

FILED / PRODUIT

Date: February 27, 2012

CT- 2011-003

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

CT-2011-003

OTTAWA, ONT.

124

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

AFFIDAVIT OF NADIA BRAULT
(Sworn February 27, 2012)

I, NADIA BRAULT, of the City of Ottawa, in the province of Ontario, swear that:

1. I am a Senior Competition Law Officer in the Civil Matters Branch of the Competition Bureau ("Bureau"). I am an authorized representative of the Commissioner of Competition ("Commissioner") for the purpose of this motion and have personal knowledge of the matters to which I hereinafter depose. Where the information I have set out is based on knowledge I have acquired from others, I believe that information to be true.

The Commissioner's Request for MLS Data and Correspondence Regarding the MLS Data

2. By letter dated December 23, 2011, counsel for the Commissioner formally requested that TREB disclose and produce, in its Affidavit of Documents in this matter, certain information in TREB's MLS system and information related to TREB's membership. Attached as Exhibit "A" is a copy of the aforementioned letter.

3. The Commissioner and TREB's counsel have exchanged numerous subsequent letters regarding the Commissioner's request for the MLS and membership data. TREB's counsel has asserted certain concerns about the volume of information that the Commissioner has requested. In response, the Commissioner has narrowed the requested information, both in terms of the fields in the MLS system and the years for which fields are sought. The Commissioner has also offered to enter into an order containing terms that will permit TREB to designate certain information as confidential, without taking a position on TREB's alleged privacy issues in relation to the requested MLS data. Attached to this Affidavit are copies of the following relevant correspondence:

- (a) attached as Exhibit "B" is a letter from Commissioner's counsel to the Tribunal dated January 27, 2012;
- (b) attached as Exhibit "C" is a letter from TREB's counsel to the Tribunal dated January 30, 2012;
- (c) attached as Exhibit "D" is an email from TREB's counsel to the Commissioner's counsel enclosing a partial list of the fields in the MLS system;

- (d) attached as Exhibit "E" is a letter from the Commissioner's counsel to TREB's counsel dated February 3, 2012;
- (e) attached as Exhibit "F" is a letter from TREB's counsel to the Commissioner's counsel dated February 6, 2012;
- (f) attached as Exhibit "G" is a letter from the Commissioner's counsel dated February 10, 2012;
- (g) attached as Exhibit "H" is a letter from TREB's counsel dated February 15, 2012;
and
- (h) attached as Exhibit "I" is a letter from the Commissioner's counsel dated February 22, 2012.

4. As set out in the correspondence between the Commissioner's and TREB's respective counsel, the requested MLS data includes information that is entered into the TREB MLS system when a house is listed for sale. Such information includes the house's listing price, its dimensions, and other relevant characteristics. This information appears in fields in the TREB MLS system called List Price, Rooms, Bedrooms, Zoning, etc.

5. The MLS data also includes information that is posted to the MLS system after the house is first listed for sale, including the house's sold price, the number of days the house was on the market before being sold, and the identities of the brokers/agents acting on the transaction. This post-listing information appears in fields in the TREB MLS system called Sold/Leased Price, Days on Market, Co-operating Brokerage, etc.

TREB's Affidavit of Documents

6. The requested MLS and membership data was not included in TREB's Affidavit of Documents received on February 8, 2012.

7. As of the date of this Affidavit, TREB has not produced the requested MLS data or any meaningful portion of it despite the multiple requests from the Commissioner.

8. With regard to the membership data, as of the date of this affidavit and despite the Commissioner's request for this information in electronic format, TREB has only produced hard copy versions of the requested membership data. I am advised by Emrys Davis, a lawyer at Bennett Jones LLP involved in this matter, and I believe that the photographs attached as Exhibit "J" accurately depict the four volumes of hard copy versions in question.

The Commissioner Requires the Requested TREB MLS and Membership Data

9. As is apparent from reading the Notice of Application and Statement of Grounds and Material Facts in this matter (the "Application and SGMF"), the requested TREB MLS data is at the heart of this proceeding. This proceeding concerns, in part, TREB's rules and policies on virtual office websites ("VOWs") (as TREB defines them) and how certain restrictions in those rules and policies adversely affect TREB's members' ability to innovate and compete by using all or part of the MLS data on a VOW. A copy of the Commissioner's Application and SGMF is attached as Exhibit "K" for ease of reference, as are TREB's Response (Exhibit "L") and the Commissioner's Reply (Exhibit "M").

10. From my involvement in the Commissioner's inquiry into this matter, I believe that real estate brokers in Toronto access and use TREB's MLS system daily to provide MLS information

to their customers and clients. Such information includes many details about individual residential properties in Toronto, including sale prices of residential properties.

11. I also believe that a significant part of the MLS data is (in the case of current listings) or has been (in the case of past listings) made accessible to the general public on the website www.realtor.ca or its predecessor website, www.mls.ca.

12. The requested MLS data, including the specific fields, and membership data requested by the Commissioner are needed principally so that one or more expert witnesses may use it to prepare analysis that may lead to one or more report(s) and oral evidence for the hearing of this matter. All of the requested fields are important for the expert in doing his work on this matter. I expect that the requested MLS and membership data will provide the basis for evidence that will be of assistance to the Tribunal's understanding and determination of numerous issues in this proceeding. Some primary examples of the issues arising from the Commissioner's Application and SGMF that such expert evidence may address are:

- (a) the determination of 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 using the traditional model of providing real estate brokerage services; and
- (d) as is apparent from correspondence from TREB's counsel (see Exhibit "F"), the requested MLS data contains some information about real estate commissions offered and the price of the residential properties on which such commissions

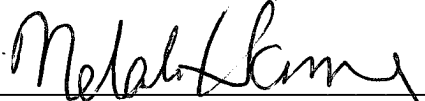
would be based. An analysis of this information may allow the Commissioner to adduce evidence to respond to TREB's allegations about price competition in its Response at paragraph 55 ("... clear evidence of price competition ...") and in its Concise Statement of Economic Theory, paragraph 8 ("... the current structure of prices (commissions) facilitates transactions in the real estate market").

13. The Commissioner's request for MLS data dated December 23, 2011 referred to all MLS and membership data from January 1, 2000 to the present day. In response to TREB's concerns about producing the MLS data from January 1, 2000 and to comments from the Tribunal, the Commissioner agreed to narrow the timeframe of her request first to after January 1, 2003, and then to January 1, 2005, on the condition that the information provided to TREB's expert(s) and the Commissioner's expert(s) is symmetrical (that is, that TREB's expert(s) not have access to more data than the Commissioner's, see Exhibit "I").

