

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. The Canadian Real Estate Association*, 2015  
Comp. Trib. 3  
File No.: CT-2010-002  
Registry Document No.: 103

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

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*;

AND IN THE MATTER OF a motion by the Canadian Real Estate Association seeking directions regarding a consent agreement;

AND IN THE MATTER OF a motion by the Commissioner of Competition about the interpretation and enforcement of certain terms in the consent agreement.

B E T W E E N:

**The Commissioner of Competition**  
(applicant)

and

**The Canadian Real Estate Association**  
(respondent)



Date of hearing: 20141118  
Before Judicial Member: Rennie J. (Chairperson)  
Date of Reasons and Order: April 30, 2015

## **REASONS FOR ORDER AND ORDER REGARDING THE INTERPRETATION OF THE CONSENT AGREEMENT**

[1] The parties disagree with respect to the interpretation of a consent agreement that they have negotiated and registered with the Competition Tribunal. The Canadian Real Estate

Association (CREA) contends that under the consent agreement it can adopt policies that prohibit the display of a seller's contact information or the reference to a private sale on a webpage that is linked directly from CREA's website to a realtor's website. The Commissioner of Competition asserts that these policies contravene the agreement which it reached with CREA in October, 2010.

## **I. BACKGROUND**

### **A. *The parties***

[2] CREA is a trade association that represents over 100,000 real estate brokers and agents working through real estate boards and associations in Canada. Membership in CREA is open to real estate boards and associations, as well as their members, but is conditional on their agreement to be bound by, amongst other things, CREA's by-laws, rules and policies.

[3] Local real estate boards and associations (member boards) operate cooperative selling systems known as MLS Systems in association with trademarks owned by CREA, such as the Multiple Listing Service (MLS) trademarks. These systems provide an ongoing inventory of available properties for sale or rent and can be accessed by realtors by virtue of their membership in the member board. The public does not have access to these systems that are described by CREA as "member-to-member" systems which enable realtors to deal with other realtors to effect the purchase and sale of real estate.

[4] A subset of the listing information for each property listing posted to an MLS system is uploaded by member boards to the public website "realtor.ca" which is owned and operated by

CREA for the purpose of advertising real estate listings of its members. Realtor.ca is a very popular website with a peak usage of 6 million visitors every month.

***B. The consent agreement***

[5] On October 25, 2010, a consent agreement was filed with the Tribunal by the parties. The agreement effectively terminated a proceeding brought by the Commissioner against CREA under section 79 of the *Competition Act* (the consent agreement). In that proceeding, the Commissioner asserted that when CREA licensed certain of its trademarks to its member real estate boards, it imposed a number of exclusionary restrictions on their use, including minimum service requirements. For example, under these restrictions, a mere posting of property information in an MLS system was contrary to CREA's Rules and the listing realtor had to remain the agent of the seller throughout the term of the listing contract so as to handle other details as well on the seller's behalf.

[6] The consent agreement is divided into seven parts. Definitions of various terms are found in Part I and CREA's obligations are set out in Part III. These obligations are focused on "mere postings" which are defined as follows in Part I of the consent agreement:

**"Mere Posting"** means a listing on a Member Board's MLS® System in respect of which the Member has chosen or agreed not to provide services to the Seller other than submitting the listing for posting on a Member Board's MLS® System.

[7] The above definition includes various terms that are also defined in Part I:

“**Member Board**” means a local real estate board or association, or a provincial or territorial real estate association, located in Canada that is a member of CREA

“**MLS® System**” means a cooperative selling system for residential real estate operated by or on behalf of a Member Board(s) in association with the MLS ® Marks

“**Member**” refers to a licensed real estate practitioner who is a member of a Member Board and CREA

“**Seller**” means a person who has an interest in selling residential real estate

[8] As will be seen below, the parties have differing interpretations of paragraph 3 of Part III of the consent agreement, which reads as follows:

CREA shall not adopt, maintain or enforce any Rules that deny the ability of Members to provide Mere Postings for Sellers, or that discriminate against Members because they offer, or wish to offer, to provide Mere Postings for Sellers, including, but not limited to, any Rule that:

1. prevents Members from offering a Mere Posting;
2. prevents Mere Postings from being listed in a Member Board’s MLS® System;
3. discriminates against Mere Postings, provided that the bare identification of a Mere Posting in a Member Board’s MLS® System is not discriminatory;
4. [...]
5. Prevents Members from:
  - (i) listing a Sellers’s contact information in the REALTOR ®-only remarks section of the MLS® System, with instructions directing interested Members to contact the Seller directly;
  - (ii) including, in the General Description section on an Approved Website, a direction to visit either the REALTOR®’s or his or her brokerage’s website (whichever site is included as the contract link in the REALTOR®’s contact information on the Approved Website) for additional information about the listing

(without specifying the nature of such additional information),  
or

(iii) displaying the Seller's contact information on a website other than an Approved Website.

