

THE COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF certain rules, policies and agreements relating to the multiple listing service of the Toronto Real Estate Board.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

**RESPONDING MOTION RECORD OF
THE COMMISSIONER OF COMPETITION
TO TREB'S MOTION TO STAY OR ADJOURN**

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TAB 1

CT-2011-003

THE COMPETITION TRIBUNAL**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34, as amended;**IN THE MATTER OF** an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;**AND IN THE MATTER OF** certain rules, policies and agreements relating to the multiple listing service of the Toronto Real Estate Board.**BETWEEN:****THE COMMISSIONER OF COMPETITION**

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PART I GROUNDS ON WHICH THE MOTION IS OPPOSED

1. On April 7, 2014 the Competition Tribunal issued an order scheduling the reconsideration hearing to commence on October 14, 2014 (the "**Further Hearing**"). On April 23, 2014 the Tribunal issued a more detailed schedule of the matters that must be addressed before the Further Hearing commences.
2. There has been no change in circumstances since those scheduling orders. Prior to issuing both orders, the Tribunal was aware that TREB had made an application on March 31, 2014 for leave to appeal to the Supreme Court of Canada. The Commissioner of Competition filed his response to TREB's leave application on April 28, 2014.
3. TREB has not filed the necessary evidence of irreparable harm to stay or adjourn the Further Hearing.
4. TREB has not demonstrated any compelling reason to adjourn the Further Hearing. Its risk of costs thrown away is speculative and, in any event, TREB may claim its costs in the usual way if successful.
5. Further delay of the Commissioner's application will cause irreparable harm to the Canadian economy in the form of continued inefficiencies, higher prices, lower service quality, and reduced innovation.
6. An adjournment will not save any judicial resources.
7. Parliament has directed the Tribunal to deal with matters as expeditiously as the circumstances and considerations of fairness permit.
8. Such further and other grounds as counsel may advise and the Tribunal may permit.

PART II. DOCUMENTARY EVIDENCE TO BE USED AT THE HEARING OF THE MOTION

9. The Commissioner intends to rely on the following documents at the hearing of the motion:

- (a) The affidavit of Stephanie Paige sworn May 30, 2014; and
- (b) Such further or other documents as counsel may advise and this Tribunal may permit.

DATED AT TORONTO, ONTARIO, this 30th day of May, 2014.



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Counsel for the Commissioner of Competition

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Counsel for the Commissioner of Competition

TAB 2

CT-2011-003

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THE CANADIAN REAL ESTATE ASSOCIATION

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**AFFIDAVIT OF STEPHANIE PAIGE
(sworn May 30, 2014)**

I, Stephanie Paige, of the City of Markham, in the Province of Ontario, MAKE OATH
AND SAY:

1. I am a law clerk with the law firm of Bennett Jones LLP, the lawyers for the Commissioner of Competition, and as such I have knowledge of the matters sworn to in my affidavit, either from my personal knowledge, or where indicated, from information provided to me by others, which in all cases I believe to be true.

2. Attached to my affidavit are copies of:

- (a) the Commissioner's Notice of Application as **Exhibit "A"**;
- (b) excerpts from the Commissioner's Closing Submissions as **Exhibit "B"**;
- (c) excerpts from the transcript from the Case Management conference held on February 26, 2014 as **Exhibit "C"**;
- (d) the Commissioner's Memorandum of Argument filed in response to TREB's application for leave to appeal as **Exhibit "D"**; and
- (e) excerpts from the transcript of September 11, 2012 as **Exhibit "E"**; and
- (f) the Tribunal's scheduling order in *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, CT-2012-002 as **Exhibit "F"**.

3. I have reviewed the Supreme Court of Canada's website. A copy of the Supreme Court of Canada statistics from its website regarding Category 5: Average Time Lapses and Category 2: Applications for Leave Submitted is attached as **Exhibit "G"**.

SWORN before me, at the City of Toronto,)
in the Province of Ontario this 30th day of)
May, 2014.)
)
)
)



Commissioner for Taking Affidavits in and
for the Province of Ontario



STEPHANIE PAIGE

Kelly Ann McPhie, a Commissioner, etc.,
Province of Ontario, for Bennett Jones LLP,
Barristers and Solicitors.
Expires September 23, 2015.

**THIS IS EXHIBIT "A" REFERRED TO
IN THE AFFIDAVIT OF STEPHANIE PAIGE
SWORN THE 30th DAY OF MAY, 2014.**



A Commissioner for taking affidavits, etc.

Kelly Ann McPhie, a Commissioner, etc.,
Province of Ontario, for Bennett Jones LLP,
Barristers and Solicitors.
Expires September 23, 2015.

FILED / PRODUIT

Date: May 27, 2011

CT- 2011-003

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

1

CT-01/

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THE TORONTO REAL ESTATE BOARD

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NOTICE OF APPLICATION

TAKE NOTICE that the Applicant will make an application to the Competition Tribunal (the "Tribunal") pursuant to section 79 of the *Competition Act* (the "Act") for an order pursuant to subsections 79(1) and (2) of the Act, prohibiting the Respondent from enacting, interpreting and enforcing rules, policies, and agreements that exclude, prevent or impede the entry of innovative business models and impose restrictions on real estate brokers who wish to use the Internet to

more efficiently serve home buyers and home sellers. The particulars of the Order sought by the Applicant are set out in paragraph 55.

AND TAKE NOTICE that the timing and place of hearing of this matter shall be fixed in accordance with the practice of the Tribunal;

AND TAKE NOTICE that the Applicant has attached hereto as Schedule “A” a concise statement of the economic theory of the case.

AND FURTHER TAKE NOTICE that the Applicant will rely on the following Statement of Grounds and Material Facts in support of this Application, and such further or other material as counsel may advise and the Tribunal may permit.

STATEMENT OF GROUNDS AND MATERIAL FACTS

PART I: GROUNDS

1. The Toronto Real Estate Board ("TREB") is a trade organization whose membership is comprised of over 30,000 real estate brokers and salespersons (together, "brokers") principally in the Greater Toronto Area (the "GTA"). TREB owns and operates an electronic database known as the TREB Multiple Listing Service system (the "TREB MLS" or "TREB MLS system"), which contains current and historical information about the purchase and sale of residential real estate in the GTA.

2. The TREB MLS system is pervasively used by brokers and is a key input into the supply of residential real estate brokerage services in the GTA. Only members of TREB have direct access to the TREB MLS system, which contains a full inventory of active and historical listings.

3. The Commissioner of Competition (the "Commissioner") submits that TREB and its members substantially or completely control the market for the supply of residential real estate brokerage services in the GTA. TREB has used and is using its control of the TREB MLS system to enact and interpret rules, policies and agreements with exclusionary and restrictive effects (the "TREB MLS Restrictions", described in detail below) on brokers' access to and use of the TREB MLS system. The TREB MLS Restrictions are a practice of anti-competitive acts, the purpose and effect of which is to discipline and exclude innovative brokers who would otherwise compete with TREB's member brokers who use traditional methods. If a broker does not abide by the TREB MLS Restrictions, TREB can terminate the broker's access to the TREB MLS system (and has done so).

4. As TREB has known for years, the TREB MLS Restrictions restrict and prevent innovation in the supply of residential real estate brokerage services, particularly services offered over the Internet. For example, TREB restricts and prevents innovative brokers from using a secure, password-protected "virtual office website" ("VOW") to provide real estate brokerage services to their customers over the Internet. If TREB's member brokers were able to offer VOWs with online search capabilities, their customers could conduct their own searches for, and review information relevant to, the purchase and sale of homes in the GTA, without the personal

assistance or direct intervention of a broker. Currently, brokers and their staff obtain such information from the TREB MLS system themselves and provide it to their customers by hand, email or fax.

5. The TREB MLS Restrictions perpetuate the traditional "bricks and mortar" business model used by a majority of its member brokers ("traditional brokers"). As a result of the TREB MLS Restrictions, brokers are prevented from using the information in the TREB MLS system to create and support innovative business models and service offerings, such as VOWs, which would improve the efficiency and productivity of their businesses. Such innovations and the resulting cost savings would enable those brokers to compete more effectively against traditional brokers. At the same time, TREB deprives all consumers of the choice to receive some services from their brokers conveniently, at a time of their choosing, often at home, via the Internet.

6. Real estate boards and associations in other Canadian jurisdictions, such as Nova Scotia, allow their members access to and use of their MLS information to provide Internet-based services. In the United States, such access to and use of MLS information is commonplace and many U.S. brokers compete by providing innovative services using the Internet. As a result, such brokers have lower operating costs and are able to offer markedly reduced commission rates or significant rebates to their customers, a practice denied to would-be innovative brokers in the GTA.

7. The TREB MLS Restrictions have lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate brokerage services in the GTA. But for the TREB MLS Restrictions, there would be substantially more competition in the GTA, including more innovation, enhanced quality of service and increased price competition, through such means as commission rebates.

8. As a result of the TREB MLS Restrictions, consumers in the GTA have no access to VOWs – or the lower prices that typically go with them. If such competition existed, the Commissioner believes that it would result in significant savings to GTA consumers.

9. The Commissioner therefore seeks an Order prohibiting TREB from directly or indirectly enacting, interpreting or enforcing restrictions, including the TREB MLS Restrictions, that

exclude, prevent or discriminate against TREB member brokers who wish to use the information in the TREB MLS system to offer services over the Internet, such as through a VOW as described in this Application; directing TREB to pay the costs and disbursements of the Commissioner and the Tribunal in relation to this Application; and such other interim, interlocutory or final relief as the Commissioner may request and this Tribunal may consider appropriate.

PART II: MATERIAL FACTS

The Parties

10. The Applicant, the Commissioner, is appointed pursuant to section 7 of the Act, and is charged with the administration and enforcement of the Act.

11. The Respondent, TREB, is Canada's largest real estate board. It is a not-for-profit corporation, incorporated pursuant to the laws of Ontario. The membership of TREB consists of 31,300 brokers principally in the GTA. TREB provides a range of services to its member brokers, including access to and use of the TREB MLS system.

Facts Giving Rise to this Application

The TREB MLS system

12. The TREB MLS system is an electronic database owned and operated by TREB for the benefit of its broker members. It is designed to collect and store information from brokers about properties offered for sale in the GTA. The information for each property is regularly updated and, over many years, the TREB MLS system has become a vital source of both current and historical information about the purchase and sale of residential real estate in the GTA.

13. Subject to interboard agreements, only members of TREB have direct access to the TREB MLS system, which contains a full inventory of active and historical listings. By listing properties for sale in the TREB MLS system, TREB brokers agree to share their listings with all

other participating TREB brokers. It is used by TREB member brokers to facilitate the matching of buyers and sellers of residential real estate.

14. TREB brokers often conduct searches of the TREB MLS system and provide their customers with information derived from those searches. TREB brokers do so both before and after they have entered into a formal broker/customer arrangement. Such searches as provided to customers may include detailed information about properties for sale, including listing prices, addresses, room dimensions, sales prices of recently sold homes, and comparative market analyses conducted using historical sales data.

15. Brokers for home sellers advise their customers on the appropriate price at which to list a property for sale, based in large part on information available only to brokers by searching in the TREB MLS system (such as prices of comparable houses recently sold in the same neighbourhood).

16. Brokers for home buyers use the TREB MLS system to locate properties that may be of interest to their buying customers. Buyers' brokers also search recent sale prices of comparable properties to advise their customers on the appropriate price to offer for a specific property.

17. The search information obtained by brokers from the TREB MLS system is not directly accessible to their customers in an efficient manner. TREB brokers may provide information to their customers in a variety of ways including in person, by fax, or by email, but are restricted from doing so through more efficient methods, such as through VOWs.

Innovative Business Models: Virtual Office Websites

18. A VOW is an example of an innovative service model that is prohibited by the TREB MLS Restrictions. A VOW is a secure, password-protected website that enables residential real estate customers to search a database containing MLS information themselves, thus obtaining MLS information over the Internet. Prior to accessing any of the services available through a VOW, such as conducting a search, a VOW user registers with the website and agrees to certain terms and conditions. These steps establish the person as a customer of the VOW brokerage.

19. VOWs provide the same services as traditional brokers in a “bricks and mortar” setting but more efficiently (as outlined in paragraphs 22 and 50-53 below).

20. A VOW is designed to allow a registered customer to search, over the Internet, a complete inventory of information available on an MLS system, including historical sales data (such as information on comparable properties recently sold in an area) and all properties currently listed for sale. A full inventory of these properties and data in the MLS system is essential for the operation of a successful VOW; otherwise, customers must use several websites to conduct their searches, which is inefficient and a significant deterrent to using a VOW. In addition, some information, such as the sales price of recently sold homes, is only available through an MLS system.

21. Where free from anti-competitive rules such as the TREB MLS Restrictions, brokerages operating VOWs typically supplement the MLS data with additional information of interest to potential buyers, such as detailed maps, demographic information, traffic and crime statistics and the locations of local amenities such as schools and hospitals. Using this additional information, VOW brokerages can create innovative websites that substantially enhance the consumer’s buying or selling experience.

22. VOWs make brokerages more efficient. For example, the use of a VOW allows for the transfer of the task of searching information on the MLS system from the broker to those customers who wish to do so. This reduces or eliminates the time and expense incurred by brokers. In effect, customers use a VOW to educate themselves about the residential real estate market and the properties available. The additional information provided through a VOW assists customers in narrowing down the properties in which they are interested, allowing brokers to spend less time responding to questions and showing properties that are ultimately not of interest. In this and other respects (described further below), VOW brokers operate more efficiently than traditional brokers who provide MLS information only by traditional methods, such as in a “bricks and mortar” environment.

23. The efficiencies realized by VOW brokerages may be passed on to consumers in the form of price competition, through such means as commission rebates. Currently, there are VOW brokerages operating in the United States that offer to rebate up to 50 percent of the broker's

commission to the buyer. These brokerages can offer greater rebates to their customers owing to the efficiencies and cost savings made possible by VOWs.

The TREB MLS Restrictions

24. To become a member of TREB and have access to the TREB MLS system, a broker must agree to be bound by TREB's By-Laws and TREB's MLS Rules and Policies and must execute an Authorized User Agreement ("AUA"). The terms of these rules, policies and agreements, as imposed and interpreted by TREB, are referred to in this Application as the "TREB MLS Restrictions".

25. TREB members are bound by TREB's MLS Rules and Policies, which include the following provisions:

RULES

R-101

Use of the MLS® System is subject to the provisions of the Authorized User Agreement as amended, restated or replaced from time to time.

RULE 400 - ADVERTISING

R-430

Members other than the Listing Brokerage may advertise an MLS® Listing only when an MLS® Listing Agreement so indicates and Members have received specific written permission from the Listing Brokerage prior to each occasion of advertising.

R-431

Members shall not use any marketing materials prepared by or created for another Member, including but not limited to, photographs, floor plans, virtual tours, personal marketing materials or feature sheets without the written consent of that Member who created or purchased the material.

POLICIES

RULE 500 – TREB COMPUTER SYSTEM

P-501

Any Member wishing to obtain access to any MLS® data (whether for office use or individual use by a Broker or Salesperson registered with a Brokerage) shall enter into an MLS® Access Agreement, or such other agreement as TREB may require from time to time.

P-508

TREB in its sole discretion, may terminate or suspend a Member's user name and Password code in the event of any unauthorized or improper use of the MLS® Online system.

26. Further, each member of TREB must agree to the following material terms of AUA:
- (a) In section 2, TREB grants a broker member a non-exclusive, non-transferable licence to access and use the TREB MLS system;
 - (b) In section 2, the broker must unconditionally agree to access and use the MLS system "for the exclusive and internal use" by the broker;
 - (c) In section 3, the broker may make "Copies" of the information in the MLS system but such Copies are limited to paper printouts and electronic copies of reports "generated from" the MLS system;
 - (d) In section 4, brokers acknowledge that the MLS Database (as defined in the AUA) has special value "due to access only by TREB members and users authorized by TREB";
 - (e) In section 4(c), the MLS Database is considered to be confidential property of TREB and requires that the user "not circulate or copy ... the MLS database ... in any manner except to authorized users... and except to persons or entities who desire or may desire to acquire or dispose of certain of their rights respecting real estate";
 - (f) Section 4(d) prohibits members from using, copying, reproducing, or exploiting the database for the purposes of "creating, maintaining or marketing, or aiding in the creation, maintenance or marketing, of any MLS database ... which is competitive with the MLS database ... or which is contrary to the By-Laws, the MLS Rules and the MLS Policies ..."

27. The TREB MLS Restrictions, on their face, and as interpreted, applied, and enforced by TREB, prevent brokers from offering innovative, Internet-based services such as VOWs to their customers.

28. For example, TREB considers the display of a listed property on a VOW to be "advertising" that property for sale. TREB Rule 430 requires "specific written permission from the Listing Brokerage prior to each occasion of advertising". According to TREB's interpretation of Rule 430, to operate a VOW with the necessary full inventory of current properties for sale, a VOW broker would have to obtain specific written permission from each brokerage in the GTA, for each occasion of advertising, potentially for the up to 25,000 new listings that are added to the TREB MLS system each month. This creates a practical barrier to entry that makes it virtually impossible to operate a VOW.

29. VOWs are not a form of advertising, just as a broker providing a physical copy of a listing to a customer does not constitute advertising. When a consumer registers with a VOW and accepts its terms, that consumer is just as much a customer of the VOW brokerage as a traditional broker's customers (who are able to receive information in person, by fax, or by email).

