

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160812

Docket: A-174-16

Citation: 2016 FCA 204

Present: GLEASON J.A.

BETWEEN:

THE TORONTO REAL ESTATE BOARD

Appellant

and

COMMISSIONER OF COMPETITION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 12, 2016.

REASONS FOR ORDER BY:

GLEASON J.A.

Federal Court of Appeal



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REASONS FOR ORDER

GLEASON J.A.

[1] I have before me two motions. One motion is brought by the appellant, the Toronto Real Estate Board [TREB], and seeks both a stay of the order of the Competition Tribunal, pending the disposition of its appeal of that order and an order expediting the appeal. The other motion is brought by the Canadian Real Estate Association [CREA], and seeks an order allowing it leave to intervene in the appeal on a limited basis to address issues that it claims are of concern to it. For the reasons below, I have determined it appropriate to grant both motions.

[2] To place the issues in context, it is useful to begin by briefly reviewing the nature of the proceedings before the Tribunal that gave rise to the order under appeal.

[3] TREB was the respondent in the proceedings before the Tribunal. The proceedings stemmed from a complaint by the Commissioner of Competition that certain of TREB's practices related to its Multiple Listing Service [MLS] system violated section 79 of the *Competition Act*, R.S.C. 1985, c. C-34. TREB is a not-for-profit corporation with approximately 46,000 members who act as real estate agents or brokers in the Greater Toronto Area [GTA]. All TREB members are also members of CREA, the pan-Canadian association that comprises approximately 110,000 real estate brokers and agents under the umbrella of approximately 90 real estate boards and associations.

[4] TREB offers services to its members, including, most importantly, access to the TREB MLS System. To access the system, members are contractually bound to comply with a set of rules. The system provides access to a non-public database of current and up to two year old listings and to archives of historical real estate listings for properties listed with a TREB member (collectively termed the "TREB MLS database"). The vast majority of properties listed in the GTA are listed with TREB members and are thus included in the TREB MLS database.

[5] The TREB MLS database contains extensive information about the listed properties, including addresses, detailed descriptions, pictures, details of the length of time the properties were on the market, the listing and sale price and information about whether the property was sold or the listing terminated, withdrawn, suspended or expired. Property owners provide much

of the information captured in the TREB MLS database to their realtors, who, in turn, transmit it to TREB as part of the MLS system. Under the documentation that is typically signed at the time of listing, property owners are asked to confirm whether they consent to at least portions of the information about the listing being uploaded to the internet. Such consent documentation may not have been signed for many of the historical listings in the TREB MLS database.

[6] Under the rules promulgated by TREB as part of its MLS system, members are restricted with respect to what portions of the information in the TREB MLS database they can place on their own password-protected websites that are made available to members of the public following registration. These rules prohibit members from copying the TREB MLS database to create a database that is competitive with the TREB MLS database. The rules also prohibit members from including on their own websites information about sold, pending sold, withdrawn, expired, suspended or terminated listings, including details of a property's agreed-upon selling price or of the commission payable to a TREB member representing the purchaser. Members can provide all information about sold, pending sold, withdrawn, expired, suspended or terminated listings to clients or prospective clients, 100 listings at a time, via hard copy or email.

[7] TREB provides its members with access to the information from its MLS database on active listings via electronic data feed, which may be easily transferred by a member to its own website. However, the data feed does not include information about sold, pending sold, withdrawn, expired, suspended or terminated listings.

[8] The Tribunal determined that the MLS rules that prohibit TREB members from posting information to their own password-protected websites about sold, withdrawn, expired, suspended or terminated listings, and about details of pending sold listings (other than the sale price), constitute an abuse of dominant position under section 79 of the *Competition Act*. In the order under appeal, the Tribunal ordered TREB to include such data in its data feed to members and, subject to certain limitations, to refrain from prohibiting members from using such data on any device (including computers, tablets or smartphones). Thus, under the order, TREB could no longer prohibit members from posting information about sold, withdrawn, expired, suspended or terminated listings, and about details of pending sold listings (other than the sale price), to their own password-protected websites. The Tribunal also ordered TREB to pay costs to the Commissioner of approximately \$1.8 million.

[9] The Tribunal gave TREB 60 days to comply with its order. By Order dated July 27, 2016, I granted an interim stay of that order, pending disposition of these motions, which were not ripe for consideration before the date set by the Tribunal for compliance with its order.

[10] CREA owns the MLS and REALTOR trademarks, which are featured on the TREB MLS database. Due to its interest in these trademarks and to the potential effect of its ruling on CREA, the Tribunal granted CREA intervener status in respect of certain issues.