[emphasis added]

[9] The consent agreement defines a “Rule” so as to include any rule, regulation, by-law, code, policy, standard and practice. Importantly, an “Approved Website” is defined as meaning “REALTOR.ca [...] or any other website operated by CREA or a member board originating from a service operated under an MLS® System”. The term “website” is not defined in the consent agreement. The full text of the consent agreement can be found at Schedule A to this decision.

### ***C. CREA's policies and documents***

[10] Policies and rules have been adopted by CREA, which, according to the Commissioner, are contrary to paragraph 3 of the consent agreement. Essentially, these policies prevent members from displaying a seller's contact information or the reference to a private sale on a webpage that is linked directly from realtor.ca to another website such as a realtor's or brokerage's website. These policies and rules, collectively the “Rules”, are described in more detail below.

#### **(1) CREA's MTC policy**

[11] In 2008, CREA's policy on the use of multi-media links banned all third party advertising on all webpages linked directly to realtor.ca by multi-media link. In January 2011 and April 2011, various changes were made to this policy and the ban was replaced with a narrower

prohibition against advertisement of private sales and seller contact information appearing on the first webpage on a website linked from realtor.ca (the MTC Policy).

[12] CREA's MLS and Technology Council Policy Manual incorporates the contents of the MTC Policy under the headings "Alternate Feature Sheet", "Use of Multimedia Links", and "Seller Contact Information". The relevant extracts of this manual provide as follows:

### **Seller Contact Information**

This policy relates to CREA Rule 17.2.4 which states that where the seller directs the listing REALTOR® to do so, the seller's contact information may appear in the REALTOR® only remarks (non-public) section of a listing on a Board/ Association's MLS® System. The seller's contact information shall not appear on REALTOR.ca or in the general (public) remarks sections of a listing on a Board/Association's MLS® System. The listing REALTOR® may include a direction in the General Description section on REALTOR.ca or on websites operated by CREA or a Board/Association to visit the REALTOR® website to obtain additional information about the listing (but the nature of such additional information shall not be specified).

**Effective Date:** April, 2011

**Policy:**

1. Seller contact information may be displayed on a listing REALTOR® / brokerage website subject to paragraph 2 immediately below.
2. The listing REALTOR® / brokerage website REALTOR® / brokerage website may be linked to from REALTOR.ca through the 'REALTOR® Website' link that appears on REALTOR.ca feature sheets, but this specific page of the REALTOR® / brokerage website must not display seller contact information (see Use of Link policy for more details).
3. Seller contact information must not be displayed on alternate feature sheets.
4. Seller contact information must not be displayed on webpages that are linked directly from REALTOR.ca through multimedia links.

## **Alternate Feature Sheet**

This policy applies to linking options for members/brokers with respect to displaying feature sheets from members/brokers own websites.

[...]

### **Policy:**

Linking to feature sheets other than those supplied by REALTOR.ca or ICX.ca may occur subject to:

1. The member/broker site generated feature sheet opens a new window smaller than the REALTOR.ca window;

[...]

5. Seller contact information must not appear on alternate feature sheets (see Seller Contact Information Policy).

[emphasis added]

[13] CREA's policy on the use of multimedia links provides as follows:

### **Use of Multimedia Links**

REALTOR.ca is a member developed and financed site, the purpose of which is to augment the member-to-member Board MLS® Systems. This policy ensures that the member-to-member aspect is respected on REALTOR.ca and on direct multimedia links from REALTOR.ca to facilitate ongoing participation on the site. [...] It is also not appropriate to have an advertisement of private sales on webpages linked directly from multimedia links. For the purpose of this policy, "advertisement of private sales" means calling to the attention of the public that a listing is a private sale. Examples of advertisement of private sales would include, but are not limited to:

- Any reference to "selling privately"
- References to dealing directly with the seller e.g. for showings, offers, etc.
- For Sale By Owner branded marketing materials e.g. a brochure that refers to or is branded with the logo or name of a FSBO company
- Directions or links to a FSBO company or website or otherwise referring to a FSBO company.

Seller contact information is itself a form of advertisement of private sales and should not appear on webpages linked directly from multimedia links. Advertisement of private sales, including seller contact information, is permitted on the REALTOR®'s own website or his or her brokerage website (subject to the Seller Contact Information policy set out above).

[emphasis added]

## **(2) CREA's Legal Practices Memorandum dated April 27 2011**

[14] A Legal Practices Memorandum was sent by CREA to its member boards and associations in the spring of 2011. The purpose of the Memorandum was to explain the changes to the MTC Policy that had been approved by the Board of Directors on January 19, 2011 and additional revisions that had been approved on April 1, 2011. The Memorandum provides as follows:

### **Revised MTC Policy**

The MTC Policy now includes the following [...]:

- Seller contact information must not appear directly on REALTOR.ca and any webpages directly linked from REALTOR.ca through either multimedia links or REALTOR® website links shall not contain seller contact information. Seller contact information may be displayed on any other part of the REALTOR® website that is not directly linked from REALTOR.ca
- The former blanket ban on third party advertising on multimedia links is now removed and replaced with a narrower restriction on the advertisement of private sales.
- Webpages that are linked directly from the multimedia links must be used for their intended purpose and be limited to property specific information, and must not automatically redirect users to a third party site, and shall not contain any advertisement of private sales (for example, a brochure that refers to a for-sale-by-owner company) nor indicate where private sale information can otherwise be located.

