Federal Court  Cour fédérale

Date: 20230925

Docket: T-595-21

Citation: **2023 FC 1293**

Toronto, Ontario, September 25, 2023

PRESENT: Chief Justice Paul Crampton

PROPOSED CLASS PROCEEDING

BETWEEN:

MARK SUNDERLAND

Plaintiff

and

TORONTO REGIONAL REAL ESTATE BOARD, THE CANADIAN REAL ESTATE ASSOCIATION, RE/MAX ONTARIO-ATLANTIC CANADA, INC. o/a RE/MAX INTEGRA, CENTURY 21 CANADA LIMITED PARTNERSHIP, RESIDENTIAL INCOME FUND L.P., ROYAL LEPAGE REAL ESTATE SERVICES LTD., HOMELIFE REALTY SERVICES INC., RIGHT AT HOME REALTY INC., FOREST HILL REAL ESTATE INC., HARVEY KALLES REAL ESTATE LTD., MAX WRIGHT REAL ESTATE CORPORATION, CHESTNUT PARK REAL ESTATE LIMITED, SUTTON GROUP REALTY SERVICES LTD. and IPRO REALTY LTD.

Defendants

ORDER AND REASONS

I. **Introduction**

[1] Mr. Sunderland, the representative plaintiff in the underlying action, claims unspecified aggregate damages on behalf of all persons who sold residential real estate listed on the Multiple Listing Service (**"MLS"**) owned and operated by the defendant Toronto Regional Real Estate Board (**"TRREB"**), dating back to March 11, 2010 (the **"Relevant Period"**).

[2] In support of his claims, the plaintiff alleges that certain of the defendants (defined below as the **"Brokerage Defendants"**) and their "co-conspirators" contravened subsection 45(1) of the *Competition Act*, RSC, 1985, c C-34 (the **"*Competition Act*"**). They have allegedly done so by conspiring, agreeing or arranging with each other to fix, maintain, increase or control the price for the supply of buyer brokerage services **("Cooperating Broker Services"** or **"Buyer Brokerage Services"**) that they provide to purchasers of residential real estate in the Greater Toronto Region (**"GTA"**). The plaintiff further alleges that the other defendants (defined below as the **"Association Defendants"** and the **"Franchisor Defendants"**), have respectively aided, abetted and counselled that purported breach of section 45, contrary to subsections 21(2) and 22(1) of the *Criminal Code*, RSC 1985 c C-46. The plaintiff makes this same allegation in the alternative against the Brokerage Defendants.

[3] In the three present Motions, brought by each of the three abovementioned groups of defendants, respectively, the defendants seek various types of relief, including an Order striking the plaintiff's Fresh as Amended Statement of Claim (the **"Statement of Claim"**) for failure to disclose a reasonable cause of action. The defendants also seek an Order dismissing the plaintiff's action.

[4] For the reasons that follow, I have concluded that the Statement of Claim discloses a reasonable cause of action against the Brokerage Defendants with respect to the alleged arrangement to "control" prices for the supply of Cooperating Brokerage Services in the GTA during the Relevant Period. However, it does not disclose a reasonable cause of action with respect to the claimed "fixing, maintaining, or increasing" of those prices. Accordingly, the latter allegations will be struck from the Statement of Claim.

[5] I have also concluded that the Statement of Claim discloses a reasonable cause of action against the Association Defendants and the Brokerage Defendants for allegedly aiding, abetting and counselling the impugned arrangement. However, it does not disclose a reasonable cause of action against the Franchisor Defendants. Accordingly, this latter aspect of the Statement of Claim will be struck.

[6] In the course of reaching the foregoing conclusions, I determined that a defendant may arguably be said to have "engaged in" conduct section 45 of the *Competition Act*, and within the meaning of section 36, even if that defendant is not a "competitor."

[7] Finally, I have concluded that it is not plain and obvious that the allegations in the Statement of Claim are time-barred as of two years prior to the filing of the initial Statement of Claim, on April 1, 2019.

[8] Having regard to the foregoing, and for the reasons further explained below, the Motions of the Brokerage Defendants and the Association Defendants will be dismissed, except insofar as

they concern allegations with respect to the "fixing, maintaining or increasing" of the above-mentioned prices. The Motion of the Franchisor Defendants will be granted as it relates to their request to strike the Statement of Claim to the extent that it concerns them.

II. **The Parties**

A. *The Proposed Representative Plaintiff and the Class He Represents*

[9] Mr. Sunderland is a resident of Toronto, Ontario. In August 2020, he sold a property that had been listed on the MLS. He and the purchaser were represented by separate brokerages.[1] However, the total commission he paid for brokerage services (5%) included a 2.5% commission that was ultimately paid to the buyer's brokerage, for Cooperating Brokerage Services.

B. *The Defendants*

[10] The plaintiff identifies three broad groups of defendants, as follows.

(1) The Brokerage Defendants

[11] The brokerage defendants are Royal LePage Real Estate Services Ltd., Right at Home Realty Inc., Forest Hill Real Estate Inc., Max Wright Real Estate Corporation, Harvey Kalles Real Estate Ltd., Chestnut Park Real Estate Limited, and iPro Realty Ltd. (collectively, the **"Brokerage Defendants"**).

[1] The plaintiff states that he was represented by Bosley Real Estate Ltd., while the buyer was represented by Bosley – Toronto Realty Group Inc.

[12] The Brokerage Defendants are real estate brokerages licensed to trade in real estate. They are alleged to have contravened section 45 of the *Competition Act*, by entering into an "arrangement" to fix, maintain, increase or control the supply of Cooperating Brokerage Services in the GTA during the Relevant Period.

(2) The Franchisor Defendants

[13] The defendants RE/MAX Ontario-Atlantic Canada, Inc. o/a RE/MAX Integra , Century 21 Canada Limited Partnership, Residential Income Fund L.P., Sutton Group Realty Services Ltd., and HomeLife Realty Services Inc. (collectively, the **"Franchisor Defendants"**) are franchisors of real estate brokerage services.

[14] Each of the Franchisor Defendants is alleged to have multiple franchisee real estate brokerages in the greater Toronto area (**"GTA"**).

[15] The plaintiff alleges that the Franchisor Defendants have encouraged, counselled, aided, abetted, assisted and required their franchisees to enter into and maintain the "arrangement" that the plaintiff claims to contravene section 45 of the *Competition Act*

(3) The Association Defendants

[16] The plaintiff alleges that TRREB and the Canadian Real Estate Association (**"CREA"**) (collectively, the **"Association Defendants"**) are not-for-profit professional associations whose membership includes the Brokerage Defendants, brokers and salespersons. The plaintiff further

alleges that the Association Defendants are controlled by, and act for the benefit of, their members.

[17] According to the plaintiff, TRREB owns and operates the Toronto Multiple Listing Service (**"Toronto MLS"**). He adds that CREA is the registered owner of certain other MLS marks, including the MLS®, Multiple Listing Service® and REALTOR® marks; and that CREA licenses those marks to its member real estate boards.

[18] As with the Franchisor Defendants, the plaintiff claims that the Association Defendants have encouraged, counselled, aided, abetted, assisted and required their members to enter into and maintain the "arrangement" that is alleged to contravene section 45 of the *Competition Act*.

III. **Background**

[19] A comprehensive overview of residential real estate industry and its principal participants is provided in *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp. Trib. 7, at paras 51–78 [***TREB***]. The following summary will be limited to the matters addressed in the Statement of Claim, as well as non-contentious matters that were addressed in the parties' written or oral submissions, and that do not appear to be in dispute.

A. *Provincial Legislation*

[20] In Ontario, real estate brokers and agents are regulated by the *Real Estate and Business Brokers Act, 2002,* SO 2002, c 30, Sched C (**"REBBA"**). Among other things, the REBBA requires all brokerages and salespersons trading in real estate in Ontario to be registered:

REBBA, s. 4(1). The REBBA also requires brokers to be remunerated by "an agreed amount or percentage of the sale price or rental price, as the case may be, or a combination of both": REBBA, s. 36(1).

[21] Pursuant to s. 31(2) of REBBA, no broker or salesperson shall accept any remuneration for trading in real estate from any person except the brokerage which employs that individual. The full text of the foregoing provisions of the REBBA is reproduced at Annex 6 below.

B. *Ontario Real Estate Association (**"OREA"**)*

[22] OREA is a professional association that serves its approximately 79,000 members through a variety of publications, educational programs (including real estate registration courses), and special services. It also makes standard forms, including the standard form real estate listing agreement (**"OREA Listing Agreement"**), available to its members.

C. *Brokers, Salespersons, Brokerages and Agents*

[23] S. 1(1) of the REBBA defines the term "broker" to mean "an individual who has the prescribed qualifications to be registered as a broker under this Act and who is employed by a brokerage to trade in real estate." The term "salesperson" is defined in essentially the same way, except that such individuals are registered as a salesperson, rather than as a broker. For the purposes of the Statement of Claim, the term "salesperson" means both a "broker" and a "salesperson", as defined above.

[24] A “brokerage” is stated to be “a corporation, partnership, sole proprietor, association or other organization or entity that, on behalf of others and for compensation or reward or the expectation of such, trades in real estate or holds himself, herself or itself out as such”: REBBA, s. 1(1). Brokerages can be independent, or they can be franchisees, operating one or more offices under the manner of a corporate franchisor.

[25] All brokerages are required to have a “broker of record” who is responsible for the brokerage’s compliance with REBBA and its regulations: REBBA, s. 12(2).

[26] The term “agent” is not defined in the REBBA. I understand that it means a person who is registered as a salesperson and who is employed by a brokerage to trade in real estate.

[27] Brokers, salespersons and agents who are retained by a seller of residential real estate are known in the industry as “listing” brokers or agents (**“Listing Brokers”**), whereas those who are retained to represent a buyer are known as “cooperating” brokers or agents (**“Cooperating Brokers”**).

[28] It appears to be common ground between the parties that a listing agreement is between a seller and a listing brokerage (**“Listing Brokerage”**), rather than between the seller and a particular salesperson. Likewise, a buyer seeking assistance from a particular salesperson will enter into a contract with that salesperson’s brokerage (**“Cooperating Brokerage”**), rather than with the salesperson. Consequently, all commissions paid in connection with residential real estate transactions are paid to brokerages, who in turn remunerate the salespersons in question.

[29] As discussed below, it appears to be the general industry practice in Ontario that sellers pay their Listing Brokerage a commission which covers the services provided by both the Listing Broker and the Cooperating Broker. The Listing Broker then pays part of that commission to the Cooperating Brokerage.

D. *TRREB Rules and CREA Rules*

[30] In addition to the requirements imposed by the REEBA and OREA, brokerages in the GTA are subject to rules promulgated by TRREB and CREA.

[31] The plaintiff alleges that, to become a member of TRREB, brokerages and the brokers/salespersons they employ must agree to abide by TRREB's rules (**"TRREB Rules"**). Likewise, to become a member of CREA, brokerages, and brokers/salespersons they employ must agree to abide by CREA's rules (**"CREA Rules"**).

[32] The plaintiff further alleges that TRREB, CREA and OREA have entered into a contractual relationship known as the **"Three Way Agreement"** under which TRREB's members are required to become members of both CREA and OREA. Pursuant to that same agreement, TRREB's members allegedly agree to be bound by CREA and OREA's rules, in addition to TRREB's Rules.

[33] The plaintiff also claims that the TRREB Rules and the CREA Rules include rules relating to the commissions paid by residential real estate sellers whose properties are sold through the Toronto MLS. These rules apparently oblige a seller of residential real estate listed

on the Toronto MLS to make an offer of commission to any Cooperating Brokerage acting for a prospective buyer, thereby making the seller responsible to pay for the Cooperating Brokerage services used by the buyer.

[34] The plaintiff maintains that, pursuant to the TRREB Rules and the CREA Rules, an offer of commission made by a seller to a Cooperating Brokerage must be a blanket offer, open for acceptance by all Cooperating Brokerages accessing the Toronto MLS.

[35] It appears to be undisputed that CREA has also promulgated rules regarding the use of its MLS marks. In this regard, real estate brokerages in Canada and the salespersons they employ, including TRREB's member brokerages and salespersons, must agree to adhere to CREA Rules regarding the use of those marks.

IV. **Issues**

[36] For the purposes of this Motion, the issues are as follows:

a) Does the Statement of Claim disclose a reasonable cause of action under section 45(1) of the *Competition Act*?

b) Does the Statement of Claim plead conduct capable of constituting aiding, abetting or counselling a criminal conspiracy within the meaning of sections 21(1) and 22(1) of the *Criminal Code*?

c) Does section 36 of the *Competition Act* apply to a defendant that is made a party to an impugned arrangement by virtue of sections 21(1) and 22(1) of the *Criminal Code*?

d) Are the plaintiff's claims statute barred as of April 1, 2019?

V. **Relevant Provisions of the *Competition Act* and the *Federal Courts Rules***

[37] The sole cause of action in this proceeding is for recovery of damages under paragraph 36(1)(a) of the *Competition Act*, as a result of conduct by the Brokerage Defendants that is alleged to be contrary to subsection 45(1) of that legislation. In the alternative, the plaintiff claims that the Brokerage Defendants aided, abetted and counselled their salespersons to contravene subsection 45(1).

[38] The plaintiff also claims that the Association Defendants and the Franchisor Defendants are liable as parties to the alleged contravention of section 45(1), by virtue of having aided, abetted and counselled that contravention, within the meaning of sections 21(1) and 22(1) of the *Criminal Code*, respectively.