[11] Turning, first, to TREB's motion for a stay and an order expediting this appeal, the test applicable for the grant of a stay such as the one sought by TREB is well-settled and requires TREB to establish three things: first, that its pending appeal raises at least one serious issue;

second, that it would suffer irreparable harm if the stay were refused; and, finally, that the balance of convenience favours granting the stay (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 347-349, 111 D.L.R. (4th) 385 [*RJR-MacDonald*]; *Baier v. Alberta*, 2006 SCC 38, [2006] 2 S.C.R. 311; *Janssen Inc. v. AbbVie Corp.*, 2014 FCA 112 at paras. 12-17, 120 C.P.R. (4th) 385 [*Janssen*]; *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 at para. 4, 224 A.C.W.S. (3d) 469 [*Glooscap Heritage Society*]). In a case such as this, the threshold for establishing a serious issue is low; TREB need only show that at least one of the issues it raises is not frivolous or vexatious (*RJR-MacDonald* at 337-338; *Janssen* at para. 23; *Glooscap Heritage Society* at para. 25; *Canadian Waste Services Holdings Inc. v. Canada (Commissioner of Competition)*, 2004 FCA 273 at para. 9, 133 A.C.W.S. (3d) 173).

[12] Here, based on a review of the motion materials and of TREB's Amended Notice of Appeal, I am satisfied that TREB has met this low threshold. More specifically, it has raised at least one serious issue with respect to the possibility that the Tribunal's order failed to take adequate consideration of property owners' privacy rights.

[13] When analysing the privacy issue, the Tribunal focussed largely on whether TREB's motivation for raising property owners' privacy rights stemmed from a legitimate concern about those rights or was tainted by an improper desire to maintain the dominant position of the majority of its members, who do not rely on web-based services. TREB argues that in focussing its inquiry on this issue, the Tribunal erred. Specifically, TREB raises as its 29th ground of appeal the following: the Tribunal erred in not determining whether the data at issue constitute personal

information as contemplated by law, whether the dissemination of such data would engage privacy legislation or other policy instruments, and whether privacy concerns with respect to the data at issue represent legitimate business concerns (paraphrased from the Amended Notice of Appeal, filed on July 8, 2016).

[14] To date, the case law has not dealt in any great degree with the interface between competition and privacy law, outside of the context of disclosure orders for the purpose of investigations conducted by the Competition Bureau. Recognizing that informational privacy can attract constitutional protection (*R. v. Tessling*, 2004 SCC 67 at para. 24, [2004] 3 S.C.R. 432) and that privacy laws have been held to be quasi-constitutional in nature by the Supreme Court of Canada (*UFCW, Local 410 v. Alberta (Information and Privacy Commissioner)*, 2013 SCC 62 at para. 19, [2013] 3 S.C.R. 733; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13 at para. 28, [2006] 1 S.C.R. 441; *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53 at para. 24, [2002] 2 S.C.R. 773), I cannot say that this ground of appeal does not raise a serious issue as the Tribunal's order might impact third parties' privacy rights and the relevance of such an impact on the Tribunal's ability to issue an order like the one under appeal is not frivolous.

[15] Contrary to what the Commissioner submits, I believe there to be a non-frivolous argument that the Tribunal did not fully consider all the relevant potential impacts of its order on third party privacy interests for at least two reasons. First, the Tribunal did not canvass whether the order might impact the interests of those who sold or purchased properties some time ago and did not sign consents to having their information disclosed on the internet. Secondly, any

consents signed more recently would have been signed at a time when TREB members did not post the additional information on the internet, in contrast to what would be enabled by the Tribunal's order. Therefore, the existing consents might not be broad enough to cover the posting of the additional information that is allowed under the Tribunal's order. Neither point was considered by the Tribunal. Moreover, the fact that the information in question is available in the land registry system is arguably not a complete answer to third party privacy concerns as the Commissioner submits. Arguably, there is such a qualitative difference between disclosure in the land registry system versus disclosure on a realtor's website so as to require an informed consent to the latter for privacy purposes. Thus, the privacy issues raised by this appeal cannot be said to be frivolous or vexatious and accordingly meet the first branch of the test for issuance of the requested stay.

[16] As for irreparable harm, I am satisfied that TREB would suffer irreparable harm if the requested stay is not granted because, as it and its affiant argues, there is a real possibility that it will lose control over the data the order requires it to permit its members to post on their websites once the data is posted. In short, TREB has established that once the information is available on the internet, it probably can be copied and there is simply no way to ensure that all copies would be retrieved if TREB were successful in its appeal. This would render its appeal somewhat nugatory.