30. The terms of the AUA require brokers to access and use the TREB MLS system "for the exclusive and internal use" of the broker and prohibit providing copies of TREB MLS information to customers unless they are reports "generated from" the TREB MLS system. TREB has interpreted the terms of the AUA to thus prohibit the transfer from TREB to brokers of the information that is necessary to operate a VOW, including a complete listings inventory and historical sales data. Effectively, the AUA only allows brokers to operate in a "bricks and mortar" environment. In addition, the terms of the AUA have been interpreted to prohibit direct access to such TREB MLS information in a searchable form, through a VOW. Without access to such complete information, neither brokers nor customers can enjoy the benefits of a VOW.

31. Finally, in the event of an "unauthorized or improper" use of the TREB MLS system (which would include a TREB member broker attempting to create a VOW), the member's access to the TREB MLS system can (and has been), in TREB's sole discretion, terminated or suspended under TREB Policy 508. Without access to the TREB MLS system, brokers cannot realistically provide competitive real estate brokerage services in the GTA.

Elements of Section 79 of the Act

The Product Market

32. The relevant product markets are the supply of residential real estate brokerage services to home buyers and the supply of residential real estate brokerage services to home sellers. Both of these services are considered to be relevant product markets, and are not acceptable substitutes for one another. Home buyers require a different package of services from those required by home sellers, such as finding suitable properties, showing these properties to the buyer, and providing information about historical prices in the area. Conversely, home sellers require services such as evaluating a property's value and advertising that property to potential buyers. As the vast majority of brokers operate in both markets, and the TREB MLS Restrictions affect both markets, in this Application the Commissioner considers it appropriate to aggregate these services and treat them as a single market.

33. For the vast majority of home buyers and sellers, there are no acceptable substitutes to residential real estate brokerage services.

The Geographic Market

34. Markets for the supply of residential real estate brokerage services are local in nature. In this Application, the geographic coverage of the TREB MLS system, subject to interboard agreements, determines the boundaries of the relevant geographic market.

TREB Substantially or Completely Controls a Class or Species of Business

35. TREB substantially or completely controls the supply of residential real estate brokerage services in the GTA through its ability to enact, interpret, and enforce rules, policies and agreements, including the TREB MLS Restrictions, that govern the use of and access to the TREB MLS system. TREB has the ability to establish (and has established) rules that restrict

how TREB brokers can compete, and constrain (and has constrained) the ability of its members to innovate and deliver better quality services to their customers.

36. The TREB MLS system is a key input in the supply of residential real estate brokerages services. The TREB MLS system is the only comprehensive source of both current and historical information about the purchase and sale of residential real estate in the GTA. The TREB MLS system has information about specific properties that is not available on other websites, such as www.realtor.ca, namely sold data, days on market, and price changes, all of which are highly salient to consumers' home purchase and sale decisions. While this information may be provided to brokers' customers by such means as fax, email or in person, the TREB MLS Restrictions prohibit brokers from sharing the same information through a VOW.

37. TREB's control of the relevant market is demonstrated by its ability to exclude brokers and brokerages that do not abide by its rules, policies and agreements. TREB brokers must conform to the TREB MLS Restrictions, as interpreted and enforced by TREB, or lose access to the TREB MLS system. TREB can and does terminate such access to brokers who do not comply with TREB's requirements.

38. There are significant barriers to entry for any listing system that could potentially emerge as a substitute to the TREB MLS system and provide the information necessary to operate a VOW. The value of the TREB MLS system is derived from network effects, meaning that the value of the TREB MLS system is greater as its number of users increases. As the incumbent real estate listing platform in the relevant market, the TREB MLS system is supported by TREB's membership of over 31,300 brokers, has a very large volume and value of property sales, and contains a critical mass of active and historical property listing information. Creating a competitive rival listing service platform would be extremely difficult, if not impossible, particularly in the near to medium-term. Network effects make the entry of a rival real estate listing system highly unlikely.

39. Brokerages require a complete inventory of listings, including historical data, from the TREB MLS system in order to provide real estate brokerage services to their customers. This holds particularly true for brokerages operating a VOW. Even withholding a small percentage of listings would impede their ability to compete in the relevant market. Given the importance of

access to such a complete source of current listings, and the importance of access to historical listings to provide advice to customers, brokers in the GTA cannot realistically offer competitive residential real estate brokerage services to customers using VOWs without access to and use of the TREB MLS system. There are no effective substitutes to the TREB MLS system.

Practice of Anti-competitive Acts

40. The TREB MLS Restrictions are a practice of anti-competitive acts, the purpose and effect of which is to discipline and exclude innovative brokers who would otherwise compete with TREB's member brokers who use traditional methods. These restrictions constrain the ability of TREB's member brokers to compete if they wish to expand their service offerings to provide innovative, Internet-based services to their customers, such as through a VOW. This effectively raises the costs of member brokers who wish to operate a VOW, by forcing them to adopt a traditional brokerage model. Furthermore, the TREB MLS Restrictions exclude potential competitors, who are not yet in the market, from joining TREB and launching innovative real estate business models.

41. The TREB MLS Restrictions impose discriminatory restrictions on brokerages that wish to operate a VOW. For example, TREB's interpretation of Rule 430 requires that VOW brokerages obtain permission from every brokerage before providing the latter's listings through a VOW. However, no such permission is required of brokerages providing this same information by more traditional delivery methods, such as in person, by fax, or by email.

TREB's Enforcement of the TREB MLS Restrictions

42. In 2007, TREB's enforcement of the TREB MLS Restrictions forced a prospective VOW operator to cease its operations. After court proceedings in Ontario, TREB's right to terminate the broker's access to the TREB MLS system was upheld under the terms of its written contractual agreements with the broker, but expressly without deciding the issues related to the Act and raised in this Application.

43. Since exercising its power to terminate innovative brokers in 2007, TREB has made it clear that it will continue to use its control over the TREB MLS system, through its enforcement

of the TREB MLS Restrictions, to terminate access to the TREB MLS system for brokers who seek to innovate. TREB has cultivated a reputation for shutting down any broker who develops an innovative service that is prohibited by the TREB MLS Restrictions, including VOWs. Through its termination of the prospective VOW in 2007 and the subsequent legal proceedings, TREB has created a hostile environment for VOWs in the GTA, resulting in a chilling effect on any broker who would otherwise wish to invest the time and money (including legal fees) necessary to begin operating a VOW.

Overall Character of the Anti-competitive Acts

44. TREB has been aware, since at least 2007, that its rules, policies and agreements, particularly the TREB MLS Restrictions, have an exclusionary and disciplinary effect on brokers who would like to offer services to their customers through a VOW. TREB has enacted, interpreted and enforced the TREB MLS Restrictions in a manner that is intended to have, and does have, exclusionary and disciplinary effects on VOW brokers who would otherwise compete with TREB's other member brokers. In any event, given the exclusionary effects of the TREB MLS Restrictions, it is reasonably foreseeable that they would have a negative exclusionary effect on competitors wishing to operate a VOW or similar business model.

45. Despite its knowledge of the exclusionary effect and its awareness of the efficiencies of VOWs, TREB continues to deny its brokers the ability to offer VOWs and other innovative business models to customers.

TREB's MLS Restrictions Lessen or Prevent Competition Substantially

46. The TREB MLS Restrictions have lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate brokerage services in the GTA. But for the TREB MLS Restrictions, consumers would benefit from substantially greater competition in the relevant market.

47. TREB's control of the relevant market through the TREB MLS Restrictions gives it the power to exclude innovative brokerage models, thereby protecting and perpetuating the static traditional brokerage model for the delivery of residential real estate brokerage services. TREB's exclusion of innovative, Internet-based business models, such as VOWs, negatively affects the

range of services being offered over the Internet by brokers to their customers. Further, the exclusion of VOWs and other innovative models denies consumers the benefits of the downward pressure on commission rates that would likely otherwise exist. VOW brokerages would impose competitive discipline on brokerages that currently operate in the relevant market; that discipline is denied by TREB's practice of anti-competitive acts.

48. The TREB MLS Restrictions allow TREB to terminate access to the TREB MLS to any brokers who operate VOWs or similar innovative business models, denying them use of this key input. As no broker can effectively compete in the relevant market without access to the TREB MLS, brokers have no incentive to incur the significant costs associated with VOWs as doing so would result in their losing access to the TREB MLS. The TREB MLS Restrictions thus constitute a significant barrier to entry or expansion for brokers who would otherwise be interested in operating VOWs. Traditional brokers generate much of their business through a large referral base of satisfied customers, which may take years to develop. VOWs allow newer brokers to develop leads and establish relationships with potential buyers, enhancing the former's ability to compete with established brokers. VOW brokers may also establish relationships with high-traffic Internet sites to help them attract consumers. By preventing brokers from using VOWs, the TREB MLS Restrictions discourage entry and expansion by brokers wishing to offer innovative services, including less experienced brokers, with the result that competition is reduced and the positions of traditional brokers are entrenched and their market power maintained.

49. Through its enactment, interpretation and enforcement of the TREB MLS Restrictions, TREB has created a business environment that is hostile to brokers who wish to operate VOWs. The increased risks and costs associated with such a climate of uncertainty reduce the likelihood of investment in, and thus impede the entry of, innovative real estate business models, such as VOWs.

50. The TREB MLS Restrictions prevent innovation and development of more efficient business models for brokers who would compete with traditional broker models in the GTA.

51. VOWs allow home searches to be conducted in a more efficient manner. By enabling customers to take control of the home search process, VOW brokers are freed from this labour-

intensive task. VOWs often also provide convenient access to additional useful information that is not contained in an MLS database, such as demographic information and school locations. This allows consumers to further narrow the properties they are interested in prior to meeting with their broker, thus freeing the broker from conducting such searches and reducing the number of homes a broker must show before closing a sale. VOWs also free brokers from having to search for price changes and comparable properties for home sellers. By freeing brokers from search tasks, VOWs also enable brokers to focus on services where they have special expertise, providing greater value to consumers.

52. The increases in efficiency and productivity, outlined in paragraph 51, allow brokers to reduce their costs and work with more customers at a time, leading to increased competition in the market and benefits for consumers. As VOWs and other innovative models enter the market, brokers would increasingly pass these cost savings on to their customers through reduced commission rates or rebates, as demonstrated by some VOWs operating in the United States.

53. Finally, VOWs encourage innovation and increased quality of service, as firms compete to add value and attract consumers by finding creative ways in which to provide more information and services to customers. By preventing innovation such as VOWs, the TREB MLS Restrictions seriously inhibit competitive innovation.

Conclusion

54. The Commissioner submits that if TREB is prohibited from imposing restrictions, such as the TREB MLS Restrictions, that exclude or prevent its member brokers from innovating by using the information in the TREB MLS system to operate a VOW, there would be substantially greater competition, which would manifest itself as follows:

- (a) VOW brokerages would enter and compete in the relevant market;
- (b) existing brokerages would adopt VOWs as part of the range of services they offer to their customers;
- (c) there would be greater efficiency in the operation of brokerages, as tasks formerly carried out by brokers become automated or done by their customers, making brokers more productive;

- (d) there would be consequential innovation in the market for the supply of residential real estate services in the GTA, as brokerages devote resources to VOWs and websites in order to compete;
- (e) the quality of residential real estate brokerage services offered would be substantially greater, as customers who use the Internet would be offered a wider range of services and information on Internet websites that are not available on www.realtor.ca and other GTA real estate websites at the present time;
- (f) customers would be more likely to be offered discounts or rebates on their commissions paid to brokers, as brokers use VOWs to deliver services more efficiently and reduce their costs. The savings to residential real estate brokerage customers in the GTA would likely be very substantial over a period of years; and
- (g) consumers would benefit from substantially greater choice, better service and lower costs in the relevant market.

PART III: RELIEF SOUGHT

55. The Commissioner therefore seeks an Order under sections 79(1) and (2):

- (a) prohibiting TREB from directly or indirectly enacting, interpreting or enforcing any restrictions, including the TREB MLS Restrictions, that exclude, prevent or discriminate against TREB member brokers who wish to use the information in the TREB MLS system to offer services over the Internet, such as through a VOW as described in this Application;
- (b) directing TREB to implement such resources and facilities as the Tribunal deems necessary to ensure the operation of VOWs or similar services by, or on behalf of, member brokers;
- (c) directing TREB to pay the costs and disbursements of the Commissioner and the Tribunal in relation to this Application;
- (d) all other orders or remedies that may be required to give effect to the foregoing prohibitions, or to reflect the intent of the Tribunal and its disposition of this matter; and
- (e) an order granting such further and other relief as this Tribunal may consider appropriate.

Procedural Matters

56. The Applicant requests that this Application be heard in English.
57. The Applicant requests that this Application be heard in the City of Toronto.
58. The Applicant proposes that documents be filed electronically.
59. For the purposes of this Application, service of all documents on the Applicant may be effected on:

John F. Rook
Andrew D. Little
Bennett Jones LLP
One First Canadian Place
Suite 3400, P.O. Box 130
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And to:

Roger Nassrallah
Competition Bureau Legal Services
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Counsel for the Applicant

Copies to:

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And to:

Donald S. Affleck
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Counsel for the Respondent

And to:

The Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4

DATED AT Gatineau, Quebec, this 26th day of May, 2011

“Melanie L. Aitken”

Melanie L. Aitken
Commissioner of Competition

Schedule “A”
Concise Statement of the Economic Theory
The Commissioner of Competition
And
The Toronto Real Estate Board

Introduction

1. The respondent, the Toronto Real Estate Board (“TREB”) represents approximately 31,300 real estate brokers and salespersons (“brokers”) licensed to trade in real estate in Ontario. TREB owns and operates an electronic database known as the TREB Multiple Listing Service system (the “TREB MLS system”), which contains current and historical information about the purchase and sale of residential real estate in the Greater Toronto Area (the “GTA”). The TREB MLS system is used by member brokers to facilitate the matching of buyers and sellers of residential real estate.
2. TREB’s restrictions imposed on members’ access to and use of the TREB MLS system constitute an abuse of dominance contrary to section 79 of the *Competition Act*. TREB and its members “substantially ... control, throughout Canada or any area thereof, a class or species of business,” namely, the provision of residential real estate brokerage services in the GTA. TREB has “engaged ... in a practice of anti-competitive acts” by disciplining and excluding innovative brokers who would otherwise compete with TREB’s member brokers who provide residential real estate brokerage services by traditional methods. TREB’s practice effectively limits the degree to which its member brokers compete with one another and as such, “has had, [and] is having ... the effect of preventing or lessening competition substantially.”

79(1)(a)

3. The relevant product market in which to evaluate the competitive impact of TREB’s conduct is the market for the provision of residential real estate brokerage services. The relevant geographic market is local and its boundaries are determined by the geographic coverage of the TREB MLS system, subject to interboard agreements.

4. TREB exerts control over the relevant product market through its ability to enact, interpret, and enforce rules, policies, and agreements that govern access to and use of the TREB MLS system.
5. The TREB MLS system is a key input into the supply of residential real estate brokerage services in the GTA. The TREB MLS system is the only comprehensive source of both current and historical information about the purchase and sale of residential real estate in the GTA. Brokers in the GTA cannot realistically compete in the market for residential real estate brokerage services without access to and use of the complete inventory of listings in the TREB MLS system. There are no effective substitutes to the TREB MLS system.
6. There are significant barriers to entry that prevent the creation of a competing real estate listing system that could emerge as a potential substitute to the TREB MLS system. The value of the TREB MLS system is derived from network effects, meaning that the value of the TREB MLS system is greater as its number of users increases. The TREB MLS system is superior to that of any other real estate listing system because it is supported by TREB's membership of approximately 31,300 brokers and contains a critical mass of active and historical real estate listing information. Network effects make the entry of a rival real estate listing system highly unlikely.

79(1)(b)

7. TREB enacts, interprets, and enforces rules, policies and agreements that constrain the manner in which its brokers may provide real estate brokerage services to their customers. TREB's interpretation and enforcement of its rules prevent brokers from providing innovative residential real estate brokerage services over the Internet, such as through a Virtual Office Website ("VOW") and raise the costs of brokers by forcing them to adopt a traditional brokerage model.
8. Brokers who operate VOWs are in violation of TREB's rules and are subjected to disciplinary action by TREB, such as having their access to the TREB MLS system terminated. Without access to the TREB MLS system, brokers who wish to provide brokerage services over the Internet, such as through a VOW, are excluded from the market. TREB has enacted,

interpreted and enforced rules, policies and agreements in a manner that is intended to have, and does have, exclusionary and disciplinary effects on innovative brokers who would otherwise compete with TREB's member brokers.

79(1)(c)

9. TREB's conduct has lessened and prevented, and will continue to lessen and prevent, competition substantially in the relevant market. This conduct constitutes a significant barrier to entry and expansion for brokers who would like to offer brokerage services over the Internet. TREB's conduct effectively limits the degree to which its member brokers compete with one another, such that the positions of traditional brokers are entrenched and their market power maintained.
10. TREB's conduct discourages entry and expansion by brokers who would like to offer innovative real estate brokerages services over the Internet. The exclusion of VOWs and other innovative business models has negatively affected the range of brokerage services being offered to consumers.
11. TREB prevents innovation in the supply of residential real estate brokerage services and impedes the development of more efficient business models and service offerings. Innovative business models, such as VOWs, increase broker efficiency and productivity by enabling them to reduce their costs, work with more customers at a time, and to specialize in providing a subset of brokerage services in which they have a comparative advantage.
12. But for TREB's conduct, there would be substantially greater competition in the market for the provision of residential real estate brokerage services in the GTA.

File No.