[39] Subsection 36(1) of the *Competition Act* provides as follows:

Recovery of damages	**Recouvrement de dommages-intérêts**
36 (1) Any person who has suffered loss or damage as a result of	**36 (1)** Toute personne qui a subi une perte ou des dommages par suite :
(a) conduct that is contrary to any provision of Part VI, or	**a)** soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,	**b)** soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

[40] In brief, subsection 36(1) permits the recovery of loss or damages suffered as a result of (a) conduct that is contrary to any of the provisions in Part VI of the *Competition Act* (which establishes various criminal offences), or (b) the failure of any person to comply with an order of the Competition Tribunal or another court under that legislation. It also permits the recovery of costs associated with investigating the matter and then bringing proceedings.

[41] Subsection 45(1) of the *Competition Act* creates an indictable offence for anyone who conspires, agrees or arranges with a competitor to do certain specific things. The provision states as follows:

Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges	**45 (1)** Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote

	ou conclut un accord ou un arrangement :
(a) to fix, maintain, increase or control the price for the supply of the product;	**a)** soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	**b)** soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	**c)** soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

[42] The various parts of section 45 that are relevant for the present purposes are reproduced in Annex 1 to these reasons.

[43] Subsection 21(1) of the *Criminal Code* deems everyone who does or omits to do anything for the purpose of aiding or abetting another person to commit an offence, to be a party to that offence.

[44] Likewise, subsection 22(1) of the *Criminal Code* deems everyone who counsels another person to be a party to an offence, to be a party to that offence if it is ultimately committed, regardless of whether it was committed in a way different from that which was counselled. The text of subsections 21(1) and 22(1) is reproduced in Annex 3 below

[45] Rule 221 of the *Federal Courts Rules*, SOR/98-106 (the **"*Federal Courts Rules*"**) authorizes the Court, on motion, to order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on numerous grounds. These include that the pleading discloses no reasonable cause of action. The text of Rule 221 is reproduced in Annex 4 below.

VI. **Assessment**

A. *Do the Pleadings Disclose a Reasonable Cause of Action?*

(1) General principles

(a) *Motion to strike*

[46] The test for assessing whether pleadings disclose a reasonable cause of action is whether "it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action": *Atlantic Lottery Corp Inc. v Babstock*, 2020 SCC 19, at para 14 [***Atlantic Lottery***]; *Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89, at para 15 [***Jensen FCA***], leave to appeal to SCC requested. In brief, "if a claim has no reasonable prospect of success it should not be allowed to proceed to trial": *Atlantic Lottery*, at para 14.

[47] A claim will fail to disclose a reasonable cause of action if it contains a "radical defect," is "doomed to fail" or is "so clearly improper as to be bereft of any possibility of success": *Atlantic Lottery*, at paras 89–90; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33 [***Wenham***], citing *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 47, leave to appeal to SCC in *Wenham* refused, 39518 (10 June 2021).

[48] In applying this test, the Court's task "is not to resolve conflicting facts and evidence and assess the strength of the case": *Wenham*, at para 28. The Court's focus is on the pleadings, not on the evidence: *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 23 [***Imperial Tobacco***]; *Jensen FCA*, at para 52. Those pleadings must be read generously, holistically, and practically, with a view to "err[ing] on the side of permitting a novel but arguable claim to proceed": *Imperial Tobacco*, at para 21; *Wenham*, at para 34; *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 18 [***Mancuso***], leave to appeal to SCC refused, 36889 (23 June 2016).

[49] Nevertheless, the court has an important screening role to play: *Desjardins Financial Services Firm Inc. v Asselin*, 2020 SCC 30 at para 74; *Jensen FCA*, at para 49; *Mohr v National Hockey League*, 2022 FCA 145 at paras 49 and 53 [***Mohr FCA***], leave to appeal to SCC refused, 40426 (20 April 2023). That role includes assessing whether the pleadings (i) are "sufficient to put the defendant on notice of the essence of the plaintiff's claim" (*Atlantic Lottery*, at para 89), (ii) have adequately addressed "the constituent elements of each cause of action," and (iii) provide enough facts or particulars to ensure that the trial proceedings will be "both manageable and fair": *Mancuso*, at paras 18–19. See also *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 104 [***Pro-Sys***].

[50] Moreover, the presumption of truth that applies to pleaded facts:

> "… does not extend to matters which are manifestly incapable of being proven, to matters inconsistent with common sense, vague generalization[s], conjecture[s], bare allegations, bald conclusory statements or speculation that is unsupported by material facts."
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> *Jensen FCA*, at para 52(b), endorsing *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 , at paras 81–82 [***Jensen FC***].

> See also *L'Oratoire Saint-Joseph du Mont-Royal v J.J.*, 2019 SCC 35, at paras 59–60.

[51] Where a cause of action advanced is under section 36 of the *Competition Act*, the Court will assess the sufficiency of the pleadings with respect to (i) the alleged "loss or damage suffered", (ii) whether that loss or damage was as a result of "conduct contrary to part VI of the Act" (which establishes various criminal offences), and (iii) the cost of any investigation alleged to have been incurred in connection with the matter and the proceedings taken under that provision: see paragraphs 39–40 above: *Jensen FCA*, at para 19; *Jensen FC*, at paras 93 and 123.

(b) *Elements and sub-elements of section 45*

[52] In the present proceeding, the alleged "conduct contrary to part VI" of the *Competition Act* is conduct described in section 45(1) of that legislation.

[53] The elements and sub-elements of section 45 were recently described in detail in *Difederico v Amazon*, 2023 FC 1156, at paras 34 – 44 [***Amazon***]. They do not need to be fully reproduced here.

[54] In essence, section 45 is concerned with the objects or purposes of the impugned agreement, rather than with its effects: *Container Materials Ltd et al. v The King*, [1942] SCR 147 at p. 159 [***Container Materials***]; *Mohr FCA*, at para 38; *R v Abitibi Power & Paper Co,* [1960] QJ No. 7 at paras 119 and 126, 131 CCC 201 (QCQB) [***Abitibi***]; *R v Armco Canada Ltd.*,

[1974] OJ No 2200 at paras 146, 6 OR (2d) 52, (ONHCJ) [***Armco***]. See also *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 655 [***PANS***].[2]

[55] There are three constituent elements of section 45. These are: (i) a "conspiracy, agreement or arrangement", (ii) with a "competitor", (iii) to do one of the things set forth in paragraphs 45(1)(a) – (c), respectively: see paragraph 41 above.

[56] It is incumbent upon a plaintiff to plead sufficient material facts with respect to each of the constituent elements of those offences: *Jensen FC*, at paras 73, 75 and 94, aff'd *Jensen FCA*, at para 19; Rules 174 and 181.

(i) "Conspiracy, agreement or arrangement"

[57] To properly plead the "act of conspiracy, agreement or arrangement," or *actus reus*, a plaintiff should provide sufficient material facts with respect to *either* (i) two way communications reflecting a meeting of the minds or a concerted purpose regarding one or more of the matters described in paragraphs 45(1)(a) – (c), *or* (ii) a communication from one party followed by a course of conduct from which a meeting of the minds or a concerted purpose regarding those matters can be inferred: *Jensen FC*, at para 98.

[58] To properly plead the requisite *mens rea*, it is incumbent upon a plaintiff to provide sufficient material facts with respect to (i) a subjective intention to enter into the alleged

[2] To the extent that the Court in *PANS* proceeded to reference "any behaviour that tends to reduce competition or limit entry," those comments must be understood in the context of the prior wording of section 45. That wording included an "effects" element that is no longer present in that provision.

agreement and knowledge of its terms, and (ii) an objective intention to do one or more of the things described in paragraphs 45(1)(a)-(c): *PANS*, at 659–660; *Watson v Bank of America Corporation*, 2015 BCCA 362 at paras 72–76 [***Watson***]; *Shah v LG Chem Ltd*, 2018 ONCA 819 at para 50 **[*Shah*]**, leave to appeal to SCC refused, 38440 (17 October 2019). Nevertheless, to survive a motion to strike, it *may* suffice for a plaintiff to allege that the impugned agreement was entered into knowingly and voluntarily, so long as the pleadings also provide sufficient material facts from which the requisite objective intention may be inferred: *Watson*, at paras 100–102.

(ii) With a "competitor"

[59] The term "competitor" is defined in subsection 45(8) to include "a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement," regarding one or more of the matters described in paragraphs 45(1) (a) to (c). Given that each of the latter paragraphs use the term "the product," it is readily apparent that the product in question is the product referred to in the "chapeau" or opening words of subsection 45(1). That is to say, the product in respect of which the parties to the alleged agreement compete: *Mohr National Hockey League*, 2021 FC 488 [***Mohr FC***], at paras 35 and 42. Consequently, plaintiffs who allege an agreement contrary to section 45 must plead sufficient material facts with respect to competition between the parties to the impugned agreement, in relation to that product.

(iii) The objects or subject matter prohibited by paragraphs 45(1)(a)-(c)

[60] Paragraphs 45(1)(a), (b) and (c) establish three separate offences. The specific conduct prohibited by each of those offences is to conspire, agree or arrange with a competitor:

> **(a)** to fix, maintain, increase or control the price for the supply of the product;
> **(b)** to allocate sales, territories, customers or markets for the production or supply of the product; or
> **(c)** to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

[61] The requirement for a plaintiff to plead sufficient material facts with respect to each of the constituent elements of an offence includes the need to provide such facts with respect to each of the foregoing paragraphs that is alleged in a statement of claim: see paragraph 56 above.

(2) Analysis of the Plaintiff's claims

(a) *The "agreement or arrangement"*

[62] The Statement of Claim asserts that one CREA Rule and four TRREB Rules, taken together (collectively, the **"Buyer Brokerage Commission Rule"**), constitute an "arrangement" that falls within the purview of section 45(1) (the **"Arrangement"**).

[63] The CREA Rule in question is Rule 11.2.1.3, which states as follows:

> **Rule 11.2.1.3**: The listing REALTOR® member agrees to pay to the co-operating (i.e. selling) REALTOR® member compensation for the co-operative selling of the property. An offer of compensation of zero is not acceptable.

[64] During the hearing of this Motion, counsel to CREA explained that there are historical reasons for the presence of the word "selling" in the second line of the passage quoted immediately above, and that "everyone understands" that this should be read to mean "Cooperating Broker."

[65] The four TRREB Rules that form part of the Buyer Broker Commission Rule are as follows:

> **R-705**: The commission offered by the Listing Brokerage to a Co-operating Brokerage including any exclusions, incentives and/or adjustments shall be disclosed on TRREB's MLS® System and be clearly and fully stated in the "Commission to Co-operating Brokerage" field. Where necessary these remarks may be continued in the "Remarks for Brokerage" field.
>
> **R-710**: The publication of a MLS® Listing on TRREB's MLS® System constitutes an offer by the Listing Brokerage to any Co-operating Brokerage that upon obtaining an Offer that is accepted for the MLS Listing the Co-operating Brokerage shall be entitled to earn the commission on TRREB's MLS® System, subject to the arbitration provisions of the TRREB By-law and MLS® Rules or Policies. Publication does not constitute an offer by such Listing Brokerage to pay commission as principal except as set out in Rules R- 711, R-712 and R-713.
>
> **R-730**: If a Member is unwilling to accept the commission offered on TRREB's MLS® System, such Member may request a change before an Offer is signed, and shall not use the terms of an Offer or an Agreement of Purchase and Sale to include or modify such commission. Any agreed upon change shall be separate and in writing. A Listing Brokerage may unilaterally refuse to change such commission.
>
> **R-740**: Commission offered to a Co-operating Brokerage on TRREB's MLS® System shall not be altered between the time of registration of an Offer and final acceptance of that Offer.

[66] In brief, CREA Rule 11.2.1.3 requires every Listing Brokerage to pay compensation to the Cooperating Brokerage "for the co-operative selling of the property." It further provides that an "offer of compensation of zero is not acceptable."

[67] TRREB Rule 705 adds that for all properties listed on the Toronto MLS, the commission offered by the Listing Brokerage to the Cooperating Brokerage must be clearly and fully disclosed in the listing. TRREB Rule 710 supplements this by essentially creating a contractual

entitlement to the commission displayed in the Toronto MLS, for Cooperating Brokerages. At paragraph 95, the Statement of Claim states:

> In effect, Rules 705 and 710 require, for all properties listed on the Toronto MLS that:
>
> a) the seller compensate the Listing Brokerage and the [Cooperating] Brokerage; and
>
> b) the commission offered to the [Cooperating] Brokerage must be a blanket offer, open to all TRREB members, which is payable upon the closing of the transaction.
>
> [Emphasis added.]

[68] Indeed, on its face, Rule 710 goes further and effectively deems a Cooperating Broker to have "accepted" the Listing Broker's "offer" of the commission in question. In effect, Rule 710 appears to establish the existence of bilateral agreements between Listing Brokers and Cooperating Brokers, which fall under the broader "arrangement" and "scheme" alleged in the Statement of Claim. By agreeing to abide by TRREB's Rules, Listing Brokers and Cooperating Brokers arguably may be said to have agreed to enter into such bilateral contracts.

[69] The Statement of Claim adds that TRREB Rules 730 and 740 "severely limit and impair the negotiation or alteration of the price for the supply of Buyer Brokerage services (i.e., the commission) which has been offered by a seller to Buyer Brokerages."

