

**FEDERAL COURT OF APPEAL**

B E T W E E N:

TORONTO REGIONAL REAL ESTATE BOARD and  
THE CANADIAN REAL ESTATE ASSOCIATION

<b>FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE</b>	
F I L E D	Oct 5/23 Mary Sansone
<b>TORONTO, ON</b>	1

Appellants (Defendants)

- and -

MARK SUNDERLAND

Respondent (Plaintiff)

**NOTICE OF APPEAL**

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellants appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellants request that this appeal be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitors, or where the appellants are self-represented, on the appellants, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

October 5, 2023

Issued by:  
(Registry Officer)

"Mary Sansone"  
Registry Officer

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## APPEAL

**THE APPELLANTS**, the Toronto Regional Real Estate Board (“**TRREB**”) and the Canada Real Estate Association (“**CREA**”, and together with TRREB, the “**Association Defendants**”), appeal to the Federal Court of Appeal from the order of Chief Justice Crampton of the Federal Court dated September 25, 2023 (the “**Order**”), dismissing in part a motion by the Association Defendants to strike the respondent’s Fresh as Amended Statement of Claim dated February 24, 2022 in court file T-595-21 (the “**Claim**”).

**THE APPELLANTS ASK** that this Court:

1. set aside paragraph 2 of the Order dismissing the Association Defendants’ motion in respect of:
  - (a) the allegations made in the Claim with respect to the aiding, abetting or counselling of conduct contrary to section 45(1) of the *Competition Act*;
  - (b) section 36 of the *Competition Act*; and
  - (c) the Association Defendants’ conduct prior to April 1, 2017;
2. set aside paragraph 1 of the Order to the extent requested by the Brokerage Defendants in paragraph 1 of their Notice of Appeal dated October 5, 2023;
3. make an order striking out the Claim as against the Association Defendants for failure to disclose a reasonable cause of action, and dismissing the action as against them;

4. grant the Association Defendants their costs of the appeal and of the motion below; and
5. grant such further relief as counsel may advise and this Court deems just.

**THE GROUNDS OF APPEAL** are as follows:

**Background**

1. The Claim alleges that certain defendants, described as the “**Brokerage Defendants**”, among other things, “entered into a conspiracy, agreement or arrangement to fix, maintain, increase or control the price for the supply of Buyer Brokerage Services in connection with the purchase and sale of residential real estate listed on the Toronto MLS” during the period March 11, 2010 to the present (the “**Relevant Period**”) in contravention of subsection 45(1) of the *Competition Act* (the “**Arrangement**”).
2. The Association Defendants are not-for-profit professional associations whose membership includes the Brokerage Defendants.
3. The Claim further alleges that the Association Defendants aided, abetted, and counselled the Brokerage Defendants and other persons that provide Buyer Brokerage Services within the Greater Toronto Area (“GTA”), within the meaning of subsections 21(1) and 22(1) of the *Criminal Code*, to engage in the Arrangement, such that the Association Defendants are parties to the offences alleged under section 45(1).
4. Section 45(1) prohibits only certain types of agreements between a person and a competitor of that person with respect to a product. However, the Claim does not



allege that the Association Defendants compete with each other or with any of the other parties to the Arrangement.

5. The Claim seeks damages against all defendants pursuant to subsection 36(1) of the *Competition Act*.

6. The Association Defendants brought a motion to strike out the Claim as disclosing no reasonable cause of action. The other defendants also brought motions to strike on similar grounds.

7. For reasons dated September 25, 2023, the motion judge made the Order, which:

(a) granted the Association Defendants' motion insofar as it concerned the allegations in the Claim with respect to the alleged Arrangement to "fix", "maintain", or "increase" the price for the supply of Buyer Brokerage Services in the GTA during the Relevant Period and struck those allegations from the Claim; and

(b) dismissed the Association Defendants' motion insofar as it concerned:

(i) the allegations in the Claim with respect to the alleged Arrangement to "control" the price for the supply of Buyer Brokerage Services in the GTA during the Relevant Period;

- (ii) the allegations in the Claim with respect to aiding, abetting, or counselling of conduct contrary to subsection 45(1) of the *Competition Act*;
- (iii) subsection 36(1) of the *Competition Act*; and
- (iv) the Association Defendants' conduct prior to April 1, 2017.

**Errors in the motion judge's decision**

8. In his reasons, the motion judge erred in law in his interpretation of subsection 45(1) by finding that the Claim disclosed a reasonable cause of action in respect of a conspiracy to “control” the price for the supply of Buyer Brokerage Services, despite having concluded that the Claim did not disclose a reasonable cause of action in respect of a conspiracy to “fix”, “maintain”, or “increase” those prices.

9. The motion judge further erred in law by interpreting the *mens rea* element of subsection 45(1) (as it reads following its amendment effective March 2010) as potentially requiring an “objective intention” (as opposed to a subjective intention) to control the price of Buyer Brokerage Services.

10. Further, in respect of the *mens rea* element of subsection 45(1), the motion judge erred in law (or alternatively, made a palpable and overriding error of mixed fact and law) by finding that the Claim pleaded conduct capable of constituting a subjective intention on the part of the Brokerage Defendants to control the price of Buyer Brokerage Services.

11. The motion judge erred in law by interpreting subsections 21(1) and 22(1) of the *Criminal Code* as potentially expanding criminal liability under subsection 45(1) of the *Competition Act* to persons, such as the Association Defendants, who are alleged only to have aided, abetted, or counselled the formation of, or addition of parties to, an agreement to control prices of a product, when such a person is not a “competitor” in respect of a product of any other party to the agreement within the meaning of subsection 45(1).

12. The motion judge further erred in law (or alternatively, made a palpable and overriding error of mixed fact and law) by finding that the Claim pleaded conduct capable of constituting the *actus reus* of aiding, abetting, or counselling the formation or expansion of the alleged Arrangement to control the price for the supply of Buyer Brokerage Services on the part of the Association Defendants.

13. The motion judge further erred in law (or alternatively, made a palpable and overriding error of mixed fact and law) by finding that the Claim pleaded sufficient material facts to constitute the *mens rea* of aiding, abetting, or counselling the formation or expansion of the alleged Arrangement on the part of the Association Defendants.

14. The motion judge erred in law by interpreting subsection 36(1) of the *Competition Act* as potentially applying to a person who is alleged only to have aided, abetted, or counselled the alleged Arrangement, when such a person is not “the person who engaged in the conduct” within the meaning of subsection 36(1).

15. The motion judge erred in law by finding that the plaintiff's claims were not discoverable prior to April 1, 2017 with the exercise of reasonable diligence, considering (among other things) that it was not disputed that the rules promulgated by the Association Defendants—which are the basis of the alleged Arrangement and the claims made against the Association Defendants—were widely known throughout the Relevant Period.

**Statutory provisions**

16. Sections 36, 45, and 90.1 of the *Competition Act*, RSC 1985, c C-34, as amended;

17. Subsections 21(1) and 22(1) of the *Criminal Code*, RSC 1985, c C-46 as amended;

18. Subsection 27(1) of the *Federal Courts Act*, RSC 1985, c F-7, as amended;

19. Rules 174, 221 and Part VI of the *Federal Courts Rules*, SOR/98-106, as amended; and

20. Such further grounds as counsel may advise and this Honourable Court may permit.

October 5, 2023



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