Federal Court of Appeal  Cour d'appel fédérale

Date: 20140203

Docket: A-174-13

Citation: 2014 FCA 29

CORAM: **SHARLOW J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Appellant

and

THE TORONTO REAL ESTATE BOARD

Respondent

Heard at Toronto, Ontario, on January 22, 2014.

Judgment delivered at Ottawa, Ontario, on February 3, 2014.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The Commissioner of Competition is appealing the decision of the Competition Tribunal that dismissed his application for a remedial order under subsection 79(1) of the *Competition Act*, R.S.C. 1985, c. C-34, against the respondent the Toronto Real Estate Board (2013 Comp. Trib. 9). The application was based on the Commissioner's allegation that a certain rule adopted by the Board is anti-competitive because it substantially lessens competition among realtors in the Greater Toronto Area who are members of the Board. The Tribunal dismissed the application without considering the merits, on the basis that subsection 79(1) cannot apply to the Board because it does not compete with its members. The Tribunal considered itself bound to reach that conclusion because of the decision of this Court in *Canada (Commissioner of Competition) v. Canada Pipe*

Co., 2006 FCA 233, [2007] 2 F.C.R. 3. For the following reasons, I would allow the appeal and refer the Commissioner's application back to the Tribunal for determination on the merits.

Factual allegations

[2] The Board disputes many factual and legal aspects of the Commissioner's application, but the Tribunal did not resolve any those disputes because it dismissed the application solely on a question of law. For that reason I have assumed without deciding, solely for the purpose of this appeal, that the Commissioner's allegations as summarized below are substantially true. Nothing in these reasons is intended to preclude the Commissioner or the Board from alleging any fact or maintaining any argument before the Tribunal in this matter, except the point of statutory interpretation addressed below.

[3] The Board is an incorporated trade association. Its membership consists of more than 35,000 competing realtors, including the vast majority of realtors who operate in the Greater Toronto Area. The Board operates a multiple listing service for the Greater Toronto Area. That service employs a database of active and past residential property listings, including the agreed sale prices of residential properties from past listings (in these reasons referred to as "historical data"). Access to the information on that database, and the ability to communicate that information to clients and potential clients, is valuable to Board members because it enables them to attract and provide services to clients.

[4] Some realtors who are members of the Board conduct their business in the traditional manner, which involves interacting with clients and potential clients in person. Recently some

members have adopted a different model in which their business is conducted online through a virtual office website (VOW). The resulting efficiencies enable those realtors to offer their services at a lower cost to clients.

[5] All members of the Board have access to the Board's multiple listing service database, including the historical data. They are permitted to disclose the historical data to their clients in person, by fax, by mail or by email. However, the Board has adopted a rule prohibiting members from posting historical data on a virtual office website. The effect of that rule is that a member who operates through a virtual office website cannot enable clients to access the historical data online.

[6] The impugned rule is binding on all members. Breach of a rule may have serious consequences for a member. The consequences may include being barred from access to the Board's multiple listing service, or from being a member of the Board.

Statutory framework

[7] Subsection 79(1) of the *Competition Act* reads as follows:

79. (1) Where, on application by the Commissioner, the Tribunal finds that	**79.** (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :
(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,	*a)* une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and	*b)* cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,	*c)* la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,
the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.	le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

[8] The term "anti-competitive act" is explained in subsection 78(1) as follows:

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:	**78.** (1) Pour l'application de l'article 79, « agissement anti-concurrentiel » s'entend notamment des agissements suivants :
(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;	*a)* la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;	*b)* l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;
(c) freight equalization on the plant	*c)* la péréquation du fret en utilisant

of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

(f) buying up of products to prevent the erosion of existing price levels;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent.

[9] The act of the Board that forms the basis of the Commissioner's application is not mentioned in subsection 78(1). However, it is undisputed that by virtue of the opening words of subsection 78(1), the list comprised by paragraphs 78(1)(*a*) to (*i*) is not intended to be exhaustive.

[10] The Tribunal may make an order under subsection 79(1) only if the conditions in paragraphs 79(1)(*a*), (*b*) and (*c*) are met. Paragraph 79(1)(*a*) requires the Tribunal to determine the relevant market and to determine whether the person who is the target of the subsection 79(1) order substantially controls that market. Then, paragraph 79(1)(*b*) requires the Tribunal to determine whether the impugned act of the target is an anti-competitive act. If it is, then paragraph 79(1)(*c*) requires the Tribunal to determine whether the anti-competitive act has, is having, or is likely to have the effect of preventing or lessening competition substantially in the relevant market.