[emphasis added]



[15] Approximately two months following these changes, counsel for the Commissioner wrote to counsel for CREA advising that, in the Commissioner's opinion, these Rules contravened section 3 of the consent agreement. Correspondence between counsel ensued and meetings were scheduled to discuss and resolve the Commissioner's concerns. No agreement was reached.

## II. THE MOTIONS

[16] CREA filed a notice of motion in April of 2014 in which it asked the Tribunal to issue a direction regarding the correct interpretation of section 3 of the consent agreement. The Commissioner filed a motion in response in which he asked for an order directing that the consent agreement does not permit CREA to adopt, maintain or enforce the Rules.

[17] The Commissioner submits that CREA's Rules contravene section 3(e)(iii) of the agreement as they prevent the display of a seller's contact information on landing pages of a website other than an approved website. In his view, section 3(e)(iii) is clear and does not have any qualifying language or an exception that would allow CREA to restrict *where* the seller's contact information may appear on a website, whether on the first or landing page of a member's website that is linked directly from realtor.ca or anywhere else on the website. He adds that this interpretation allows the individual member or the brokerage to control the contents of his or her own website and advertise mere postings without interference.

[18] In the alternative, he argues that CREA's Rules are contrary to the opening language of section 3 and subsection 3(c) which prevent CREA from adopting Rules that discriminate against members offering mere postings. He submits that the Rules affect only mere postings and individual CREA members who offer such low-price innovative services. He explains that these

members are required to add an extra step or create a buffer page in order to display the seller's contact information.

[19] In response, CREA asserts that the Rules do not “prevent”, in the sense of creating an absolute bar to an activity, a member from displaying the seller's contact information on a website other than an approved website. The MTC Policy rather prescribes that the seller's contact information may not be displayed on the landing page or the first webpage of a website other than an approved website. CREA argues that the interpretation advocated by the Commissioner would mean that the Tribunal has to read words into section 3(e)(iii) that are not there (e.g. the word “anywhere” on a website).

[20] CREA further submits that the Commissioner's interpretation ignores the difference in meaning of the words “website” and “webpage”. It asserts that these words have different meanings and that the consent agreement does not preclude CREA from prohibiting the display of a seller's contact information on a particular *webpage* as opposed to on a *website*.

### **III. ANALYSIS**

#### ***A. Principles of interpretation***

[21] A consent agreement, upon registration, “has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal” (see: section 105 of the *Competition Act*). Consent agreements that are registered under section 105 must also be based on terms that could be the subject of an order of the Tribunal against a respondent. In consequence, a consent agreement should be interpreted in a manner that is consistent with the principles applicable to the interpretation of Tribunal orders.

[22] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada stated as follows with respect to the interpretation of contracts:

[47] The overriding concern is to determine “the intent of the parties and the scope of their understanding”... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(Reardon Smith Line, at p. 574, per Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[23] The above principles are, subject to two qualifications, applicable to the interpretation of the consent agreement in this case.

[24] The governing principle in respect of consent agreements is self-evident. A consent agreement registered under section 105 of the *Competition Act* has the same force and effect as if

it were an order of the Tribunal. The order must be clear. It must be capable of enforcement. As non-compliance could give rise to contempt, ambiguities are construed in favour of the alleged contemnor.

[25] Secondly, the Commissioner acts in the public interest in the administration of the *Competition Act*. A consent agreement is not a commercial arrangement, but rather an agreement as to how the respondent may conduct its business without, in the Commissioner's opinion, triggering the provisions of the *Competition Act*. A consent agreement can also be remedial and address the anti-competitive effects of a substantial lessening or prevention of competition. There are also limitations, inherent in the role the Commissioner plays in the enforcement of the *Competition Act*, to the application of commercial law principles to the interpretation of an order.

[26] While the consent agreement was negotiated with the assistance of experienced counsel, the agreement between the Commissioner and CREA is not a contract. It is to be interpreted in accordance with the plain meaning of its terms, in light of the purpose and objects of the *Competition Act*. In this case, there is no ambiguity in the precise terms of the agreement; rather the dispute arises from the intention of the parties as to the scope of its application.

#### **(1) General observations about the agreement**

[27] CREA asserts that the consent agreement cannot be interpreted in a way that undermines the member-to-member nature of the MLS systems underlying realtor.ca. Member-funded services are not required to promote private sales, something antithetical to the CREA member-to-member business model. CREA argues that there is nothing in the language of the consent

agreement which suggests the principles which the member-to-member nature of realtor.ca were to be disrupted.

[28] I agree with CREA's interpretation. The Commissioner's interpretation effectively places a private seller in the same proximity to a prospective purchaser as a member.

