisit this issue at a later date"). Instead, Dale reiterates his request to be allowed to inspect and make copies of the documents listed in any affidavit of documents filed by the Commissioner or Respondent, subject to conditions set out in the Request. Dale submits that denying him the ability to inspect documents will unnecessarily hinder his ability to make relevant representations to the Tribunal which will ensure that the Tribunal has access to all relevant information. Moreover, the Commissioner's suggestion that the issue may be revisited at a later date is of no assistance to either Dale or to the Tribunal. Because he would have no access to the documents, Dale would never have any basis to argue that he should be granted access to those documents. The Tribunal has previously accepted "that some access to discovery documents and transcripts is a practical necessity" to meaningfully exercise intervention rights. Without access to relevant documents, Dale would not be able to prepare adequately to make representations at the hearing.

Response, para. 11(a)(ii)

Request, esp. at para. 18(b)

*Tele-Direct, supra*

9. Proposing to limit Dale's ability to review discovery transcripts to "as they directly concern Realtysellers or its principals" is inconsistent with the Commissioner's acknowledgement that "Dale is in a position to make unique and informed representations to the Tribunal on matters relevant to the

proceedings defined in the pleadings”. As the Commissioner acknowledges in paragraphs 4 and 5 of the Response, Dale is able to make representations regarding matters that are directly relevant, including:

- (a) how a new entrant providing innovative services in the relevant product market was adversely affected by the rules and actions of CREA and its members, including the so-called "Three Pillars" passed in 2002 and the "Interpretations" announced in 2006 and passed in 2007;
- (b) CREA's relationship with its member boards and how CREA exercises control over how its member boards operate their MLS system; ...
- (d) the effect of the MLS Restrictions on potential entrants (in the case of Realtysellers, a re-entrant) into the relevant product market; and
- (e) the prospects for entry into the relevant product market at this time.

See Response, paras. 4 and 5

10. Accordingly, Dale submits that he is in a position to make unique and informed representations to the Tribunal on relevant matters beyond issues that “directly concern Realtysellers or its principals”. Indeed, Realtysellers is just one of many vehicles through which Dale and his partner Stephen Moranis intended to provide the New Business<sup>1</sup>. In fact, while Realtysellers joined several local real estate boards in Ontario, the New Business opened a real estate brokerage in Nova Scotia. In addition, Dale did not exit the residential real estate brokerage business entirely after closing Realtysellers in 2006. He continued to have interests in the relevant market, (for example his shared majority interest in Chestnut Park Real Estate, a leading brokerage in the city of Toronto). In any event, Dale plans to re-enter the market with non-traditional brokerages offering innovative services once the anti-competitive restraints are lifted. Taken together, these facts clearly indicate that Dale brings a unique and distinct perspective that will assist the Tribunal in deciding the issues before it, including matters related to the definition of the relevant market, the role of CREA and its importance to both traditional and non-traditional realtors, the practice of anti-competitive acts and their impact on both traditional and non-traditional realtors (including, but not limited to Realtysellers), and the effect of the impugned practices in the relevant

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<sup>1</sup> The “New Business” refers to the non-traditional new business concept developed by Dale and Stephen Moranis to provide consumers with lower cost residential real estate brokerage services in Canada.

markets. Therefore, Dale reiterates his request that he be allowed to review the discovery transcripts and have access discovery documents, subject to the conditions proposed in paragraph 18(a) of the Request.

Response, para. 11(c)

Request, paras. 4, 7, 11, 12 and 18(a)

11. If considered necessary by the Tribunal, Dale is prepared to attend an oral hearing of his Request for Leave to Intervene.