14. I believe it is important to obtain the MLS and membership data for the sought after period in order for an expert to meaningfully identify trends in the Toronto real estate market. The Tribunal may find such analysis helpful to its understanding of the geographic market, the development of market shares and the positions of incumbent real estate brokerages and brokers that have occurred in Toronto.

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

SWORN BEFORE ME at the City of)
Gatineau, in the Province of Quebec, this)
27th day of February, 2012.)

)
A commissioner for taking oaths)


NADIA BRAULT





Bennett Jones LLP
3400 One First Canadian Place, P.O. Box 130
Toronto, Ontario, Canada M5X 1A4
Tel: 416.863.1200 Fax: 416.863.1716

John F. Rook
Partner
Direct Line: 416.777.4885
e-mail: rookj@bennettjones.com
Our File No.: 51654-14

December 23, 2011

BY EMAIL TO dsaffleck@agmlawyers.com

Donald S. Affleck, Q.C.
Affleck Greene McMurtry LLP
365 Bay Street, Suite 200
Toronto, ON M5H 2V1

THIS IS EXHIBIT A TO THE
AFFIDAVIT OF Nadia Brault

SWORN BEFORE ME THIS 27 DAY
OF Feb 2012
Michael J. McNamee
COMMISSIONER FOR OATHS

Dear Mr. Affleck:

Re: Commissioner of Competition v. Toronto Real Estate Board

To follow up on the Case Management Conference earlier this week, we are writing to advise that the Commissioner requires that TREB provide, in its Affidavit of Documents, Schedule A, a copy of all of the data set in the TREB MLS system for all residential properties entered after January 1, 2000, up to the present.

In addition, the Commissioner also requires that TREB provide, if it is stored separately, membership data including members' names, original licence or membership date, name of employing brokerage and its location, all for the same time period, so that this information can be correlated to the data set mentioned above.

The data is required for the Commissioner and her expert advisors to analyze in preparation for both discovery and the ultimate hearing of this matter. The information is relevant to numerous issues mentioned in the pleadings, including the Concise Statements of Economic Theory (CSETs) of the parties. Those issues include, without limitation:

- the determination and definition of the geographic and product market (see for instance, TREB CSET, para 13 and following);
- the MLS platform, including the allegations concerning the use, role and importance of the MLS, availability of substitutes, network effects and allegations about a two-sided platform (see for example, Amended Notice of Application, para 44-48 and CSET, para 5-6; TREB Response, at para 12, 15 and CSET, para 2-3, 5, 6-12);
- TREB's allegations concerning a "pro-competitive" VOW Policy (as alleged in TREB's CSET, para 24; see also Commissioner's Reply, at para 39);

December 23, 2011
Page Two

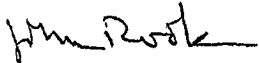
- TREB's allegation that there is "clear evidence of price competition amongst participants" in the market (see TREB Response, at para 55);
- privacy issues raised by TREB related to the content of the TREB MLS; and
- the market positions and share of large participants whose business models may be described as traditional.

This data may be provided by way of DVD or hard drive as may be appropriate for the volume of information. We request that the data be provided in Excel-compatible format, although we suggest an early conversation amongst technical personnel to ensure that the data are fully useable by the recipients.

If TREB has any concerns or objections to providing this data as required, kindly advise us immediately so that the Commissioner can commence the appropriate application to the Competition Tribunal at the earliest possible date.

Yours very truly,

BENNETT JONES LLP



John F. Rook

/jfp

c: Chris Hersh, *Cassels Brock & Blackwell LLP*
Sandra Forbes, *Davies Ward Phillips & Vineberg*
Andrew Little, *Bennett Jones LLP*

7397697v2



John F. Rook, Q.C.
Direct Line: 416.777.4885
e-mail: rookj@bennettjones.com
Our File No.: 51654.14

January 27, 2012

BY EMAIL to Chantal.Fortin@ct-tc.gc.ca

Hon. Madam Justice S. Simpson
Competition Tribunal
c/o Chantal Fortin, Registry Officer
Thomas D'Arcy McGee Building
Royal Bank Centre
600-90 Sparks Street
Ottawa, ON K1P 5B4

THIS IS EXHIBIT B TO THE
AFFIDAVIT OF Nadia Brault

SWORN BEFORE ME THIS 27 DAY
OF Feb 2012
N. McKeown
COMMISSIONER FOR OATHS

Dear Madam Justice Simpson:

Re: Commissioner of Competition v. The Toronto Real Estate Board ("TREB")
File No. CT-2011-003

We write to request a Case Conference as soon as practicable due to developments, including TREB's failure to serve an Affidavit of Documents and its refusal to produce electronic data from its MLS system to the Commissioner.

We are available at the Tribunal's convenience for this Case Conference.

TREB's Non-Compliance with Scheduling Order

Following extensive negotiations, a Case Conference on December 19, 2011, and the Tribunal Directions and correspondence since that Conference, the Tribunal issued the Scheduling Order on January 19, 2012. TREB has not complied with that Order by serving an Affidavit of Documents by last Friday, January 20, 2012.

As of today, we have only received an unsworn affidavit and production of approximately 560 documents, plus a new batch of documents received late yesterday.

Based on discussions with TREB's counsel, however, it is not clear to us when a sworn Affidavit of Documents will be provided or when production will be complete. We do understand that TREB expects to produce many more documents than previously expected and that 560 documents represents just a small proportion of the overall number that will likely be produced by TREB in this proceeding.

By contrast, the Commissioner has served a sworn Affidavit of Documents and provided her Schedule A documents to both CREA's and TREB's counsel. CREA has served a sworn Affidavit of Documents and produced more than 5,000 documents.

A Case Conference is the appropriate forum in which to address these concerns, including obtaining clear commitments from TREB and the Tribunal's directions concerning the timing and extent of TREB's document production.

TREB Is Not Producing Electronic Data Required by the Commissioner

On December 23, 2011, we wrote to TREB's counsel to advise that we required, as part of the TREB's Affidavit of Documents, certain data in TREB's multiple listing service (MLS) database. A copy of this letter is enclosed. It explains the nature of the data we require in detail and provides an explanation of how the data are relevant to matters in the pleadings.

We also requested that if TREB had any concerns or objections to providing this data as requested, to kindly advise us immediately so that the Commissioner could commence the appropriate application to the Tribunal at the earliest possible date.

