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Date: February 27, 2012

CT- 2011-003

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

CT-2011-003

OTTAWA, ONT.

123

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

NOTICE OF MOTION

TAKE NOTICE THAT the applicant, The Commissioner of Competition ("Commissioner"), will make a motion to the Competition Tribunal on Wednesday, March 7, 2012, at a time to be determined by the Competition Tribunal at 180 Queen Street West, Toronto, Ontario.

THE MOTION IS FOR THE FOLLOWING RELIEF:

- (a) an Order requiring the respondent, The Toronto Real Estate Board ("TREB") to produce to the Commissioner in readable electronic format a copy of:
 - (i) the data in TREB's multiple listing service ("MLS") system entered for all residential properties (which shall include at minimum the fields listed in Schedule "A") for the period from January 1, 2003 (or alternatively January 1, 2005 but only on the condition that TREB's expert(s) will likewise not have access to any MLS data before January 1, 2005) to February 1, 2012, together with any tool, legend or instructions that may be required to allow the Commissioner, her counsel, or her experts to use such data to prepare the Commissioner's case (the "MLS Data");
 - (ii) TREB's membership data (including members names, original licence or membership date, name of employing brokerage and its location) for the period January 1, 2003 to February 1, 2012 ("Membership Data");
- (b) an Order requiring TREB to produce the above data forthwith, and no later than 10 days after this Order is granted;
- (c) the Commissioner's costs of this motion on an appropriate scale; and
- (d) such further or other relief as counsel may request and this Honourable Court may find just.

THE GROUNDS FOR THE MOTION ARE:

1. The Commissioner requested the MLS Data and Membership Data from TREB by letter dated December 23, 2011;
2. TREB has not disclosed the MLS Data and Membership Data in its Affidavit of Documents and has not produced it in electronic format, or any meaningful portion thereof, to the Commissioner, contrary to its obligations under Rule 60 of the *Competition Tribunal Rules*;
3. TREB has admitted the existence of the MLS Data in its correspondence with the Commissioner's counsel and its ownership/control over the MLS Data in its Response to the Commissioner's application;
4. TREB has produced only hard copy versions of the Membership Data in response to the Commissioner's request for this information in electronic format. TREB has not asserted that the Membership Data does not exist in electronic format;
5. The MLS Data and Membership Data is relevant to the Commissioner's application, and the former is at the very heart of this proceeding;
6. The MLS Data is accessed electronically and used every day by thousands of real estate brokers in Toronto;
7. A copy of the MLS Data and Membership Data is necessary for the preparation of the Commissioner's case to be presented at the hearing of this matter, particularly by one or more expert witnesses;
8. Analysis of the MLS Data and Membership Data is expected to be of assistance to the Tribunal's determination of important issues in this proceeding, most notably:

- (a) the geographic market;
- (b) market shares of individual real estate brokerages and brokers;
- (c) the ability of real estate brokers who wish to use VOWs to compete effectively against incumbent real estate brokers; and
- (d) issues related to prices (commissions) as raised by TREB in its pleadings;

9. The Commissioner requires the membership data in electronic format to correlate with the MLS data that will be provided electronically.

10. The Commissioner is prepared to agree to terms in an Order, if necessary, to address confidentiality concerns raised by TREB in relation to the MLS Data and Membership Data;

11. While TREB claims that privacy laws apply to the requested data, paragraph 7(3)(c) of *Personal Information and Protection of Electronic Documents Act* (Canada) expressly permits information disclosures "to comply with rules of court relating to the production of records". Applicable provincial legislation similarly permits information disclosures to comply with production obligations in civil litigation;

12. In the circumstances, it is appropriate to require to TREB to produce the MLS Data and Membership Data immediately;

13. The *Competition Tribunal Rules*, Rules 60, 61 and 62 and if necessary, *Competition Tribunal Act*, sections 8 and 9;

14. Such further or other grounds as counsel may advise.

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

- (a) the affidavit of Nadia Brault, sworn on February 27, 2012; and
- (b) such further or other material as counsel may advise and this Honourable Tribunal may allow.