The Commissioner's case against the Toronto Real Estate Board

[11] At the risk of oversimplifying, and without intending to limit the scope of this case in the event it goes further, I summarize as follows the allegations made by the Commissioner under each of paragraphs 79(1)(*a*), (*b*) and (*c*):

(a) With respect to paragraph 79(1)(*a*), the Board substantially controls the residential real estate services business in the Greater Toronto Area in two ways. First, the Board can and does make rules governing the business conduct of its members. They comprise the vast majority of realtors in that area, and they compete with one another. Second, the Board is the sole supplier to its members of the information on

its multiple listing service database. That information is of significant value to the members in attracting and serving clients.

(b) With respect to paragraph 79(1)(*b*), the Board's rule that prohibits its members from posting historical data online is an anti-competitive act because its purpose is exclusionary. It intentionally limits the permitted use of the Board's database, a valuable resource for members, in a manner that substantially and negatively affects only members who operate through a virtual office website.

(c) With respect to paragraph 79(1)(*c*), the impugned rule has had, is having or is likely to have the effect of preventing or lessening competition substantially between members of the Board.

Standard of review

[12] The Board dismissed the Commissioner's application based solely on its interpretation of the scope of subsection 79(1). As indicated above, the Tribunal held that it is bound by *Canada Pipe* to conclude that the Board can never engage in an anti-competitive act in respect of the market for residential real estate services in the Greater Toronto Area, because the Board is not a competitor in that market. The Commissioner argues in this appeal that the Board's conclusion is based on a misinterpretation of subsection 79(1). That is a question of statutory interpretation for which the standard of review is correctness.

Discussion

[13] The Commissioner takes the position that a person that is not a competitor in a particular market nevertheless may control that market substantially within the meaning of paragraph 79(1)(*a*) by, for example, controlling a significant input to competitors in the market, or by making rules that effectively control the business conduct of those competitors. In my view, the Commissioner's position reflects an interpretation of paragraph 79(1)(*a*) that its words can reasonably bear, given the statutory context.

[14] *Canada Pipe* is a leading authority on the meaning of subsection 79(1). In analyzing in that case what acts might be considered anti-competitive acts within the meaning paragraph 79(1)(*b*) and subsection 78(1), the Court focused on acts that have as their purpose a negative effect on a competitor that is predatory, exclusionary or disciplinary. However, I do not interpret *Canada Pipe* to mean that as a matter of law, a person who does not compete in a particular market can never be found to have committed an anti-competitive act against competitors in that market, or that a subsection 79(1) order can never be made against a person who controls a market otherwise than as a competitor.

[15] The Tribunal in this case concluded the contrary based on the following passages from *Canada Pipe* (the emphasis is in the original *Canada Pipe* report):

> [63] The Act does not provide an express definition of "anti-competitive act". Section 78 provides a list of 11 anti-competitive acts, expressly "without restricting the generality of the term". These examples are thus illustrative only, and indeed the Tribunal has recognized in its previous decisions that conduct not specifically mentioned in section 78 can constitute an anti-competitive act [citations omitted]. While clearly non-exhaustive, the illustrative list in section 78 provides direction as to the type of conduct that is intended to be captured by paragraph 79(1)(*b*): reasoning by analogy, a non-enumerated anti-competitive act

> will exhibit the shared essential characteristics of the examples listed in section 78.
>
> [64] In [*Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990) 32 C.P.R. (3d) 1 (Comp. Trib.)], the Tribunal applied this interpretive approach to paragraph 79(1)(*b*), and suggested (at page 34) the following working definition of "anti-competitive act":
>
> > A number of the acts [mentioned in section 78] share common features but ... only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in paragraph 78(*f*), is an intended negative effect on a competitor that is [...] predatory, exclusionary or disciplinary. [Emphasis added.]
>
> [65] I adopt the above definition, which is very close in substance to the core characteristic of the enumerated list of section 78, save at paragraph 78(1)(*f*). This exception was noted by the Tribunal in *NutraSweet*.
>
> [66] Two aspects of this definition should be noted. First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary or disciplinary negative effect on a competitor. I will elaborate on each of these aspects in turn.
>
> …
>
> [68] The second aspect describes the type of purpose required in the context of paragraph 79(1)(*b*): to be considered "anti-competitive" under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor. The paragraph 79(1)(*b*) inquiry is thus focused upon the intended effects of the act on a competitor. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(*b*), if […] these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(*b*). While, for the Act as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(*b*), "anti-competitive" refers to an act whose purpose is a negative effect on a competitor.