[70] The Statement of Claim maintains that by joining and maintaining membership in TRREB and *expressly agreeing* to abide by the TRREB Rules and the CREA Rules, including the Buyer Brokerage Commission Rule, each of the Brokerage Defendants has agreed to enter and has entered into the Arrangement. It is further claimed that, at the time they joined TRREB,

each of the Brokerage Defendants executed a TRREB Membership Application and Agreement. Pursuant to this, they allegedly executed a Certificate and Agreement of Brokerage & Broker/Salesperson Applicant, certifying that "if accepted as a Member [of TRREB], *I agree to be bound* by the By-Laws, MLS Rules and Policies of [TRREB], a copy of which has been received, read and understood by me" [emphasis added].

[71] The plaintiff's allegation of the overarching Three Way Agreement between CREA, TRREB and OREA is also arguably relevant to this issue: see paragraph 32 above.

[72] In my view, the facts discussed above are sufficient to meet the pleading requirements for the "agreement or arrangement" element of section 45(1). They (i) are "sufficient to put the defendant on notice of the essence of the plaintiff's claim," (ii) have adequately addressed the issue of a communication reflecting a meeting of the minds or a concerted purpose - in this case each Brokerage Defendant's written agreement to be bound by the Buyer Brokerage Commission Rule, and (iii) provide enough facts or particulars to ensure that the trial proceedings will be "both manageable and fair": see paragraphs 49 and 57 above.

[73] Stated differently, it is not plain and obvious, assuming the above-mentioned pleaded facts to be true, that the Statement of Claim has no reasonable prospect of success with respect to the "agreement or arrangement" element of subsection 45(1). This is particularly so if one adopts the required generous approach that errs on the side of permitting a novel but arguable claim to proceed: see paragraph 48 above.

[74] For greater certainty, I consider it to be implicit that each Brokerage Defendant recognizes and understands that each other Brokerage Defendant must agree to the Buyer Brokerage Commission Rule. This is something that the plaintiff could seek to clarify through a request for leave to amend.

(b) *With a "competitor"*

[75] The Statement of Claim asserts that the Brokerage Defendants are competitors in the market for the provision of Cooperating Brokerage Services for residential real estate in the GTA. In support of this assertion, the Statement of Claim states that TRREB members and CREA members include brokerages who compete with one another in the market for residential real estate services, including Cooperating Brokerage Services for residential real estate in the GTA. It is further maintained that, during the Relevant Period, each of the Brokerage Defendants provided Cooperating Brokerage Services in the GTA.

[76] Assuming the foregoing facts to be true, they are sufficient to meet the pleading requirements for the "with a competitor" element of section 45(1). Once again, they (i) are "sufficient to put the defendant on notice of the essence of the plaintiff's claim", (ii) have adequately addressed the issue of why the Brokerage Defendants are competitors - in this case, because they compete with one another to provide Cooperating Brokerage Services in the GTA, and (iii) provide enough facts or particulars to ensure that the trial proceedings will be "both manageable and fair": see paragraphs 49 and 59 above.

[77] It is not plain and obvious, assuming the pleaded facts to be true, that the Statement of Claim has no reasonable prospect of success with respect to the "with a competitor" element of subsection 45(1). In this regard, the plaintiff's allegation that TRREB is controlled by its members may prove to play an important role in the ultimate analysis.

(c) *The object and subject matter of the Buyer Broker Commission Rule*

[78] The Statement of Claim makes broad allegations with respect to "subsection 45(1)" of the *Competition Act*. However, the specific claims made are confined to the offence set forth in paragraph 45(1)(a). No claims are made with respect to the offences contemplated by paragraphs 45(1)(b) or (c). Consequently, the analysis below will be confined to paragraph 45(1)(a). Any claims that the plaintiff may have intended to advance with respect to paragraphs 45(1)(b) or (c) shall be struck for a failure to plead sufficient material facts.

[79] The Statement of Claim repeatedly states that the Arrangement constitutes a conspiracy, agreement or arrangement "to fix, maintain, increase or control the price for the supply of [Cooperating] Brokerage services for residential real estate in the GTA" during the relevant period: see, e.g., paragraphs 19, 47, 105, 130 and 159. However, this claim is a bald assertion with respect to the alleged conspiracy, agreement or arrangement to "fix", "maintain", and "increase" the price for the supply of Cooperating Brokerage Services. That is to say, the Statement of Claim does not plead any material facts with respect to the requisite object on the part of the Brokerage Defendants to do any of those things. I will address the allegation with respect to an agreement to "control" prices further below.

(i) The alleged Arrangement to “fix”, “maintain” and “increase” prices

[80] Insofar as the alleged conspiracy, agreement or arrangement to “fix”, “maintain” and “increase” the price for the supply for Cooperating Brokerage Services is concerned, the allegations in the Statement of Claim simply address the *interests* of the Defendants and the *effects* of the Arrangement. Beyond the bald assertions mentioned immediately above, the Statement of Claim does not include additional material facts with respect to an object or a concerted purpose on the part of the Brokerage Defendants to “fix”, “maintain” or “increase” the price for the supply of Cooperating Brokerage Services.

[81] At paragraphs 100 and 101, the Statement of Claim maintains that the *interests* of the Defendants are “aligned and intertwined” in respect of the price of Cooperating Brokerage Services. Those interests are specifically alleged to be “in fixing, maintain[ing], increasing or controlling the price for the supply of residential real estate [Cooperating] Brokerage services in the GTA.” This is not a claim with respect to the requisite *actus reus* to fix, maintain or control such prices.

[82] In several other places, the Statement of Claim addresses alleged *effects* of the Arrangement. For example, paragraph 21 alleges that the Arrangement has *thwarted* competition by *causing* the plaintiff and class members to pay higher prices for Cooperating Brokerage Services than they would have paid absent the Arrangement. In a similar vein, paragraph 22 alleges that the Arrangement has *impeded* negotiations between sellers of residential real estate and Cooperating Brokerages, thereby *frustrating* competition and *causing* the plaintiff and class

members to pay higher prices than they would have paid in the absence of the Arrangement. Other passages of the Statement of Claim make allegations with respect to the *impact* of the Arrangement on prices: see e.g., paragraphs 126(g), 129 and 151–154. Elsewhere, the Statement of Claim alleges *reduced incentives* to negotiate lower commissions, and the *elimination of downward pressure* on prices: see e.g., paragraphs 136, 137 and 150. Additional passages allege adverse impacts on the ability of market forces to determine prices: see e.g., paragraphs 138 – 140 and 151. Allegations are also made with respect to *pressure* on sellers not to deviate from the "standard" 2.5% to 3% commission offered to Cooperating Brokerages, and how this standard commission results from the Buyer Brokerage Commission Rule: see paragraphs 141–147.

[83] These allegations with respect to effects do not constitute claims with respect to the requisite *actus reus* to fix, maintain or control such prices: see paragraph 57 above.

[84] Beyond the foregoing allegations with respect to the *interests* of the Defendants and the *effects* of the Arrangement on prices, the Statement of Claim does not plead any sufficient material facts with respect to the requisite object or concerted purpose to fix, maintain or increase prices, as contemplated by paragraph 45(1)(a). In other words, the Statement of Claim does not plead sufficient material facts with respect to the *actus reus* of a conspiracy, agreement or arrangement to fix, maintain or increase prices. It bears reiterating that the Statement of Claim simply makes bald assertions in this regard. This is not sufficient to survive a motion to strike.

[85] For greater certainty, on a plain reading of their terms, the five specific rules that comprise the Buyer Brokerage Commission Rule and that are alleged to constitute the Arrangement do not fix, maintain or increase any prices, whether of Cooperating Brokerage Services or otherwise: see paragraphs 63–69 above. Indeed, Rule 730 explicitly allows a member of TRREB to request a change in the commission offered by the Listing Broker.

[86] I acknowledge that the Statement of Claim alleges that members of TRREB and CREA objectively or subjectively *intended* to enter into a conspiracy, agreement or arrangement to fix, maintain or increase the price for the supply of Cooperating Brokerage Services: see e.g., paragraphs 30, 36, 161–164 and 190. However, those particular pleadings do not provide material facts with respect to the requisite *actus reus* of an actual conspiracy, agreement or arrangement to *fix, maintain or increase* the price of Cooperating Brokerage Services.

[87] In summary, the allegations made in the Statement of Claim with respect to such an agreement are not supported by sufficient material facts. It is plain and obvious that those allegations are bound to fail. Those allegations are not sufficient to put the defendant on notice of the essence of the plaintiff's claim. They also have not adequately addressed the *actus reus* of the alleged conspiracy, agreement or arrangement to *fix, maintain or increase* the price of Cooperating Brokerage Services in the GTA during the Relevant Period. In addition, they do not provide enough facts or particulars to ensure that the trial proceedings will be "both manageable and fair": see paragraph 49 above. Accordingly, the claims in the Statement of Claim with respect to an alleged conspiracy, agreement or arrangement to "fix", "maintain" or "increase" the price of Cooperating Brokerage Services in the GTA during the Relevant Period will be struck.

[88] I will now turn to the plaintiff's claims with respect to an Arrangement to *control* the price of such services.

(ii) The alleged Arrangement to "control" prices: *actus reus*

[89] Read generously and holistically, the Statement of Claim specifies various ways in which certain aspects of the Brokerage Commission Rule, on their face, "control" prices. I agree that it is at least arguable that some of those ways fall within the purview of paragraph 45(1)(a): *Mohr FCA*, at para 48. For the reasons set forth below, those allegations are "worth considering" (*Mohr FCA*, at para 52) and it cannot be said that they have no reasonable prospect of success.

[90] At paragraph 134, the Statement of Claim maintains that the Buyer Broker Commission Rule controls the cost of Cooperating Broker commissions by "forcing sellers to bear the cost of services used by buyers." The Statement of Claim proceeds to assert at paragraph 135 that "by requiring a seller to pay a commission to [Cooperating] Brokerages, the Buyer Brokerage Commission Rule makes the seller responsible for paying the cost of services that, in a competitive marketplace, would otherwise be borne by the buyer."

[91] These allegations are arguably borne out by the plain language of CREA Rule 11.2.1.3, and are arguably contemplated by the other four Buyer Broker Commission Rules. Specifically, the CREA Rule requires the Listing Brokerage to pay the Cooperating Brokerage's compensation "for the cooperative selling of the property." The four TRREB rules arguably reinforce this CREA Rule by contemplating, on their face, that the Listing Brokerage will offer a

commission to the Cooperating Brokerage, such that the latter's compensation will be indirectly paid by the seller of the property in question.

[92] At paragraph 95, the Statement of Claim goes further and states that TRREB Rules 705 and 710 effectively require the seller to compensate both the Listing Brokerage and the Cooperating Brokerage. A similar allegation is made at paragraph 13.

[93] In my view, this interpretation of Rules 705 and 710 is at least arguable. In any event, this requirement is explicit in CREA Rule 11.2.1.3. I also consider it to be arguable that by requiring the Listing Brokerage to pay the Cooperating Broker's commission/compensation, the Buyer Brokerage Commission Rule explicitly contemplates a form of control of the price of Cooperating Brokerage Services that falls within the purview of paragraph 45(1)(a) of the *Competition Act*. It does so by controlling *who* pays such commission.

[94] By effectively requiring that such commissions only be paid by the seller of the property, through the Listing Brokerage, the Buyer Brokerage Commission Rule arguably controls the price of Cooperating Brokerage Services by preventing Cooperating Brokers from negotiating their commissions directly with their client, namely, the purchaser of the property in question. To the extent that this explicitly excludes those on the "buying" side of the transaction from having any role in establishing the price of Cooperating Brokerage Services, it is arguably an important form of control over such prices. It effectively eliminates a role for those who actually supply the Cooperating Brokerage Services, which represent half of the total brokerage services supplied in connection with any residential sale.

[95] At paragraphs 17 and 96, the Statement of Claim alleges that the Buyer Brokerage Commission Rule establishes limitations that amount to additional forms of control over the price of Cooperating Brokerage Services. Those forms of control are alleged to be created by TRREB Rules 730 and 740, which are claimed to "severely limit and impair the negotiation or alteration of the price for the supply of [Cooperating] Brokerage services (i.e., the commission) which has been offered by a seller to [Cooperating] Brokerages." These limitations are explicitly articulated in two passages of TRREB Rule 730 and in one passage of TRREB Rule 740. Specifically, on its face, the former rule controls *when* a change of commission may be requested. It does so by stipulating that a TRREB member "may request a change [of the commission] before an Offer is signed" [emphasis added]. That rule arguably establishes a further form of control by providing that a TRREB member "shall not use the terms of an Offer or an Agreement of Purchase and Sale to include or modify such commission." Insofar as TRREB Rule 740 is concerned, the limitation is that the "Commission offered to a Co-operating Brokerage on TRREB's MLS® System shall not be altered between the time of registration of an Offer and final acceptance of that Offer."

[96] Despite the fact that the term "limit" rather than "control" is used at paragraphs 17 and 96 of the Statement of Claim, a generous and holistic reading of that document permits those paragraphs to be read as asserting forms of control over the price of Cooperating Brokerage Services in the GTA during the Relevant Period. This is particularly so given the numerous allegations that are made throughout the Statement of Claim, regarding a conspiracy, agreement or arrangement to control the price of such services: see e.g., paragraphs 30, 36, 161–164 and

190. In any event, this is something that the plaintiff could seek to clarify through a request for leave to amend.

[97] The Association Defendants and the Brokerage Defendants maintain that the Arrangement does not engage section 45. In support of this position, they rely on the plain meaning of section 45 in the context of the *Competition Act*, the legislative history of section 45 and the jurisprudence regarding that provision. This all leads them to maintain that Parliament intended section 45 to apply solely to "hard core cartel agreements," namely, the most egregious types of agreements between competitors, which are unambiguously harmful to competition.