We received no response from TREB's counsel to our letter. We accordingly were under the impression that TREB did not have any concerns or objections to producing the MLS data with its Affidavit of Documents on January 20, 2012. However, when we raised the issue orally with TREB's counsel on January 19, 2012, we were advised for the first time that TREB disagrees with any production of the requested electronic data (apart from examples of individual property listings).

TREB's refusal to provide the requested and plainly relevant MLS data is unjustifiable, given the issues in this proceeding (including real estate brokers' access to and use of that very MLS data). The data are needed in electronic form principally by the Commissioner's expert to prepare analysis that would ultimately be included in a report provided to the Tribunal at the hearing. We fully expect an expert tendered by TREB will provide a report containing analysis of the same MLS data requested by the Commissioner.

We would like to raise this issue expeditiously and efficiently at the proposed Case Conference, and will accordingly be asking for the Tribunal's directions for immediate production of the requested data. If necessary, the Commissioner will seek an Order compelling TREB to provide the requested data forthwith and as part of the productions in its Affidavit of Documents.

January 27, 2012
Page Three

Finally, we note that we may seek have to additional relief with respect to productions after we receive TREB's sworn Affidavit of Documents and have had an opportunity to review its Schedule A documents.

Thank you.

Yours very truly,

BENNETT JONES LLP



John F. Rook

/jpr

Encl.

c: Donald Affleck, *Affleck Greene McMurtry LLP*
Chris Hersh, *Cassels Brock & Blackwell LLP*
Sandra Forbes, *Davies Ward Phillips & Vineberg*
Andrew Little, *Bennett Jones LLP*



Bennett Jones LLP
3400 One First Canadian Place, PO Box 130
Toronto, Ontario, Canada M5X 1A4
Tel: 416.863.1200 Fax: 416.863.1716

John F. Rook
Partner
Direct Line: 416.777.4885
e-mail: rookj@bennettjones.com
Our File No.: 51654-14

December 23, 2011

BY EMAIL TO dsaffleck@agmlawyers.com

Donald S. Affleck, Q.C.
Affleck Greene McMurtry LLP
365 Bay Street, Suite 200
Toronto, ON M5H 2V1

Dear Mr. Affleck:

Re: Commissioner of Competition v. Toronto Real Estate Board

To follow up on the Case Management Conference earlier this week, we are writing to advise that the Commissioner requires that TREB provide, in its Affidavit of Documents, Schedule A, a copy of all of the data set in the TREB MLS system for all residential properties entered after January 1, 2000, up to the present.

In addition, the Commissioner also requires that TREB provide, if it is stored separately, membership data including members' names, original licence or membership date, name of employing brokerage and its location, all for the same time period, so that this information can be correlated to the data set mentioned above.

The data is required for the Commissioner and her expert advisors to analyze in preparation for both discovery and the ultimate hearing of this matter. The information is relevant to numerous issues mentioned in the pleadings, including the Concise Statements of Economic Theory (CSETs) of the parties. Those issues include, without limitation:

- the determination and definition of the geographic and product market (see for instance, TREB CSET, para 13 and following);
- the MLS platform, including the allegations concerning the use, role and importance of the MLS, availability of substitutes, network effects and allegations about a two-sided platform (see for example, Amended Notice of Application, para 44-48 and CSET, para 5-6; TREB Response, at para 12, 15 and CSET, para 2-3, 5, 6-12);
- TREB's allegations concerning a "pro-competitive" VOW Policy (as alleged in TREB's CSET, para 24; see also Commissioner's Reply, at para 39);

December 23, 2011

Page Two

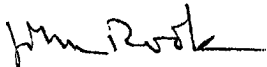
- TREB's allegation that there is "clear evidence of price competition amongst participants" in the market (see TREB Response, at para 55);
- privacy issues raised by TREB related to the content of the TREB MLS; and
- the market positions and share of large participants whose business models may be described as traditional.

This data may be provided by way of DVD or hard drive as may be appropriate for the volume of information. We request that the data be provided in Excel-compatible format, although we suggest an early conversation amongst technical personnel to ensure that the data are fully useable by the recipients.

If TREB has any concerns or objections to providing this data as required, kindly advise us immediately so that the Commissioner can commence the appropriate application to the Competition Tribunal at the earliest possible date.

Yours very truly,

BENNETT JONES LLP



John F. Rook

/jP

c: Chris Hersh, *Cassels Brock & Blackwell LLP*
Sandra Forbes, *Davies Ward Phillips & Vineberg*
Andrew Little, *Bennett Jones LLP*

7397697v2





Affleck Greene McMurtry LLP

Barristers and Solicitors

Donald S. Affleck, Q.C.
Email: dsaffleck@agmlawyers.com
Direct Line: (416) 360-1488

January 30, 2012

File: 2502-005

BY E-MAIL: filing.depot@ct-tc.gc.ca

THIS IS EXHIBIT C TO THE
AFFIDAVIT OF Nadia Brault

SWORN BEFORE ME THIS 27 DAY
OF Feb 2012
Meletsky
COMMISSIONER FOR OATHS

The Honourable Madam Justice Sandra J. Simpson
Chairperson
The Competition Tribunal
c/o Chantal Fortin, Registry Officer
Thomas D'Arcy McGee Building
Royal Bank Centre
600-90 Sparks Street
Ottawa ON K1P 5B4

Dear Justice Simpson:

Re: Commissioner of Competition v. The Toronto Real Estate Board ("TREB")
File No. CT-2011-003

This is but a brief response to Mr. Rook's letter of last Friday.

Affidavit of Documents of The Toronto Real Estate Board (TREB)

Mr. Rook is correct in stating that TREB has not yet delivered a sworn affidavit of documents. While we have now delivered some 1900 documents to Mr. Rook's office, we have been beset by both electronic and personnel difficulties. In the latter regard, our law clerk in this matter had a medical emergency and has not returned to the office. We have had to employ two new persons to replace her.

We fully expect to deliver a sworn affidavit of documents within the next week notwithstanding the setbacks we have encountered.

TREB MLS® Data

The Commissioner states she requires a copy of "...all of the data set in the TREB MLS system for all residential properties entered after January 1, 2000, up to the present". We are advised that this would represent in excess of 2,510,823 listings or some 375 Gigabytes of material (100 Gigabytes is said to be a library floor of shelved academic journals).

...2

Affleck Greene McMurtry LLP

Barristers and Solicitors

The Commissioner's 'requirement' lacks the degree of proportionality in discovery referenced in the Canadian Sedona principles and now incorporated in the *Rules of Civil Procedure* in Ontario (Rule 29.2) and other Provinces.

