

THE COMPETITION TRIBUNAL

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

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

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

AND IN THE MATTER OF a motion seeking directions regarding a consent agreement.

BETWEEN :

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT April 4, 2014 CT-2010-002 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 78

THE COMMISSIONER OF COMPETITION

Applicant/Responding Party

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Respondent/Moving Party

NOTICE OF MOTION

**Re: Respondent's Motion for Directions
Concerning Section 3 of the Consent Agreement**

TAKE NOTICE THAT the Respondent, The Canadian Real Estate Association ("CREA"), will make a motion to the Competition Tribunal (the "Tribunal") on a date and time to be fixed by the Tribunal for the motion to be heard in Ottawa, Canada, orally and not in writing.

THE MOTION IS FOR:

1. The issuance by this Tribunal of a direction regarding the correct interpretation of section 3 of the Consent Agreement and resolving the dispute regarding the interpretation of such section (as described herein) (the "**Dispute**") that has arisen between CREA and the Commissioner of Competition (the "**Commissioner**") subsequent to entering into the Consent Agreement. The introductory language of sections 3 as well as section 3(c) and 3(e)(iii) of the Consent Agreement read in relevant part as follows:

III. Obligations of CREA

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

...

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

...

(e) prevents Members from:

...

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

2. An order, if necessary, scheduling a pre-hearing conference to set the date for the hearing of this motion, as well as a schedule for the delivery of both parties' motion materials.

3. An order, if necessary, extending the time limits prescribed by the *Competition Tribunal Rules* for the filing of supporting affidavits for this motion.
4. An order awarding costs of this motion in favour of the Respondent.
5. Such further and other orders as requested by the Respondent and deemed just by the Tribunal.

THE GROUNDS FOR THE MOTION ARE:

Background

(I) CREA, MLS® Systems and REALTOR.ca

1. CREA was incorporated under Part II of the *Canada Corporations Act* and is continued under the *Canada Not-for-profit Corporations Act*. It is one of Canada's largest single-industry trade associations. CREA represents over 100,000 real estate brokers and agents working through approximately 100 real estate boards and associations across Canada, including provincial and territorial associations.
2. Membership in CREA is open to real estate boards and associations, as well as their members in good standing, but is conditional on agreeing to be bound by, amongst other things, CREA's By-Laws, Rules and Policies, as well as the REALTOR® Code (CREA's Code of Ethics) (the "**CREA Terms of Membership**").
3. Benefits of membership in CREA include the benefits of CREA's trademarks.
4. Specifically, CREA owns (through a subsidiary and together with the national real estate industry association in the U.S.) the REALTOR® and REALTORS® trademarks and their associated logos (the "**REALTOR® Trademarks**"). CREA also owns the

Multiple Listing Service® trademark, the MLS® trademark, and their associated logos (the "**MLS® Trademarks**").

5. The board MLS® Systems are cooperative selling systems operated by the local boards and associations in association with CREA's MLS® Trademarks (under license from CREA). These systems provide an ongoing inventory of available properties listed for sale by REALTORS® and ensure a certain level of accuracy of information and professionalism among REALTORS®. This inventory is accessed by REALTORS® by virtue of their membership in the local boards and associations. The public has no access to the MLS® Systems and only members can post listings. The hallmark of the board MLS® Systems is that they are cooperative "member-to-member" systems which enable REALTORS® to deal with other REALTORS® to effect the purchase and sale of real estate.

6. Brokers and agents must be licensed to practice real estate under applicable provincial legislation. Only those licensed brokers and agents who agree to be bound by the CREA Terms of Membership are entitled to the benefits of CREA membership – including the ability to call themselves a REALTOR®.

7. While only REALTORS® can enter information concerning properties for sale on a board's MLS® System and access the information entered by other REALTORS® on a board's MLS® System, a subset of the listing information for each property listing posted to a board's MLS® System is uploaded by local boards to CREA's public website, REALTOR.ca (formerly MLS.ca). REALTORS® may opt out of having a listing posted on REALTOR.ca.

8. REALTOR.ca is operated and financed by CREA and its members for the purpose of advertising the real estate listings of its members. REALTOR.ca acts as a means to augment the member-to-member board MLS® Systems by disseminating information to the public about properties listed by REALTORS® across Canada.