[98] I agree with this position regarding Parliament's intention regarding the purview of section 45. However, I disagree with the submission that the Arrangement plainly does not involve conduct contemplated by section 45. In this latter regard, it is not plain and obvious that the plaintiffs' claims regarding the "control" sub-element of paragraph 45(1)(a) have no reasonable prospect of success or are doomed to fail: see paragraphs 46–47 above.

[99] The position of the Association Defendants and the Brokerage Defendants with respect to Parliament's intention regarding the purview of section 45 is consistent with the analysis recently conducted in *Amazon*, at paras 79–113. It is unnecessary to fully reproduce that analysis here. For the present purposes, it is sufficient to state that it included a contextual analysis of section 45 and the scheme of the *Competition Act*, together with a review of the recent jurisprudence and the legislative history of section 45. The conclusion ultimately reached is that:

> [108] The legislative history discussed above helps to inform the Court's interpretation of section 45. As with the scheme and

> purposes of the Act, as well as the jurisprudence, it strongly suggests that the application of section 45, as currently worded, was intended to be limited to conspiracies, agreements and arrangements that are unambiguously harmful to competition. Such agreements are also known as "hard-core" or "naked" cartel agreements. Other agreements between competitors were intended to be reviewed under the non-criminal provision in section 90.1 of the Act, in part to provide clearer standards to the business community.
>
> *Amazon*, at para 108. See also paras 91 and 100.

[100] The Association Applicants and the Brokerage Applicants maintain that it is readily apparent that the Buyer Brokerage Commission Rule is not a "hard-core" or "naked" cartel conduct that is unambiguously harmful to competition and that was contemplated by Parliament when it amended section 45 in 2010. In support of this position, they assert that the TRREB Rules and the CREA Rules were promulgated to promote increased transparency in the real estate industry and to establish mechanisms to facilitate a very large number of transactions among their members in an orderly manner. This is not plain and obvious at this point in the proceedings. It is something to be determined on the basis of the evidentiary record in the hearing on the merits: *Imperial Tobacco*, at para 23; *Mohr FCA*, at para 57. In any event, persons "cannot immunize what would otherwise be a horizontal agreement proscribed by section 45, by burying that agreement in a broader agreement" that may have legitimate objectives: *Amazon*, at para 67.

[101] The Association Defendants note that in *R v Chambre d'immeuble du Saguenay-Lac St. Jean Inc.* [1988], 23 CPR (3d), 204, at para 4 *[CREA 1988*], the prohibition order that was issued explicitly permitted the respondents to "require that listing Brokers indicate the commission available to a selling Broker with respect to a particular transaction and require that such

compensation be paid to the listing Broker unless the listing Broker and selling Broker have mutually agreed to alder the said commission": *CREA 1988,* at para 7. However, that particular conduct is much narrower than the five rules that comprise the Buyer Broker Commission Rule now being challenged by the plaintiff.

[102] In summary, I conclude that it is not plain and obvious that the Buyer Broker Commission Rule does not "control" the price of Cooperating Brokerage Services in a manner contemplated by paragraph 45(1)(a) of the *Competition Act*. In other words, it is not plain and obvious that the Buyer Broker Commission Rule does not constitute the *actus reus* contemplated by paragraph 45(1)(a).

[103] This is because, on its face, the Buyer Broker Commission Rule arguably exercises various forms of control in relation to the price for the supply of Cooperating Brokerage Services. These include restrictions on *who* may pay Cooperating Brokerage commissions/compensation, and on *when* a change in such commissions/compensation may be requested and made. A further form of control is arguably imposed through the prohibition on using the terms of an Offer or an Agreement of Purchase and Sale to "include or modify" a commission.

[104] It is not plain and obvious, assuming the facts pleaded to be true, that the claims made with respect to these matters have no realistic prospect of success. I consider it arguable that these aspects of the Buyer Broker Commission Rule are unambiguously harmful to competition and purchasers of Cooperating Brokerage Services in the GTA during the Relevant Period.

[105] For greater certainty, I have reached the foregoing conclusions notwithstanding the fact that subsection 36(1) of the REEBA requires brokers to be remunerated by "an agreed amount or percentage of the sale price or rental price, as the case may be, or a combination of both." In brief, that provision is silent as to *who* is responsible for paying the percentage commission and *when* it is paid.

(iii) The alleged Arrangement to "control" prices: *mens rea*

[106] The defendants assert that the Statement of Claim "does not – and cannot credibly – allege [the requisite] subjective *mens rea* for section 45 of the *Competition Act*. Accordingly, they maintain that the Statement of Claim should be struck on the basis that it does not disclose a reasonable cause of action.

[107] In support of this position, the defendants maintain that section 45 is a "true criminal offence" and that therefore, absent express statutory language to the contrary, section 45 requires subjective *mens rea* with respect to both an intention to enter into an agreement or arrangement and an intention to agree to the conduct described in paragraph 45(1)(a).

[108] In further support of their position, the Defendants state that when section 45 was amended in 2010, Parliament removed statutory language that expressly provided that a subjective intention to engage in conduct prohibited by the former language of section 45 was not required. That provision was section 45(2.2), which stated as follows:

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or	2.2) Il demeure entendu qu'il est nécessaire, afin d'établir qu'un complot, une

arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).	association d'intérêts, un accord ou un arrangement constitue l'une des infractions visées au paragraphe (1), de prouver que les parties avaient l'intention de participer à ce complot, cette association d'intérêts, cet accord ou cet arrangement et y ont participé mais qu'il n'est pas nécessaire de prouver que les parties avaient l'intention que le complot, l'association d'intérêts, l'accord ou l'arrangement ait l'un des effets visés au paragraphe (1).

[109] In my view, it is not plain and obvious that subjective *mens rea* was required immediately prior to the insertion of the foregoing provision into the *Competition Act* in 1986, when that provision initially appeared as subsection 32(1.3).[3] It is also not plain and obvious that the removal of that provision from the *Competition Act* has had the effect of elevating the *mens rea* required under section 45 to subjective intent.

[110] The plaintiff maintains that the Defendants' position on this issue does not account for the interplay between *PANS* and the enactment of subsection 45(2.2), the legislative history of section 45, or the scheme of the Act. I agree.

[111] In *PANS*, the Supreme Court of Canada (**"SCC"**) held that section 45 requires two fault elements, one subjective and one objective. The first consists of a subjective intention to enter into the impugned agreement and knowledge of its terms. The second consists of an objective

[3] This provision was renumbered as subsection 45(2.2) later that year.

intention to do one or more of the things described in paragraphs 45(1)(a)-(c). This approach has been followed by two separate appellate courts: see paragraph 58 above.

[112] In *PANS*, the Court characterized the subjective and objective fault elements for subsection 45(1), as it then stood, in the following terms:

> To satisfy the subjective element, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.
>
> In order to satisfy the objective element of the offence, the Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly […] Once again, it would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition.
>
> *PANS*, at 659–660.

[113] In 2010, the requirement to demonstrate certain stipulated effects was removed from section 45. Consequently, the objective element now requires a demonstration that a reasonable business person who is familiar with the business in question would or should know that the impugned agreement had as its object or purpose one of the prohibited types of conduct prescribed in paragraphs 45(1)(a), (b) or (c): *Amazon*, at para 99.

[114] As the plaintiff points out, the conduct at issue in *PANS* occurred before subsection 45(2.2) was inserted into the Act. An arguable implication of this is that the SCC considered that the addition of subsection 45(2.2) did not change the pre-existing law. This view of the law prior

to 2010 is supported by some jurisprudence of that Court: see e.g., *Container Materials*, at p 158; the minority opinion in *Aetna Insurance Company v The Queen*, [1978] 1 SCR 731 at 739 and 740-41 [***Aetna***]; the decision of Justices Cartwright and Locke, in *Howard Smith Paper Mills Ltd. v The Queen*, [1957] SCR 403 at 426; and the dissenting decision in *Atlantic Sugar Refineries Co Ltd et al. v Attorney General of Canada*, [1980] 2 SCR 644 at 669–672 [***Atlantic Sugar***]. However, the proverbial waters were muddied by the majority opinion in *Aetna*, at 748, which was then quoted with approval in *Atlantic Sugar* at 659 and 660. What became subsection 45(2.2)[4] was then inserted into the *Competition Act* a few years later.

[115] Turning to the legislative history, the plaintiff asserts that the removal of subsection 45(2.2) flowed from the elimination of the requirement to demonstrate certain *effects*, in order to establish a contravention of subsection 45(1). I consider this to be a more persuasive proposition than the defendants' position that the removal of subsection 45(2.2) reflected an intention by Parliament to elevate the second *mens rea* requirement in section 45(1) from an objective requirement to a subjective one. The wording of subsection 45(1), as it was immediately prior to the 2010 amendments, is reproduced in Annex 2 below.

[116] Regarding the scheme of the *Competition Act*, the plaintiff notes that when Parliament decided to establish a subjective *mens rea* requirement for another one of the provisions of the *Competition Act* in 1999, it included explicit language to this effect in that legislation. This was done when Parliament added the words "knowingly or recklessly" to the false or misleading advertising provisions in subsection 52(1) of the *Competition Act*. I agree with the plaintiff that

[4] As previously noted, subsection 45(2.2) was subsection 32(1.3) before the *Competition Act* was renumbered.

this suggests that, had Parliament wished to elevate the second *mens rea* requirement in section 45 to a subjective standard, it would have explicitly done so. Subsection 52(1) is reproduced in full in Annex 1 below.

[117] The defendants maintain that it was unnecessary to include explicit language with respect to subjective *mens rea* because, absent express language to the contrary, subjective *mens rea* is a presumed requirement for all "true" criminal offences. In this regard, the defendants rely on *R v A.D.H.*, 2013 SCC 28 at para 23 [***A.D.H.***]. However, the Court there proceeded to make it clear that the presumption is simply that "true" crimes have "a" subjective fault element. The Court added that this presumption is not a self-applying rule, but rather a principle of interpretation: *A.D.H.*, at paras 25 and 28. The Court then conducted a full contextual analysis in the course of concluding that the crime of child abandonment has a subjective fault element: *A.D.H.*, at paras 21 and 73–74.

[118] As previously noted, it is generally accepted that section 45 has a subject *mens rea* requirement, namely, a subjective intention to enter into the impugned agreement and knowledge of its terms. This is not controversial.

[119] The defendants also rely on the increases in the penalties set forth in subsection 45(2) to support their position that subjective *mens rea* is required with respect to the specific conduct described in paragraph 45(1)(a). In this regard, they note that in 2010, the maximum penalties were increased from five years imprisonment and/or a fine not exceeding $10 million to 14 years

imprisonment and/or a fine not exceeding $25 million. They add that, in 2019, the $25 million limit was replaced with an unlimited "fine in the discretion of the court."

[120] Although these increased penalties clearly communicate Parliament's view of the seriousness of the offences created by paragraphs 45(1)(a) – (c), they do not necessarily indicate an intention to establish a double subjective *mens rea* requirement for those provisions. As mentioned above in connection with the false or misleading advertising provisions in section 52 of the *Competition Act*, Parliament inserted express statutory language when it decided to elevate the *mens rea* requirement on another occasion.

[121] The defendants have not identified any contextual factors to support their position that section 45 has a double subjective *mens rea* requirement, other than those addressed above, i.e., the increases in penalties stipulated in subsection 45(2) and the elimination of subsection 45(2.2) from the *Competition Act* in 2010. In any event, the SCC conducted a contextual analysis in *PANS* and concluded that section 45 has only a single subjective intent requirement, as described in the immediately preceding paragraph above: *PANS*, at 659–660. It bears underscoring that the Court did so in the course of considering indictments involving conduct that predated the insertion of former subsection 45(2.2) into the *Competition Act*.

[122] During the hearing of this Motion, the defendants asserted that the stigma associated with a conviction under section 45, particularly following the increases in maximum penalties discussed above, is such that section 45 must now be understood to require a double subjective

mens rea requirement. In this regard, they relied on *R v Vaillancourt*, [1987] 2 SCR 636, at p 653 [***Vaillancourt***], where the SCC observed:

> […] there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. Such is theft, where, in my view, a conviction requires proof of dishonesty. Murder is another such offence.

[123] However, *Vaillancourt* was explicitly referenced by the SCC in the course of finding that section 45 only has one subjective *mens rea* requirement: *PANS*, at 659. The issue of whether the stigma associated with a conviction under section 45 has changed in the intervening period, to the point that section 45 should now be understood as having a double subjective intent requirement, will require an evidentiary record to resolve. On this Motion, such evidence may not be considered and was not adduced.

[124] It is relevant to note that, in *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425, at p 510 [***Thomson***], Justice La Forest stated that the *Competition Act* is "not concerned with 'real crimes' but with what has been called 'regulatory' or 'public welfare' offences". He added:

> There can be little doubt that the conduct prohibited by the Act is far removed from what is the typical concern of the criminal justice system, i.e. the "underlining [of] crucial social values" (emphasis added) where "[t]he sort of things prohibited – acts of violence, dishonesty and so on – are acts violating common sense standards of humanity" which we regard as meriting disapprobation and punishment … [cites omitted].
>
> *Thomson*, at p 509.