In addition, we believe serious legal issues are raised by the request under the federal *Personal Information Protection and Electronic Documents Act* and the new tort of intrusion upon seclusion as spelled out by the Ontario Court of Appeal in the recent decision of *Jones v. Tsige*, 2012 ONCA 32.

We would be pleased to elaborate on any of these issues on a case conference.

Yours very truly,

AFFLECK GREENE McMURTRY LLP



D. S. Affleck
DSA/lc

c: John F. Rook, *Bennett Jones LLP* (by email)
Andrew Little, *Bennett Jones LLP* (by email)
Sandra Forbes, *Davies Ward Phillips & Vineberg LLP* (by email)
Chris Hersh, *Cassels Brock & Blackwell LLP* (by email)
Renai Williams, *Affleck Greene McMurtry LLP* (by email)

Andrew Little

From: Don Affleck [DSAffleck@agmlawyers.com]
Sent: 01 February 2012 3:47 PM
To: John Rook; Andrew Little
Cc: sforbes@dwpv.com; Hersh, Chris; Renai Williams
Subject: The Toronto Real Estate Board ats Commissioner of Competition
Attachments: List of Fields.pdf

Counsel:

Attached is the list of fields for freehold property used in submitting listings to the TREB MLS® system. Additional condominium fields would include:

- Property Mgt. company
- Condo Registry Office
- Condo Corp #
- Locker #
- Parking spot #
- Garage Type
- Parking Type
- Parking legal description
- Exposure
- Balcony
- Retirement
- Sq. Footage source
- Building amenities
- Services included yes or no (i.e. heat, hydro etc.)
- Pets permitted

THIS IS EXHIBIT D TO THE
AFFIDAVIT OF Nadia Brait

SWORN BEFORE ME THIS 27 DAY
OF Feb 2012
Malik Ham
COMMISSIONER FOR OATHS

Don Affleck

Donald S. Affleck, Q.C.

Affleck Greene McMurtry LLP
365 Bay Street
Suite 200
Toronto ON M5H 2V1
Email: dsaffleck@agmlawyers.com
Tel: (416) 360-1488
Fax: (416) 360-5960

This email may be privileged and confidential. If you received this email in error, please do not use, copy or distribute it, but advise me (by return email or otherwise) immediately, and delete the email.

List of Fields

PIN#

Area

Municipality

Community

Out of Area Municipality

Street Number

Street Name

Street Abbreviation

Street Direction (East, North, South, West)

Apt/Unit

Postal Code

Fronting On (NSEW)

Legal Description

Lot Front

Lot Depth

Lot Size Code

Lot Irregularities

Acreage

Zoning

Directions/Cross Streets

Map Page

Map Column

Map Row

Province

List Price

Taxes

Tax Year

Assessment

Assessment Year

Contract Date

Expiry Date

Possession Date

Holdover Days

Seller/Landlord Name

Mortgage Comments

Type

Style

Exterior

Additional Monthly Fees

Garage Type

Garage Spaces

Drive

Parking Spaces

Pool

Water

Sewers

Retirement
Physically Handicapped Equipped
Special Designation
Approximate Age
Approximate Square Footage
Property Features
Other Structures
Water Supply Types
Farm/Agriculture
Waterfront
Utilities Cable
Utilities Hydro
Utilities Sewers
Utilities Gas
Utilities Municipal Water
Utilities Telephone
Rooms
Rooms + (below grade)
Bedrooms
Bedrooms + (below grade)
Kitchens
Kitchens + (below grade)
Washrooms 1
Pieces Washroom 1
Level Washroom 1
Washrooms 2
Pieces Washroom 2
Level Washroom 2
Washrooms 3
Pieces Washroom 3
Level Washroom 3
Washrooms 4
Pieces Washroom 4
Level Washroom 4
Washrooms 5
Pieces Washroom 5
Level Washroom 5
Family Room
Basement
Fireplace/Stove
Heat Source
Heat Type
Air Conditioning
UFFI
Central Vac
Laundry Level
Elevator/Lift

Room 1 Level
Room 1 Type (e.g. Kitchen, Den)
Room 1 Length
Room 1 Width
Room 1 Desc1
Room 1 Desc2
Room 1 Desc3
Room 2 Level
Room 2 Type
Room 2 Length
Room 2 Width
Room 2 Desc1
Room 2 Desc2
Room 2 Desc3
Room 3 Level
Room 3 Type
Room 3 Length
Room 3 Width
Room 3 Desc1
Room 3 Desc2
Room 3 Desc3
Room 4 Level
Room 4 Type
Room 4 Length
Room 4 Width
Room 4 Desc1
Room 4 Desc2
Room 4 Desc3
Room 5 Level
Room 5 Type
Room 5 Length
Room 5 Width
Room 5 Desc1
Room 5 Desc2
Room 5 Desc3
Room 6 Level
Room 6 Type
Room 6 Length
Room 6 Width
Room 6 Desc1
Room 6 Desc2
Room 6 Desc3
Room 7 Level
Room 7 Type
Room 7 Length
Room 7 Width
Room 7 Desc1

Room 7 Desc2
Room 7 Desc3
Room 8 Level
Room 8 Type
Room 8 Length
Room 8 Width
Room 8 Desc1
Room 8 Desc2
Room 8 Desc3
Room 9 Level
Room 9 Type
Room 9 Length
Room 9 Width
Room 9 Desc1
Room 9 Desc2
Room 9 Desc3
Room 10 Level
Room 10 Type
Room 10 Length
Room 10 Width
Room 10 Desc1
Room 10 Desc2
Room 10 Desc3
Room 11 Level
Room 11 Type
Room 11 Length
Room 11 Width
Room 11 Desc1
Room 11 Desc2
Room 11 Desc3
Room 12 Level
Room 12 Type
Room 12 Length
Room 12 Width
Room 12 Desc1
Room 12 Desc2
Room 12 Desc3
Remarks for Clients
Extras
Remarks for Brokerages
Listing Brokerage Name
List Brokerage Phone #
List Brokerage Fax #
Salesperson 1
Salesperson 1 Phone
Salesperson 2
Salesperson 2 Phone

Commission Co-Op Brokerage
Seller Property Information Statement
Energy Certification
Certification Level
Green Property Information Statement
Permission To Advertise
Distribute To Internet Portals
Display Address on Internet
Open House Date
Open House From Time
Open House To Time
Open House Notes
Appointments
Occupancy
Contact After Expired
Virtual Tour URL
Sales Brochure URL
Additional Pictures URL
Alternate Feature Sheet URL
Map Location URL
Sound Bite URL

John F. Rook
Partner
Direct Line: 416.777.4885
e-mail: rookj@bennettjones.com
Our File No.: 51654-14

February 3, 2012

BY EMAIL TO dsaffleck@agmlawyers.com

Affleck Greene McMurtry LLP
365 Bay Street, Suite 200
Toronto, ON M5H 2V1

Attention: Donald S. Affleck, Q.C. and Renai Williams

Dear Counsel:

Re: Commissioner of Competition v. Toronto Real Estate Board

We are writing concerning the Commissioner's request for TREB's MLS data dated December 23, 2011, following the Case Conference with Justice Simpson on Tuesday, January 31, 2012 and the communications between you and Ms. Williams for TREB and Mr. Little for the Commissioner this week.