[29] The Commissioner seeks to read into the clause the word "anywhere", with the consequence that CREA may not impose any limitations or restrictions on where the information appears. The terms of the consent agreement do not mandate that the seller contact information appear on the landing page. I do not agree that the word "anywhere" is implied in clause 3(e)(ii) or (iii). The agreement does not support that reading of that requirement. The consequence of this would be that there would be an immediate and direct linkage between private sellers and purchasers, through the medium of realtor.ca. As will be seen, this was not contemplated by the agreement, and indeed, would be inconsistent with other express provisions.

[30] It is evident from the consent agreement that the parties specifically directed their minds to the question of where seller's contact information could be posted. Clauses 3(e)(ii) and (iii) implicitly recognise that CREA *can* adopt rules which would preclude members from posting a seller's contact information on, for example, the publicly accessible realtor.ca website. However, CREA *cannot* adopt rules which would preclude members from posting that information in the private comments section of a member board MLS Listing to which the public does not have access. In sum, reading clauses 3(e)(ii) and (iii) together, the consent agreement is indicative of an understanding and agreement between the parties as to a distinction between websites that are publicly accessible and those websites that are not.

[31] It is significant that the consent agreement specifically allows for the posting of contact seller information in the members only section of the listing. This provision would not be required if the parties had contemplated direct access by the public from the realtor.ca site to the private seller contact information. In sum, the Commissioner's interpretation would force the Tribunal to overlook this provision of the agreement, or more accurately, make it redundant. Put more simply, if the parties had contemplated direct linkage from realtor.ca to the private seller, clause 3(e)(i) would have been unnecessary. A purchaser would simply click on the house of interest, triggering the agent's page, with the mere posting and contact seller's information. The consent agreement takes pains to avoid that possibility.

## **(2) Prevention**

[32] CREA contends that the ordinary meaning of "prevent" entails an absolute bar to a particular activity (see: *Canadian Oxford Dictionary*, 2nd ed., *sub verbo* "prevent"). The Rules do not, in its view, prevent the display of the private seller's contact information; they simply restrict it from being on the first page or the landing page after leaving realtor.ca. Put otherwise, the policy does not "prevent" the display on a broker's website; it may limit or restrict where sellers' contact information may be found, but it does not contravene either the spirit of the consent agreement or the plain meaning of its terms. The seller's contact information is on the website – it is just not on the first page of the website.

[33] The word "prevent" has to be interpreted in light of the *Competition Act* and the circumstances of the consent agreement itself. Just as competition must be "substantially" lessened in accordance with section 79 of the *Competition Act*, "prevent" as used in the consent agreement, must have some demonstrable effect or consequence given its meaning. While the

Canadian Oxford Dictionary informs that “prevent” entails an absolute bar to a particular activity it also includes “hinder”.

[34] I do not accept this interpretation. The word “prevent”, when viewed in the context of the *Competition Act* and its objectives, requires a more liberal interpretation, in the sense conveyed by “hindering”. “Prevent” also encompasses, in the context of the resolution of an abuse of dominance proceeding under section 79 of the *Competition Act*, measures which, in their application or operation, effectively frustrate or effectively defeat the purpose of the agreement by restricting access by a potential purchaser to a private seller’s contact information.

[35] This then requires an analysis of the evidence – whether the Rules effectively prevent or frustrate access to the private seller.

### **(3) The evidence with respect to prevention**

[36] I find that CREA’s Rules do not prevent or hinder members from displaying the seller’s contact information on a website other than an approved website in the sense that the Rules do not, in their application, bar, block or constrain the listing of seller’s contact information as contemplated by the agreement. Members are free to make the information available on their websites. However, where a member creates a link between a webpage of his or her website to an approved website, paragraph 3(e)(iii) of the consent agreement does not preclude CREA from requiring those members to create a buffer page so that the buffer or landing page does not contain a seller’s contact information.

[37] The evidence demonstrates that CREA's rule falls short of "preventing" or "hindering" mere postings, or that the rule effectively prevents or hinders the display of the seller's contact information on a website. The creation of this additional step does not result in the prevention of the display of the seller's contact information on the member's website. Evidence was led of four examples of searches for property that were mere postings. The degree of complexity varied with the search parameters chosen by the purchaser – the geographic scope of the search, the steps taken to filter results by type of dwelling, number of rooms, price, etc. In these examples, locating the private seller contact information was straightforward and the additional step to link to the vendor inconsequential. This evidence does not support the conclusion that the Rule prevents or hinders a potential purchaser from finding the contact information of a private seller.

[38] Curiously, the evidence of Mr. Herr, called by the Commission, corroborates the evidence of CREA. Mr. Herr is the owner and broker of record for two residential real estate brokerages called "The For Sale By Owner Depot" and "FF4M Property Postings Inc." Since April 2011, Mr. Herr has posted over 1,000 homes as mere postings. The FSBO Depot website, operated by Mr. Herr describes the linkage to the private seller contact information:

The phrase we use on the REALTOR.ca website that says "For More Information Please Visit the REALTOR® Website" has quickly become widely recognized to indicate a FSBO listing. When buyers click on the REALTO® Website text link they immediately get access to the seller's contact information on the right side of the REALTOR.ca web page and it points directly to a specific page on our servers where each seller's contact information and a link to their special FSBO webpage is displayed.