[125] Justice La Forest proceeded to explain that:

> …the relevance of the regulatory character of the offences defined in the Act is that conviction for their violation does not really entail, and is not intended to entail, the kind of moral reprimand and stigma that undoubtedly accompanies conviction for the tradition "real" or "true" crimes.
>
> *Thomson*, at 516.

[126] Justice La Forest's views on this issue were adopted by Justice Cory in *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154, at 222–223 [***Wholesale Travel***], where he also embraced the SCC's teaching in *General Motors of Canada Ltd. v City National Leasing*, [1989], 1 SCR 641, at 676 [***General Motors***], to the effect that the *Competition Act* "as a whole embodies a complex scheme of economic regulation," the purpose of which "is to eliminate activities that reduce competition in the market-place." Justice Cory further observed: "[t]hese decisions make it clear that the Act in all its aspects is regulatory in character": *Wholesale Travel*, at 223.

[127] The defendants note that, more recently, this Court observed that "[p]rice fixing agreements, like other forms of hard core cartel agreements, are analogous to fraud and theft. They represent nothing less than an assault on our open market economy": *The Queen v Maxzone Auto Parts (Canada) Corp*., 2012 FC 1117, at para 54 [***Maxzone***]. However, it is far from clear that this view, or the suggestion that such agreements "be treated at least as severely as fraud and theft," has been widely embraced: *Maxzone*, at para 56.

[128] Having regard to all of the foregoing, I find that it is not plain and obvious that paragraph 45(1)(a) should be interpreted as having a double subjective intent requirement, such that the alleged failure to adequately plead such intent is fatal to the plaintiff's case. The defendants have not demonstrated that the plaintiff's pleadings regarding *mens rea* are "doomed to fail" and have

no reasonable prospect of success should this dispute proceed to a trial: see paragraphs 46–47 above. I consider that the plaintiff's pleadings regarding *mens rea* raise a very arguable case and are "worth considering": see paragraph 89 above.

(iv) The plaintiff's allegations

[129] At paragraph 30, the Statement of Claim states that "TRREB had knowledge that TRREB Members *intended to enter into a conspiracy, agreement or arrangement to fix, maintain, increase or control the price for the supply of Buyer Brokerage services for residential real estate in the GTA during the Relevant Period*" [emphasis added]. A similar allegation is made at paragraph 36 with respect to CREA and its members, and at paragraph 57 with respect to the Franchisor Defendants and their franchisees. To the extent that the Brokerage Defendants are members of TRREB and CREA, the pleadings at paragraphs 30 and 36 can reasonably be read as claiming that they had the subjective intent to enter the impugned Arrangement as well as the subjective intent to engage in the conduct described in paragraph 45(1)(a).

[130] In any event, at paragraphs 161 and 162, the Statement of Claim states as follows:

> 161. The Brokerage Defendants and their co-conspirators intentionally entered into an illegal conspiracy, agreement or arrangement.
>
> 162. The Brokerage Defendants had a subjective intention to agree and had knowledge of the terms of the Arrangement.

[131] The Statement of Claim then proceeds to assert as follows:

> 164. The Brokerage Defendants had the objective intention, that is, a reasonable person in the Brokerage Defendants' position, would or should have been aware that the likely effect of the Arrangement would be to fix, maintain, increase or control the

> price for the supply of Buyer Brokerage services for residential real estate in the GTA during the Relevant Period.

[132] Finally, at paragraph 190, the Statement of Claim states as follows:

> By entering into the Arrangement and by aiding, abetting and counselling the Arrangement, as alleged, the Defendants have put in place a scheme which, in respect of the purchase and sale of properties listed on the Toronto MLS, *was intentionally designed to* and has resulted in fixing, maintaining, increasing or controlling the price for the supply of Buyer Brokerage services for residential real estate in the GTA during the Relevant Period in excess of what Class Members would have paid but for the Arrangement.

[133] It is readily apparent from all of the passages of the Statement of Claim quoted in the four immediately preceding paragraphs above that the Statement of Claim does in fact plead, with respect to the Brokerage Defendants, (i) subjective *mens rea* with respect to an intention to agree to the impugned Arrangement and knowledge of its terms, (ii) an objective intention with respect to the conduct described in paragraph 45(1)(a), and, in the alternative, (iii) a subjective intention with respect to that conduct.

[134] Although the Statement of Claim does not provide additional material facts with respect to these elements of *mens rea*, that is not fatal on this Motion: *Watson*, at para 101. Prior to discovery, such facts can be very difficult to obtain: *North York Branson Hospital v Praxair Canada Inc.*, [1998] OJ No 5993, at para 22; *Watson v Bank of America Corporation*, 2014 BCSC 532, at para 142; *Fairhurst v Anglo American PLC*, 2014 BCSC 2270, at paras 23–25; *Crosslink v BASF Canada*, 2014 ONSC 4529, at para 27. This is particularly so with respect to subjective *mens rea*.

[135] The overall adequacy of the pleadings can be assessed by reference to what they say as well as to common sense inferences that can reasonably be made: *Lin v Airbnb, Inc.*, 2019 FC 1563, at para 55; *Watson*, at para 101; *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283, para 109, citing *R. v Cooper*, [1978] 1 SCR 860 at 879. See also *Eurocopter v. Bell Helicopter Textron Canada Limitée*, 2009 FC 1141, at para 19.

[136] In my view, it can reasonably be inferred from the plain language of the Buyer Brokerage Commission Rule that a reasonable business person who is familiar with the residential real estate business in the GTA would likely conclude that this rule likely had as its object or purpose at least some forms of "control" of the price of Cooperating Broker Services, i.e., Cooperating Broker commissions/compensation. It will ultimately be up to the Court to determine whether such forms of "control" are in fact contemplated by paragraph 45(1)(a). For the present purposes, it suffices to observe that it is not plain and obvious that those forms of control are not within the purview of paragraph 45(1)(a). The plaintiff's position in this regard is at least arguable and "worth considering."

[137] In summary, I find that it is not plain and obvious that paragraph 45(1)(a) should be interpreted as having a double intent requirement, such that the alleged failure to adequately claim such intent is fatal to the plaintiff's case. More broadly, the allegations made in the Statement of Claim with respect to the *mens rea* of the Brokerage Defendants are not "doomed to fail" or "so clearly improper as to be bereft of any possibility of success": see paragraphs 46–47 above. In my view, those allegations raise an arguable case that is "worth considering": see paragraph 89 above.

(d) *Conclusions – Reasonable Cause of Action*

[138] For all of the reasons set forth in parts VI.A(2)(a) – (c) above, I find that the Statement of Claim discloses a reasonable cause of action with respect to the claimed Arrangement among the Brokerage Defendants to "control" the price for the supply of Cooperating Brokerage Services in the GTA during the Relevant Period. However, it does not disclose a reasonable cause of action with respect to the "fixing, maintaining, or increasing" of those prices during that period.

B. *Does The Statement of Claim Plead Conduct Capable of Constituting Aiding, Abetting or Counselling a Criminal Conspiracy within the Meaning of Sections 21(1) And 22(1) of the Criminal Code?*

[139] The sole allegation made in the Statement of Claim against the Association Defendants and the Franchisor Defendants is that they aided, abetted and counselled their salespersons to enter into and participate in the alleged Arrangement and thereby contravene subsection 45(1). The Statement of Claim makes this same allegation in the alternative against the Brokerage Defendants. These allegations are made under subsections 21(1) and 22(1) of the *Criminal Code.*

(1) General principles

[140] Pursuant to subsection 21(1) of the *Criminal Code*, "Every one is a party to an offence who (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it."

[141] The concepts of "aiding" and "abetting" are distinct. Broadly speaking, the *actus reus* of "aiding" is to "assist or help the actor"; whereas "abetting" contemplates "encouraging,

instigating, promoting or procuring the crime to be committed": *R. v. Briscoe*, 2010 SCC 13, at para 14 [***Briscoe***], quoting from *R. v. Greyeyes*, [1997] 2 SCR 825, at para 26.

[142] The *mens rea* of "aiding" has two components: intent and knowledge. To prove "intent," it must be demonstrated that the accused "intended to assist the principal in the commission of the offence": *Briscoe*, at para 16. Insofar as "knowledge" is concerned, "the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed": *Briscoe*, at para 17. The *mens rea* of "abetting" is the same as the one for "aiding": *R v Phillips*, 2017 ONCA 752 at para 207; Belleville v R, 2018 QCCA 960 at paras 89–92.

[143] Where the offence alleged to have been aided and abetted is conspiracy, the person claimed to have aided and abetted can be found criminally liable for either (i) assisting in or encouraging the initial formation of the conspiracy, or (ii) encouraging or assisting new members to join a pre-existing conspiracy. However, simply assisting in or encouraging the *implementation* or the *furtherance* of the conspiracy does not attract such liability, although it may provide evidence of membership in the conspiracy: *R v J.F.*, 2013 SCC 12, at paras 52–54, and 63.

[144] Subsection 22(1) of the *Criminal Code* addresses the counselling of offences. It provides as follows:

22 (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a	**22 (1)** Lorsqu'une personne conseille à une autre personne de participer à une infraction et que cette dernière y

party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.	participe subséquemment, la personne qui a conseillé participe à cette infraction, même si l'infraction a été commise d'une manière différente de celle qui avait été conseillé

[145] The *actus reus* for "counselling" is the deliberate encouragement or active inducement of the commission of a criminal offence: *R. v. Hamilton,* 2005 SCC 47, at para 29 [***Hamilton***]. To demonstrate *mens rea*, "it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct": *Hamilton,* at para 29.

[146] As a result of subsection 34(2) of the *Interpretation Act*, RSC 1985, c I-21, the provisions in the *Criminal Code* regarding aiding, abetting and counselling generally apply to offences created under the *Competition Act*. Subsection 34(2) essentially states that all of the provisions of the *Criminal Code* apply to all offences created by an enactment, unless an enactment otherwise provides. The text of that provision is reproduced in Annex 5 below.

[147] The *Competition Act* does not "otherwise provide," as contemplated by subsection 34(2) of the *Interpretation Act*. Consequently, the latter provision applies to section 45.

(2) Analysis

[148] The defendants maintain that the Statement of Claim fails to plead a viable claim that they aided, abetted or counselled the formation of an unlawful agreement. Instead, they assert

that the Statement of Claim does nothing more than allege that they aided, abetted or counselled the *implementation* and *enforcement* of the Arrangement. I disagree.

(a) *Actus reus*

(i) The Association Defendants

[149] With respect to the Association Defendants, the Statement of Claim alleges that they aided, abetted and counselled the Brokerage Defendants, their salespersons, the Franchisor Defendants' franchisees, and other TRREB-member brokerages that provide Cooperating Brokerage Services to *enter into* the Arrangement, including by

(a) developing and promulgating TRREB and CREA's Rules and the anti-competitive restraints therein, including the rules that make-up the Buyer Brokerage Commission Rule (CREA Rule 11.2.1.3 and TRREB Rules 705, 710, 730 and 740);

(b) providing a forum in and vehicle through which the conspirators have conspired (i.e., TRREB and CREA meetings and TRREB and CREA membership);

(c) entering into the "Three Way Agreement" thereby requiring all TRREB members to also become members of CREA, in turn requiring them to adhere to the Buyer Brokerage Commission Rule;

(d) conditioning the benefits of participation in the Toronto MLS on adherence to TRREB and CREA's Rules, including the Buyer Brokerage Commission Rule;

(e) requiring a seller to make an offer of commission to a Buyer Brokerage in order to post the seller's residential real estate on the Toronto MLS;

(f) disciplining their members who failed to comply with TRREB and CREA's Rules, including the Buyer Brokerage Commission Rule;

(g) disseminating and recommending the use of the standard form OREA Listing Agreement, which contractually binds GTA residential real estate sellers to the Buyer Brokerage Commission Rule;

(h) requiring all applicants for membership in TRREB to execute a TRREB Membership Application in which they certify that that they agree to be bound by the By-Laws, MLS Rules and Policies of TRREB, a copy of which they have acknowledged they have received, read and understood;

(i) promulgating CREA Rule 2.1.1.4, which provides that to qualify for and maintain membership in CREA, real estate boards, including TRREB, must include a provision in their bylaws requiring that all their member brokerages and the brokers and salespersons they employ to also be members of CREA; and

(j) promulgating CREA Rule 2.1.8, requiring that member boards, through their own by-laws and membership agreements, require their members abide by CREA's Rules.

[150] I consider that the foregoing allegations provide sufficient material facts to raise an arguable case with respect to the *actus reus* of either aiding and abetting *the initial formation* of the Arrangement or aiding and abetting their salespersons *to join* the Arrangement after it was initially constituted. Among other things, this is because the allegations specify that the Association Defendants developed and promulgated the Buyer Brokerage Commission Rule, and

then required their members to adhere to it. Each time a new member certified that they agreed to be bound by the Association Defendants' rules and by-laws, including the Buyer Brokerage Commission Rule, they thereby arguably joined the Arrangement.

[151] To the extent that the Association Defendants *required* this adherence to the Buyer Brokerage Commission Rule, they arguably implicitly assisted, instigated or procured the formation and expansion of the Arrangement. Assuming these pleaded facts to be true, the Association Defendants arguably aided and abetted the formation and expansion of the Arrangement, as contemplated by subsection 21(1) of the *Criminal Code*. These allegations are "worth considering" and are not "doomed to fail."