We have still had no response to our requests in relation to the MLS data made by email on Monday, January 30 and Wednesday February 1, 2012. For clarity we refer to:

- a complete list of the fields in TREB's MLS system (as was also requested by Justice Simpson during the Case Conference) – you provided only a partial response on Wednesday February 1 which we promptly advised was incomplete by responding email;
- a list of the specific fields in TREB's MLS system in which TREB has a concern about privacy;
- what the issues are, if any, in relation to the Stratus "dictionary" that may be (you have indicated) needed for the MLS data, together with information on TREB's agreement with Stratus; and
- how long it will take TREB to produce the MLS data as requested or as may be agreed.

In your letter to the Tribunal dated January 30, 2012, you raised issues of proportionality and privacy. On the first issue, Mr. Little indicated by telephone that same day that we may be able to accommodate your request that the volume of MLS data request be reduced, by not requiring

THIS IS EXHIBIT E TO THE
AFFIDAVIT OF Nadine Brouil

SWORN BEFORE ME THIS 27 DAY
OF Feb 20 12
Melanie H. ...
COMMISSIONER FOR OATHS

production of certain fields such as the photographs of residential properties. I stated during the Case Conference with Justice Simpson that we may have additional flexibility on the time period of the MLS data request if you are prepared to reasonably address other issues.

On the second issue you raised, we have also attempted to be reasonable in proposing methods to address TREB's privacy concerns, by reviewing the fields in the MLS system and possibly reducing our client's request, without either party having to agree on the merits of the privacy issues.

So far we have had no substantive response from you on either issue, apart from the obviously incomplete list of fields provided with your email on February 1, 2012.

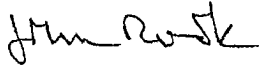
While we remain prepared to discuss a resolution of the issues you raised in your January 30 correspondence, we believe TREB's position is untenable. With respect to privacy, there is no impediment to production of the MLS data in the *Personal Information and Protection of Electronic Documents Act* (Canada), as your letter dated January 30 would imply. To the contrary, there is a specific exception in PIPEDA that allows disclosure of personal information without the knowledge or consent of an individual "to comply with rules of court relating to the production of records": see PIPEDA paragraph 7(3)(c).

We also confirm that the Commissioner is prepared, if necessary, to discuss an Order that includes confidentiality terms that would allow privacy issues in the MLS data fields to be addressed. We note that much of the MLS data has, however, already appeared on the Internet on www.realtor.ca when the relevant properties were listed for sale.

We again repeat our request that you provide us with the specific information described above and that your client include the requested TREB MLS data described in our letter dated December 23, 2012 in its Affidavit of Documents and productions.

Yours very truly,

BENNETT JONES LLP



John F. Rook

JFR/

Affleck Greene McMurtry LLP

Barristers and Solicitors

Donald S. Affleck, Q.C.
Email: dsaffleck@agmlawyers.com
Direct Line: (416) 360-1488

February 6, 2012

File: 2502-005

BY EMAIL: rookj@bennettjones.com; littlea@bennettjones.com

Bennett Jones LLP

3400 One First Canadian Place
PO Box 130
Toronto ON M5X 1A4

Attention: John F. Rook, Q.C. and Andrew D. Little

Dear Counsel:

Re: The Toronto Real Estate Board ats Commissioner of Competition
(Court File No. CT-2011-003)

We have provided you with a list of fields in the MLS System for both freehold and condominium listings that can be completed at the time of listing. After listing, the system generated fields are:

- MLS Number
- Sold/Leased Price
- Last Status
- % Sold (or Leased) Price to List Price
- Days on Market
- Bathroom Total
- Sold/Leased Date
- Closing Date
- Date Last Updated
- Original Price
- Co-operating Brokerage
- Co-operating Salesperson 1
- Co-operating Salesperson 2
- Escape Clause Flag (Y/N)
- Escape Clause (Hours)
- Sold/Leased Conditional (Condition-text box)
- Sold/Leased Conditional Expiry Date
- Leased Term (text box).

...2

THIS IS EXHIBIT F TO THE
AFFIDAVIT OF Nadia Brault

SWORN BEFORE ME THIS 27 DAY
OF Feb 20 12
Mohamed Elamin
COMMISSIONER FOR OATHS

Affleck Greene McMurtry LLP

Barristers and Solicitors

The fields that raise concerns as to privacy, safety and security are:

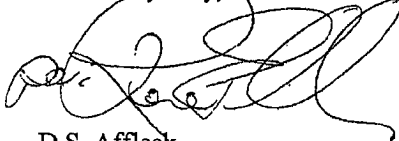
- name of seller
- occupancy
- contractual information (e.g. days on market)
- financial information
- broker remarks (access, hours for showing, etc.)
- attachments (e.g. inspection reports)
- sale price
- photographs including virtual tours
- floor plans
- cooperating broker commission
- salesperson name(s)
- brokerage name.

The listings maintained by Stratus Data Systems appear in a form akin to a ledger sheet. In order to determine what various columns represent one requires a "dictionary" to apply to the software. As to the length of time required to make data available, it would be of assistance if you could indicate whether the Commissioner is prepared to abbreviate the time period initially proposed. We understood from your comments to Justice Simpson on January 31, 2012 that you would seek instructions in that regard but we have not heard anything from you since that time. That time period will affect any production period.

TREB's Agreement with Stratus is impressed with confidentiality provisions. Any disclosure under it would have to be subject to a confidentiality agreement with limitations as to the use of the information, the personnel involved and containing provisions providing for the immediate destruction of material at the conclusion of use.

We have noted your reference to PIPEDA. It does not answer TREB's concerns. We would remind you that not all TREB MLS® listings involve property located in the Province of Ontario.