[39] Further, in response to a FAQ on the FSBO website as to whether contact information can be displayed in the listing, the response given is:



No. Nowhere on the REALTOR.ca posting can the contact information of the seller appear. On the front end we can provide a link from the REALTOR.ca listing directly back to your “home-base” posting on the FlatFee4me.ca website where you are free to publish the contact information, photos, private website address and any other information you might have related to the private sale including any buyers agent incentives.

Our unique jump link system can also link the buyer from REALTOR.ca to your own FSBO website if you have one.

[40] There is nothing in the public representation of the process that suggests that it is difficult to find the contact information; to the contrary, the process is represented to be seamless and one that is widely recognized by the public.

[41] Finally, I note that information was available, but not produced, which would have indicated how many visits are made to the FSBO website, and which webpages are viewed. This evidence, if produced, would have demonstrated whether customers were stymied at the last stage of their search. The failure to produce this evidence supports the inference that it is not favourable to the Commission’s position.

[42] To conclude, the existing Rule, applied in the context of realtor.ca does not “prevent” members from displaying sellers’ contact information. This conclusion is reached not because the Tribunal endorses CREA’s interpretation of prevention, rather because the word, functionally applied to the evidence before the Tribunal, does not, in effect, prevent the display of private seller contact information. Depending on what changes may occur in the future to CREA’s Rules, it is possible that the Tribunal may conclude otherwise when faced with a different set of facts.

#### **(4) Discrimination**

[43] The Commissioner asserts, in the alternative, that CREA's Rules discriminate against mere postings and the members that offer them, contrary to the opening language of clause 3 and clause 3(c) of the consent agreement which read as follows:

CREA shall not adopt, maintain or enforce any Rules that deny the ability of Members to provide Mere Postings for Sellers, or that discriminate against Members because they offer, or wish to offer, to provide Mere Postings for Sellers, including, but not limited to, any Rule that:

[...]

(c) discriminates against Mere Postings, provided that the bare identification of a Mere Posting in a Member Board's MLS® System is not discriminatory;

[44] The Commissioner's interpretation of the agreement would mean that any distinctions between CREA members and private sellers are discriminatory, no matter how minor. Had the parties agreed to place, effectively, private sellers in the same position as agents in respect of realtor.ca, clauses 3(c) and (e) would have been unnecessary.

[45] The Commissioner asserts that CREA's Rules result in different treatment to the detriment of mere postings or the members that offer them. He says that CREA's Rules only affect mere postings and the members that offer them and that they target the display of the seller's contact information. He argues that they are designed to make it harder for the consumer to determine where the seller's contact information may be found. Instead of having this information immediately after leaving realtor.ca, an interested buyer must click through a link to a second page where a seller's contact information is listed. He further submits that the Rules adversely affect members' mere posting business and that they create burdens and obligations for

the mere posting realtors and increase their costs. He relies, in that regard, on the evidence provided by Mr. Logue and Mr. Herr.

[46] Mr. Logue is the owner and broker of record for a real estate brokerage known as “rhinorealty”. In his affidavit sworn on August 8, 2014, he explains that amongst its services, rhinorealty offers a “By Owner Plan”, which provides a client with a posting on a local MLS board, as well as some other services such as a comparative market analysis, examination of the property title, and the installation of signage. With respect to the costs of the By Owner Plan package, he stated in his affidavit:

74. Third, CREA’s rules have the effect that we receive and must deal with numerous telephone calls and emails from Realtors and/or potential buyers for homes that are on our By Owner Plan (mere posting). Taking these calls increases our costs associated with offering a mere postings service. And, as a result of this we had to increase our price for that service plan from \$795 to \$995 shortly after its introduction as we greatly underestimated the time involved fielding these inquiries that should have gone to the seller.

[47] Mr. Logue also stated that CREA Rules affect consumers negatively and negatively affect his relationship with his By Owner clients. He explains that the “seller is usually confused or worse, thinks that we are trying to deceive them and reduce their chances of successfully selling their home in order to ‘upsell’ or induce them to a higher (more expensive) level of service”.

[48] As noted earlier, Mr. Herr is the owner and broker of record for two residential real estate brokerages called “The For Sale By Owner Depot” and “FF4M Property Postings Inc.” Since April 2011, he has posted over 1,000 homes as mere postings and he states in his affidavit sworn on August 12, 2014, as follows:

55. Sellers certainly do not like the buffer pages we are required to add in order to comply with CREA's rules, not at all. I know this in part because sellers get very cranky when they find out and demand an explanation. They often tell me that including the buffer page and not immediately displaying their contact information will interfere with the possibility of a sale [...]

[...]

57. Adding the buffer page is a problem. I have been told this at least 20 times by potential buyers.

58. In some cases, I have lost or almost lost potential business because of this requirement. One seller initially refused to sign up with my brokerage because she didn't want her contact information to be behind a buffer page. Another seller simply refused to accept the service because he felt the public would not be able to deal with the two webpage process.