[152] To the extent that the allegations set forth in paragraphs 149 (d), (f) and (g) above arguably constitute forms of *deliberate encouragement* to join the Arrangement, they also arguably constitute the *counselling* of the Association Defendants' members to join the Arrangement, within the meaning of subsection 22(1) of the *Criminal Code*.

[153] For greater certainty, I reject the Association Defendants' position that it is plain and obvious that the conduct claimed to have constituted aiding and abetting on their part Claim does nothing more than allege that they aided, abetted or counselled the *implementation* and *enforcement* of the Arrangement.

(ii) The Franchisor Defendants

[154] Regarding the Franchisor Defendants, the allegations in the Statement of Claim focus on the agreements that the Franchisor Defendants entered into, renewed or continued with their franchisees during the Relevant Period. Specifically, the Statement of Claim alleges as follows:

> 122. During the Relevant Period, each of the Franchisor Defendants required each of their franchisees that provide Buyer Brokerage services for residential real estate in the GTA (and by extension, the salespersons they employ), as a condition of doing business with them, to join and/or maintain TRREB membership (and therefore CREA membership) and to comply with and implement TRREB and CREA's Rules, including the Buyer Brokerage Commission Rule. This requirement is contained in the franchise agreements between each Franchisor Defendant and each Franchisor Defendant franchisee. In so doing, the Franchisor Defendants have aided in, abetted, required and encouraged each of their franchisees to join and maintain their participation in the Arrangement.

[155] The Statement of Claim proceeds to allege that, "[i]n imposing these requirements on their franchisees, the Franchisor Defendants have aided, abetted and counseled the Defendant Brokerages, their franchisees, and others, to enter into and participate in the Arrangement."

[156] My observations at paragraph 151 above with respect to the interplay between the requirement to join the Arrangement and the *actus reus* elements of aiding and abetting apply equally here. It follows that the allegations made in the Statement of Claim with respect to the Franchisor Defendants' and subsection 21(1) of the *Criminal Code* is also arguable and "worth considering." To the extent that they adequately particularize how the Franchisor Defendants indirectly and implicitly assisted, instigated, procured and encouraged their franchisees to join the Arrangement, they raise an arguable case with respect to the aiding and abetting of the alleged contravention of s. 45 of the *Competition Act*. Those allegations are not "doomed to fail."

[157] However, in the absence of additional material facts, I consider that it is plain and obvious that the allegations made against the Franchisor Defendants under the "counselling" provisions of subsection 22(1) of the *Criminal Code* do not have a reasonable prospect of success. This is because merely requiring franchisees to sign a Franchise Agreement, which in turn requires them to comply with and implement TRREB and CREA's Rules, implicitly including the Buyer Brokerage Commission Rule, does not arguably rise to the level of *deliberately encouraging* or *actively inducing* the commission of a criminal offence: see paragraph 145 above.

(iii) The Brokerage Defendants

[158] Turning to the Brokerage Defendants, the Statement of Claim alleges at paragraph 170 (in the alternative to the direct contravention of section 45 discussed in part VI.A. above), that they "*assisted and encouraged the salespersons they employ in joining and maintaining their participation in the Arrangement*" (emphasis added). In this regard, the Brokerage Defendants are alleged to have required each of the salespersons they employ to do various things, including:

(a) Requiring them to be members of TRREB and, as such, to have executed a TRREB membership Application and Agreement, as well as a Certificate and Agreement of Brokerage & Broker/Salesperson Applicant certifying that they agree to be bound by the By-Laws, MLS Rules and Policies of TRREB, a copy of which they acknowledged that they received, read and understood; and

(b) Requiring them to abide by TRREB's Rules and CREA's Rules, including the Buyer Brokerage Commission Rule.

[159] In my view, the foregoing pleadings provide sufficient material facts to raise an arguable case with respect to the *actus reus* of either aiding and abetting the initial formation of the Arrangement or aiding and abetting their salespersons to join the Arrangement after it was initially constituted. This is because the conduct described above arguably constitutes either assistance, encouragement, instigation or procurement in relation to the joining of the Arrangement. Likewise, those pleadings provide sufficient material facts with respect to the *actus reus* of counselling salespersons of the Brokerage Defendants to join the Arrangement, either at the outset or after it was initially formed. This is because some of the conduct described above constitutes either the deliberate encouragement or the active inducement of the joining of the Arrangement by those salespersons. These pleadings are worth considering: see paragraph 89 above.

(b) *Mens rea*

[160] The defendants maintain that the Statement of Claim fails to properly plead the *mens rea* required for aiding, abetting or counselling under subsections 21(1) and 22(1) of the *Criminal Code*. In this regard, the defendants assert as follows:

> At best, the Claim pleads that the Association Defendants intended that their members abide by the Associations Rules, which is not enough. There is no suggestion in the pleaded particulars of the conduct alleged against the Association Defendants that they knew that the Brokerage Defendants **intended to unlawfully fix or control the price of Buyer Broker services, nor it is suggested that they intended the Brokerage Defendants to do so** [emphasis added].

[161] To the extent that this argument relies on there being a double subjective intent requirement in section 45 of the *Competition Act*, it is not a sufficient basis for finding that it is

plain and obvious that the plaintiff's claims have no reasonable prospect of success. This is because it is arguable that section 45 only has one subjective *mens rea* requirement, namely the intention to join the impugned conspiracy, agreement or arrangement, and knowledge of its terms: see discussion at paragraph 58 above.

[162] The defendants further assert that the allegations regarding *mens rea* are bald, conclusory and insufficient to raise an arguable case. Stated differently, they maintain that the allegations pertaining to their purported knowledge and intent simply parrot the wording of the legislation or the applicable legal requirement, and are not supported by adequate material facts.

[163] Insofar as the Association Defendants and the Brokerage Defendants are concerned, I disagree.

[164] The claims made with respect to the *mens rea* of the Brokerage Defendants are described at paragraphs 129–132 above. In my view, those allegations raise an arguable case with respect to the requisite subjective *mens rea* of (i) an "intention to assist the principal in the commission of an offence", in this case the salespersons of the Brokerage Defendants, and (ii) knowledge that the principal intends to commit the crime: see paragraph 142 above. In this latter regard, the principals are the Brokerage Defendants' salespersons; and their arguable crime, or contravention, is their subjectively intentional entering into of the Arrangement, with knowledge of its terms, and their objective intention to "control" the price for the supply of Cooperating Brokerage Services in the GTA during the Relevant Period.

[165] I acknowledge that the Statement of Claim only baldly alleges an objective and subjective intention to control prices by the Brokerage Defendants themselves, rather than by their salespersons: see paragraphs 164 and 190 of the Statement of Claim. However, it may be reasonably inferred from those allegations, as well as from the specific and adequate allegations made at paragraph 119 with respect to the *actus reus* of those salespersons, that the Statement of Claim contemplates what is arguably the *mens rea* required by paragraph 45(1)(a) of the *Competition Act*: see paragraphs 58 and 133–136 above. That arguably sufficient *mens rea* is an objective intention on the part of those salespersons to control the price for the supply of Cooperating Brokerage Services in the GTA during the Relevant Period: see paragraphs 106–127 above.

[166] Turning to the Association Defendants, the particulars pleaded at paragraphs 30, 36 and 190 of the Statement of Claim, discussed at paragraphs 129 and 132 above, are sufficient to raise an arguable case with respect to the requisite *mens rea*. This is for essentially the same reasons provided immediately above in relation the Brokerage Defendants. Given the detailed nature of the various allegations made against the Association Defendants, it is not plain and obvious that the plaintiff's claims are bound to fail because they do not provide additional particulars with respect to the requisite *mens rea* of the Association Defendants, for the purposes of subsections 21(1) and 22(1) of the *Criminal Code*: see paragraphs 134–136 above.

[167] I consider that the situation with respect to the Franchisor Defendants is different. The lynchpin of the allegations against the Franchisor Defendants is that they entered into franchise agreements with their franchisees. In turn, those franchise agreements allegedly require:

> …franchisees that provide Buyer Brokerage services for residential real estate in the GTA (and by extension, the salespersons they employ), as a condition of doing business with [the franchisor], to join and/or maintain TRREB membership (and therefore CREA membership) and to comply with and implement TRREB and CREA's Rules, including the Buyer Brokerage Commission Rule.
>
> Statement of Claim, at para 122.

[168] In contrast to the situation with respect to the Brokerage Defendants and the Association Defendants, no further material facts from which common sense inferences regarding *mens rea* may be made are alleged in the Statement of Claim.

[169] Consequently, a reasonable business person who is familiar with the retail real estate business in the GTA would not and should know that, by simply requiring franchisees to sign a franchise agreement, the Franchisor Defendants were thereby requiring their franchisees to enter into the Arrangement, and thereby "control" the price of Cooperating Brokerage Services in the GTA. In my view, it is plain and obvious that the allegation that the Franchisor Defendants aided, abetted and counselled their franchisees to enter into an arrangement "control" such prices has no reasonable prospect of success. Therefore, the claims against the Franchisor Defendants will be struck.

(c) *Parliamentary intent*

[170] The defendants further allege that the claims against them under subsections 21(1) and 22(1) of the *Criminal Code* should be should be struck because they would permit the plaintiff to do indirectly what Parliament has deliberately excluded through the 2010 amendments to the *Competition Act*, namely, liability for non-competitors under subsection 45(1).

[171] In my view, it is not plain and obvious that Parliament intended to exclude non-competitors from party liability pursuant to subsections 21(1) and 22(1).

[172] The SCC has observed that "it is 'a matter of indifference' at law whether an accused personally committed a crime, or alternatively, aided and/or abetted another to commit the offence" *R v Pickton*, 2010 SCC 32, at para 51, quoting *R v Thatcher*, [1987] 1 S.C.R. 652, at p. 694; *Chow Bew v. The Queen*, [1956] S.C.R. 124, at p. 127.

[173] The defendants assert that this principle does not apply in the case of subsection 45(1) of the *Competition Act*, because Parliament specifically narrowed subsection 45(1) in 2010 to capture only agreements among *competitors*. In other words, the defendants maintain that subsection 45(1) restricts the category of persons who can be held criminally liable to those persons who are *competitors* in relation to the product in question. The defendants add that it would be perverse to interpret subsections 21(1) and 22(1) of the *Criminal Code* in a manner that creates indirect liability for a person who is incapable of committing a direct violation of the principal offence. The defendants maintain that the latter provisions should be interpreted as only creating liability for a non-principal to the latter offence where that person is a competitor of those alleged to have directly contravened subsection 45(1).

[174] In the absence of express language in section 45 of the *Competition Act* ousting subsection 34(2) of the *Interpretation Act* from applicability, I consider that it is arguable that subsections 21(1) and 22(1) of the *Criminal Code* apply to section 45: see discussion of subsection 34(2) of the *Interpretation Act*, at paragraphs 146–147 above; *R v Del Mastro*, 2017

ONCA 711, at para 98 [***Del Mastro***]; and *Regina v Campbell*, 1964 CanLII 612, at 102, 46 DLR (2d) 83. This argument is "worth considering."

[175] Among other things, such a reading of subsections 21(1) and 22(1) of the *Criminal Code* would be arguably consistent with giving those provisions "such fair, large and liberal construction and interpretation as best ensures the attainment of [their] objectives": *Interpretation Act*, s 12. The same is arguably true with respect to the objectives of the *Competition Act*.

[176] In addition to the foregoing, I note that in *Del Mastro*, the Ontario Court of Appeal rejected an argument similar to the one now being raised by the defendants. There, the appellant, who was a candidate in an election, argued that he could not be liable as a party to an offence under the *Canada Elections Act* [***CEA***] that applied simply to *candidates' agents*. The Court upheld the conclusions of the trial judge and the summary convictions appeal judge that, in the absence of express provisions in the *CEA* that ousted s. 21 of the *Criminal Code*, the latter provision could be applied.

[177] In summary, having regard to all of the foregoing, it is not plain and obvious that Parliament intended to exclude non-competitors from party liability pursuant to subsections 21(1) and 22(1) of the *Criminal Code*. Despite the fact that the Association Defendants are not competitors of the Brokerage Defendants and their salespersons, the plaintiff's claims of party liability under subsections 21(1) and 22(1) are "worth considering."

(d) *Conclusion*

[178] For the reasons set forth above, I find that the Statement of Claim arguably pleads conduct capable of constituting aiding, abetting or counselling a criminal conspiracy within the meaning of sections 21(1) and 22(1) of the *Criminal Code*, for the Association Defendants and the Brokerage Defendants. However, I reach the opposite conclusion with respect to the Franchisor Defendants, for two reasons. First, the Statement of Claim does not provide sufficient material facts with respect to the *actus reus* required under subsection 22(1). Second, despite the fact that the Statement of Claim arguably provides sufficient facts with respect to the *actus reus* required under subsection 21(1), it does not provide sufficient facts with respect to the *mens rea* required under that provision.

C. *Does Section 36 of the Competition Act Apply to a Defendant That Is Made a Party to an Impugned Arrangement by Virtue of Sections 21(1) And 22(1) of the Criminal Code?*

[179] Pursuant to paragraph 36(1), any person who has suffered loss or damage as a result of conduct contrary to any provision of Part VI of the *Competition Act*, including section 45, may sue for and recover actual damages *from the person who engaged in the conduct*.