[17] The balance of convenience favours the grant of the requested stay, given the potential for interference with third party privacy interests and the fact that the grant of the stay will effectively continue the *status quo*. However, to minimize the detriment to the public interest in

having any violation of the *Competition Act* remedied as soon as possible, this appeal should be expedited. Indeed, both parties concur that this is appropriate. To ensure expedition, the parties and CREA shall file within 15 days of the date of this order a proposed timetable for the completion on an expedited basis of the various pre-hearing steps in this appeal. In the event they are unable to agree on such a timetable, the appellant shall make a motion in writing to settle the timetable within 15 days of the date of this order.

[18] Finally, I note that the Commissioner did not forcefully argue in the alternative for compliance only with the costs portion of the Tribunal's order. Given the quantum of the costs award, the nature of the issues engaged in this appeal and TREB's not-for-profit nature, I believe it appropriate that the stay extend to all parts of the Tribunal's order.

[19] Turning now to CREA's motion for intervener status, the test for intervention was set out in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74, 15 A.C.W.S. (3d) 323 (T.D.), aff'd [1990] 1 F.C. 90, 103 N.R. 391 (C.A.), which was recently affirmed, with some nuances, in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, 480 N.R. 387. The Court will consider several factors in deciding whether to allow an intervention; however, not all of the factors need to be present for an intervention to be warranted, and the Court retains an overarching discretion to allow an intervention when the interests of justice so require. The factors listed in the case law for consideration are:

1. whether the proposed intervener is directly affected by the outcome;
2. whether the case raises a judiciable issue and engages the public interest (presumably when the proposed intervener seeks public interest intervention status);

3. whether there is a lack of any other reasonable means to put the questions the intervener seeks to raise before the Court;
4. whether the position of the intervener is adequately defended by one of the parties to the case;
5. whether the interests of justice are better served by allowing the intervention; and
6. whether the Court can decide the case without the presence of the intervener.

[20] Here, I agree with the Commissioner that the second, third, and sixth of the foregoing factors are either absent or irrelevant. However, the other three factors support allowing the intervention.

[21] In terms of the first factor, it cannot be contested that CREA is directly affected by the appeal and has more than a mere jurisprudential interest in its outcome. As CREA notes, the Tribunal, itself, in granting CREA intervener status, recognized that its order could well have a direct impact on how CREA is required to deal with information like the data the Tribunal ordered TREB to allow its members to post on their password-protected websites as CREA makes similar information available to its members, subject to similar conditions. As CREA argues, its interest in the appeal is highlighted and impacted directly by one of TREB's grounds of appeal alleging that the Tribunal erred in limiting its order to TREB as opposed to other CREA members. In addition, CREA has a direct interest in the appeal by virtue of its ownership of implicated trademarks. CREA alleges that a lack of control over the MLS data on the internet may well damage the value of its MLS trademark. Once again, the Tribunal recognized this interest as sufficient to afford CREA intervener status.

[22] As for the fourth and fifth factors, CREA possesses unique knowledge and a unique position as the voice of the real estate industry in Canada that will be of benefit to the Court in deciding this appeal. As it convincingly argues, many of its positions and evidence were found useful by the Tribunal, and it is to be expected that its intervention will similarly be of use to the Court. Further, CREA seeks leave to intervene on limited issues tied to industry practice and its interest in its MLS trademark and its own MLS database. Its participation will therefore not unduly lengthen this process.

[23] I therefore find that CREA should be granted intervener status on the basis it seeks with the exception of being exempt from costs. I believe it more appropriate to leave the issue of its responsibility for costs to the panel hearing the appeal, particularly in light of the Commissioner's concern that CREA overstepped the bounds of its permitted intervention before the Tribunal. Without agreeing that this occurred, the ability to address any such concern in this proceeding through a costs award should be maintained.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-174-16

STYLE OF CAUSE: THE TORONTO REAL ESTATE
BOARD v. COMMISSIONER OF
COMPETITION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: GLEASON J.A.

DATED: AUGUST 12, 2016

WRITTEN REPRESENTATIONS BY:

Jeff Rosekat
Jacqueline Horvat

FOR THE APPELLANT

William V. Sasso

John F. Rook
Andrew D. Little
Emrys Davis

FOR THE RESPONDENT

Esther Rossman

Sandra A. Forbes
Michael Finley

FOR THE PROPOSED
INTERVENER

SOLICITORS OF RECORD:

Spark LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE APPELLANT

Sutts, Strosberg LLP
Windsor, Ontario

Bennett Jones LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE RESPONDENT

Competition Bureau Legal Services
Gatineau, Quebec

Davies Ward Phillips & Vineberg LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE PROPOSED
INTERVENER