[49] Mr. Herr also explained that for each mere posting listing, there is the additional work of adding a buffer page and making the links work. This requires approximately 10 minutes of his time. Given his evidence that he has posted over 1,000 homes as mere postings, this results, according to the Commissioner, in 160 additional hours of work over the last few years.

[50] Not all distinctions are discriminatory. In some cases, discrimination is apparent on its face, whereas in other cases, evidence is required of the effects and consequence. In this case, the evidence does not support the conclusion that the Rules discriminate against mere postings.

[51] Mr. Herr's business has, since April 2011, posted over 1,000 homes to the MLS System as mere postings. With respect to Mr. Herr's affidavit, he concedes that he can only point to one incident where a client apparently refused his services because of the necessity of a buffer page. No evidence was adduced by this client, nor was the client identified. Over that period of time and number of transactions, the loss of a single potential client by reason of the requirement of a buffer page, is *de minimus*.

[52] Further, Mr. Herr states that it takes him about ten minutes of time to create a buffer page. First, buffer pages are only one method to direct consumers from the broker to the private seller. Secondly, the evidence before the Tribunal, tracking the pathway from a sample property of interest to a potential purchaser through to brokers' sites to the contact seller demonstrated that the path was neither convoluted nor time-consuming.

[53] Finally, the fact that ten minutes of time may be associated with the creation of a buffer page, does not, standing on its own, reveal much about whether the Rule discriminates. The evidence indicates that CREA members operate through a range of business models, and within those models, there are elements of choice by vendors as to the nature and extent of real estate services they wish to engage. Each of these models may have certain unique costs. To be meaningful, evidence of the comparative costs is required.

[54] I turn next to the evidence of Mr. Logue. I accord little weight to the evidence of Mr. Logue. Counsel for CREA highlighted the fact that rhinorealty has never displayed on its website the seller's contact information for any "By Owner Plan" property listing. Instead, Mr. Logue decided, as a business model, that rhinorealty would be the first point of contact for all inquiries by potential buyers. In other words, potential buyers are directed to contact rhinorealty and will not find the seller's contact information on rhinorealty's website. Mr. Logue decided on this business model because he thought CREA's rules cumbersome, that individuals would have difficulties finding the information and that there would be additional costs associated to the creation of a buffer page.

[55] In these circumstances, it appears that the increased number of calls that Mr. Logue's brokerage receives from interested buyers as well as the price increase for the By Owner Plan

services are not the direct result of CREA's Rules, but rather the result of Mr. Logue's business model.

[56] Mr. Herr and Mr. Logue also make various statements about what they have heard and express various opinions about those statements. This constitutes mostly anecdotal evidence. I have questions about the admissibility, and if admissible, the use of such evidence to interpret a very significant agreement, which has the effect of a Tribunal order, and which has important public interest and private interest implications.

[57] To conclude, the Tribunal is not satisfied, on a balance of probabilities, that the Rules discriminate against members who offer mere postings. The evidence addressed by CREA suggests to the contrary, that even a novice user of realtor.ca would have little difficulty in finding the information under the existing rules and design of the website.

#### **(5) Spirit and intention**

[58] The essence of the Commissioner's position is that CREA's interpretation offends the spirit and intention of the parties. That purpose, according to the Commissioner, was to increase competition in the real estate industry market by, *inter alia*, allowing agents to offer a range of services from the traditional full-service and associate commission, to agreeing merely to post a private seller's listing for a fixed fee. While I am sympathetic to this argument, there are counter-veiling contextual considerations which suggest that the parties did not intend to eliminate completely, the barrier between realtor.ca and private sellers.

[59] The consent agreement does not go so far as to require a direct interface between realtor.ca and the private sellers' contact information. The structure of the agreement and clauses

3(e)(i)(ii) and (iii), when read together as they must, reflect this separation. The agreement does not oblige CREA to directly link realtor.ca to a private sale, or put otherwise, the agreement respects the member-to-member nature of the MLS system. That is why, for example, the agreement specifically allows a member to put private sellers contact information in the members only comments section of the MLS system.

**[60]** To read 3(e)(iii) as to require direct linkages between realtor.ca and the private seller would render 3(e)(ii) redundant, offending the principle that provisions are not to be read in isolation but are to be read to achieve consistency, harmony and meaning between each provision: *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69, para 64.

**[61]** Second, it is possible that a direct link between the purchaser and the private seller would take prospective purchasers to photographs and virtual tours prepared by the private seller, giving rise to the concern that what the purchaser was viewing was an extension of realtor.ca.

**[62]** Third, it is not uncommon for websites to make clear, either through express language or other means such as a buffer page, that the reader is leaving a proprietary website. The Rule is directed to what information a member may directly link to CREA's website, not about limiting what may be displayed. In any event, in the evidence before the Tribunal, a reasonably informed purchaser can, or should be able, to find the seller's contact information with two or three clicks.

#### **IV. CONCLUSION**

[63] I conclude that the Commissioner has failed to establish, on the evidence before the Tribunal in this case, that CREA's Rules prevent mere postings or discriminate against the members that offer them.