DATE: February 27, 2012



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AND TO: **The Registrar**
 Competition Tribunal
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SCHEDULE A – MLS FIELDS

- | | |
|--|-------------------------------------|
| 1. MLS Number | 42. Province |
| 2. Sold/Leased Price | 43. List Price |
| 3. Last Status | 44. Taxes |
| 4. % Sold (or Leased) Price to List Price | 45. Tax Year |
| 5. Days on Market | 46. Assessment |
| 6. Bathroom Total | 47. Assessment Year |
| 7. Sold/Leased Date | 48. Contract Date |
| 8. Closing Date | 49. Expiry Date |
| 9. Date Last Updated | 50. Possession Date |
| 10. Original Price | 51. Holdover Days |
| 11. Co-operating Brokerage | 52. Type |
| 12. Co-operating Salesperson 1 | 53. Style |
| 13. Co-operating Salesperson 2 | 54. Exterior |
| 14. Escape Clause Flag (Y/N) | 55. Additional Monthly Fees |
| 15. Escape Clause (Hours) | 56. Garage Type |
| 16. Sold/Leased Conditional (Condition-
text box) | 57. Garage Spaces |
| 17. Sold/Leased Conditional Expiry Date | 58. Drive |
| 18. Leased Term (text box) | 59. Parking Spaces |
| 19. PIN# | 60. Pool |
| 20. Area | 61. Water |
| 21. Municipality | 62. Sewers |
| 22. Community | 63. Retirement |
| 23. Out of Area Municipality | 64. Physically Handicapped Equipped |
| 24. Street Number | 65. Special Designation |
| 25. Street Name | 66. Approximate Age |
| 26. Street Abbreviation | 67. Approximate Square Footage |
| 27. Street Direction (East, North, South,
West) | 68. Property Features |
| 28. Apt/Unit | 69. Other Structures |
| 29. Postal Code | 70. Water Supply Types |
| 30. Fronting On (NSEW) | 71. Farm/Agriculture |
| 31. Legal Description | 72. Waterfront |
| 32. Lot Front | 73. Utilities Cable |
| 33. Lot Depth | 74. Utilities Hydro |
| 34. Lot Size Code | 75. Utilities Sewers |
| 35. Lot Irregularities | 76. Utilities Gas |
| 36. Acreage | 77. Utilities Municipal Water |
| 37. Zoning | 78. Utilities Telephone |
| 38. Directions/Cross Streets | 79. Rooms |
| 39. Map Page | 80. Rooms + (below grade) |
| 40. Map Column | 81. Bedrooms |
| 41. Map Row | 82. Bedrooms + (below grade) |
| | 83. Kitchens |
| | 84. Kitchens + (below grade) |

85. # Washrooms 1
86. # Pieces Washroom 1
87. Level Washroom 1
88. # Washrooms 2
89. # Pieces Washroom 2
90. Level Washroom 2
91. # Washrooms 3
92. # Pieces Washroom 3
93. Level Washroom 3
94. # Washrooms 4
95. # Pieces Washroom 4
96. Level Washroom 4
97. # Washrooms 5
98. # Pieces Washroom 5
99. Level Washroom 5
100. Family Room
101. Basement
102. Fireplace/Stove
103. Heat Source
104. Heat Type
105. Air Conditioning
106. UFFI
107. Central Vac

108. Laundry Level
109. Elevator/Lift
110. Remarks for Clients
111. Extras
112. Listing Brokerage Name
113. List Brokerage Phone #
114. List Brokerage Fax #
115. Salesperson 1
116. Salesperson 1 Phone
117. Salesperson 2
118. Salesperson 2 Phone
119. Commission Co-Op Brokerage
120. Seller Property Information
Statement
121. Energy Certification
122. Certification Level
123. Green Property Information
Statement
124. Permission To Advertise
125. Distribute To Internet Portals
126. Display Address on Internet
127. Contact After Expired

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