THE COMPETITION TRIBUNAL**THE COMMISSIONER OF COMPETITION****Applicant**

- and -

THE TORONTO REAL ESTATE BOARD**Respondent****NOTICE OF APPLICATION****BENNETT JONES LLP**

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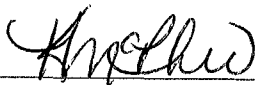
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Counsel for the Applicant

**THIS IS EXHIBIT "B" REFERRED TO
IN THE AFFIDAVIT OF STEPHANIE PAIGE
SWORN THE 30th DAY OF MAY, 2014.**



A Commissioner for taking affidavits, etc.

Kelly Ann McPhie, a Commissioner, etc.,
Province of Ontario, for Bennett Jones LLP,
Barristers and Solicitors.
Expires September 23, 2015.

CT-2011-003

THE COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF certain rules, policies and agreements relating to the multiple listing service of the Toronto Real Estate Board.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

**THE CANADIAN REAL ESTATE ASSOCIATION and
REALTYSELLERS REAL ESTATE INC.**

Intervenors

CLOSING SUBMISSIONS OF THE COMMISSIONER OF COMPETITION

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623. Today's GTA VOW cannot provide Historical MLS Data and offers of commission to customers over the Internet. If a VOW-operator wants to provide this critical information to its customers, it must do so by less efficient delivery mechanisms (by email, hand, or fax). In other words, it must replicate the model used in a non-VOW environment, where home buyers and sellers must reach out to an agent by email, phone, or in person to get the Historical MLS Data that they use to understand market conditions, identify desirable neighbourhoods, find good months in which to sell or buy, and value properties.

624. But less efficient delivery mechanisms destroy VOWs' critical value proposition, that distinguishes them from non-VOW brokerages. VOWs permit agents to provide (i) more information and better services, (ii) to more customers, (iii) in a more attractive and efficient way, than in a non-VOW setting.

625. In VOW models outside the GTA, such as Redfin or ViewPoint, home buyers and sellers do not have to email, phone or physically interact with an agent early in their search or sale process to get the Historical MLS Data they need. Once they register, they can educate themselves about neighbourhoods and the market using the Historical MLS Data and the technology the VOW offers.

626. Harnessing the power of a website and technology in this way means that VOW-based brokerages can serve more customers at the "top of the funnel" (i.e., those buyers and sellers that are looking but remain uncertain about which home, or whether or when to buy or sell). They can maintain a large network of customers, and serve them in an effective but very efficient way, through their VOW. As home buyers and sellers move to the "bottom of the funnel", agents can then engage with them in a more direct way. This model creates efficiencies and lets operators

pass on cost savings in the form of rebates. As Mr. Nagel testified, Redfin compensates its clients for the effort they put in on the front end by rebating some of the commission.

627. But a new business model using technology and transparency to bring price and non-price competition scares some TREB members. And because of their fear, TREB has withheld the Historical MLS Data from VOWs. This disadvantages GTA VOWs in two fundamental ways. First, it increases their costs because they cannot serve customers or generate leads as efficiently as if they had the Historical MLS Data in a datafeed without prohibition on its display. Second, it reduces the attractiveness of the VOW business model by preventing home buyers and sellers from accessing the Historical MLS Data online and by impairing VOW-operators' ability to innovate new and better services using the Historical MLS Data.

628. These disadvantages perpetuate the *status quo* – traditional ways of doing business and generating leads through personal networks and other common methods. Home buyers and sellers must continue to contact agents by email, phone, or in person to obtain the Historical MLS Data that they want and need.

629. A detailed review of these issues and the evidence of increased costs and reduced advantages facing GTA VOW operators follows.

(i) TREB's Conduct Increases VOWs' Costs

630. VOW operators testified about three main ways that TREB's conduct increases their costs.

631. *First*, witnesses testified about how they could deliver Historical MLS Data to customers more efficiently than via other delivery mechanisms. This would let them "download" some

agent services onto home buyers and sellers, such as education about market conditions using the Historical MLS Data. Mr. Nagel testified how Redfin asks home buyers and sellers "to do some of the research on their own" and "so we compensate them for their efforts" through commission rebates.⁶⁵³

632. Mr. Sage's monthly market report newsletter demonstrates the amount of time and resources VOW operators could save "but for" TREB's restrictions relative to the current world. Mr. Sage testified that his brokerage must manually copy Historical MLS Data from TREB's Stratus system every month and then prepare its monthly newsletters. The entire process requires about 40 hours of work every month. Mr. Sage's brokerage only publishes reports for a small segment of the GTA, around 40 GTA neighbourhoods.⁶⁵⁴ In contrast, Realosophy has divided the GTA into 175 neighbourhoods.⁶⁵⁵ Thus, providing a similar service on a GTA-wide scale would likely require significantly more than 40 hours per month. And even if this could be done, the resulting product would not be as timely as if displayed in real-time on a VOW. Mr. Sage's reports circulate up to 45 days after some of the homes they list have sold.⁶⁵⁶ Ms. Desai testified that Realosophy's neighbourhood analyses are already nearly two years out of date because of the time and cost of manually extracting and manipulating the data.⁶⁵⁷

633. *Second*, VOW operators testified that they could use technology and the information in the VOW datafeed to develop time saving tools that would reduce agents' workload. For example, Mr. Hamidi described how TheRedPin could perform CMAs more efficiently and for a

⁶⁵³ September 12 Transcript p. 401.

⁶⁵⁴ September 28 Transcript p. 1836.

⁶⁵⁵ Exhibit A7, Desai Statement, para 20, p. 6.

⁶⁵⁶ September 28 Transcript pp. 1892-1893.

⁶⁵⁷ September 11 Transcript p. 386.

greater number of listings than is currently possible.⁶⁵⁸ On cross-examination, he described the time TheRedPin has spent internally studying CMAs to understand how it can improve them using technology.⁶⁵⁹ He testified that "instead of taking an hour or more to research and gather information, with the help of our technology, it would be minutes."⁶⁶⁰

634. Likewise, Mr. Enchin testified that the CMA/appraisal tool he developed before 2007 saved him considerable time compared to preparing a CMA manually. He testified that before when clients would ask him for a CMA, he would return to his office, spend hours or days preparing it, and then present it to his client. With the software he developed, he could perform CMAs immediately with his clients, saving him significant time and improving his quality of service.⁶⁶¹

635. *Finally*, witnesses testified about how they could allocate agents more efficiently and increase their productivity, both by "downloading" some tasks to buyers and sellers, but also by developing leads through their websites. Without having to prospect for leads, per agent productivity increases and agents can focus on customer-service.

636. The evidence demonstrates that for most agents, prospecting for new leads takes a considerable amount of their time. Mr. Gidamy testified about how most brokerages rely on individual agents to prospect their own leads "whether it be through door knocking or however

⁶⁵⁸ September 13 Transcript p. 620.

⁶⁵⁹ September 13 Transcript p. 635.

⁶⁶⁰ Exhibit A13, Hamidi Statement, para 47, p. 11.

⁶⁶¹ September 14 Transcript p. 761-762.

they like to generate business."⁶⁶² This can take a "significant amount" of agents' time, especially in the early years.⁶⁶³

637. Non-GTA VOWs that display Historical MLS Data demonstrated how productive agents can be because of the three main efficiencies VOWs create. In its first full year operating as a brokerage, ViewPoint completed 117 transactions with 8 or fewer agents (only 6 agents for most of that time). On average each agent completed between 14 and 20 transactions over ViewPoint's first year.

638. Likewise, Mr. Nagel testified about the productivity of Redfin's agents compared to traditional brokerages. Whereas traditional agents may complete 6-8 deals per year, Redfin expects its agents to complete approximately 36.⁶⁶⁴ They can do so many because Redfin's technology improves their efficiency and its website generates leads for them. But to generate enough leads, Mr. Nagel testified that Redfin's website had to be the best and provide information that home buyers and sellers cannot get elsewhere. For Redfin, that includes displaying sold information.⁶⁶⁵

639. [REDACTED]
[REDACTED]⁶⁶⁶ [REDACTED]
[REDACTED]
[REDACTED]

⁶⁶² September 13 Transcript p. 674.

⁶⁶³ September 13 Transcript p. 674.

⁶⁶⁴ September 12 Transcript pp. 403 & 436.

⁶⁶⁵ September 12 Transcript p. 403-405.

⁶⁶⁶ [REDACTED]

640. Neither Redfin nor ViewPoint has entered the GTA market. If either thought that they could deliver the same efficiencies to GTA customers as they can in the U.S. or Nova Scotia, one would expect them to have entered in the year since TREB's VOW datafeed launched. Instead, Mr. McMullin has testified that ViewPoint will not enter the GTA because of TREB's restrictions.

641. Dr. Vistnes considered the efficiencies VOWs create. In his June 22 report, he examined how VOWs can increase agent productivity on both the buy and sell-side. Dr. Vistnes considered three phases on the buy-side: "developing that buyer as a lead; working with that buyer during the "incubation" process in which the buyer is learning about the market but is not yet ready to make an offer on a home; and working with the buyer during the "active" phase in which the buyer is ready to make an offer."⁶⁶⁷ He reviewed each phase in detail, considering several efficiencies including:

- (a) **More efficient lead generation:** "By reducing the amount of effort agents require to develop leads, VOWs increase agent productivity and allow them to spend more time providing real estate services to customers."⁶⁶⁸
- (b) **Better service:** "Increased productivity also increase agents' capacity to serve customers, thereby creating incentives for agents to compete more vigorously through lower prices and better service."⁶⁶⁹

⁶⁶⁷ Exhibit A30, First Vistnes Report, para. 202, p. 62.

⁶⁶⁸ Exhibit A30, First Vistnes Report, para 203, p. 64-65.

⁶⁶⁹ Exhibit A30, First Vistnes Report, para 209, p. 209.

- (c) **Ability to service more clients:** "VOWs free up substantial amount of the agent's time and allow agents to accept additional customers that would otherwise be turned away or not given adequate levels of support."⁶⁷⁰

642. Dr. Vistnes also considered that VOWs can save listing agents' time and improve the quality of service they offer.⁶⁷¹ He concluded that VOWs enable efficiencies on both the buy-side and sell-side. These efficiencies enure to the benefit of the VOWs competing in the market (i.e., help them perform better than their competition) and to home buyers and sellers because VOWs will have incentives to pass on savings to home buyers and sellers to make themselves even more attractive to consumers.⁶⁷²

643. Last year alone, Redfin rebated an average of US \$5,386 to home sellers and US \$6,188 to home buyers, for aggregate rebates of over US \$24,000,000.⁶⁷³

644. But without a datafeed that includes the Historical MLS Data, GTA VOWs cannot achieve these efficiencies internally, and thus cannot pass on the same amount of cost savings to their clients.

(ii) TREB's Conduct Reduces VOWs' Ability to Provide Services and Attract Customers

645. The Commissioner's witnesses testified that TREB's restrictions reduce the attractiveness of their businesses to customers relative to the "but for" world in two ways. First, the information on their websites is less attractive to home buyers and sellers, particularly because

⁶⁷⁰ Exhibit A30, First Vistnes Report, para 211, p. 209.

⁶⁷¹ Exhibit A30, First Vistnes Report, para 214-215, p. 66-67.

⁶⁷² Exhibit A30, First Vistnes Report,, para 201, p. 62.

⁶⁷³ Exhibit A8, Nagel Statement, para 54, p. 15.

the active listing data is already available on public websites such as realtor.ca. Second, their agents cannot use information in the VOW datafeed internally to offer attractive services to home buyers and sellers.

646. *First*, with respect to the attractiveness of their websites, only Available listings appear on GTA VOWs. Witnesses described their inability to provide Historical MLS Data on a VOW as a "serious competitive disadvantage".⁶⁷⁴ Mr. Hamidi said that the Historical MLS Data "would attract a greater number of people to our brokerage and it would allow innovation and more information to be used by our customers and our agents."⁶⁷⁵ He testified about the innovative services TheRedPin could offer customers if the Historical MLS Data was in the VOW datafeed. These included large-scale trending information, like "heat maps", and more detailed analysis, like sophisticated comparisons between resale properties and new developments.⁶⁷⁶

647. Mr. Enchin testified about the popularity of the appraisal feature he built for his VOW-product in the early 2000s.⁶⁷⁷ He also testified about the disadvantages his current VOW faces because of TREB's restrictions on the use and display of Historical MLS Data. He believes his 2012 VOW would be more popular with agents and their clients if it could offer the appraisal feature using the Historical MLS Data.⁶⁷⁸

648. Mr. Prochazka testified about how attractive tools would develop over time that had not yet even been anticipated: "I think, as time went on and the competitive forces were applied, I

⁶⁷⁴ Exhibit A15, Gidamy Statement, para 22, p. 7.

⁶⁷⁵ Exhibit A13, Hamidi Statement, para 44, p. 10.

⁶⁷⁶ September 13 Transcript p. 620.

⁶⁷⁷ Exhibit A20, Enchin Statement, para 22, p. 7.

⁶⁷⁸ Exhibit A20, Enchin Statement, paras 37-38, p. 13.

think that, you know, there would be some very interesting tools that would result from it, from being able to process that data."⁶⁷⁹

649. On cross-examination, Mr. Pasalis testified that Realosophy provides far more "information" than analysis and statistics, primarily because they do not have the Historical MLS Data in the datafeed.⁶⁸⁰ Providing public information is a less attractive work-around because they do not have any other choice.

650. Suggestions that home buyers and sellers do not value receiving Historical MLS Data on a website do not withstand scrutiny. Those VOW operators with experience displaying Historical MLS Data to customers all testified about how valuable it is to attracting home buyers and sellers. For example, Mr. Nagel testified that home buyers and sellers "love the fact that they get updated every 15 minutes about what just changed, what went pending, what was its price, what just sold, what was its price, so that they can go in to the next round of negotiations where there may be two, three or sometimes 30 offers on a home and know that they are in a better position than most people who aren't using Redfin."⁶⁸¹

651. Mr. McMullin testified that distributing MLS data to customers and clients online provides a competitive advantage over other brokerages who do not do so.⁶⁸²

The rationale for using the MLS data was also that viewpoint.ca could provide a key service, the provision of information, that is very important to consumers' education about, and understanding of, the real estate market, as well as particular homes and neighbourhoods. This information provided through a website allows the potential buyer or seller to self-

⁶⁷⁹ September 18 Transcript p. 873.

⁶⁸⁰ September 12 Transcript p. 524.

⁶⁸¹ September 12 Transcript p. 411 (emphasis added).

⁶⁸² Exhibit A2, McMullin Statement, para 33, p. 9.

educate at a point in time where he or she may not yet be ready to enter a transaction but instead needs to understand more about the market. [...]

In the case of both potential buyers and potential sellers, convenience and transparency are key ingredients in being able to use viewpoint.ca to attract customers. We have to be able to compete for consumers' business with traditional brokerages. Unless we can provide the same MLS information through our website as those traditional brokerages can through conventional means (in person, by phone, email, etc.), then we will rarely succeed to convince a customer to list or buy with ViewPoint. Without a full dataset from the MLS system, we would be unable to compete effectively. With access to the same information and the ability to display it on our website, the consumer can compare and choose between the convenience and transparency of using our website to obtain information about their potential purchase or sale, and the personal relationship of a traditional Realtor to obtain that same information.⁶⁸³

652. He testified that ViewPoint has no realistic basis for competing in the GTA without the Historical MLS Data in the VOW datafeed.⁶⁸⁴

653. Mr. Enchin explained that the appraisal feature on his VOW-product and its display of Historical MLS Data "impressed home buyers and sellers" and other agents. Mr. Enchin testified that his VOW-product was very popular with his clients and with the agents who used it.⁶⁸⁵ In contrast, he believes that his 2012 VOW suffers from not being able to display Historical MLS Data through the appraisal feature, and that it would be more popular with agents and their clients if that feature were available.⁶⁸⁶

654. Dr. Vistnes reviewed the many reasons why consumers are likely to prefer receiving Historical MLS Data over a VOW rather than via email or other delivery mechanisms. These

⁶⁸³ Exhibit A2, McMullin Statement, paras 77-78, pp. 21-22.

⁶⁸⁴ Exhibit A2, McMullin Statement, para 10, p. 4.

⁶⁸⁵ Exhibit A20, Enchin Statement, paras 22-23, pp. 7-8.

⁶⁸⁶ Exhibit A20, Enchin Statement, para 38, p. 13.

include speed, convenience, burdening the agents less, and increasing the interaction with the information as compared to the "snapshot" in an email.⁶⁸⁷

655. To suggest that a VOW without Historical MLS Data will prove just as popular with home buyers and sellers also does not withstand scrutiny. VOWs require buyers and sellers to register and provide contact information before accessing the MLS data behind the registration "wall". Registration is a barrier. Mr. Pasalis testified that users dislike providing their contact information. Mr. Simonsen testified that "even an additional click is something that deters a consumer from use of a site."⁶⁸⁸

656. Thus, only a narrow segment of website users choose to register on "full information" VOWs, such as Redfin and ViewPoint. But without Historical MLS Data, GTA VOWs offer only Available listings, what home buyers and sellers can already get via public advertising websites such as CREA's realtor.ca. It is unlikely that VOWs without Historical MLS Data will attract customers in the same numbers when those customers can use public websites and obtain the same information. To be effective and distinguish themselves from public websites, VOWs need to offer home buyers and sellers something more (i.e., Historical MLS Data and the innovation they can build on it).

657. In his June 22 report, Dr. Vistnes recognized this issue and concluded that TREB's restrictions turned VOWs into a less attractive version of other data sharing websites:

Many of the data fields that TREB has agreed to provide as part of its VOW data feed are already available through its IDX data feed. Thus, in making those data fields available to VOWs, TREB did little to increase

⁶⁸⁷ Exhibit A32, Reply Vistnes Report, para 110, pp. 50-51.