[180] The defendants maintain that the grammatical and ordinary meaning of the words "engaged in the conduct" excludes parties who are only alleged to have aided, abetted or counselled the conduct in question. In this regard, the defendants assert that the words "the person who engaged in the conduct" mean "the person who actually committed the conduct defined in the statute." In the case of section 45, this is the person who "conspired, agreed or arranged" with a competitor to do one of the things prohibited by that section.

[181] The defendants add that this interpretation also achieves a result that is harmonious with subsections 21(1) and 22(1) of the *Criminal Code*, which contemplate that "actually committing" an offence is a different basis of liability from "aiding", "abetting" or "counselling" that offence. The defendants further state that interpreting section 36 in a manner that only allows recovery from those who actually commit the acts described in section would be consistent with Parliament's intent to narrow section 45 to agreements between *competitors*.

[182] In my view, it is not plain and obvious that this restrictive interpretation of the meaning of the words "from the person who engaged in the conduct" is correct.

[183] Subsection 36(1) "must … be read in its entire context and in its grammatical and ordinary sense, harmoniously with the scheme and objects of the *Competition Act*": *Pioneer Corp v Godfrey*, 2019 SCC 42, at para 61 [*Godfrey*].

[184] Regarding the ordinary meaning of the words "engaged in," *The Oxford English Dictionary* defines "engage" as "to involve" and "to entangle." Likewise, *Black's Law Dictionary* defines "engage" as including to "involve oneself" and "to take part in." Similarly, in *Chandler v. Champion Enterprises (Canada) Ltd.*, 2013 BCSC 1518, at para 33 the court held that "[a] person can be engaged when he is being occupied, taking part or being involved in something or committed to an undertaking." In the same vein, the court in *Wishlow v. Derow* [1983] 146 DLR (3d) 55 (SKQB), observed as follows:

> 9. Now, I do not consider the words "engaged in" to be ambiguous. To "expound those words in their ordinary and natural sense" it is to be occupied or busy at, or involved in, a particular activity. My source is Funk & Wagnalls, Standard Encyclopedic Dictionary…

[185] A broad interpretation of the word "engaged" was also adopted in *Architectural Institute (British Columbia) v. Francour*, 1962 CanLII 706 (BC SC), 41 WWR (NS) 356 [***Francour***], where the court was called upon to interpret subsection 56(2) of the *Architectural Profession Act*, RSBC, 1960, C. 16. This subsection stated: "[a] person shall be deemed to practise the profession of architecture within the meaning of this Act who (a) is engaged in the planning or supervision of the erection, enlargement, or alteration of buildings for persons other than himself […]" After giving the word "engaged" its "widest meaning," the court observed that it includes a person who ordered the plans and who was to be responsible for the payment of those plans: *Francour*, at p 359.

[186] It is arguable that the foregoing interpretations of the words "engaged" and "engaged in" contemplate the type of conduct that is alleged in relation to the Association Defendants, as well as the Brokerage Defendants (in their alternative alleged capacity as parties to conduct engaged in by their salespersons).

[187] Turning to the scheme and objects of the *Competition Act*, two of those objects are "the deterrence of anti-competitive behaviour, and compensation for the victims of such behaviour": *Godfrey*, at para 65. Moreover, pursuant to section 1.1 of that legislation, one of the purposes of the *Competition Act* is to provide consumers with competitive prices.

[188] Interpreting subsection 36(1) in a manner that furthers these objectives would be more in keeping with the scheme of the *Competition Act* than a restrictive interpretation that would reduce such deterrence and compensation: *Godfrey*, at paras 66–67; *Shah*, at paras 36–38. To the

extent that a narrow interpretation of subsection 36(1) would allow persons who may not have been principal actors in conduct contrary to paragraph 45(1)(a) to escape potential party liability under subsection 36(1), such an interpretation would be inconsistent with the objectives of deterring anti-competitive behaviour, compensating victims of such behaviour, and providing consumers with competitive prices.

[189] In summary, it is not plain and obvious that the grammatical and ordinary meaning of the words "engaged in the conduct" is limited to persons who actually committed a type of conduct described in Part VI of the *Competition Act* – in this case conduct described in paragraph 45(1)(a). It is also not plain and obvious that the restrictive interpretation advanced by the defendants is consistent with the scheme and objects of the *Competition Act*. I consider that it is reasonably arguable that a person who is found to have been a party to an offence described in paragraph 45(1)(a), by virtue of subsection 21(1) or subsection 22(1) of the *Criminal Code*, is a person who "engaged in" that conduct, within the meaning of subsection 36(1).

D. *Are the Plaintiff's Claims Statute Barred as of April 1, 2019?*

[190] Pursuant to subsection 36(4) of the *Competition Act*, no action may be brought under subsection 36(1) more than two years from the later of (i) the date upon which an alleged contravention of any provision in Part VI of that legislation was engaged in,[5] or (ii) the day on which any criminal proceedings relating thereto were finally disposed of. In this case, it appears that no criminal proceedings have been initiated in respect of the alleged Arrangement.

[5] Part VI of the *Competition Act* deals with criminal matters.

[191] Despite the foregoing, the SCC has held that "the scheme of s. 36(4) also supports the view that discoverability was intended to apply to the limitation period": *Godfrey*, at para 45. The Court added that this view is further supported by "the overall object of the *Competition Act*" as well as "the object of statutory limitation periods": *Godfrey*, at paras 46–47.

[192] Given the application of the discovery principle, the limitation period in subsection 36(4) does not begin to run until "the material facts on which [the plaintiff's] claim is based were discovered by him or ought to have been discovered by him by the exercise of reasonable diligence": *Godfrey*, at para 50.

[193] The defendants maintain that it is plain and obvious that the plaintiff's claim is time-barred as of two years prior to the filing of the initial Statement of Claim, on April 1, 2019. In support of this position, the defendants assert that the Buyer Brokerage Commission Rule has been in effect since at least March 2010, and that five rules which make up that rule were distributed to each of TRREB's 64,000 members, and to CREA's 135,000 members.

[194] However, it is not plain and obvious that the representative plaintiff or the other members of the proposed class knew about the Buyer Brokerage Commission Rule prior to the filing of the initial Statement of Claim. This issue will be "heavily dependent on factual inquiry" that has not yet been conducted: *Hudson v Canada*, 2022 FC 694, at para 143.

[195] Moreover, Rule 183(b)(i) requires the defendants to plead any matter of fact that might defeat a claim or defence of an adverse party. That has not yet been done, as the defendants were

relieved of their obligation to file their Statements of Defence until a further order or direction of the Court, which has not been given. In the absence of any agreement regarding the underlying facts, this is a further reason why it would not be appropriate to adjudicate upon the limitation issue at this stage of the proceedings: *Salewski v Lalonde*, 2017 ONCA 515, at para 45; *Stenzler v TD Asset Management Inc.*, 2020 ONSC 111, at para 31. See also *Fehr v Sun Life Assurance Company of Canada*, 2018 ONCA 718, at paras 169, 173 and 189.

[196] Consequently, I find that it is not plain and obvious that the plaintiff's claim is time-barred as of two years prior to the filing of the initial Statement of Claim on April 1, 2019.

VII. **Conclusion**

[197] For the reasons provided in part VI.A(2) above, I find that the Statement of Claim discloses a reasonable cause of action with respect to the claimed Arrangement among the Brokerage Defendants to "control" the price for the supply of Cooperating Brokerage Services in the GTA during the Relevant Period. However, it does not disclose a reasonable cause of action with respect to the "fixing, maintaining, or increasing" of those prices during that period.

[198] On its face, the Buyer Broker Commission Rule arguably exercises various forms of control in relation to the price of the supply of Cooperating Brokerage Services. These include restrictions on *who* may pay Cooperating Brokerage commissions/compensation and *when* a change in such commissions/compensation may be requested and made. A further form of

control is arguably imposed through the prohibition on using the terms of an Offer or an Agreement of Purchase and Sale to "include or modify" a commission.

[199] For the reasons provided in part VI.B above, I find that the Statement of Claim arguably pleads conduct capable of constituting aiding, abetting or counselling a criminal conspiracy within the meaning of sections 21(1) and 22(1) of the *Criminal Code*, on the part of the Association Defendants and the Brokerage Defendants. Among other things, this is because the allegations specify that the Association Defendants developed and promulgated the Buyer Brokerage Commission Rule, and then required their members to adhere to it. Each time a new member certified that they agreed to be bound by the Association Defendants' rules and by-laws, including the Buyer Brokerage Commission Rule, they thereby arguably joined the Arrangement. To the extent that the Association Defendants *required* this adherence to the Buyer Brokerage Commission Rule, they arguably implicitly assisted, instigated or procured the formation and expansion of the Arrangement.

[200] To the extent that the allegations set forth in paragraphs 149(d), (f) and (g) above arguably constitute forms of *deliberate encouragement* to join the Arrangement, they also arguably constitute the *counselling* of the Association Defendants' members to join the Arrangement, within the meaning of subsection 22(1) of the *Criminal Code*.

[201] Insofar as the Brokerage Defendants are concerned, the conduct alleged in the Statement of Claim arguably constitutes either assistance, encouragement, instigation or procurement in relation to the joining of the Arrangement, as contemplated by subsection 21(1). The Statement

of Claim also provides sufficient material facts with respect to the deliberate encouragement or the active inducement of the Brokerage Defendants' salespersons to *join* the alleged Arrangement, either at the outset or after it was initially formed.

[202] However, the Statement of Claim does not disclose a reasonable cause of action against the Franchisor Defendants. This is so for two reasons. First, the Statement of Claim does not provide sufficient material facts with respect to the *actus reus* required under subsection 22(1) of the *Criminal Code*. Second, despite the fact that the Statement of Claim arguably provides sufficient facts with respect to the *actus reus* required under subsection 21(1), it does not provide sufficient facts with respect to the *mens rea* required under that provision.

[203] For the reasons provided in part VI.C above, it is not plain and obvious that the defendants' restrictive interpretation of the meaning of the words "from the person who engaged in the conduct," in subsection 36(1) of the *Competition Act*, is correct. It is reasonably arguable that a person who is found to have been a party to an offence described in paragraph 45(1)(a), by virtue of subsection 21(1) or 22(1) of the *Criminal Code*, is a person who "engaged in" that conduct, within the meaning of subsection 36(1).

[204] For the reasons provided in part VI.D above, it is not plain and obvious that the plaintiff's claim is time-barred as of two years prior to the filing of the initial Statement of Claim, on April 1, 2019.

VIII. **Costs**

[205] Rule 334.39 states that “no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding,” barring certain exceptions.

[206] The general principle underlying this “no costs” rule is that the award of costs in class proceedings, including preliminary motions such as motions to strike, are exceptional: *Pelletier v Canada*, 2020 FC 1019 at paras 75 and 81. This rule applies as soon as the parties to the action are made parties to the certification motion: *Campbell v Canada (Attorney General)*, 2012 FCA 45 [***Campbell***]; *Wenham v Canada*, 2020 FC 592 at para 10. In *Campbell*, the court stated that “once a party to a proposed class proceeding becomes a party to a certification motion, that is, once the certification motion is served and filed, that person is immune from costs with respect to any and all steps taken before and during the certification process”: *Campbell* at para 33.

[207] Parties may exceptionally be awarded costs on a motion to strike if it is justified as an exception to the general principle in Rule 334.39: *Pelletier v Canada*, 2020 FC 1019 at para 81. The stipulated exceptions are: (a) the conduct of the party unnecessarily lengthened the duration of the proceeding, (b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or (c) exceptional circumstances make it unjust to deprive the successful party of costs: Rule 334.39. In my view, none of these exceptions apply in the present circumstances.

[208] Moreover, the Plaintiff did not seek costs in these motions.

[209] Having regard to the foregoing, no costs will be awarded.

ORDER in T-595-21

THIS COURT ORDERS that:

1. The Brokerage Defendants' Motion is dismissed insofar as it concerns the allegations in the Statement of Claim with respect to:

    (a) the alleged Arrangement to "control" the price for the supply of Buyer Brokerage Services (also defined as Cooperating Brokerage Services) in the GTA during the Relevant Period;

    (b) the aiding, abetting or counselling of conduct contrary to section 45(1) of the *Competition Act*; and

    (c) the Brokerage Defendants' conduct prior to April 1, 2017.

2. The Association Defendants' Motion is dismissed insofar as it concerns:

    (a) the allegations made in the Statement of 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.

3. The Franchisor Defendants' Motion is granted insofar as it concerns the allegations made against them in the Statement of Claim with respect to the aiding, abetting or counselling of conduct contrary to section 45(1) of the

Competition Act. Consequently, the plaintiff's cause of action against the Franchisor Defendants is dismissed.

4. The Motions of the Brokerage Defendants, the Association Defendants and the Franchisor Defendants are granted insofar as they concern the allegations in the Statement of 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. Those allegations shall be struck from the Statement of Claim.