Yours very truly,



D.S. Affleck
DSA/lc

c: Sandra Forbes, *Davies Ward Phillips & Vineberg LLP* (by email)
Chris Hersh, *Cassels Brock & Blackwell LLP* (by email)
Renai Williams, *Affleck Greene McMurtry LLP* (by email)



Bennett Jones LLP
3400 One First Canadian Place, PO Box 130
Toronto, Ontario, Canada M5X 1A4
Tel: 416.863.1200 Fax: 416.863.1716

John F. Rook
Partner
Direct Line: 416.777.4885
e-mail: rookj@bennettjones.com
Our File No.: 51654-14

February 10, 2012

BY EMAIL TO: dsaffleck@agmlawyers.com

Donald S. Affleck, Q.C.
Affleck Greene McMurtry LLP
365 Bay Street, Suite 200
Toronto, ON M5H 2V1

THIS IS EXHIBIT G TO THE
AFFIDAVIT OF Nadia Brault
SWORN BEFORE ME THIS 27 DAY
OF Feb 20 12
Nadia Brault
COMMISSIONER FOR OATHS

Dear Mr. Affleck:

Re: Commissioner of Competition v. The Toronto Real Estate Board

Thank you for your letter dated February 6, 2012. We respond as follows:

1. Attached please find a list of the fields required by the Commissioner, based on the fields identified in your email last week and your letter dated February 6. We have attempted to correlate the areas of concern due to privacy, safety and security issues as identified in your letter, with your lists of specific fields in the MLS system. Unfortunately, several of the concerns you identified do not correspond to specific fields in your lists and therefore we have had to make some certain assumptions in preparing the attached list. In addition, please confirm that the field called "Last Status" contains information about whether a listing has been withdrawn or has expired.

Our review of your lists of fields does not reveal fields containing membership information requested in our letter dated December 23, 2011. We continue to request this data as part of TREB's production at this time. The precise request was for production of "membership data including members' names, original licence or membership date, [and] name of employing brokerage and its location".

Please advise us immediately whether the enclosed proposed list and membership information may form part of an Order for production. If not, specify any remaining issues.

2. Our client is also prepared, as I indicated at the recent Case Conference with Justice Simpson, to be flexible with respect to the timeframe of the request for MLS data. We are prepared to change the MLS data request from its current commencement date (January 1, 2000) to a commencement date of January 1, 2003 in order to resolve this matter.

February 10, 2012
Page Two

3. As previously indicated, to address the concerns expressed by TREB, the Commissioner is prepared to agree to a draft Order with respect to the production of the MLS data which would include confidentiality terms. The basis of doing so is to avoid any attempt at this time to resolve whether or not any of the MLS data is in fact subject to the privacy, safety or security concerns you have mentioned.

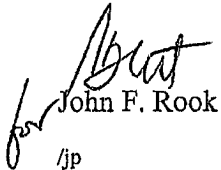
The terms of an Order should also address the confidentiality concerns you have raised in your letter in respect of the "dictionary" to apply to the software" and allow whatever materials that are necessary to understand and use the MLS data, including the "dictionary", to be produced. On this topic, we do not understand what your reference to "software" is. Please clarify.

4. Please advise how long it will take TREB to produce the MLS data described above.

5. We will not continue to debate PIPEDA at this stage. There is no basis for any objection to production based on PIPEDA.

Yours very truly,

BENNETT JONES LLP


John F. Rook
/jp

c: Chris Hersh, *Cassels Brock & Blackwell LLP*
Sandra Forbes, *Davies Ward Phillips & Vineberg*
Andrew Little, *Bennett Jones LLP*

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



Affleck Greene McMurtry LLP

Barristers and Solicitors

Donald S. Affleck, Q.C.
Email: dsaffleck@agmlawyers.com
Direct Line: (416) 360-1488

February 15, 2012

File: 2502-005

BY EMAIL: rookj@bennettjones.com

John F. Rook, Q.C.
Bennett Jones LLP
3400 One First Canadian Place
PO Box 130
Toronto ON M5X 1A4

Dear Mr. Rook:

**Re: The Toronto Real Estate Board ats Commissioner of Competition
(Court File No. CT-2011-003)**

We have your letter dated February 10, 2012. Our responses to the queries contained in that letter follow.

1. The field called "Last Status" contains information as to whether a listing has been withdrawn or has expired.
2. We are delivering to you, with a copy of this letter, four Manuals and Rosters for The Toronto Real Estate Board for the period 2007 to 2012 each of which contains membership information.
3. We note that your client is prepared to change the commencement date for the MLS® data to January 1, 2003. Unfortunately that commencement date would still result in the production of some 1.8 million listings (269 Gigabytes). We do not consider such discovery proportional or reasonable and would ask you to determine whether a more reasonable date is possible.

THIS IS EXHIBIT 4 TO THE
AFFIDAVIT OF Nadia Bawt

SWORN BEFORE ME THIS 27 DAY
OF Feb 20 12
Nadia Bawt
COMMISSIONER FOR OATHS

...2

Affleck Greene McMurtry LLP

Barristers and Solicitors

4. Attached is the list of fields that accompanied your February 10th letter. We have crossed out those fields that continue to raise concerns as to privacy, safety and security.

Yours very truly,

AFFLECK GREENE McMURTRY LLP



D.S. Affleck
DSA/lc

c: Sandra Forbes, *Davies Ward Phillips & Vineberg LLP* (by email)
Andrew Little, *Bennett Jones LLP* (by email)
Chris Hersh, *Cassels Brock & Blackwell LLP* (by email)
Renai Williams, *Affleck Greene McMurtry LLP* (by email)

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~~



Bennett Jones LLP
3400 One First Canadian Place, PO Box 130
Toronto, Ontario, Canada M5X 1A4
Tel: 416.863.1200 Fax: 416.863.1716

John F. Rook
Partner
Direct Line: 416.777.4885
e-mail: rookj@bennettjones.com
Our File No.: 51654-14

February 22, 2012

BY EMAIL TO: dsaffleck@agmlawyers.com

Donald S. Affleck, Q.C.
Affleck Greene McMurtry LLP
365 Bay Street, Suite 200
Toronto, ON M5H 2V1

THIS IS EXHIBIT I TO THE
AFFIDAVIT OF Nadia Brout
SWORN BEFORE ME THIS 27 DAY
OF Feb 20 12
Nadia Brout
COMMISSIONER FOR OATHS

Dear Mr. Affleck:

Re: Commissioner of Competition v. The Toronto Real Estate Board

We are in receipt of your letter on MLS data dated February 15, 2012. We are also in receipt of the copy of your letter enclosing four manuals and rosters for TREB for 2007-08 to 2011-12.