#### **FOR THESE REASONS, THE TRIBUNAL ORDERS AS FOLLOWS:**

[64] The Commissioner's motion is dismissed.

[65] CREA's Rules, based on the evidence before the Tribunal, do not contravene clause 3 of the consent agreement.

[66] Costs on both motions to CREA.

DATED at Ottawa, this 30<sup>th</sup> day of April, 2015.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie



**SCHEDULE "A"**

**CT — 2010 — 002**

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/94-290;

**AND IN THE MATTER OF** an application pursuant to section 79 of the *Competition Act*, relating to certain practices of the Canadian Real Estate Association in the residential real estate industry in Canada;

**AND IN THE MATTER OF** the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*.

COMPÉTITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE Registered / Enregistré FILED / PRODUIT	
October 25, 2010 CT-2010-02	
JOS LORAM TSE / DORE REGISTRAR / REGISTRARE	
OTTAWA, ONT	# 75

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**AND**

**THE CANADIAN REAL ESTATE ASSOCIATION**

**Respondent**

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**CONSENT AGREEMENT**

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**WHEREAS** the Commissioner filed an Application with the Competition Tribunal on February 8, 2010, pursuant to section 79 of the Act, challenging Rules imposed by CREA that the Commissioner alleges limit consumer choice and prevent innovation in the market for residential real estate brokerage services to home sellers in Canada;

**AND WHEREAS** the Commissioner and CREA (together, the "Parties") have reached an agreement to resolve the Commissioner's concerns regarding certain of CREA's practices pursuant to section 79 of the Act;

**AND WHEREAS IT IS AGREED AND UNDERSTOOD THAT CREA** does not accept the allegations of the Commissioner and nothing in this Agreement will be taken as an admission or acceptance by the Commissioner or CREA of any facts, liability, wrongdoing, submissions, legal argument or conclusions for any other purposes,

**NOW THEREFORE** the Parties agree as follows:

**I. Definitions**

1. For the purposes of this Agreement, the following capitalized terms have the following meanings:
  - (a) "**Act**" means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
  - (b) "**Agreement**" means this Consent Agreement entered into by CREA and the Commissioner pursuant to section 105 of the Act;
  - (c) "**Approved Website**" means REALTOR.ca (formerly mls.ca) or any other website operated by CREA or a Member Board originating from a service operated under an MLS® System;
  - (d) "**CREA**" or the "**Respondent**" means The Canadian Real Estate Association, a trade association incorporated under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32;
  - (e) "**Commissioner**" means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on her behalf;
  - (f) "**Member**" refers to a licensed real estate practitioner who is a member of a Member Board and CREA;
  - (g) "**Member Board**" means a local real estate board or association, or a provincial or territorial real estate association, located in Canada that is a member of CREA;
  - (h) "**Mere Posting**" means a listing on a Member Board's MLS® System in respect of which the Member has chosen or agreed not to provide services to the Seller other than submitting the listing for posting on a Member Board's MLS® System;
  - (i) "**MLS® Marks**" means the following trademarks and certification marks owned and licensed by CREA with the following registration numbers: TMA155124, TMA221815, TMA221816, TMA118344;
  - (j) "**MLS® System**" means a cooperative selling system for residential real estate operated by or on behalf of a Member Board(s) in association with the MLS® Marks;
  - (k) "**Parties**" means CREA and the Commissioner;

- (l) "Rule" means any rule, regulation, bylaw, code, policy, standard, practice, agreement or similar instrument, or any other instrument referred to therein, including any interpretations thereof;
- (m) "Seller" means a person who has an interest in selling residential real estate; and
- (n) "Tribunal" means the Competition Tribunal established by the *Competition Tribunal Act*, R.S.C. 1985, c.19 (2nd Supp.), as amended.

## II. Application

2. The provisions of this agreement apply to:

- (a) CREA; and
- (b) the Commissioner.

## III. Obligations of CREA

3. CREA shall not adopt, maintain, or enforce any Rules that deny the ability of Members to provide Mere Postings for Sellers, or that discriminate against Members because they offer, or wish to offer, to provide Mere Postings for Sellers, including, but not limited to, any Rule that:

- (a) prevents Members from offering a Mere Posting;
- (b) prevents Mere Postings from being listed in a Member Board's MLS® System;
- (c) discriminates against Mere Postings, provided that the bare identification of a Mere Posting in a Member Board's MLS® System is not discriminatory;
- (d) prevents Members from cooperating with Members that offer Mere Postings;
- (e) prevents Members from:
  - (i) listing a Seller's contact information in the REALTOR®-only remarks section of the MLS® System, with instructions directing interested Members to contact the Seller directly,
  - (ii) including, in the General Description section on an Approved Website, a direction to visit either the REALTOR®'s or his or her brokerage's website (whichever site is included as the contact link in the REALTOR®'s contact information on the Approved Website) for additional information about the listing (without specifying the nature of such additional information), or
  - (iii) displaying the Seller's contact information on a website other than an Approved Website;