9. The REALTOR® mark, when used in the "REALTOR.ca" website domain name, certifies that the listings on the REALTOR.ca website are posted by REALTOR® members of CREA for the purpose of marketing and selling their listings. The mark also certifies that the REALTOR® is responsible for, and stands behind the accuracy of, the listing information.

10. The REALTOR.ca website contains individual "feature sheets" for each listed property. Each individual feature sheet on the REALTOR.ca website contains designated information fields populated with a subset of the listing information for each property listing posted to a board's MLS® System and uploaded to the REALTOR.ca website. Each REALTOR.ca feature sheet also contains a "REALTOR® Website" link by which a REALTOR®/brokerage website may be linked from the REALTOR.ca feature sheet. In addition, each REALTOR.ca feature sheet also contains a number of specific fields which allow for direct multimedia links from a listing on REALTOR.ca to property-specific information (namely, an alternate feature sheet for the listed property, a virtual tour, sound bites, a sales brochure, additional photos, and a map service to locate the listed property).

(ii) The Consent Agreement

11. In February, 2010 the Commissioner filed an Application (the "**Application**") with the Tribunal challenging certain of CREA's rules that the Commissioner alleged limited consumer choice and innovation in the market for residential real estate brokerage services to home sellers in Canada.

12. The Commissioner's Application was resolved by Consent Agreement dated September 30, 2010 which was filed with the Tribunal pursuant to section 105 of the *Competition Act* on October 25, 2010.

13. The Consent Agreement includes an express recital confirming that it was understood and agreed that CREA did not accept or admit the Commissioner's allegations made in the Application.

14. Section 14 of the Consent Agreement provides that it shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein.

15. The Consent Agreement contains an entire agreement clause at section 18 which provides: "(t)his Agreement constitutes the entire agreement between the parties and supercedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof."

16. Section 20 of the Consent Agreement provides that either the Commissioner or CREA shall be at liberty to apply to the Tribunal for an order interpreting any of the provisions of the Agreement in the event of a dispute as to interpretation or application.

(iii) CREA Policy on Multimedia Links

17. CREA's MLS® and Technology Council and its successor, the Technology Committee (collectively the "MTC"), have been at the forefront of CREA's initiatives in relation to the Internet and is responsible for preparing and recommending strategies and policies for, amongst other things, the creation of national data standards for the operation of MLS® Systems and REALTOR.ca, and responding to rapidly and constantly changing technological trends.

18. On January 19, 2011 (and subsequently also on April 1, 2011) CREA's Board of Directors approved various changes to CREA's MTC Policy on Multimedia Links (the "**MTC Policy**"). The MTC Policy was disseminated to CREA's member boards and associations in a Legal Practices Memorandum dated April 27, 2011 (the "**April 27, 2011 Legal Practices Memorandum**").

19. The MTC Policy addresses, amongst other things, the circumstances in which a seller's contact information may appear in a property listing on a board MLS® System and whether and where seller contact information may appear on websites and direct multimedia links linked from REALTOR.ca. The MTC Policy also specifically addresses what services and information may be linked on direct multimedia links from REALTOR.ca. In summary, the MTC Policy provides:

- (i) seller contact information must not appear directly on REALTOR.ca;
- (ii) any webpages directly linked from REALTOR.ca through either multimedia links or REALTOR® Website links shall not contain seller contact information. Seller contact information may be displayed

anywhere else on a REALTOR® website that is not directly linked from REALTOR.ca;

- (iii) the advertising of private sales on multimedia links from REALTOR.ca is prohibited; and
- (iv) webpages that are linked directly from the REALTOR.ca multimedia links must be used for their intended purpose and be limited to property-specific information, and must not automatically redirect users to a third party website or contain any advertisement of private sales.

20. Amongst other things, the MTC Policy is intended to respect the member-to-member nature of the board MLS® Systems and, by extension, REALTOR.ca which sources its data and publicly advertises properties listed on these MLS® systems. In addition, local board MLS® Systems and REALTOR.ca are funded and operated on behalf of members, and it is important that they not be used to promote private sales since doing so would be antithetical to their cooperative nature. Furthermore, the MTC Policy is intended to address the potential risk to CREA's trademarks inherent in any direct association with private sales. As well, the MTC Policy ensures that REALTOR.ca displays information that consumers expect to see based on the link they wish to use and that such links are only used for the purpose for which they are intended, *i.e.* to provide specific identified services and property specific information.