Membership Data

The hard copies of the manuals and rosters appear to be a purported response to our request for membership data. However, hard copies of membership data were not our request. After making the request for data in the MLS system, our original request for membership data made on December 23, 2011 was stated as follows:

... if it is stored separately, membership data including members' names, original licence or membership date, name of employing brokerage and its location, all for the same time period, so that this information can be correlated to the data set mentioned above.

As is obvious, our request is for the membership data in electronic form, for the same time period as the MLS data, so that the membership data can be correlated with the MLS data. Please advise whether and when this membership data will be made available as requested. For clarity, please advise if TREB considers that there are any other issues or conditions that should be attached to such production, such as a Confidentiality Order, so that we may attempt to resolve them this week.

MLS Data

You have asked for a further change in the commencement date of the Commissioner's request for MLS data, without offering any concessions or compromise to the position TREB took previously on this data. Taking into account your letter and the Tribunal's comments at the Case Management

February 22, 2012
Page Two

Meeting on January 31, the Commissioner is prepared to change the commencement date from January 1, 2003 to January 1, 2005, on the condition that there is complete symmetry between the information available to Commissioner's expert(s) and TREB's expert(s). That is, if any additional MLS data beyond what is agreed (or is ordered by the Tribunal) to be produced to the Commissioner now is (or has been) provided to an expert engaged by TREB for the purposes of this proceeding, then the additional data will also be produced to the Commissioner's expert now or no later than a specified date (we suggest April 1, 2012). Is this agreeable?

With respect to the list of fields, we see no principled basis on which to restrict production of any of the fields in the schedule as you propose, for reasons given in prior correspondence. Whether or not TREB's position on privacy and other issues is correct, all of the requested MLS data can be produced under a Confidentiality Order, as Justice Simpson suggested at the Case Management Conference on January 31. Again, TREB offers no compromise or hint at a solution. Will TREB produce this data, or not? If not, why not? If so, when and under what conditions (if any)? As we have indicated previously, the Commissioner will agree to a Confidentiality Order, as may be required and we are prepared to send you a draft promptly.

If we are unable to resolve all of these issues this week so that the data is produced promptly, we will have no alternative but to seek relief from the Tribunal.

Yours very truly,

BENNETT JONES LLP



John F. Rook

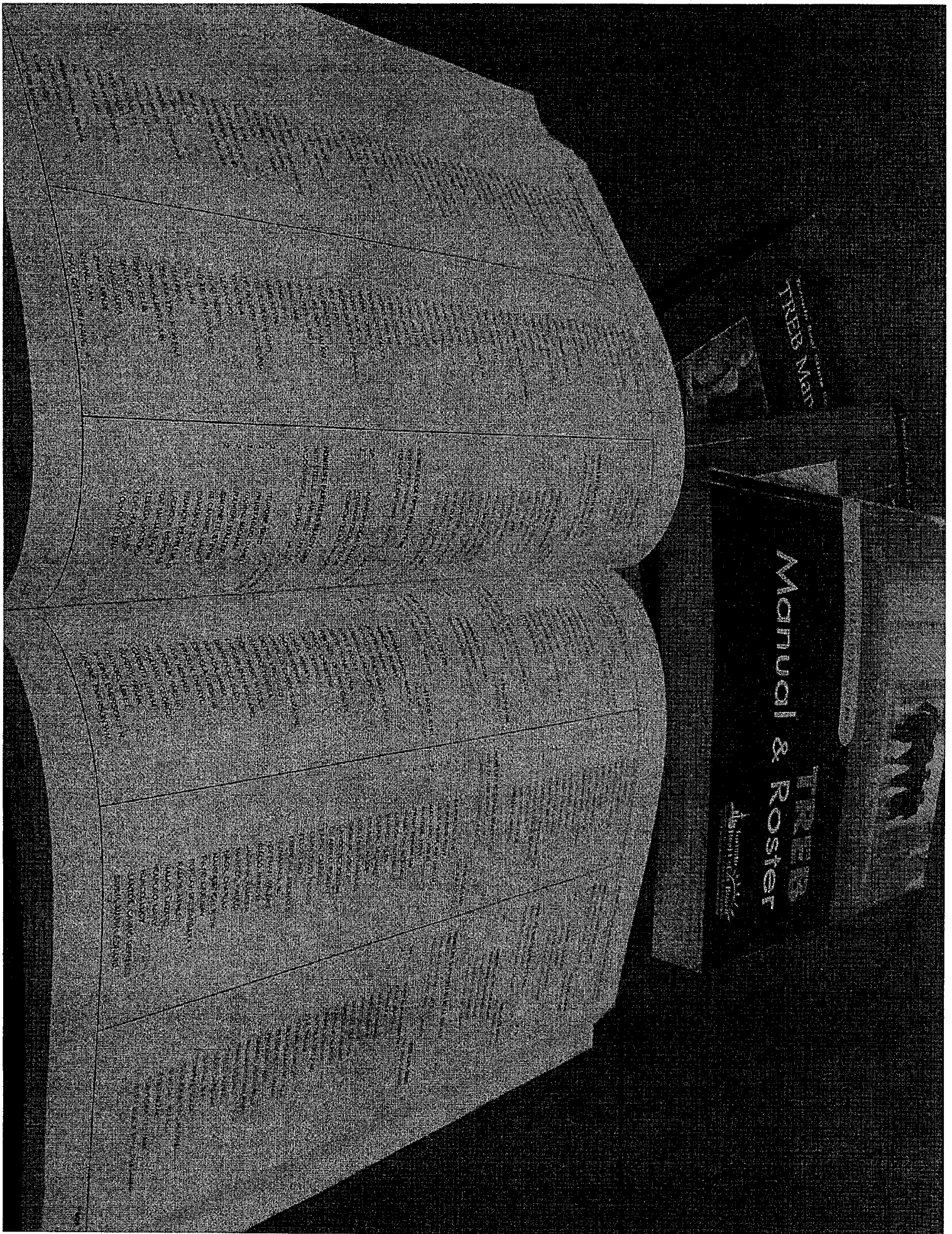
c: Chris Hersh, *Cassels Brock & Blackwell LLP*
Sandra Forbes, *Davies Ward Phillips & Vineberg*
Andrew Little, *Bennett Jones LLP*

THIS IS EXHIBIT 5 TO THE
AFFIDAVIT OF Nadia Brault

SWORN BEFORE ME THIS 27 DAY
OF Feb 2012

by Nadia Brault
COMMISSIONER FOR OATHS





THIS IS EXHIBIT.....K.....TO THE
AFFIDAVIT OF.....Nadia Brault.....