⁶⁸⁸ October 9 Transcript p. 2200.

the amount of data that brokers could provide to consumers. In contrast, the data fields that TREB continues to exclude from its VOW data feed remain some of the most difficult data fields for consumers to access outside the context of an MLS.⁶⁸⁹

658. ViewPoint's success in Nova Scotia demonstrates how effective VOWs can be when able to provide Historical MLS Data to customers through the VOW. In just one year, ViewPoint has grown to occupy at least 1% of the entire Nova Scotia residential real estate brokerage services market. And it has done so with fewer than 10 agents. To put ViewPoint's success into perspective, if ViewPoint achieved the same level of success in the GTA, for example, 1% of the buy-side market, it would be in the top 15 buy-side brokerages in the *entire* GTA in the first year of operation. It would complete over 1,000 transactions for annual revenues of over \$10 million (using the average estimated cooperating commission amount).⁶⁹⁰

659. On cross-examination, Dr. Church refused to admit that such growth could show the attractiveness of a "full information" VOW. Instead, he suggested that such a high ranking among GTA brokerages with such a small market share showed how much competition exists in the GTA market. But once again, Dr. Church missed the point. ViewPoint's one-year growth story shows how popular a "full information" VOW can be. Many businesses would be very satisfied with revenues of over \$10 million in their first year. Apparently, Dr. Church considers that insignificant.

660. TREB has tried to downplay the value of displaying the Historical MLS Data by marginalizing online CMAs or home valuations. It relies on evidence that agents do more than simply use Historical MLS Data to arrive at a value. For example, Ms. Prescott testified that she

⁶⁸⁹ Exhibit A30, First Vistnes Report, para 249, p. 75 (emphasis added).

⁶⁹⁰ October 3 Transcript p. 2171. See also Exhibit R79, Church Report, Table 4.4, p. 136.

visits comparable homes and views them from the side-walk, or perhaps looks at maps to find about the home's location.

661. But the evidence contradicts TREB's attempts to downplay the value and attractiveness of online tools such as CMAs. Nothing prevents home buyers and sellers from visiting comparable homes in person. Mr. Nagel says Redfin encourages such visits, but leaves the decision up to the customer.⁶⁹¹ On cross-examination, Mr. Nagel confirmed Redfin's experience that home buyers and sellers are well positioned to make important decisions based on online CMAs powered by Historical MLS Data:

MR. AFFLECK: No, no, no requirement, but let's be frank with one another, Mr. Nagel, most consumers driving by a property are not going to be able to assess its value. Are they going to look at the roof to tell whether it needs a new roof? They see a beautiful green park behind it, do they know that that park is going to be turned into a shopping plaza that's just been passed by council, city council? How do they glean any of these things? Are you not misleading them?

MR. NAGEL: Not at all. If we are being frank, let's be frank: Consumers are smart people, they can drive a neighbourhood and determine, does this home seem like it's situated in a similar neighbourhood of a similar type of the home I am interested in, and they can draw conclusions from that.

Can they tell the impact of whether or not the view from the back right corner is worth \$5,000 or \$3,000? No, they can't, but that is not what this is designed to do. It's designed to let them exclude properties that they know are not a good fit. And I think consumers are smart enough to make that distinction.⁶⁹²

662. TREB's apparent position on CMAs also contradicts the evidence of all VOW operators, who may agree that agents can add value to a CMA, but who nevertheless want to offer a CMA tool to their customers on a VOW.

⁶⁹¹ September 12 Transcript p. 443.

⁶⁹² September 12 Transcript p. 444 (emphasis added).

663. Mr. Enchin testified at length about the utility, functionality, and popularity of his pre-2007 appraisal tool. Of all of the witnesses who testified, he had by far the most experience with online CMAs. TREB did not even cross-examine him on this topic.

664. TREB's position even contradicts its own VOW Task Force who encouraged online CMAs. Its minutes record that "AVMs/CMAs and creative use of sold information to provide consumer services encouraged".⁶⁹³ Of course, TREB has not furthered this objective.

665. Witnesses also rejected the idea that active listings could substitute for the Historical MLS Data when identifying comparable properties. On cross-examination, Mr. Gidamy rejected the suggestion that information in the VOW datafeed (i.e., data on available listings) was sufficient to permit him to determine comparable properties and conduct a CMA:

MR. VAILLANCOURT: The information that is presently contained in VOW data feed is sufficient to meet the task of figuring out what is comparable versus what is not comparable?

MR. GIDAMY: Not entirely, because those are properties that are active, they haven't been sold, so a value hasn't been attached to that as of yet. So you could ask for whatever you want, but what it's sold for, and then its characteristics would be my first and best comparable.⁶⁹⁴

666. *Second*, witnesses also testified about how using the Historical MLS Data internally could improve their agents' quality of service and help them attract home buyers and sellers. In their witness statements, Ms. Desai and Mr. Pasalis explained in detail the importance of a constant, live datafeed for the "analytics" on Realosophy's website and for timely, accurate and

⁶⁹³ Exhibit CR40, Richardson Statement, Exhibit EE p. 503. These minutes were made public at the hearing. See September 24 Transcript, p. 1249-1252.

⁶⁹⁴ September 13 Transcript p. 685.

data-based (rather than "anecdotal") information and advice to customers.⁶⁹⁵ Both commented on the importance of such data to Realosophy's business model of attracting buyers and sellers to their brokerage using their website realosophy.com and their blog.⁶⁹⁶

667. Mr. Pasalis also described the "dashboard" he could build for his agents using technology so that his agents could quickly "look at the last time [a home] was sold, the last time it was listed on the MLS®, whether it was terminated." He noted that with "statistics internally, our Realtor®s are a lot more informed when they are showing houses. And it really just speeds up this process of becoming familiar with a particular house's history every time they are going to show it."⁶⁹⁷ This would enable his agents to be more prepared and give much better advice. Better advice and service mean happier clients who are more likely to become repeat customers and recommend Mr. Pasalis' brokerage to others.

668. Likewise, Mr. Hamidi described how TheRedPin could use technology and the Historical MLS Data to help its agents better understand market trends and communicate this information to their clients.⁶⁹⁸ They could also prepare much more sophisticated CMAs than they can now that better account for small but important differences between comparable homes.⁶⁹⁹

669. Mr. Gidamy described using the Historical MLS Data and automating significant aspects of TheRedPin's internal education programs and client service "to ensure that the service our sales representatives and I provide is simply better than our competitors. We can simply do

⁶⁹⁵ Exhibit A7, Desai Statement, paras 4, 7, 9, 13 and 30, p. 2-4, 9 & Exhibit A10, Pasalis Statement, paras 5, 9, 13, 32, 35, 37 and 39, p. 2-5, 9-13.

⁶⁹⁶ Desai Witness Statement at para 8-13, p. 3-4 & Exhibit A10, Pasalis Statement, paras 5, 8, 12, 13, 31, 33, p. 2-5, 9-13.

⁶⁹⁷ September 12 Transcript pp. 520-521.

⁶⁹⁸ Exhibit A13, Hamidi Statement, para 49, p. 12.

⁶⁹⁹ September 13 Transcript p. 620.

better ourselves due to our technology capabilities at TheRedPin."⁷⁰⁰ At the hearing, he elaborated on one way technology improved quality of service:

And having the information in its raw form and being able to get as close as possible to an automated way to be able to look at different statistics, to look at different sold prices in the area to come up with more accurate -- as opposed to assumptions, come up with more accurate ways to give buyers the information that they need in order to make a better decision, I would call it, in their home-buying or selling experiences, I think is key in this industry.⁷⁰¹

670. Mr. Gidamy also described how TheRedPin could use the offers of commission data to automatically calculate commission rebates.⁷⁰²

671. Dr. Vistnes recognized that VOWs need more than what TREB permits today to compete effectively: "[b]y denying brokers full MLS access for their VOWs, TREB reduces the competitive viability and likely success of VOWs."⁷⁰³ Similarly, Dr. Vistnes noted that: "Forcing VOW-based brokers to rely upon an inferior data feed disadvantages those brokers and reduces their ability to compete. Inasmuch as those VOW-based competitors would have offered improved services that consumers value, TREB's disadvantaging of competitors in this way has the effect of substantially reducing competition."⁷⁰⁴

(iii) TREB's Restrictions Impact VOWs and Home Buyers and Sellers Across the GTA and Show No Signs of Stopping

672. Where VOWs effectively compete they often do so across entire metropolitan areas. Mr. Nagel testified that Redfin operates in 20 metropolitan areas across the U.S., not just in a few

⁷⁰⁰ Exhibit A15, Gidamy Statement, para 15, p. 5.

⁷⁰¹ September 13 Transcript pp. 676-677.

⁷⁰² Exhibit A15, Gidamy Statement, para 23, p. 8.

⁷⁰³ Exhibit A30, First Vistnes Report, para 271, p. 83.

⁷⁰⁴ Exhibit A30, First Vistnes Report, para 258, p. 78.

neighbourhoods in Seattle. Likewise, ViewPoint operates across Nova Scotia, not just in a few neighbourhoods in Halifax. Competing across an entire metropolitan area increases a VOW's competitive reach and informs the scope of competition prevented or lessened by TREB's anticompetitive conduct.

673. This can occur in part because technology permits VOWs to "level the playing" field against incumbent brokerages that have greater neighbourhood expertise and referral networks. As Dr. Vistnes explained, by "reducing the importance of building a referral base through past customers, VOWs can also put less established agents on a more competitive footing vis-à-vis more established incumbents."⁷⁰⁵ This helps VOWs to become "viable competitors" and "compete more quickly" with incumbents.⁷⁰⁶

674. The evidence demonstrates that new entrants need the best tools available to challenge incumbents. Although entry to the real estate profession may be easy, success in the profession is challenging. At least thirty percent of agents leave the profession after their first few years. In these circumstances, it is critical that new entrants can innovate and operate more efficiently to achieve elusive success. TREB's restrictions have entirely the opposite effect. They exclude new and innovative agents wishing to offer services online through a "full information" VOW.

675. Quantitative data confirms the impact VOWs could have on the GTA market as a whole if permitted to compete on effective terms. On cross-examination, CREA's counsel directed Dr. Vistnes to NAR's 2011 Survey of Home Buyers and Sellers. Counsel asked whether it was "fair to look to the US experience to see what it can tell us about the effect of VOWs with sold

⁷⁰⁵ Exhibit A30, First Vistnes Report, para 204, p. 63.

⁷⁰⁶ September 19 Transcript p. 1074.

information".⁷⁰⁷ According to NAR's survey, 10% of buyers⁷⁰⁸ and 3% of sellers⁷⁰⁹ found their agent through the Internet.

676. These percentages translate into significant market shares and revenues for "full information" VOWs when applied to the GTA. Approximately 90,000 residential transactions occurred over TREB's MLS in 2011. If 10% of buyers and 3% of sellers found their agent through a "full information" VOW, VOWs would attract 9,000 buyers and 2,700 sellers every year. With average commission payments for one end of a transaction around \$10,000, "full information" VOWs would have annual revenues of approximately \$117 million. If they rebated a quarter of those revenues to home buyers and sellers, consumers would save \$29 million *every year*.

677. These rebates could have a significant impact on commissions, particularly on the cooperating agent (buy) side. The vast majority of GTA listings offer cooperating commissions of 2.5%. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷¹⁰ [REDACTED]

[REDACTED]⁷¹¹ [REDACTED]

[REDACTED]

[REDACTED]

⁷⁰⁷ September 19 Transcript p. 1118.

⁷⁰⁸ September 19 Transcript p. 1127.

⁷⁰⁹ September 19 Transcript pp. 1128-9.

⁷¹⁰ [REDACTED]

⁷¹¹ [REDACTED]

712

[REDACTED]

713

[REDACTED]

714

678. A ten percent market share on the buy-side for VOWs could pressure the "stickiness" of the cooperating commission rates. Mr. Nagel testified that [REDACTED] of Redfin's clients are on the buy-side.⁷¹⁵ Redfin advertises rebates which translated into rebating an average of US \$6,188 to each home buyer in 2011. Such rebates through effective competition from VOWs are likely to pressure cooperating commission rates which [REDACTED]

716

[REDACTED]

679. There is no end in sight to TREB's prohibitions on search and display of the Historical MLS Data and offers of commission on VOWs. The prohibition is indefinite.

680. There is no evidence of any substitute provider for Historical MLS Data emerging in a reasonable period. There is no evidence of a franchisor collecting data to replace the comprehensiveness of TREB's Historical MLS Data for use on a VOW. Even if one were to do so, it would take two years to build a stable of historical data to compare with the two years of data that TREB members have at their fingertips through Stratus, and many more years to replace the richness of the entire MLS archive. Nearly a year has passed since TREB's VOW datafeed launched. In that period, no substitute has emerged for the Historical MLS Data. There is every reason to believe that none will.

712

[REDACTED]

713

[REDACTED]

714

[REDACTED]

715 September 12 IN CAMERA Transcript, p. 1.

716

[REDACTED]

681. The evidence also confirms that TREB is not likely to relax its restrictions. Although Mr. Richardson testified that TREB might make the Historical MLS Data available if it obtained clarity on privacy and RECO issues, his assertion is not credible. TREB has done nothing to obtain such clarity since it formed its VOW Task Force in March 2011. It cares so little for an answer from the Privacy Commissioner that it did not even follow up to ask why the Privacy Commissioner was taking so long to respond to TREB's communication regarding its privacy "Questions and Answers". TREB followed up only in August 2012 when diligencing for this litigation.

(iv) TREB and CREA's Responses Lack Merit

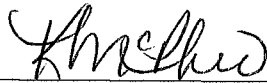
682. In response to the Commissioner's evidence, TREB and CREA appear to be preparing to argue that:

- (a) Buyer steering issues do not exist, and even if they did, this is not a barrier to "full information" VOWs and thus is not an anticompetitive act.
- (b) Dr. Vistnes concluded TREB's conduct did not create, maintain, or enhance market power.
- (c) The current market is very competitive and VOWs will have little impact.

683. None of these arguments has merit.

684. *First*, TREB has tried to downplay the prevalence of buyer steering. Dr. Church asserted that Dr. Vistnes' buyer steering theory revealed no anticompetitive act because harm accrued to home buyers and sellers, not to competitors like "full information" VOWs. Indeed, Dr. Church

**THIS IS EXHIBIT "C" REFERRED TO
IN THE AFFIDAVIT OF STEPHANIE PAIGE
SWORN THE 30th DAY OF MAY, 2014.**



A Commissioner for taking affidavits, etc.

Kelly Ann McPhee, a Commissioner, etc.,
Province of Ontario, for Bennett Jones LLP,
Barristers and Solicitors.
Expires September 23, 2015.

File No. / Dossier no. CT-2011-003

COMPETITION TRIBUNAL**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** certain rules, policies and agreements relating to residential multiple listing service of the Toronto Real Estate Board**BETWEEN:****THE COMMISSIONER OF COMPETITION****Applicant****- and -****THE TORONTO REAL ESTATE BOARD****Respondent****- and -****THE CANADIAN REAL ESTATE ASSOCIATION
REALTYSELLERS REAL ESTATE INC.****Intervenors****BEFORE:**

The Honourable Madam Justice Simpson

Chairperson**HELD AT:**Case Management Conference Call
26 February 2014

1 hear that, as I go along, I'm going to number the discussion
2 points, so that when we reconvene we can talk about things
3 by number just so everyone will know what's being discussed.

4 And to that end, I had asked that we have
5 a reporter on the call, and so there will be a transcript
6 available as well, so that you can feel comfortable with
7 what I say if your notes aren't quite up to scratch.

8 The thing to tell you that I think will
9 come as a surprise, but it is the fact of today, is that
10 none of the Panel Members who initially heard the case are
11 available to work on it further, and this is for a variety
12 of reasons which I'm not going to go into.

13 But the bottom line is that we are
14 thinking that there will need to be a further hearing with a
15 new Panel, chaired by Mr. Justice Rennie.

16 My role at this point and through the
17 summer, if need be, is to be your case management Judge.

18 The Tribunal is thinking that the further
19 hearing will be quite limited and is looking to offer you a
20 week or two in October, and if you could consider the week
21 of October 13th and 20th, and the thinking would be that we
22 wouldn't probably need that whole period, but that is the
23 period that we were going to suggest and that is, of course,
24 subject to further discussion because we haven't consulted
25 you on your availability at all.

1 issue which is timing in terms of whether or not TREB seeks
2 leave, is given leave, and whether it's given leave once the
3 matter is resolved.

4 I think if we are able to go ahead in
5 October, I may have an answer on leave by then. If it's
6 positive, we have to decide whether this further hearing
7 should go ahead when (a) it would be a waste of money.
8 That's kind of a resource issue that your clients may need
9 to look at.

10 Mr. Affleck, have you got instruction yet
11 about whether to seek leave?

12 MR. AFFLECK: Whether what?

13 MR. VAILLANCOURT: You're seeking leave.

14 MR. AFFLECK: That's been discussed,
15 Justice, with the client.

16 MADAM JUSTICE SIMPSON: All right.

17 MR. AFFLECK: But I don't have
18 instructions to do so at this time.

19 MADAM JUSTICE SIMPSON: Can you give us
20 some sense of when you will have instructions?

21 MR. AFFLECK: I would expect by mid-March.

22 MADAM JUSTICE SIMPSON: All right.

23 MR. AFFLECK: But that's just a guess on
24 my part.

25 MADAM JUSTICE SIMPSON: Your deadline is

1 It's more a question -- first of all, it's
2 not a requirement to update, it's more if someone has
3 something relevant to add that has occurred in their
4 business since the last hearing. But it's not an
5 opportunity to sort of take the case off on a new track.
6 We're still bound by the parameters of the proceedings that
7 we're already working with.