The Dispute Concerning Section 3 of the Consent Agreement

21. Since June 20, 2011 the Commissioner has sporadically expressed the view to CREA in correspondence exchanged in 2011, 2013 and 2014 as well as in meetings

with CREA, that the MTC Policy "*appears to inhibit or restrict*" the ability of CREA's members to provide "Mere Postings" through the MLS® Systems, and that this allegedly contravenes section 3 of the Consent Agreement.

22. A "Mere Posting" as understood by CREA and the Commissioner and as defined in the Consent Agreement is a property "listing on a Member Board's MLS® System in respect of which the Member [a licensed real estate practitioner who is a member of a Member Board and CREA] has chosen or agreed not to provide services to the Seller (of the residential real estate) other than submitting the listing for posting on a Member Board's® MLS System".

23. Since the issue was first raised by the Commissioner in June, 2011, CREA has consistently maintained that the Commissioner's position is without basis, that the Commissioner is not properly interpreting the Consent Agreement and that the Commissioner's position ignores specific provisions of the Consent Agreement.

24. The crux of the Dispute and the parties' differences in interpreting section 3 of the Consent Agreement as currently articulated by the Commissioner is two-fold:

- (i) the Commissioner asserts that the MTC Policy prohibition against the display of a seller's contact information on any webpage linked from REALTOR.ca (including on the landing page of a REALTOR'S own

website linked from REALTOR.ca)¹ is contrary to section 3(e)(iii) of the Consent Agreement and is also "discriminatory in nature", contrary to paragraph 3 of the Consent Agreement; and

- (ii) the Commissioner also asserts that the MTC Policy prohibition against the advertising of private sales on any webpages linked directly from REALTOR.ca through its multimedia links² is "discriminatory" contrary to section 3 of the Consent Agreement.

25. The Commissioner's assertions are unsupported by and contrary to the specific terms of the Consent Agreement and section 3, in particular.

26. None of the provisions of the MTC Policy to which the Commissioner objects "prevents Members from displaying the seller's contact information on a website other than an Approved Website [REALTOR.ca]", contrary to section 3(e)(iii) of the Consent Order.

27. Contrary to the Commissioner's position, the correct interpretation of the Consent Agreement is that it does not preclude CREA from prohibiting the display of seller contact information on particular webpages as opposed to websites. "Webpage" has a distinctly different meaning than "website" and the Commissioner's position entirely

¹ The Commissioner specifically references the following provisions of the MTC Policy: (i) para. 2 under "Seller Contact Information"; (ii) para. 5 under "Alternate Feature Sheet" and (iii) the final paragraph of the introduction to the section "Use of Links from REALTOR.ca".

² The Commissioner references the following provisions of the Revised MTC Policy under "Use of links from REALTOR.ca": (i) the introductory paragraph; (ii) para. 6 and (iii) para. 7.

ignores this difference. The MTC Policy simply prescribes that the seller's contact information may not be displayed on the "landing page" or first page (a webpage) of a REALTOR® website linked from REALTOR.ca.

28. Furthermore, none of the provisions of the MTC Policy to which the Commissioner objects:

- (i) deny the ability of Members to provide Mere Postings for sellers; or
- (ii) discriminate against Members because they offer or wish to offer to provide Mere Postings to sellers,

contrary to section 3 of the Consent Agreement.

29. The Consent Agreement must be interpreted in a way that does not undermine the member-to-member nature of the MLS® Systems underlying REALTOR.ca and in such a way that member-funded vehicles (MLS® Systems and REALTOR.ca) need not promote private sales that are antithetical to the cooperative member-to-member systems. Indeed the specific terms of the Consent Agreement reflect this principle.

30. Section 8 of the *Competition Tribunal Act*, R.S.C. 1985, c.19, sections 5 and 82-88 of the *Competition Tribunal Rules* (SOR/2008-141), and section 20 of the Consent Agreement.

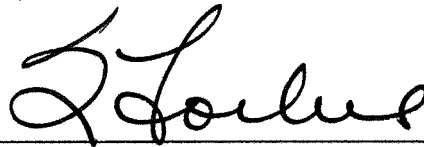
31. Section 105 of the *Competition Act*.

32. Such further and other grounds as counsel may advise and this Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

33. Affidavit evidence on behalf of CREA, to be sworn; and
34. such further and other evidence as counsel may advise and this Honourable Tribunal may permit.

DATED AT TORONTO, this 4th day of April, 2014



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