- (f) prevents Members from negotiating and contracting, with a Seller, in respect of the terms of payment for compensation to the co-operating Members for the co-operative selling of the property, as long as the offered compensation is not zero; or
  - (g) conditions use of, or access to, the MLS® Marks or a Member Board's MLS® System on a Member, or a prospective Member, not offering Mere Postings.
4. Effective upon registration of this Agreement, CREA shall amend its Rules to remove the Agency Pillar, Rule 17.1.1.2, and replace it with the following:

A listing REALTOR®/brokerage must act as agent for the seller to post, amend or remove a property listing in a Board's MLS® System. The nature of any additional services to be provided by the listing REALTOR®/brokerage to the seller is determined by agreement between the listing REALTOR®/brokerage and the seller.

#### **IV. Implementation and Compliance**

5. Effective upon registration of this Agreement, CREA shall amend its Rules to comply with the provisions of this Agreement.
6. CREA shall send a written notice to its Member Boards stipulating that they amend, in accordance with the Rules of those Member Boards, their Rules to comply with the provisions of this Agreement. In particular, within ten (10) days of registration of this Agreement, CREA shall provide a copy of this Agreement to each of its Member Boards and specifically advise them of the consequences, as set out in this Agreement, of a failure by a Member Board to amend its Rules in accordance with this Agreement.
7. CREA shall not adopt any Rules that would have the effect of breaching the terms of this Agreement.
8. CREA shall not license or continue to license the MLS® Marks to any Member Board that has failed to amend its MLS® Rules to comply with the amendment by CREA of its Rules in accordance with this Agreement.
9. CREA shall not license or continue to license the MLS® Marks to any Member Board that adopts and/or enforces any Rules that are inconsistent with the terms of this Agreement.
10. CREA shall provide template language to Member Boards for the implementation of the Rule changes arising from this Agreement. CREA shall provide such template language to the Commissioner for her review prior to providing such template language to Member Boards.

**V. Term**

11. Unless otherwise agreed by the Parties, the term of this Agreement shall commence upon the date of registration of this Agreement and end ten (10) years from the date of registration of this Agreement.

**VI. General**

12. This Agreement shall be registered with the Tribunal immediately after ratification by the members of CREA.
13. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.
14. The Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein.
15. Computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21. For the purpose of this Agreement, the definition of "holiday" in the Interpretation Act shall be deemed to include Saturday.
16. Nothing in this Agreement precludes CREA or the Commissioner from bringing an application under section 106 of the Act (or a successor or equivalent provision under the Act) to rescind or vary this Agreement.
17. For greater certainty, the Tribunal shall retain jurisdiction for the purpose of any application by the Commissioner or CREA to rescind or vary any of the provisions of this Agreement pursuant to section 106 of the Act.
18. This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.
19. The headings in this Agreement are for convenience of reference only and shall not affect the construction or interpretation thereof.
20. In the event of a dispute as to the interpretation or application of this Agreement, either the Commissioner or CREA shall be at liberty to apply to the Tribunal for an order interpreting any of the provisions of the Agreement. In the event of a dispute in relation to the English and French versions of the Agreement, the English version shall govern.

VII. Notices

21. Notices pursuant to the Agreement shall be given to the Parties at the following addresses or facsimile numbers:

(a) **The Commissioner**

Melanie L. Aitken  
Commissioner of Competition  
Competition Bureau  
Place du Portage, Phase 1, 50 Victoria Street  
Gatineau (QC) K1A 0C9

Telephone: (819) 997-3301  
Facsimile: (819) 953-5013

**With copies to:**

John F. Rook, Q.C.  
Bennett Jones LLP.  
3400 One First Canadian Place  
P.O. Box 130, 100 King Street W.  
Toronto (ON) M5X 1A4

Telephone: (416) 777-4885  
Facsimile: (416) 863-1716

(b) **Canadian Real Estate Association**

Pierre Beauchamp  
Chief Executive Officer  
Canadian Real Estate Association  
200 Catherine Street, 6th Floor  
Ottawa (ON) K2P 2K9

Telephone: (613) 237-7111  
Facsimile: (613) 234-2567

**With copies to:**

Katherine L. Kay  
Stikeman Elliot LLP  
5300 Commerce Court W.  
199 Bay Street  
Toronto (ON) M5L 1B9

Telephone: (416) 869-5507  
Facsimile: (416) 947-0866

Any party hereto may from time to time change its address or facsimile number for notice by giving notice to the other party hereto in accordance with the provisions of this section 21.

DATED this [30<sup>th</sup>] day of [September], 2010

[original signed by Melanie L. Aitken]  
Melanie L. Aitken  
Commissioner of Competition

The Canadian Real Estate Association

[original signed by Pierre Beauchamp]  
Per: Pierre Beauchamp  
Title: Chief Executive Officer

## APPEARANCES

For the applicant:

The Commissioner of Competition

Andrew D. Little  
Tara DiBenedetto

For the respondent:

The Canadian Real Estate Association

Sandra Forbes  
Andrea Burke