8 Does that help?

9 MR. AFFLECK: When I look at the
10 transcript, I'm sure it will.

11 MS FORBES: It's Sandra Forbes, Justice
12 Simpson. Can I just ask one question?

13 MADAM JUSTICE SIMPSON: Certainly.

14 MS FORBES: In the proposed procedure that
15 you have considered and set out, would it be contemplated
16 that the new Panel Members (technical difficulties) before
17 we appear and (technical difficulties).

18 MADAM JUSTICE SIMPSON: Yes. And one of
19 the reasons we picked October is that we have a week before
20 the hearing, with that panel free to sit down and read.

21 So they will come in briefed.

22 Whatever date we ultimately choose,
23 they'll have to be chosen so that it builds in reading time
24 for the Panel before the hearing.

25 MS FORBES: Thank you.

**THIS IS EXHIBIT "D" REFERRED TO
IN THE AFFIDAVIT OF STEPHANIE PAIGE
SWORN THE 30th DAY OF MAY, 2014.**



A Commissioner for taking affidavits, etc.

Kelly Ann McPhie, a Commissioner, etc.,
Province of Ontario, for Bennett Jones LLP,
Barristers and Solicitors.
Expires September 23, 2015.

Court File No. 35799

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

THE TORONTO REAL ESTATE BOARD

Applicant
(Respondent)

-and-

THE COMMISSIONER OF COMPETITION

Respondent
(Appellant)

**MEMORANDUM OF ARGUMENT
OF THE COMMISSIONER OF COMPETITION**

*Pursuant to Section 40 of the **Supreme Court Act** and
Rule 27 of the **Rules of the Supreme Court of Canada***

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PART I – OVERVIEW AND CONCISE STATEMENT OF FACTS

Overview

1. The Toronto Real Estate Board ("TREB") seeks leave to appeal to this Court from the unanimous decision of the Federal Court of Appeal (the "Appeal Decision"). The Appeal Decision allowed the appeal of the Commissioner of Competition (the "Commissioner") from the decision of the Competition Tribunal ("Tribunal").

2. TREB makes two principal arguments. First, it argues that the Appeal Decision creates uncertainty in the law and that "there is [now] no reliable guidance" to identify an "anti-competitive act" under paragraph 79(1)(b) of the *Competition Act* ("Act"). Central to TREB's argument is its submission that the Appeal Decision conflicts with the Federal Court of Appeal's decision in *Commissioner of Competition v. Canada Pipe Ltd.*¹ Second, TREB argues that the Appeal Decision is a "radical expansion" of the doctrine of abuse of dominance because it "detached the test for control of the market from the concept of market power" under paragraph 79(1)(a) of the *Act*.

3. The Commissioner submits that neither argument is correct. Both rely on TREB's erroneous interpretation of *Canada Pipe* and the Appeal Decision. There is no conflict between the two cases as TREB contends. As commentators have noted, the Appeal Decision did not overrule *Canada Pipe*. Rather, it overruled the Tribunal's (and TREB's) misinterpretation of *Canada Pipe* and consequently, their misinterpretation of paragraph 79(1)(b). The Court of Appeal was well within its mandate to do so.

¹ [2007] 2 FCR 3 (CA); and [2007] 2 FCR 57 (CA); leave to appeal to the Supreme Court of Canada refused [2006] SCCA No. 366, Leave Application [LA] at tabs 6D and 6E.

4. Similarly, the Appeal Decision did not radically recast the test for control of a market under paragraph 79(1)(a) as TREB contends. Market power remains the focus for proving control in the case law. The Commissioner did not argue otherwise before the Court of Appeal, nor did the Court of Appeal so decide. The Commissioner's position has always been that, on the evidence, TREB has market power and therefore substantially controls the relevant market under paragraph 79(1)(a).

5. TREB advanced its interpretation of *Canada Pipe* and its position on control in the court below. The Court of Appeal unanimously rejected TREB's arguments. In so doing and in the best traditions of the common law, the Court of Appeal clarified its previous decision in *Canada Pipe*, clarified the scope of the abuse of dominance provisions as they apply to TREB, and returned this matter to the Tribunal, as the trier of fact, to decide the case on the evidence. TREB now asks this Court for another chance to make the same arguments.

6. In these circumstances, TREB's application should be dismissed. There are no issues of national or public importance. This matter should return to the Tribunal for an expeditious determination on the extensive evidentiary record.

TREB's Anti-Competitive Conduct and the Commissioner's Application

7. The Commissioner commenced an application against TREB on May 27, 2011. The Commissioner alleged that TREB, an association of 35,000 competing real estate agents in the Greater Toronto Area ("GTA"), had abused its dominant position pursuant to section 79 of the *Act* because:

- (a) Under paragraph 79(1)(a), TREB substantially or completely controls (i.e., has market power in) the GTA residential real estate brokerage market through, among other things, its control of the local multiple listing service and its ability to make binding rules that govern how its members compete in the market.²
- (b) Under paragraph 79(1)(b), TREB engaged in a practice of anti-competitive acts by enacting exclusionary rules that discriminate against certain members who wished to innovate by displaying historical listing information (like a home's sale price) on a password-protected website known as VOW. Whereas TREB's members could and did distribute such historical information by hand, email and fax, TREB prohibited them from doing so over the Internet because it feared that competition from more efficient VOW-based brokers would cause real estate commissions to fall.³
- (c) Under paragraph 79(1)(c), TREB's discriminatory practice against VOWs substantially lessened or prevented competition by increasing barriers to entry for VOW-based brokers with the effect of creating, preserving, or enhancing the market power of TREB's traditional broker members. Reduced competition

² Appeal Decision at paras. 3 and 11, LA at tab 3.

³ Appeal Decision at paras. 4-6 and 11, LA at tab 3.

produced higher commission prices and lower quality service for GTA home buyers and sellers than would otherwise exist.⁴

8. Over a 17-day hearing in September and October 2012, the Tribunal heard 18 witnesses, including three experts.

The Tribunal Decision

9. The Tribunal reserved its decision for six months until April 15, 2013 when it released a 6-page decision. Despite the extensive evidence and nearly 500 pages of written argument filed by the parties, the Tribunal made no findings of fact. It dismissed the Commissioner's application based on its interpretation of the Court of Appeal's decision in *Canada Pipe*. It did not consider the Commissioner's application on the merits. The Tribunal cited the description of "anti-competitive act" adopted by the Court of Appeal in *Canada Pipe*: an "anti-competitive act" is one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.⁵

10. The Tribunal interpreted "competitor" in that description to mean, in every case, a "competitor of the person who is the target of the Commissioner's application for a subsection 79(1) order".⁶ Based on its interpretation of *Canada Pipe's* use of the word "competitor", the Tribunal dismissed the Commissioner's application on the basis that:

⁴ Appeal Decision at paras. 11, LA at tab 3.

⁵ Tribunal Decision at para. 13, LA at tab 2.

⁶ Appeal Decision at para. 17, LA at tab 3.

- (a) because TREB as a trade association did not itself compete with the targets of its exclusionary conduct (although its members did), TREB's conduct was not in law an anti-competitive act;⁷ and
- (b) even if TREB as a trade association had market power in the relevant market, it did not substantially control that market as a matter of law because it did not compete in it.⁸

The Appeal Decision

11. The Court of Appeal unanimously allowed the Commissioner's appeal, overturned the Tribunal's decision and rejected the Tribunal's interpretation of *Canada Pipe*. At the Court of Appeal, the parties made submissions on whether "competitor" as used in *Canada Pipe*:

- (a) meant, in every case, "competitor of the person who is the target of the Commissioner's application for a subsection 79(1) order" as the Tribunal had interpreted;⁹ or
- (b) meant something broader such as "competitor in the relevant market", particularly where a trade association that represents and acts in the interests of the vast majority of competitors in the relevant market engages in a practice of anti-competitive acts that discriminate against and exclude competitors from that market.

⁷ Tribunal Decision at para. 23, LA at tab 2.

⁸ Tribunal Decision at para. 24, LA at tab 2.

⁹ Appeal Decision at para. 17, LA at tab 3.

12. As it does on this leave application, TREB argued strenuously for the former interpretation of *Canada Pipe*. Before the Court of Appeal, both parties made extensive written and oral submissions on the scheme and history of the *Act*, the Tribunal's prior jurisprudence, economic considerations, and *Canada Pipe* itself.

13. The Court of Appeal unanimously rejected the Tribunal's (and TREB's) interpretation of *Canada Pipe*. For present purposes, it made three critical findings.

14. First, given the facts before it and the law it applied, the panel in *Canada Pipe* **had not** narrowed the scope of subsection 79(1) as the Tribunal held. There was no factual or legal basis to interpret "competitor" to mean, in **every** case, a "competitor of the person who is the target of the Commissioner's application for a subsection 79(1) order".¹⁰ Rather, the Court of Appeal held that the *Canada Pipe* description of "anti-competitive act" and subsection 79(1) contemplated acts against competitors in the relevant market:

I do not interpret *Canada Pipe* to mean that as a matter of law, a person who does not compete in a particular market can never be found to have committed an anti-competitive act against competitors in that market, or that a subsection 79(1) order can never be made against a person who controls a market otherwise than as a competitor.¹¹ [Emphasis added.]

15. Second, given Parliament's intent expressed in the "anti-competitive act" described in paragraph 78(1)(f) of the *Act*, the panel in *Canada Pipe* **could not** have narrowed the scope of subsection 79(1) as the Tribunal held:

¹⁰ Appeal Decision at paras. 17-18, LA at tab 3.

¹¹ Appeal Decision at para. 14, LA at tab 3.

In my view, paragraph 78(1)(f) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to [TREB] in this case.¹²

16. Third, if the panel in *Canada Pipe* had intended to narrow the scope of subsection 79(1) as the Tribunal held, then **that aspect** of its decision was manifestly wrong for the panel's failure to explain the inconsistency between Parliament's intent expressed in paragraph 78(1)(f) and the restrictive description of "anti-competitive act" the panel **might have** adopted.¹³

17. The Court of Appeal allowed the appeal and returned the matter to the Tribunal for reconsideration on the merits. The Tribunal hearing is scheduled to begin on October 14, 2014.

PART II – CONCISE STATEMENT OF THE QUESTIONS IN ISSUE

18. The only question is whether TREB's two proposed questions for appeal raise issues of public and national importance, such that this Court should grant leave to appeal.

19. The Commissioner submits that they do not. TREB overstates the difficulty in identifying an "anti-competitive act". Contrary to TREB's assertions, the Appeal Decision does not conflict with *Canada Pipe* in interpreting paragraph 79(1)(b), nor did it hold that the *Canada Pipe* description of an "anti-competitive act" was "manifestly wrong". Similarly, the Appeal Decision has not "radically" changed the interpretation of paragraph 79(1)(a) by detaching the legal concept of control of a market from the economic concept of market power.

¹² Appeal Decision at para. 20, LA at tab 3.

¹³ Appeal Decision at para. 20, LA at tab 3.

PART III – CONCISE STATEMENT OF ARGUMENT

Issue #1: The Legal Test for Identifying an "Anti-competitive Act"

20. The Commissioner submits that the Appeal Decision has not created uncertainty in the law as TREB alleges. There is no issue of national or public importance and no need for this Court to grant leave to appeal on this issue.

21. First, although a conflict between appellate decisions is itself insufficient to obtain leave to appeal, TREB has not even demonstrated that such a conflict exists. The Appeal Decision does not conflict with *Canada Pipe*. The Court of Appeal correctly interpreted paragraph 79(1)(b) in a manner consistent with section 78 of the *Act* and properly clarified *Canada Pipe* as it applies to TREB. It did not find that *Canada Pipe's* description of an "anti-competitive act" was "manifestly wrong".

22. Second, contrary to TREB's submissions, there is reliable guidance for the Tribunal and Canadian businesses as to what constitutes an "anti-competitive act".

23. Finally, the Court of Appeal correctly applied its prior decision in *Miller v. Canada*.¹⁴

The Appeal Decision does not conflict with *Canada Pipe* and did not find that *Canada Pipe* was "manifestly wrong"

24. The Commissioner submits that the Appeal Decision does not conflict with *Canada Pipe*. Rather, the Appeal Decision overruled the Tribunal's (and TREB's) misinterpretation of *Canada Pipe*, not *Canada Pipe* itself.

¹⁴ (2002), 220 DLR (4th) 149 (FCA), LA at tab 6K.

25. First, the panel in *Canada Pipe* did not hold that an anti-competitive act must **in every case** be targeted at the dominant firm's own competitor.¹⁵ As the Appeal Decision recognized, neither the facts before the *Canada Pipe* panel nor the law it applied produced that conclusion.

26. In *Canada Pipe*, the key question under paragraph 79(1)(b) was whether Canada Pipe's stocking distribution program was an anti-competitive act.¹⁶ In answering 'yes' to that question, the panel identified shared characteristics of the anti-competitive acts listed in subsection 78(1), save for paragraph 78(1)(f) which it noted was an exception. The shared characteristics implied that an "anti-competitive act" is an act whose purpose is an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.¹⁷

27. However, the panel in *Canada Pipe* did not opine on **who** must perpetrate the "anti-competitive act" as that question did not arise. On the facts of that case, Canada Pipe competed in the relevant market.¹⁸ Neither *Canada Pipe* nor any other decided Tribunal case involved a trade association, rather than a single dominant firm that competed in a product market.

28. Nevertheless, the Tribunal, in its brief decision in this case, interpreted the panel's comments in *Canada Pipe* regarding "a competitor" "as authority for the proposition that by necessary implication, an anti-competitive act must be the act of a person who competes in the relevant market".¹⁹ Thus, according to the Tribunal, the panel in *Canada Pipe* had restricted the scope of subsection 79(1) to apply only to firms who compete in the relevant market. The Court of Appeal considered and unanimously rejected that interpretation of *Canada Pipe*. *Canada Pipe* had not restricted subsection 79(1) as the Tribunal held.

¹⁵ Appeal Decision at para. 14, LA at tab 3.

¹⁶ *Canada Pipe* at p. 4, LA at tab 6D.

¹⁷ *Canada Pipe* at para. 65, LA at tab 6D.

¹⁸ *Canada Pipe* at p. 4, LA at tab 6D.

¹⁹ Appeal Decision at para. 16, LA at tab 3.

29. The Court of Appeal held that the Tribunal's interpretation of *Canada Pipe* had no support in law or fact: "I see nothing in the language or context of the *Competition Act* to justify [the Tribunal's interpretation of *Canada Pipe*]." ²⁰ It continued:

Nor can [the Tribunal's interpretation of *Canada Pipe*] be justified by the facts as found in *Canada Pipe*. Given the factual context in which *Canada Pipe* was decided, I do not accept that *Canada Pipe* is intended to preclude the application of subsection 79(1) to [TREB] in respect of a rule it makes that is binding on its members. ²¹

30. Rather, the Court of Appeal held that *Canada Pipe's* use of the word "competitor" contemplated not only "competitors of the dominant firm", but also "competitors in the relevant market":

I do not interpret *Canada Pipe* to mean that as a matter of law, a person who does not compete in a particular market can never be found to have committed an anti-competitive act against competitors in that market... ²² [Emphasis added.]

31. The facts of *Canada Pipe* and the Court of Appeal's conclusions answer TREB's assertion of conflict. No conflict exists. Correcting the Tribunal's misinterpretation of *Canada Pipe* does not amount to a conflict between the Appeal Decision and *Canada Pipe*. Appellate courts routinely overrule lower courts that misinterpret their previous decisions. ²³ The Court of Appeal was well within its mandate to do so in this case.

32. Second, the Appeal Decision's interpretation of paragraph 79(1)(b) is consistent with Parliament's intention as expressed in the language, purpose and scheme of the *Act*. The Appeal Decision also properly clarifies the decision in *Canada Pipe* as it applies to TREB.

²⁰ Appeal Decision at para. 17, LA at tab 3.

²¹ Appeal Decision at para. 18, LA at tab 3.

²² Appeal Decision at para. 14, LA at tab 3.

²³ *Pelletier v. Canada (Attorney General)*, [2008] FCJ no 4 (QL) at para 40, Response at tab 2C.

33. The Court of Appeal recognized that Parliament had described "anti-competitive act", expansively and non-exhaustively, through a list of "anti-competitive acts" in subsection 78(1) of the *Act*.²⁴ Several "anti-competitive acts" in subsection 78(1) refer specifically to a "competitor". But a past decision of the Tribunal,²⁵ the panel in *Canada Pipe*,²⁶ and the Appeal Decision all recognized that paragraph 78(1)(f) is an exception: it does not refer to an act directed against a competitor.²⁷

34. Unlike the Tribunal, the Appeal Decision correctly recognized that a proper interpretation of "anti-competitive act" must attribute significance to Parliament's intention as expressed in paragraph 78(1)(f). It correctly held that "paragraph 78(1)(f) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to [TREB] in this case".²⁸ For that reason, the Appeal Decision held that the panel in *Canada Pipe* could not have narrowed the scope of subsection 79(1) as the Tribunal held.

35. As the Commissioner submitted to the Court of Appeal, that interpretation of paragraph 79(1)(b) and *Canada Pipe* supports the purposes in section 1.1 of the *Act*, specifically protecting small and medium-sized businesses, promoting efficiency, and providing consumers with competitive prices and product choices. Where a trade association's conduct is aimed at its members' competitors to harm them or exclude them from the market, section 79 should apply just as it would in the context of a single firm. To restrict subsection 79(1) such that it cannot apply to trade associations, such as TREB, would permit firms to do indirectly what they cannot

²⁴ Appeal Decision at para. 9, LA at tab 3. See also *Canada Pipe* at para. 63, LA at tab 6D.