[16] The Tribunal interpreted *Canada Pipe* as authority for the proposition that by necessary implication, an anti-competitive act must be the act of a person who competes in the relevant

market. The Tribunal reasoned from that proposition that because the Board does not compete with its members, none of the statutory conditions for the subsection 79(1) order sought by the Commissioner can be met. The condition in paragraph 79(1)(*b*) cannot be met as there can be no anti-competitive act by the Board against its members, which necessarily means that the condition in paragraph 79(1)(*c*) cannot be met either. By the same reasoning, the condition in paragraph 79(1)(*a*) cannot be met because a person who does not compete in a market cannot exercise market power.

[17] The Tribunal's conclusion is rooted in its interpretation of the passages from *Canada Pipe* quoted above. Specifically, the Court interpreted "competitor" in those passages to mean "competitor of the person who is the target of the Commissioner's application for a subsection 79(1) order". However, I see nothing in the language or context of the *Competition Act* to justify the addition of those qualifying words.

[18] Nor can the addition of those qualifying words be justified by the facts as found in *Canada Pipe*. Given the factual context in which *Canada Pipe* was decided, I do not accept that *Canada Pipe* is intended to preclude the application of subsection 79(1) to the Board in respect of a rule it makes that is binding on its members.

[19] The Court stated in *Canada Pipe* that a common element of the anti-competitive acts listed in subsection 78(1) is that they are acts taken by a person against that person's own competitor. But in the same reasons the Court recognizes, correctly in my view, that paragraph 78(1)(*f*) describes an

act that is not necessarily taken by a person against that person's own competitor. The inconsistency is not explained in *Canada Pipe* or in any other authority to which the Court was referred.

[20] In my view, paragraph 78(1)(*f*) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to the Board in this case. If the Court in *Canada Pipe* intended to narrow the scope of subsection 79(1) as the Tribunal held, then I would be compelled to find that aspect of *Canada Pipe* to be manifestly wrong because it is based on flawed reasoning (specifically, the unexplained inconsistency in the reasons).

[21] The Tribunal in this case found support for its conclusion in certain guidelines of the Competition Bureau. The guidelines indicate at most that the Commissioner's understanding of the scope of subsection 79(1) has changed over time. In my view, they provide no useful guidance to the Court in interpreting that provision.

[22] The Tribunal also found support for its position in subsection 79(4). In my view, there is merit to the submission of the Commissioner that subsection 79(4) says only that for purposes of applying paragraph 79(1)(*c*), the Tribunal is obliged to consider whether the alleged anti-competitive act is the result of superior competitive performance. That consideration may be of critical importance in some cases, and of no importance in others. I see no reason to infer from subsection 79(4) that as a matter of law, a subsection 79(1) order cannot be made against the Board simply because it does not compete with its members.

Conclusion

[23] For these reasons, I conclude that the Tribunal erred in law in its interpretation of *Canada Pipe* and consequently in its interpretation of paragraphs 79(1)(*a*), (*b*) and (*c*). It follows that the Tribunal erred in dismissing the Commissioner's application solely on the basis that subsection 79(1) cannot apply to the Board because it does not compete with its members.

[24] I would allow the appeal with costs, set aside the order of the Tribunal, and refer the Commissioner's application back to the Tribunal for reconsideration on the merits.

"K. Sharlow"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-174-13

(APPEAL FROM AN ORDER OF THE COMPETITION TRIBUNAL DATED APRIL 15, 2013)

STYLE OF CAUSE:	THE COMMISSIONER OF COMPETITION v. THE TORONTO REAL ESTATE BOARD
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 22, 2014
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	(WEBB, NEAR JJ.A.)
DATED:	FEBRUARY 3, 2014

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