5. No costs are awarded.

"Paul S. Crampton"
Chief Justice

ANNEX 1

Competition Act, RSC 1985, c C-34

PART 1
Purpose and Interpretation
Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

PARTIE I
Objet et définition
Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

PART IV
Special Remedies
Recovery of damages

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or

PARTIE IV
Recours spéciaux
Recouvrement de dommages-intérêts

36 (1) Toute personne qui a subi une perte ou des dommages par suite :

a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;

b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le

another court under this Act,

Tribunal ou un autre tribunal en vertu de la présente loi,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

Limitation

Restriction

(4) No action may be brought under subsection (1),

(4) Les actions visées au paragraphe (1) se prescrivent :

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

a) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes:

(i) a day on which the conduct was engaged in, or

(i) soit la date du comportement en question,

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

(ii) soit la date où il est statué de façon définitive sur la poursuite;

whichever is the later; and

[…]

PART VI

Offences in Relation to Competition

Conspiracies, agreements or arrangements between competitors

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not

[…]

PARTIE VI

Infractions relatives à la concurrence

Complot, accord ou arrangement entre concurrents

45 (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :

a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;

b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;

c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende

exceeding $25 million, or to both.

maximale de 25 000 000 $, ou l'une de ces peines.

Evidence of conspiracy, agreement or arrangement

Preuve du complot, de l'accord ou de l'arrangement

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

(3) Dans les poursuites intentées en vertu du paragraphe (1), le tribunal peut déduire l'existence du complot, de l'accord ou de l'arrangement en se basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable.

Defence

Défense

(4) No person shall be convicted of an offence under subsection (1) or (1.1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(4) Nul ne peut être déclaré coupable d'une infraction prévue aux paragraphes (1) ou (1.1) à l'égard d'un complot, d'un accord ou d'un arrangement qui aurait par ailleurs contrevenu à ce paragraphe si, à la fois :

(a) that person establishes, on a balance of probabilities, that

a) il établit, selon la prépondérance des probabilités :

(i) it is ancillary to a broader or separate agreement or arrangement that

(i) que le complot, l'accord ou l'arrangement, selon le cas, est accessoire à un accord ou à un arrangement plus

includes the same parties, and	large ou distinct qui inclut les mêmes parties,
(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and	**(ii)** qu'il est directement lié à l'objectif de l'accord ou de l'arrangement plus large ou distinct et est raisonnablement nécessaire à la réalisation de cet objectif;
(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.	**b)** l'accord ou l'arrangement plus large ou distinct, considéré individuellement, ne contrevient pas au même paragraphe.
Definitions	**Définitions**
(8) The following definitions apply in this section.	**(8)** Les définitions qui suivent s'appliquent au présent article.
competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (*concurrent*)	***concurrent*** S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un arrangement visant à faire l'une des choses prévues aux alinéas (1)a) à c). (*competitor*)
price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (*prix*)	***prix*** S'entend notamment de tout escompte, rabais, remise, concession de prix ou autre avantage relatif à la fourniture du produit. (*price*)

[…]

False or misleading representations

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Agreements or Arrangements that Prevent or Lessen Competition Substantially

Order

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing

[…]

Indications fausses ou trompeuses

52 (1) Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

Accords ou arrangements empêchant ou diminuant sensiblement la concurrence

Ordonnance

90.1 (1) Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :

a) interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement —

anything under the agreement or arrangement; or

d’accomplir tout acte au titre de l’accord ou de l’arrangement;

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

b) enjoignant à toute personne — qu’elle soit ou non partie à l’accord ou à l’arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

ANNEX 2

Competition Act, RSC 1985, c C-34 (as it appeared on March 9, 2010)

Conspiracy	**Complot**
45 (1) Every one who conspires, combines, agrees or arranges with another person	**45 (1)** Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :
(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,	**a)** soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;
(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,	**b)** soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;
(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or	**c)** soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;
(d) to otherwise restrain or injure competition unduly,	**d)** soit, de toute autre façon, pour restreindre, indûment,

la concurrence ou lui causer un préjudice indu.

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

ANNEX 3

Criminal Code, RSC 1985, c C-46

PART 1	**PARTIE I**
Parties to offences	Participants aux infractions
Parties to an offence	**Participants à une infraction**
21 (1) Every one is a party to an offence who	**21 (1)** Participent à une infraction :
(a) actually commits it;	**a)** quiconque la commet réellement;
(b) does or omits to do anything for the purpose of aiding any person to commit it; or	**b)** quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;
(c) abets any person in committing it.	**c)** quiconque encourage quelqu'un à la commettre.
Common intention	**Intention commune**
(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.	**(2)** Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale et de s'y entraider et que l'une d'entre elles commet une infraction en réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la perpétration de l'infraction, participe à cette infraction.

22 (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

22 (1) Lorsqu'une personne conseille à une autre personne de participer à une infraction et que cette dernière y participe subséquemment, la personne qui a conseillé participe à cette infraction, même si l'infraction a été commise d'une manière différente de celle qui avait été conseillé

ANNEX 4

Federal Court Rules, SOR/98-106

PART 4 – Actions	**PARTIE 4 - Actions**
Striking Out Pleadings	Radiation d'actes de procédure
Parties to an offence	**Participants à une infraction**
Motion to strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	**a)** qu'il ne révèle aucune cause d'action ou de défense valable;
[…]	[…]
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
PART V.1 - CLASS PROCEEDINGS	**PARTIE V.1 – RECOURS COLLECTIF**
Costs	**Dépens**
334.39(1) No costs	**334.39(1) Sans dépens**
Subject to subsection (2), no costs may be awarded against any party to a motion for	Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser

certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless

l'instance comme recours collectif, à un recours collectif ou à un appel découlant d'un recours collectif, que dans les cas suivants :

(a) the conduct of the party unnecessarily lengthened the duration of the proceeding;

a) sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;

(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake r excessive caution; or

b) une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée de manière négligente, par erreur ou avec trop de circonspection;

(c) exceptional circumstances make it unjust to deprive the successful party of costs.

c) des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.

ANNEX 5

Interpretation Act, RSC 1985, c I-21

RULES OF CONSTRUCTION	RÈGLES D'INTERPRÉTATION
Offences	Infractions
Indictable and summary conviction offences	**Mise en accusation ou procédure sommaire**
34 (1) Where an enactment creates an offence,	**34 (1)** Les règles suivantes s'appliquent à l'interprétation d'un texte créant une infraction :
(a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;	**a)** l'infraction est réputée un acte criminel si le texte prévoit que le contrevenant peut être poursuivi par mise en accusation;
(b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and	**b)** en l'absence d'indication sur la nature de l'infraction, celle-ci est réputée punissable sur déclaration de culpabilité par procédure sommaire;
(c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of	**c)** s'il est prévu que l'infraction est punissable sur déclaration de culpabilité soit par mise en accusation soit par procédure sommaire, la personne déclarée coupable de l'infraction par procédure sommaire n'est pas censée avoir été

the offence on summary conviction.

condamnée pour un acte criminel.

Criminal Code to apply

(2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

Application du Code criminel

(2) Sauf disposition contraire du texte créant l'infraction, les dispositions du *Code criminel* relatives aux actes criminels s'appliquent aux actes criminels prévus par un texte et celles qui portent sur les infractions punissables sur déclaration de culpabilité par procédure sommaire s'appliquent à toutes les autres infractions créées par le texte.

ANNEX 6

Real Estate and Business Brokers Act, 2002, SO 2002, c 30, Sch C

PART 1 - INTERPRETATION	**PARTIE I – INTERPRÉTATION**
Interpretation	Interprétation
Interpretation	Interprétation
1 (1) In this Act, […]	**1 (1)** Les définitions qui suivent s'appliquent à la présente loi. […]
"broker" means an individual who has the prescribed qualifications to be registered as a broker under this Act and who is employed by a brokerage to trade in real estate; ("courtier")	«agent immobilier» Particulier qui a les qualités prescrites pour être inscrit à ce titre sous le régime de la présente loi et qui est employé par une maison de courtage pour mener des opérations immobilières. («salesperson»)
"brokerage" means a corporation, partnership, sole proprietor, association or other organization or entity that, on behalf of others and for compensation or reward or the expectation of such, trades in real estate or holds himself, herself or itself out as such; ("maison de courtage") […]	«courtier» Particulier qui a les qualités prescrites pour être inscrit à ce titre sous le régime de la présente loi et qui est employé par une maison de courtage pour mener des opérations immobilières. («broker») […]
"salesperson" means an individual who has the prescribed qualifications to be registered as a salesperson under this Act and who is	«maison de courtage» Personne morale, société de personnes, entreprise à propriétaire unique, association ou autre

employed by a brokerage to trade in real estate; ("agent immobilier")

[…]

organisation ou entité qui mène des opérations immobilières pour le compte d'autrui, soit contre rémunération ou moyennant un avantage, soit dans l'attente de l'un ou de l'autre, ou qui se fait passer pour telle. («brokerage»)

[…]

PART III: PROHIBITIONS RE: PRACTICE

PARTIE III – INTERDICTIONS CONCERNANT L'EXERCICE DE LA PROFESSION

Prohibition against trade in real estate unless registered

Interdiction de mener des opérations immobilières sans être inscrit

4 (1) No person shall,

4 (1) Nul ne doit, selon le cas :

(a) trade in real estate as a brokerage unless the person is registered as a brokerage;

a) mener des opérations immobilières en qualité de maison de courtage à moins d'être inscrit à ce titre;

(b) trade in real estate as a broker unless he or she is registered as a broker of a brokerage;

b) mener des opérations immobilières en qualité de courtier à moins d'être inscrit à titre de courtier d'une maison de courtage;

(c) trade in real estate as a salesperson unless he or she is registered as a salesperson of a brokerage; or

c) mener des opérations immobilières en qualité d'agent immobilier à moins d'être inscrit à titre d'agent immobilier d'une maison de courtage;

(d) trade in real estate unless registered under this Act.

d) mener des opérations immobilières sans être inscrit.

PART IV – REGISTRATION

PARTIE IV – INSCRIPTION

Broker of Record

Courtier responsable

12 (1) Every brokerage shall,

12 (1) La maison de courtage :

(a) designate a broker who is employed by the brokerage as the broker of record and notify the registrar of his or her identity; and

a) d'une part, désigne comme courtier responsable un courtier qui est employé par elle et avise le registrateur de son identité;

(b) notify the registrar if the broker of record changes, within five days of the change.

b) d'autre part, avise le registrateur d'un changement de courtier responsable dans les cinq jours.

Duties

Obligation

(2) The broker of record shall ensure that the brokerage complies with this Act and the regulations.

(2) Le courtier responsable veille à ce que la maison de courtage observe la présente loi et les règlements.

PART VI – CONDUCT AND OFFENCES

PARTIE VI – CONDUITE ET INFRACTIONS

Restrictions re: brokers and salespersons

Restrictions : courtiers et agents immobiliers

31 (1) No broker or salesperson shall trade in real estate on behalf of any brokerage other than the

31 (1) Nul courtier ou agent immobilier ne doit mener des opérations immobilières pour le compte d'une maison de

brokerage which employs the broker or salesperson.

courtage autre que celle qui l'emploie.

Same

(2) Except if the regulations provide otherwise and subject to the regulations, no broker or salesperson is entitled to or shall accept any remuneration for trading in real estate from any person except the brokerage which employs the broker or salesperson.

Idem

(2) Sauf disposition contraire des règlements et sous réserve de ceux-ci, nul courtier ou agent immobilier n'a droit à une rémunération, ni ne doit en accepter une, de qui que ce soit, pour avoir mené des opérations immobilières, sauf de la part de la maison de courtage qui l'emploie.

Remuneration

36 (1) All remuneration payable to a brokerage in respect of a trade in real estate shall be an agreed amount or percentage of the sale price or rental price, as the case may be, or a combination of both

Rémunération

36 (1) La rémunération à payer à une maison de courtage à l'égard d'une opération immobilière correspond soit à une somme convenue, soit à un pourcentage convenu du prix de vente ou du loyer, selon le cas, ou à une combinaison des deux.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-595-21**
STYLE OF CAUSE:	MARK SUNDERLAND V **TORONTO REGIONAL REAL ESTATE BOARD ET AL**
PLACE OF HEARING	TORONTO, ONTARIO
DATES OF HEARING:	March 6, 2023
ORDER AND REASONS:	CRAMPTON C.J.
DATED:	SEPTEMBER 25 , 2023

APPEARANCES:

Mr. Garth Myers Mr. Paul Bates Mr. John Syme	FOR THE PLAINTIFF
Mr. Joseph Osborne Mr. Randall Hofley	FOR THE DEFENDANT Toronto Regional Real Estate Board
Ms. Sandra A. Forbes Mr. Trevor N. May	FOR THE DEFENDANT The Canadian Real Estate Association
Mr. Eric Lefevre Ms. Erika Woolgar	FOR THE DEFENDANT Century 21 Canada Limited Partnership
Mr. David Kent Ms. Samantha Gordon	FOR THE DEFENDANT Re/Max Ontario – Atlantic Canada Inc. o/a Re/max Integra
Ms. Casey Halladay Mr. Devon Johnson	FOR THE DEFENDANTS Harvey Kalles Real Estate Ltd, Chestnut Park R E Max Wright R E
Ms. Andrea Sanche	FOR THE DEFENDANT Forest Hill Real Estate Inc.
Mr. Antonio Di Domenico Mr. Timothy Law	FOR THE DEFENDANT Homelife Realty Services
Ms. Caroline Abela	FOR THE DEFENDANT Right at Home Realty Inc.

Mr. Nikiforos Iatrou Erich Schultze	FOR THE DEFENDANTS Royal LePage Real Estate Services Ltd. Residential Income Fund
Mr. Avi Slodovnick	FOR THE DEFENDANT Sutton Group Realty Services Ltd.
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