²⁵ *Director of Investigation & Research v. NutraSweet Co.*, (1990) 32 CPR (3d) 1 (Comp Trib) [*NutraSweet*], LA at tab 6H.

²⁶ *Canada Pipe* at para. 65, LA at tab 6D.

²⁷ Although the Appeal Decision did not refer to it, paragraph 78(1)(g) also does not refer to "competitor".

²⁸ Appeal Decision at para. 19, LA at tab 3.

do directly: exclude or disadvantage competitors and restrict competition, contrary to the purposes of the *Act* in section 1.1.

36. Third, the Court of Appeal did not find that *Canada Pipe's* interpretation of "anti-competitive act" was "manifestly wrong", as TREB submits it did. There are two critical qualifiers to the Appeal Decision's comments in this regard. First, they were conditional; and second, they applied only to one aspect of *Canada Pipe's* description of "anti-competitive act":

If the Court in *Canada Pipe* intended to narrow the scope of subsection 79(1) as the Tribunal held, then I would be compelled to find that aspect of *Canada Pipe* to be manifestly wrong because it is based on flawed reasoning (specifically, the unexplained inconsistency in the reasons).²⁹ [Emphasis added.]

37. The "aspect" in question was the Tribunal's interpretation of "competitor" as used in *Canada Pipe* to mean, in **every** case, "competitor of the person who is the target of the Commissioner's application for a subsection 79(1) order".³⁰ The Court of Appeal unanimously rejected "the addition of those qualifying words" to *Canada Pipe*.³¹ It concluded that the "competitors" referred to in *Canada Pipe*, against whom anti-competitive acts are done, were not necessarily "competitors of the dominant firm" as the Tribunal had interpreted. Rather, given Parliament's intention expressed in paragraph 78(1)(f), they could be "competitors in the relevant market".³²

38. Only if the panel in *Canada Pipe* had intended a contrary result did the Appeal Decision find that it would have been "manifestly wrong" in doing so.

²⁹ Appeal Decision at para. 20, LA at tab 3.

³⁰ Appeal Decision at para. 17, LA at tab 3. The Court of Appeal appears to have used "the Court" in one instance in paragraph 17 of its reasons where the context indicates it meant to refer to the Tribunal.

³¹ Appeal Decision at paras. 17 and 18, LA at tab 3.

³² Appeal Decision at para. 14, LA at tab 3.

39. Finally, none of the commentators TREB relies on support its theory of an irreconcilable conflict between the Appeal Decision and *Canada Pipe*. Rather, the law firm marketing materials observe that the Appeal Decision corrected the Tribunal's misinterpretation of *Canada Pipe*.³³

There is Reliable Guidance to Identify "Anti-Competitive Acts"

40. TREB also argues that there "is no guidance as to what qualifies as an anti-competitive act",³⁴ or that there is no such "reliable" guidance.³⁵ In fact, there is reliable guidance from Parliament, in the jurisprudence from the Court of Appeal and in other authoritative sources.

41. Parliament itself has provided guidance by listing, non-exhaustively, nine illustrations of "anti-competitive acts" in paragraphs 78(1)(a) to (i) of the *Act*. The Court of Appeal's decision in *Canada Pipe* remains a significant source of assistance in identifying an "anti-competitive act", now supplemented with an important clarification provided by the Appeal Decision: an "anti-competitive act" is one whose purpose is an intended negative effect on a competitor in the relevant market that is predatory, exclusionary or disciplinary.³⁶

³³ George Addy et al (Davies Ward Phillips & Vineberg LLP), "Canadian Federal Court of Appeal Expands Scope of Competition Act's Abuse of Dominance Provisions", LA at tab 6N, p. 156: "[T]he Court of Appeal held that the Tribunal had misinterpreted the *Canada Pipe* decision..."

Donald Houston, Jonathan Bitran, Michele Sju (McCarthy Tétrault LLP), "Federal Court of Appeals Allows Competition Bureau Appeal in Toronto Real Estate Board Case", LA at tab 6Q, p. 162: "The FCA's ruling hinged on its finding that the Tribunal incorrectly interpreted its 2006 decision in [*Canada Pipe*] and, consequently, the application of the abuse of dominance provisions..."

Susan M. Hutton and Shannon Kack (Stikeman Elliot LLP), "Federal Court of Appeal sends Toronto Real Estate Board case back to Competition Tribunal", February 6, 2014, Response at tab 2I: "[T]he FCA concluded that the Tribunal had misinterpreted *Canada Pipe* and consequently, misinterpreted the abuse of dominance provisions of the Act."

Imran Ahmad and Chris Hersh (Cassels Brock & Blackwell LLP), "Federal Court of Appeal Rules That Trade Associations Not Immune From Abuse of Dominance Provisions", February 4, 2014, Response at tab 2H: "The Court concluded that the Tribunal had erred in its interpretation of *Canada Pipe*. As a result, its interpretation as to the applicability of the abuse of dominance provisions to TREB (or the conduct of trade associations generally) was incorrect."

Stephen Natrass (Norton Rose Fulbright), "Abuse of dominance do-over: appeals court orders new hearing in real estate case", February 2014, Response at tab 2J: "The court found that the tribunal's interpretation of a leading dominance case, *Canada Pipe*, was incorrect, and as a result the court ordered the tribunal to reconsider its decision on the merits."

³⁴ TREB Memorandum at para. 38, LA at tab 4.

³⁵ TREB Memorandum at para 5, LA at tab 4.

³⁶ *Canada Pipe* at paras. 63-73, LA at tab 6D.

42. Guidance from other authoritative sources includes: (i) the Tribunal's guidance in the four previous contested cases under section 79 (other than *Canada Pipe*);³⁷ (ii) Consent Orders approved by or Consent Agreements registered with the Tribunal that resolve issues under section 79 (and, where available, the Tribunal's reasons for approval); (iii) the Commissioner's *Enforcement Guidelines: The Abuse of Dominance Provisions* (2012); and (iv) the guidance the Tribunal will provide when it reconsiders this matter on the merits.

43. In this context, it cannot be maintained that the Tribunal has insufficient guidance to decide the present case on the evidence. For their part, Canadian businesses have the same guidance, together with the benefit of legal counsel in the competition bar, many of whom also have experience with section 79 matters that did not proceed to a hearing before the Tribunal.

44. Particularly given the absence of a factual record in this case, an appeal to this Court is unnecessary and premature. The preferable way to obtain additional guidance on "anti-competitive acts" is to dismiss this application and let the Tribunal decide this case on the merits.

The Court of Appeal correctly applied *Miller v. Canada*

45. TREB argues that the Appeal Decision failed to follow the Court of Appeal's own decision in *Miller v. Canada*. That is plainly incorrect. As has been demonstrated above, the Appeal Decision did not overrule *Canada Pipe*. A comment that *Canada Pipe* would have been manifestly wrong in one respect **if** the *Canada Pipe* panel had intended a particular result does not amount to a wholesale rejection of *Canada Pipe*.

³⁷ *NutraSweet*, LA at tab 6H; *Director of Investigation and Research v. Laidlaw Waste Systems* (1992), 40 CPR (3d) 289 (Comp Trib), LA at tab 6G; *Director of Investigation and Research v. D & B Companies of Canada* (1995), 64 CPR (3d) 289 (Comp Trib), LA at tab 6F; and *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1997), 73 CPR (3d) 1 (Comp Trib), LA at tab 6F.

46. In any event, the Court of Appeal has applied *Miller* where, as here, prior judicial statutory interpretations contradict plain and clear statutory language.³⁸

Issue #2: Control and Market Power

The Appeal Decision did not "radically expand" the test for control of a market

47. TREB submits that "the Appeal Decision has detached the test for control of the market from the concept of market power" thereby "radically expanding" the doctrine of abuse of dominance in section 79 of the *Act*.³⁹ The Commissioner submits that TREB is incorrect for four reasons.

48. First, the Appeal Decision referred to market power in rejecting the Tribunal's conclusion that "a person who does not compete in a market cannot exercise market power" for the purposes of paragraph 79(1)(a). That statement implies that the Court of Appeal recognized the role of market power in the legal test for control. The effect of the Appeal Decision is that if a trade association, such as TREB, has market power in the relevant market, there is no reason that it cannot control that market under paragraph 79(1)(a).

49. Second, whether the legal concept of control of the market in paragraph 79(1)(a) is synonymous with the economic concept of market power was not in issue before the Court of Appeal. The Commissioner has asserted from the outset of this proceeding that TREB has market power by reason of, among other things, its control of the multiple listing service and its

³⁸ *RCI Environnement Inc. v. Canada*, 2008 FCA 419 at paras. 51-52 (CanLII), Response at tab 2D.

³⁹ TREB Memorandum at para. 56, LA at tab 4.

ability to make rules that govern how its members compete.⁴⁰ TREB's market power establishes its substantial or complete control of the relevant market under paragraph 79(1)(a) of the *Act*.

50. Third, no law firm commentary cited in TREB's submissions argues that the Appeal Decision detached market power from control of the market. Had the Appeal Decision so "radically departed" from the prior jurisprudence in this respect, one would expect some mention of it.

51. Fourth, the Court of Appeal correctly interpreted paragraph 79(1)(a) in the context of its and the Tribunal's prior jurisprudence. Prior cases have held that market power is synonymous with control. Thus, the Court of Appeal rejected the Tribunal's additional requirement that a person who does not compete in the market cannot control it. In the words of the Court of Appeal, "[i]n my view, the Commissioner's position reflects an interpretation of paragraph 79(1)(a) that its words can reasonably bear, given the statutory context".⁴¹

52. Before the Court of Appeal, the Commissioner submitted, among other things, that adding that additional criterion to the test for control undermined the purpose of section 79. As this Court held in *R v. Nova Scotia Pharmaceutical Society*,⁴² firms with market power can act independently of market forces. The Commissioner argued that section 79 applies to a person or persons with market power precisely because market forces cannot discipline them. To be effective, paragraph 79(1)(a) must apply to all persons with market power. Otherwise, some firms with market power will evade section 79 scrutiny, and uncompetitive markets, higher prices, and reduced product choice will result.

⁴⁰ During oral argument before the Tribunal, the Commissioner, in response to a question from the panel, submitted in the alternative that "control" in paragraph 79(1)(a) could be broader than "market power"; but this submission was not the subject of any comment by the Tribunal or the Court of Appeal and was not made in the Commissioner's written argument on appeal.

⁴¹ Appeal Decision at para. 13, LA at tab 3.

⁴² [1992] 2 SCR 606, LA at tab 6L.

53. With the benefit of the parties' detailed submissions, the Court of Appeal corrected the Tribunal's error and returned the jurisprudence to its long-standing position: proof of market power in the relevant market establishes control of the market under paragraph 79(1)(a).

TREB's Discussion of Market Power is Incomplete

54. TREB characterizes market power as the ability to "earn supra-normal profits". TREB also asserts that, as an input supplier, it cannot have market power in a downstream market.⁴³ Neither submission fully reflects the law or the Commissioner's position.

55. First, as a non-profit trade association, TREB relies on the language of "supra-normal profits" in an apparent attempt to distance its conduct from the concept of market power. In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, the Tribunal provided the following, more complete description of market power:

Market power is the ability of a firm or group of firms to maintain prices above the competitive level. Market power may also be exercised by offering, for example, poor service or quality or by restricting choice. When used in a general context, "price" is thus a shorthand for all aspects of firms' actions that bear on the interest of buyers.⁴⁴

56. With reference to that description of market power, the Commissioner argued on the evidence that TREB had market power in the economic sense because it has the ability to maintain prices in the relevant market or decrease levels of non-price competition (such as through its rule-making powers over its 35,000 members and its ability to exclude participants and potential participants from the market).

⁴³ TREB Memorandum at paras. 50-55, LA at tab 4.

⁴⁴ (1992), 43 CPR (3d) 161 (Comp Trib) at p. 177, Response at tab 2A, cited with approval in *Canada Pipe* at para. 6, LA at tab 6E.

57. Second, TREB's assertion that an input supplier that has market power in an upstream market cannot have market power in a downstream market is not relevant to this case. TREB is not merely an input supplier. TREB is a trade association with a mandate to act in the interests of its 35,000 members, who comprise the vast majority of all participants in the relevant market. A trade association such as TREB has obvious incentives to affect competition in – and indeed to exclude competitors from – the market in which its members compete. By contrast, the example of NutraSweet in TREB's submissions has no similar incentive to affect competition in the soft drink market or to exclude competitors from competing in it.

58. Further, TREB not only controls a key input without which none of its members can do business; it also enacts binding rules and policies that govern many aspects of how its members compete. It has excluded participants from the market who breach its rules, including some of those who have tried to compete using VOWs. In over fifty pages of written submissions to the Tribunal following the hearing, the Commissioner asserted that these and other factors give TREB the ability to affect or set prices and non-price competition, giving it market power in the relevant market.

American Jurisprudence

59. TREB relies on jurisprudence under section 2 of the United States *Sherman Act* and argues that the Appeal Decision's interpretation of paragraph 79(1)(a) of the *Act* departs from concepts of antitrust liability under American monopolization law.

60. TREB's reliance on American jurisprudence is curious given that TREB took the position before the Court of Appeal that American case law on this issue is of no application to this

appeal, in part because there are important differences between the abuse of dominance/monopolization regimes in Canada and the United States.

61. TREB's submission that the Appeal Decision endorses a concept of antitrust liability considered and rejected in the United States does not account for the American decisions which have held that trade associations, in certain circumstances, can have economic market power in the market in which their members compete.⁴⁵

TREB's Submission that the Appeal Decision is "Under-Reasoned"

62. TREB argues that the Appeal Decision is "under-reasoned" and asserts that the entire reasoning with respect to control occurred in one sentence.⁴⁶ However, the Appeal Decision considered and discussed the Commissioner's factual theory, the Tribunal's decision, the relevant provisions of the *Act*, the previous decision in *Canada Pipe*, and Parliament's intent. In addition, both the Commissioner and TREB made extensive written submissions to the Court of Appeal about the proper interpretation of section 79. In those circumstances, the Court of Appeal concluded that narrowly construing control of the market would subvert Parliament's intention expressed in the whole of subsection 79(1). That is the "statutory context" the Court of Appeal referred to and considered.⁴⁷

63. Given that in the court below the Tribunal made no findings of fact and did not analyze the expert evidence concerning market power, it is not surprising that the Court of Appeal's analysis is not more extensive. The appropriate solution, however, is not to grant leave to this

⁴⁵ The Commissioner provided the Court of Appeal with American cases decided under section 1 of the *Sherman Act*: *Wilk v. American Medical Association*, 895 F 2d 352 (7th Cir 1990) [AMA] at paras. 22 Response at tab 2G.; *National Collegiate Athletic Assn v. Board of Regents of Univ of Okla*, 468 US 85 (1984) at 112, Response at tab 2B; *United States v. Realty Multi-List*, 629 F 2d 1351 (5th Cir 1980) at 1374, Response at tab 2F; and *Realcomp II, Ltd v. FTC*, 635 F 3d 815 (6th Cir 2011) at 828-829, Response at tab 2E.

⁴⁶ TREB Memorandum at para. 62, LA at tab 4.

⁴⁷ Appeal Decision at para 13, LA at tab 3.

Court to expand the abstract analysis. The preferable avenue is to allow the Tribunal to weigh the evidence and decide this case on the merits at the hearing scheduled to begin on October 14, 2014.

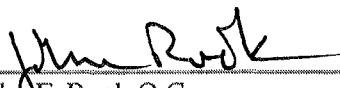
PART IV – COSTS SUBMISSIONS

64. Since no issue of public importance has been raised and there is no reason for departing from the usual course of awarding costs to the successful party, the Commissioner should be awarded costs.


PART V – ORDER SOUGHT

65. The Commissioner requests that this Court dismiss TREB's application for leave to appeal and grant his request for costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of April, 2014.



John F. Rook Q.C.



Emrys Davis

BENNETT JONES LLP



Andrew D. Little

DEPARTMENT OF JUSTICE CANADA

Counsel for the Respondent
The Commissioner of Competition

PART VI – TABLE OF AUTHORITIES

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PART VII – STATUTES RELIED ON

Competition Act, R.S.C., 1985, c. C-34

Loi sur la concurrence, L.R.C., 1985, ch. C-34

PURPOSE

OBJET

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.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

Objet

1.1 La présente loi 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.

L.R. (1985), ch. 19 (2^e suppl.), art. 19.

Prohibition where abuse of dominant position

79. (1) Where, on application by the Commissioner, the Tribunal finds that

- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

- a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
- b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;
- c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

Ordonnance d'interdiction dans les cas d'abus de position dominante

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'en-

Ordonnance supplémentaire ou substitutive

Abuse of Dominant Position

Definition of "anti-competitive act"

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the part of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

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

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

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

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

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

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

(j) and (k) [Repealed, 2009, c. 2, s. 427]

Abus de position dominante

Définition de « agissement anti-concurrentiel »

78. (1) Pour l'application de l'article 79, « agissement anti-concurrentiel » s'entend notamment des agissements suivants :

a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

b) l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;

c) la péréquation du fret en utilisant comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

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

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

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

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher

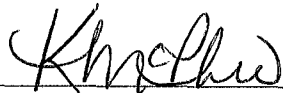
l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

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

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

j) et k) [Abrogés, 2009, ch. 2, art. 427]

**THIS IS EXHIBIT "E" REFERRED TO
IN THE AFFIDAVIT OF STEPHANIE PAIGE
SWORN THE 30th DAY OF MAY, 2014.**



A Commissioner for taking affidavits, etc.