DATED at Toronto, Ontario, this 22 day of April, 2010



Mark Nicholson

Cassels Brock & Blackwell LLP  
2100 Scotia Plaza  
40 King Street West  
Toronto, ON, Canada M5H 3C2

Mark Nicholson  
Phone: (416) 860-6513  
Fax: (416) 642-7168  
E-mail: mnicholson@casselsbrock.com

Chris Hersh  
Phone: (416) 860-5387  
Fax: (416) 642-3017  
E-mail: chersh@casselsbrock.com

Nicole Washington  
Phone: (416) 860-2970  
Fax: (416) 642-7157  
E-mail: nWASHINGTON@casselsbrock.com

Counsel for Lawrence Mark Dale

TO:

THE REGISTRAR  
The Competition Tribunal  
600 – 90 Sparks Street  
Ottawa, Ontario  
K1P 5B4

Phone: (613) 957-7851  
Fax: (613) 952-1123

AND TO:

BENNETT JONES LLP  
One First Canadian Place  
Suite 3400, P.O. Box 130  
Toronto, Ontario  
M5X 1A4

John F. Rook  
Phone: (416) 777-4885  
Fax: (416) 863-1716

AND TO:

DEPARTMENT OF JUSTICE CANADA  
Competition Bureau Legal Services  
place du Potage, Phase 1  
50 Victoria Street, 22<sup>nd</sup> Floor  
Gatineau, Quebec  
K1A 0C9

Roger Nassrallah  
Phone: (819) 956-2842  
Fax: (819) 997-5747

Counsel for the Applicant

AND TO:

STIKEMAN ELLIOTT LLP  
5300 Commerce Court West  
199 Bay Street  
Toronto, Ontario  
M5L 1B9

Katherine Kay  
Phone: (416) 869-5507  
Fax: (416) 947-0866

Danielle K. Royal  
Phone: (416) 869-5254

Mark Walli  
Phone: (416) 869-5277

Counsel for the Respondent

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** an application by the  
Commissioner of Competition pursuant to  
section 79 of the *Competition Act*, R.S.C. 1985,  
c. C-34, as amended

**BETWEEN:**

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**- and -**

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**REQUEST FOR LEAVE TO INTERVENE  
ON BEHALF OF LAWRENCE MARK  
DALE**

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Cassels Brock & Blackwell LLP  
2100 Scotia Plaza  
40 King Street West  
Toronto, ON, Canada M5H 3C2

Mark Nicholson  
Phone: (416) 860-6513  
Fax: (416) 642-7168

Chris Hersh  
Phone: (416) 860-5387  
Fax: (416) 642-3017

Nicole Washington  
Phone: (416) 860-2970  
Fax: (416) 642-7157

Counsel for Mr. Lawrence Mark Dale



# **SCHEDULE "A"**

**THE COMPETITION TRIBUNAL**

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

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**AND IN THE MATTER OF** certain rules, regulations and policies of the Canadian Real Estate Association.

**BETWEEN:**

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**SUPPLEMENTAL AFFIDAVIT OF LAWRENCE MARK DALE**

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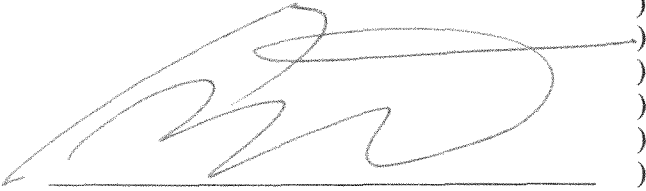
1. I, Lawrence Mark Dale, businessman, lawyer and resident of the City of Toronto, in the Municipality of Metropolitan Toronto, SWEAR THAT:
2. My Request for Leave to Intervene, which was dated and filed with the Competition Tribunal on April 1, 2010, was prepared at my direction and intended to supplement my affidavit sworn on the same date. To the best of my knowledge, information and belief the facts therein are true.

3. I make this affidavit in support of my Request for Leave to Intervene in the proceedings and not for any improper purpose.

SWORN BEFORE ME in the City of Toronto, )  
)  
in the Municipality of Metropolitan Toronto, )  
)  
this 21<sup>st</sup> day of April, 2010. )



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LAWRENCE MARK DALE



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A Notary Public in and for the Province of Ontario