Kelly Ann McPhie, a Commissioner, etc.,
Province of Ontario, for Bennett Jones LLP,
Barristers and Solicitors.
Expires September 23, 2015.

File No. / Dossier no. CT-2011-003

Competition Tribunal

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

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

AND IN THE MATTER OF certain rules, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board.

BEFORE:

The Honourable Madam Justice Simpson
The Honourable Mr. Justice Scott
Mr. Henry Lanctôt

Chairperson

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

**REALTYSELLERS REAL ESTATE INC. and
CANADIAN REAL ESTATE ASSOCIATION**

Intervenors

VOLUME 2

HELD AT:

180 Queen Street West, Courtroom 7A
Toronto, Ontario
on Tuesday, September 11, 2012, at 9:30 a.m.

180 rue, Queen ouest, salle 7A
Toronto, Ontario
mardi, le 11 septembre, 2012 à 9 h 30

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(ii)

APPEARANCES:

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Andrew Little
Emrys Davis
William J. Miller, Department of Justice

for the Applicant

Donald Affleck, Q.C.
David Vaillancourt
Fiona Campbell

for the Respondent

Sandra A. Forbes
James Dinning

for the Intervenor, CREA

1 marked, and I would ask that that be done, please?

2 **MADAM JUSTICE SIMPSON:** I think it may
3 have been done, that is why my numbers are out of
4 whack. Mr. Registrar, have you done that?

5 **THE REGISTRAR:** Yes, I did.

6 **MADAM JUSTICE SIMPSON:** What number did
7 you give it?

8 **THE REGISTRAR:** This is Number 5, the
9 other exhibit of Ms. Forbes would be Number 6, I am
10 sorry.

11 **MADAM JUSTICE SIMPSON:** I think for
12 tomorrow morning, we will have an updated exhibit
13 list.

14 **EXHIBIT NO. A-6: ViewPoint**
15 **demonstration video, Brief #01431.**

16 **MR. ROOK:** Those are my questions,
17 thank you very much.

18 **MADAM JUSTICE SIMPSON:** Thank you very
19 much.

20 **MR. ROOK:** Thank you Mr. McMullin, I
21 believe you may step down.

22 **MADAM JUSTICE SIMPSON:** Thank you, sir.

23 Now before we turn to the next witness
24 on the list, I had promised to deal with the Notice of
25 Constitutional Question today and so I have prepared

1 just a short two-pager dealing with that issue. So,
2 if you don't mind, I will just read it into the record
3 and that will be the decision of the panel on the
4 question of whether we are going to hear the notice.
5 So let me start with a heading called "background":

6 **RULING BY MADAM JUSTICE SIMPSON:**

7 **MADAM JUSTICE SIMPSON:** 1. Background

8 On August 24, 2012, the Toronto Real
9 Estate Board ("TREB") submitted a Notice of
10 Constitutional Question of even date (the "Notice")
11 for filing with the Competition Tribunal (the
12 "Tribunal). The Notice was not accepted for filing
13 but was received for information purposes because,
14 under the Tribunal's Scheduling Order of January 19,
15 2012 (the "Order") the Notice was to have been filed
16 by April 2, 2012 (the "Deadline").

17 The Tribunal first learned that the
18 Notice was being prepared on August 23, 2012 when,
19 during a teleconference attended by counsel for both
20 parties and both intervenors to deal with prehearing
21 matters, counsel for TREB advised that he was about
22 to serve the Notice.

23 Following the teleconference the
24 Tribunal issued a Direction which said in part as
25 follows:

1 "[...]the Tribunal was surprised
2 to learn in today's teleconference
3 that counsel for TREB is proposing
4 to file a Notice of Constitutional
5 Question (the "Notice) given that
6 the Revised Scheduling Order reads
7 as follows:

8 "Friday, April 27, 2012: Hearing
9 of any motions (including
10 constitutional issues notified by
11 April 2, 2012) and questions
12 arising from answers to
13 undertakings.

14 "The parties are hereby advised
15 that the Tribunal may conclude
16 that the Notice is out of time."

17 The Notice raises the constitutionality
18 of the order sought by the Commissioner. The Notice
19 says that the regulated conduct defence applies
20 because real estate professionals in Ontario are
21 subject to the provisions of the Real Estate and
22 Business Brokers Act, 2002, c. 30 ("REBBA") and its
23 regulations.

24 On September 10, 2012, at the opening
25 of the hearing on the merits, the Tribunal asked

1 counsel for TREB and the Commissioner for submissions
2 about the Notice. Their remarks are found in the
3 transcript of the proceedings. Counsel for TREB
4 indicated that by the Deadline there had been only one
5 day of discovery and that, for that reason and because
6 he had not received the list of documents on which the
7 Commissioner intended to rely at the hearing (the
8 "List") he was unable to decide by the Deadline
9 whether the Notice should issue.

10 Counsel for the Commissioner did not
11 oppose the Notice but, as discussed below, indicated
12 that it might well lengthen the hearing. Counsel for
13 the Canadian Real Estate Association ("CREA") took no
14 position and no one appeared for the intervenor
15 Realtysellers Real Estate Inc.

16 2. Discussion

17 a) The order was made on consent

18 A letter from counsel for the
19 Commissioner to the Tribunal dated December 13, 2011,
20 shows that the Order as it related to possible notices
21 of constitutional question was made on consent.

22 In a teleconference on Monday, December
23 19, 2011, which dealt with the proposed scheduling
24 order at which counsel for all parties and intervenors
25 were present, the timing of any notice of

1 constitutional question was specifically addressed
2 because the Tribunal added a date for the filing of
3 any such notice. Counsel for TREB said at page 5 of
4 the transcript of the teleconference that the proposed
5 filing date was fine with him.

6 b) There is no justification for the
7 delay

8 TREB has not offered a satisfactory
9 explanation for its breach of the Order. The Order
10 provided that examinations for discovery would be held
11 in March, April and possibly May 2012. This meant
12 that when counsel for TREB consented to the Order it
13 was possible that discoveries could continue past the
14 Deadline. However, they were in fact held in March and
15 April. TREB's representative was examined on March 19,
16 20, 21 and April 3 and on one day later in April.
17 TREB completed the examinations of the Commissioner's
18 representative on March 22nd and 23, 2012. This means
19 that TREB's counsel was mistaken when he suggested
20 that there had at most been one day of discovery
21 before the April 2nd Deadline.

22 Regarding the List, the Order provided
23 that it was to be delivered on June 22, 2012. This
24 meant that when counsel for TREB consented to the
25 Order he did so on the understanding that the Deadline

1 would arrive before the List.

2 Finally, the REBBA and its regulations
3 are not new. In these circumstances I do not accept
4 that there was a need to see the List and complete
5 discoveries to determine whether the Notice was
6 required and, had counsel needed an amendment to the
7 Order to extend the Deadline a motion for that purpose
8 should have been brought before the Deadline passed.

9 c) A disruption of the hearing is
10 likely

11 Although TREB says that the present
12 hearing will create the record needed to deal with the
13 Notice it is likely that the hearing will be disrupted
14 to some extent because:

15 • TREB has not identified the witness
16 it will subpoena from the Real Estate Council of
17 Ontario to deal with the Notice. There may not be a
18 witness statement for that witness so counsel for the
19 Commissioner will likely need an adjournment to
20 prepare to cross-examine the witness. Counsel may
21 also need to call additional witnesses to deal with
22 the issues raised by the witness who speaks to the
23 issues in the Notice.

24 • Counsel for the Attorney General of
25 Canada has advised Commissioner's counsel that he may

1 wish to participate in oral argument. This is not
2 scheduled and is likely to require an adjournment so
3 that TREB can respond.

4 3. Conclusion

5 The Notice was submitted on the eve of
6 the hearing, contrary to the consent Order and without
7 justification. For these reasons and because the
8 adjudication of the issues raised in the Notice is
9 likely to extend the hearing the notice will not be
10 entertained.

11 Thank you. And, Mr. Rook, if you will
12 now call your next witness.

13 **MR. ROOK:** Thank you, Madam Chair. The
14 next witness is Urmi Desai. If you can please come
15 forward. Mr. Little will conduct the examination on
16 behalf of the Commissioner.

17 **AFFIRMED: URMI DESAI**

18 **EXAMINATION IN-CHIEF BY MR. LITTLE:**

19 **MR. LITTLE:** Good afternoon, Ms. Desai.

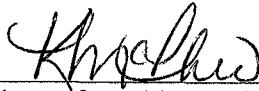
20 **MS. DESAI:** Good afternoon.

21 **MR. LITTLE:** Do you have in front of
22 you copy of your witness statement?

23 **MS. DESAI:** I do.

24 **MR. LITTLE:** Mr. Registrar, I believe
25 the document number is 187, if you can bring that up,

**THIS IS EXHIBIT "F" REFERRED TO
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SWORN THE 30th DAY OF MAY, 2014.**



A Commissioner for taking affidavits, etc.

Kelly Ann McPhie, a Commissioner, etc.,
Province of Ontario, for Bennett Jones LLP,
Barristers and Solicitors.
Expires September 23, 2015.

Competition Tribunal**Tribunal de la Concurrence**

Reference: *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, 2013
Comp. Trib. 20
File No.: CT-2012-002
Registry Document No.: 075

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 certain policies and procedures of Reliance Comfort Limited Partnership

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Reliance Comfort Limited Partnership
(respondent)

and

National Energy Corporation
(intervener)



Decided on the basis of the written record
Before Judicial Member: Rennie J. (Chairperson)
Date of Order: December 9, 2013
Order signed by: Justice Donald J. Rennie

AMENDED SCHEDULING ORDER

[1] FURTHER TO the notice of application filed by the Commissioner of Competition (“Commissioner”) pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, against the respondent Reliance Comfort Limited Partnership and the notice of application filed by the Commissioner pursuant to section 79 of the *Competition Act* against the respondent Direct Energy Marketing Limited (CT-2012-003);

[2] AND FURTHER TO the Tribunal’s Scheduling Order of November 27, 2013, and recent correspondence from counsel;

[3] AND WHEREAS, in fixing the hearing date of these matters to begin January 12, 2015, the Tribunal notes two factors, raised by the parties in their correspondence and not previously discussed; the possible length of time of the hearings, and the possibility that they might be heard consecutively, rather than concurrently;

[4] AND HAVING regard to the scheduling implications of these factors for the Tribunal and reserving for future submissions and consideration the length and place of hearings and whether the hearings will be concurrent or consecutive, the Tribunal has amended and fixed the start date accordingly;

THE TRIBUNALS ORDERS THAT:

[5] The schedule for the pre-hearing steps shall be as follows:

Friday, March 28, 2014	Service of Affidavits of Documents and delivery of documents by all Parties
Wednesday, April 30, 2014	Deadline for the filing of any motions arising from Affidavits of Documents and/or productions and/or in respect of the scope of examinations for discovery
Date to be set as needed, during week of May 26, 2014	Hearing of any motions arising from Affidavits of Documents and/or productions and/or in respect of the scope of examinations for discovery

Friday, June 6, 2014	Deadline for delivery of any additional productions resulting from any Affidavits of Documents/production motions
Monday, June 16, 2014 – Friday, July 25, 2014	Examinations for discovery according to a schedule to be settled between counsel.
Friday, September 12, 2014	Deadline for fulfilling answers to discovery undertakings
Friday, September 19, 2014	Deadline for filing motions arising from answers to undertakings and refusals
Week of September 29, 2014	Hearing of motions arising from answers to undertakings and refusals
Friday, October 17, 2014	Last day for follow-up examinations for discovery
Friday, October 31, 2014	Applicant and Intervenor to serve documents relied upon, witness statements, and serve and file expert reports
Friday, November 14, 2014	Applicant to serve list of documents proposed to be admitted without further proof
Tuesday, December 2, 2014	Respondent to serve documents relied upon, witness statements, and serve and file expert reports

Friday, December 19, 2014	Deadline for delivering any Requests for Admissions
Friday, December 19, 2014	Applicant and Intervenor to serve list of reply documents, witness statements, and serve and file reply expert reports
Tuesday, December 30, 2014	Deadline for the hearing of any motions for Summary Disposition and/or any motions related to the evidence
Tuesday, December 30, 2014	Deadline to provide documents to the Tribunal for use at the hearing (e.g., Briefs of Authorities, witness statements, and Agreed Books of Documents)

[6] The hearing of the applications will commence at 10:00 am on Monday, January 12, 2015.

[7] This Order governing pre-hearing scheduling shall apply in respect of the application filed by the Commissioner against Direct Energy Marketing Limited (CT-2012-003).

DATED at Ottawa, this 9th day of December, 2013.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

COUNSEL:

For the applicant:

The Commissioner of Competition

Jonathan Hood

Parul Shah

For the respondents:

Reliance Comfort Limited Partnership

Robert S. Russell

Brendan Wong

Direct Energy Marketing Limited

Donald Houston

For the intervener:

National Energy Corporation

Adam Fanaki

Derek D. Ricci

**THIS IS EXHIBIT "G" REFERRED TO
IN THE AFFIDAVIT OF STEPHANIE PAIGE
SWORN THE 30th DAY OF MAY, 2014.**



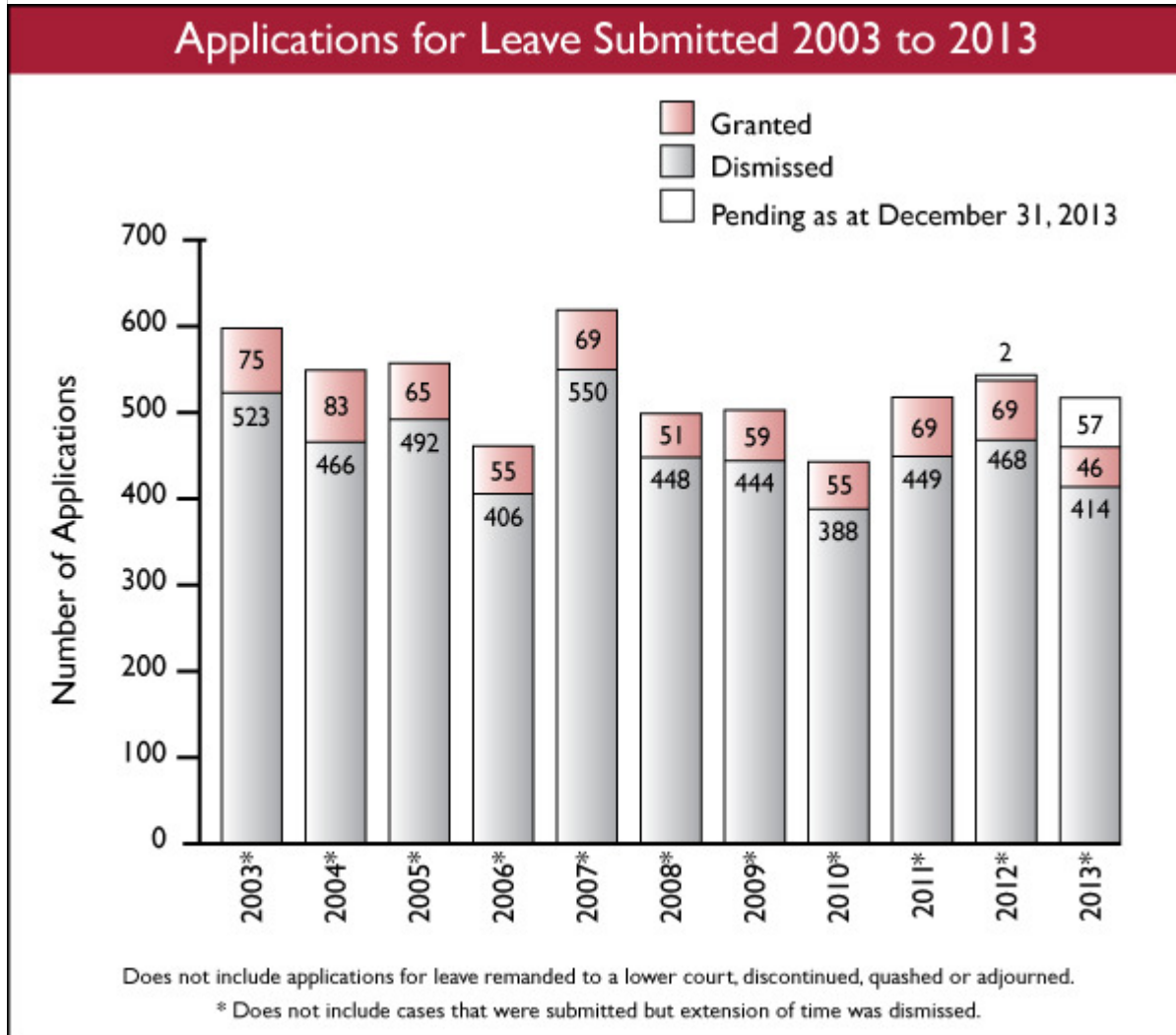
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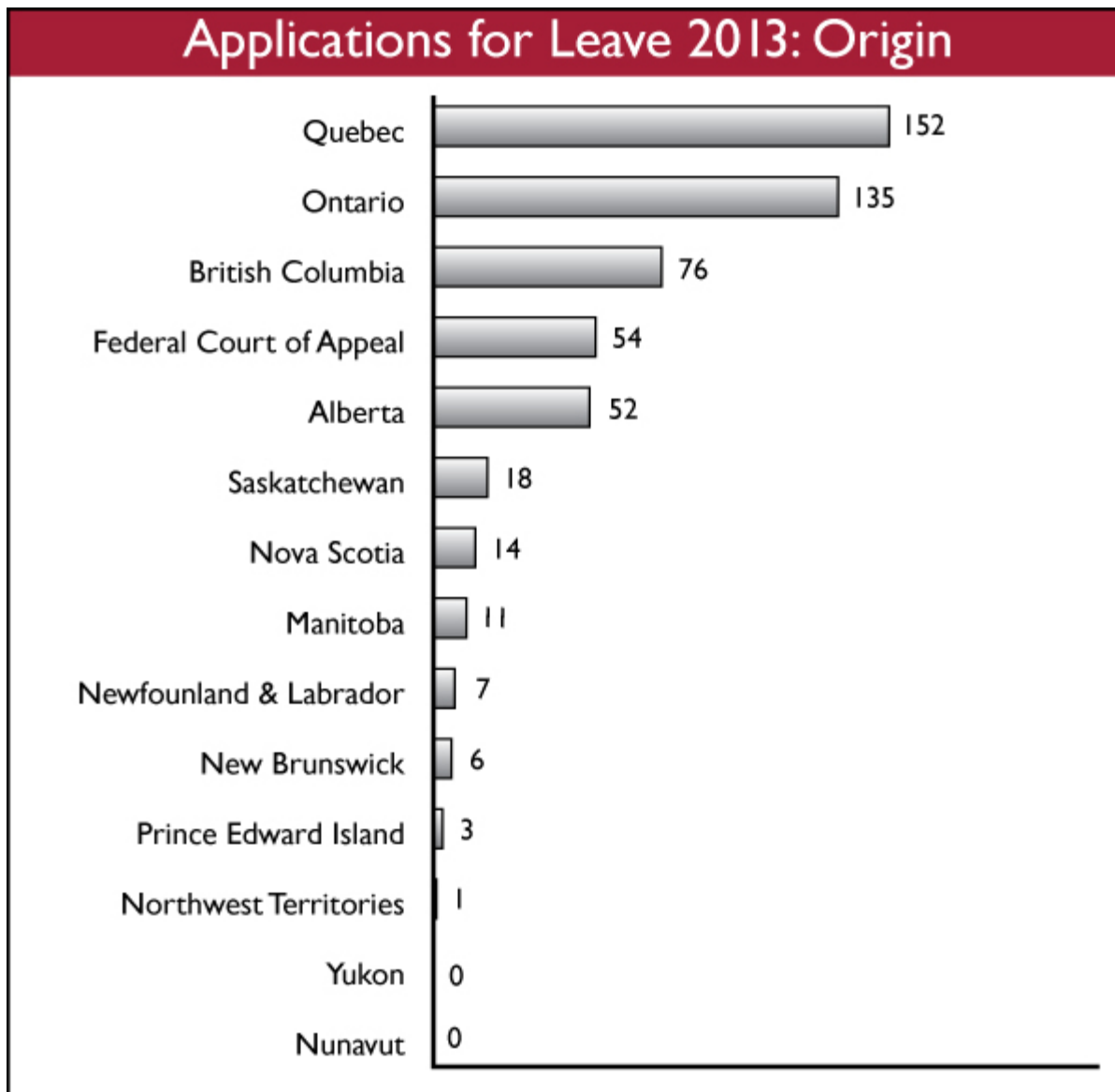
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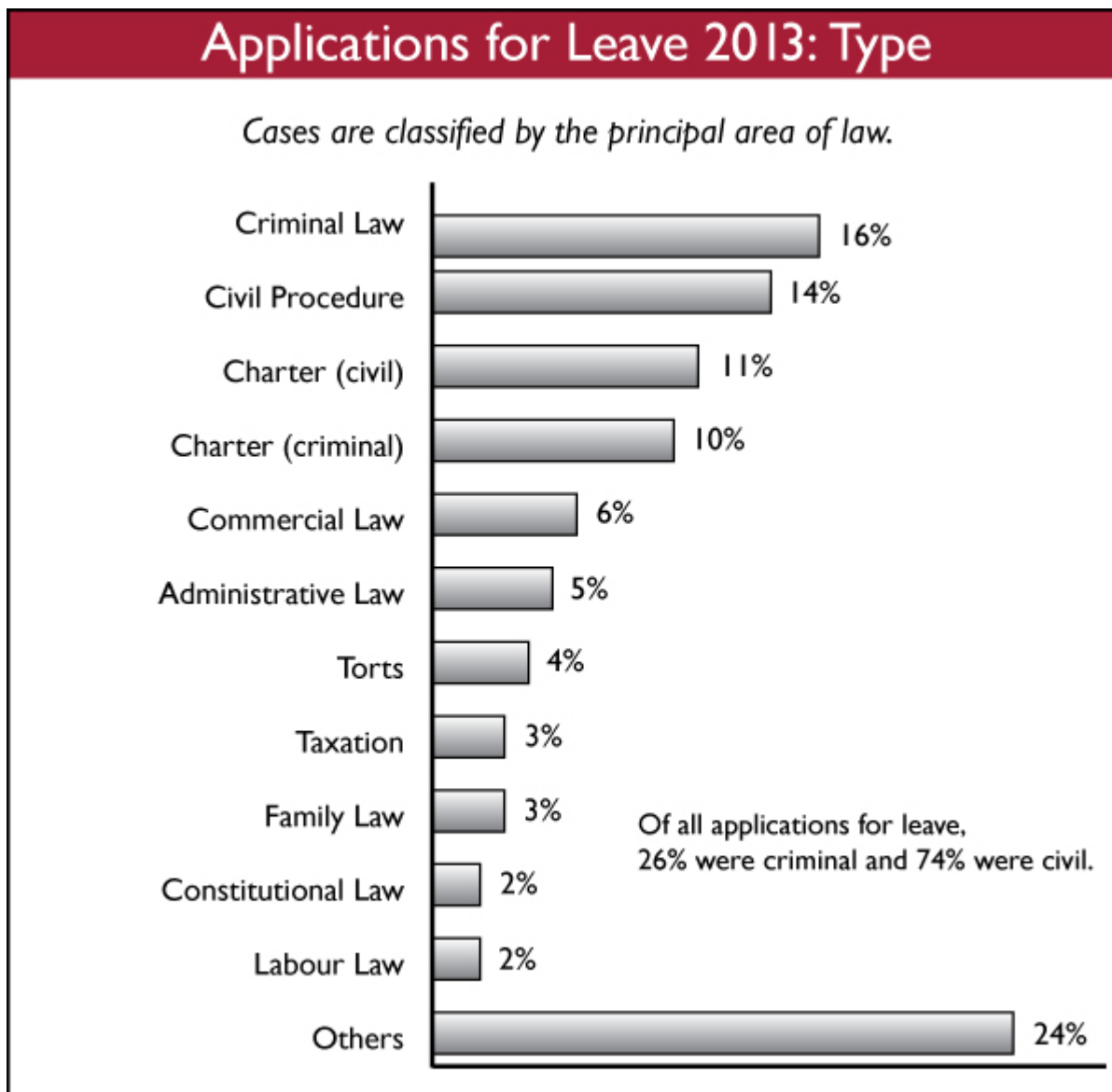
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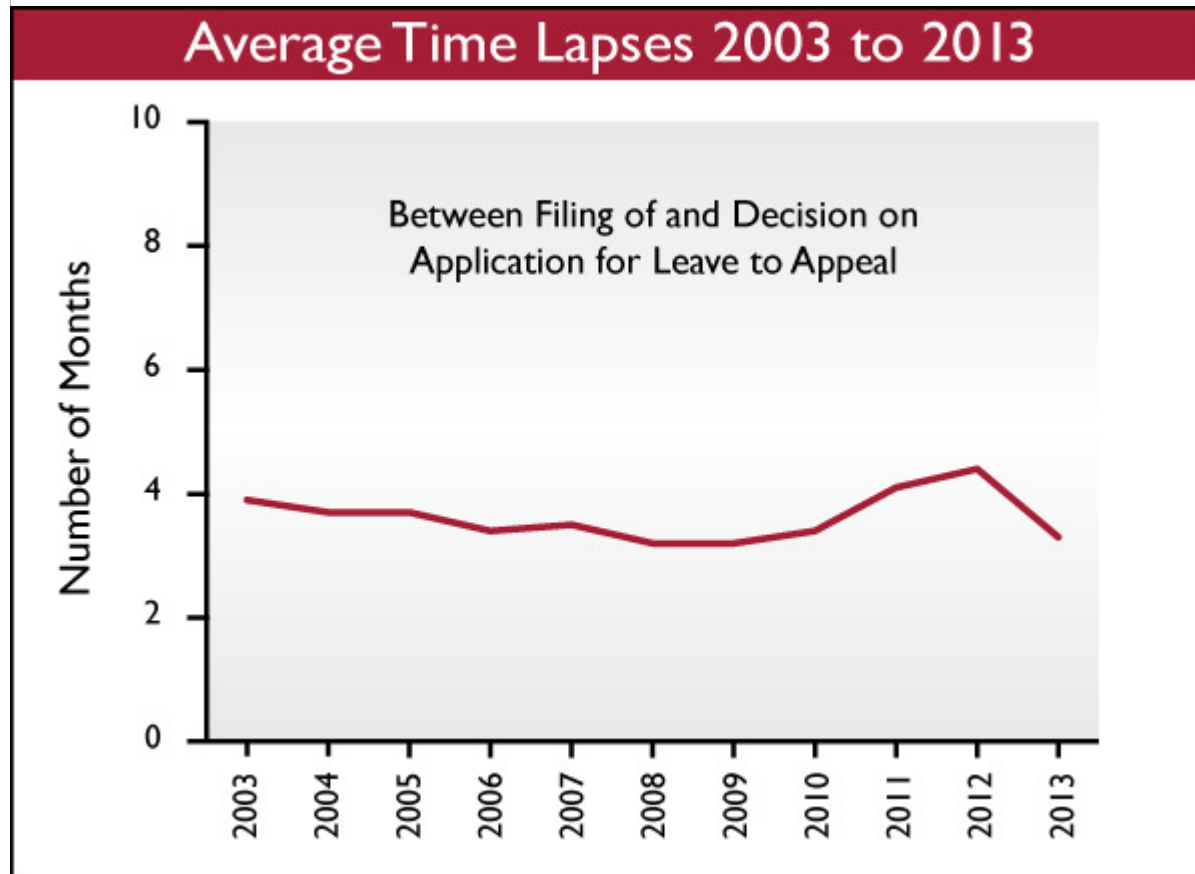
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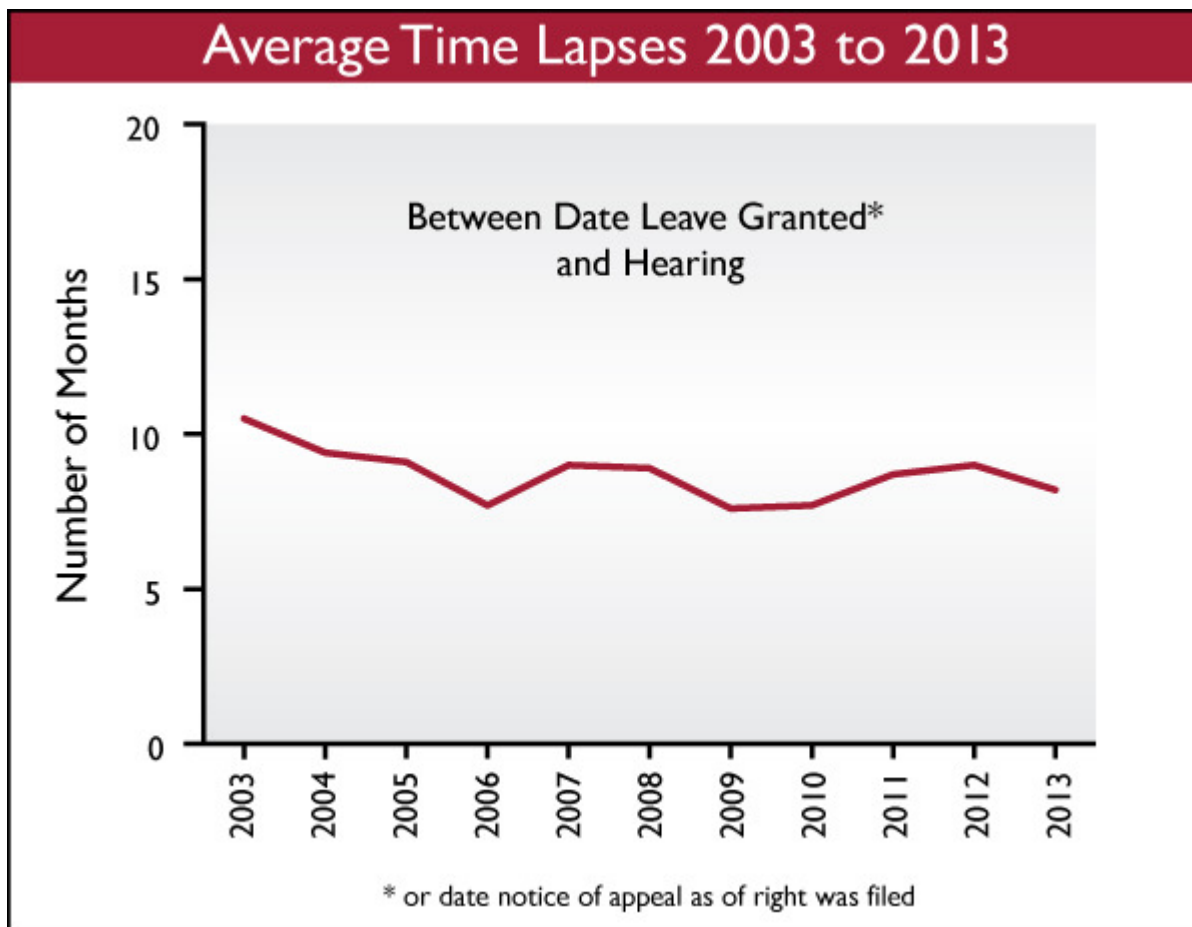
Supreme Court of Canada

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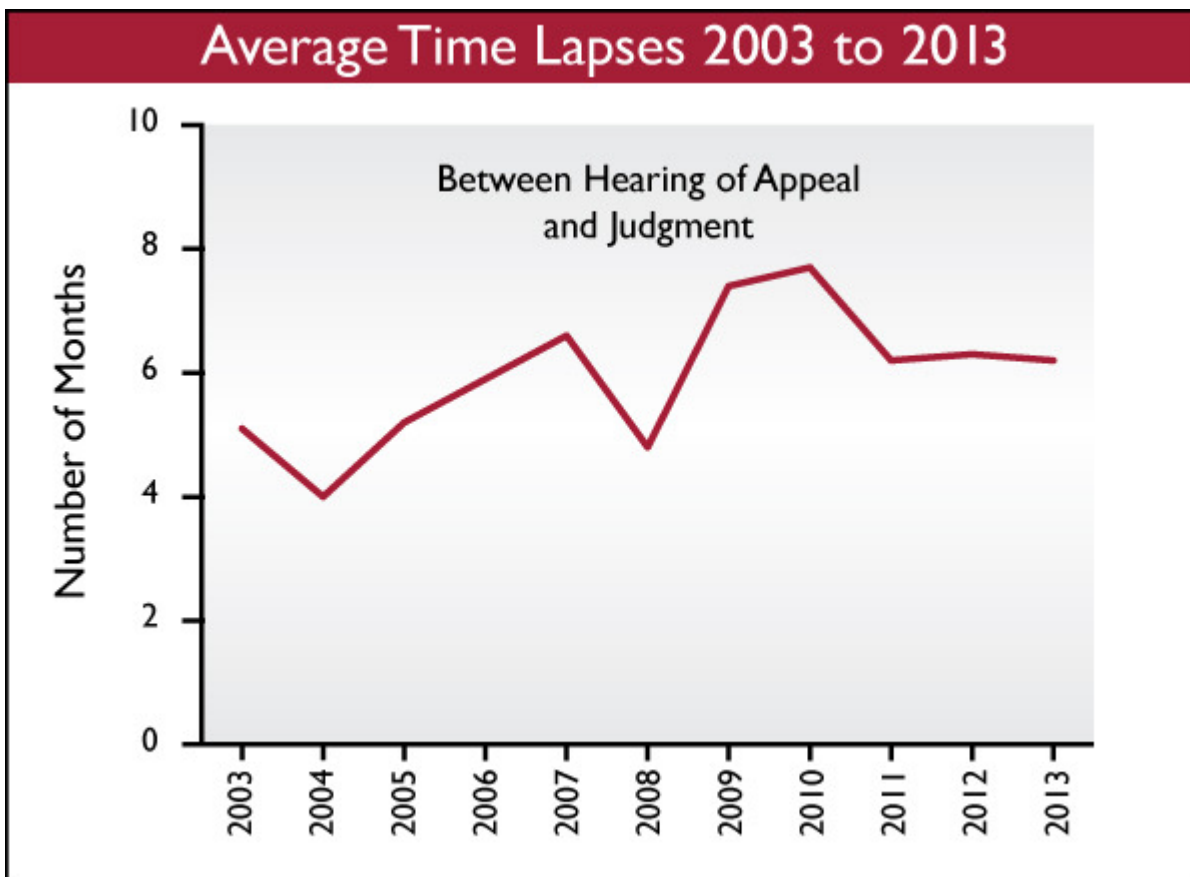
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Date modified: 2014-02-28

THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

AFFIDAVIT OF STEPHANIE PAIGE

SWORN MAY 30, 2014

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Counsel to the Commissioner of Competition

THE COMPETITION TRIBUNAL**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

**RESPONDING MOTION RECORD OF THE
COMMISSIONER OF COMPETITION
TO TREB'S MOTION TO STAY OR ADJOURN****BENNETT JONES LLP**

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