SWORN BEFORE ME THIS.....23.....DAY
OF.....Feb.....20.....12.....
.....Makletsume.....
COMMISSIONER FOR OATHS

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 residential multiple listing service of the Toronto Real Estate Board.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

AMENDED 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 66.

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, including, but not limited to TREB's Proposed Rules (as described and defined in paragraph 33), 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. In late June, 2011, after the Commissioner commenced this Application, TREB provided its members with proposed policy and rule amendments that TREB claims will allow its member brokers to operate VOWs. In fact, if TREB's Proposed Rules (as described and defined in paragraph 33) are enacted, they will continue to prevent TREB member brokers from operating a VOW as described in this Application; as such, TREB will continue to thwart the development of new, innovative, and efficient models of providing real estate brokerage services using the Internet. TREB's Proposed Rules will discriminate against brokers seeking to innovate, and will constitute a further anti-competitive act by TREB.

8. 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.

9. 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.

10. 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

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

12. 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

13. 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.

14. 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.

15. 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.

16. 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).

17. 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.

18. 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

19. 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.

20. VOWs provide the same services as traditional brokers in a “bricks and mortar” setting but more efficiently (as outlined in paragraphs 23 and 61-64 below).

21. 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.

22. 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.

23. 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.

24. 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

25. 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".

26. 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.

27. 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 ...”

28. TREB’s MLS Rules and Policies (as outlined in paragraphs 25-27), 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.

29. 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.

30. 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).

31. 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.

32. 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.

TREB's Proposed Rules

33. After this Application was filed, TREB announced on June 23, 2011 that it had published a proposal for a VOW Policy and Rules, and that members would have 60 days to provide input and feedback. To this end, TREB provided its members with several documents, including the new Policy concerning VOWs, a section for frequently asked questions, and a document entitled "Virtual Office Website (VOW) Rules" (together, "TREB's Proposed Rules").

34. TREB's Proposed Rules will, if ultimately enacted in their present form by TREB's Board of Directors, impose obligations and restrictions on member brokers who wish to operate VOWs that are not imposed on traditional brokers. As such, TREB's Proposed Rules will entrench and perpetuate the traditional "bricks and mortar" business model for providing real estate brokerage services; accordingly, TREB's Proposed Rules are discriminatory and their enactment will constitute a further anti-competitive act under the Act.

35. Specifically, under TREB's Proposed Rules, TREB will, under certain conditions, provide a data feed for those member brokers who wish to establish a website to display listings for residential properties currently available for sale. However, according to TREB's Proposed Rules, member brokers may not make available for search or display on a VOW the following information (all of which is available in TREB's MLS system and is provided today by members to customers by hand, email or fax):

- (a) MLS data on pending solds, including listings where sellers and buyers have entered into an agreement that has not yet closed;

(b) MLS data on sold properties, unless the method of use of the actual sales price of completed transactions is in compliance with the rules of the Real Estate Council of Ontario (“RECO”) and applicable privacy laws;

(c) The compensation offered by the seller's broker to the buyer's broker.

In addition, and significantly given the value potential customers place on this information, the data feed provided to member brokers for VOWs will not include any MLS data pertaining to sold properties, unless the data is “readily publicly accessible”. This restriction does not apply in a “bricks and mortar” environment; as such TREB’s Proposed Rules discriminate and are in violation of the Act.

36. The effect of TREB's Proposed Rules will be merely to allow TREB's member brokers to display current listings on their own websites using a data feed from TREB, but significantly, a data feed intentionally compromised to exclude the very information of value to customers. As noted above, TREB will prevent VOWs from offering a complete inventory of listings and other data, including valuable historical data, that is available for download from TREB’s MLS system. This information is required by a VOW brokerage to effectively provide real estate brokerage services to their customers over the Internet. TREB’s Proposed Rules will continue to require customers to contact a member broker personally to obtain such information, entrenching the traditional “bricks and mortar” model and discriminating against member brokers wanting to innovate.

37. In addition, the TREB Proposed Rules will not allow consumers to see a key component of the ultimate purchase price of a residential property, because TREB's Proposed Rules do not allow a member broker to display the compensation offered to the cooperating member broker as part of a listing on a VOW. In contrast, this information is available in a “bricks and mortar” environment. The offer of compensation is made by the seller's broker to the buyer's broker and, when offered by a broker in a traditional brokerage, is almost always a fixed percentage of the purchase price. Particularly with the significant increases in the price of homes in the GTA over the last decade, the price of a broker's services will continue to be a very large part of the real estate transaction that is non-transparent to consumers, especially buyer customers.

38. Furthermore, TREB's Proposed Rules are vague and ambiguous, allowing TREB to frustrate or disadvantage member brokers who wish to offer VOWs, in the very same way TREB has done, to date, using the existing set of TREB MLS Restrictions as described in this Application. The resulting uncertainty reduces the likelihood of investment in, and thus impedes the entry of, innovative real estate business models.

39. Thus, rather than opening up the market to new, innovative models of providing residential real estate brokerage services through the Internet, and stimulating competition in the supply of such services, TREB's Proposed Rules, if enacted, will in fact constrain competition. They will impose discriminatory, anti-competitive restrictions on member brokers who wish to operate a VOW and effectively exclude those member brokers who would like to establish a VOW brokerage. By restricting member brokers' websites to the display of current listings, TREB's Proposed Rules will deny both member brokers and customers the benefits of the efficient, innovative VOW model of delivering services.

40. If the TREB Proposed Rules are enacted in their current form, TREB will continue to prevent or lessen competition substantially in the market for the supply of residential real estate brokerage services in the GTA in the very policy that purports to (but does not) allow its members to innovate and operate a VOW, as described in this application. As such, TREB's Proposed Rules will continue and aggravate TREB's practice of anti-competitive acts contrary to section 79 of the Act, and will comprise part of the "TREB MLS Restrictions" as defined in this Application.

Elements of Section 79 of the Act

The Product Market

41. 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.

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

The Geographic Market

43. 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

44. 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. As the TREB Proposed Rules demonstrate, 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.

45. 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, price changes and pending sold data, 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.

46. 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.

47. 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.

48. 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

49. 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.

50. 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.

51. Similarly, compliance with TREB's Proposed Rules would impose obligations and restrictions on member brokers who would like to provide real estate brokerage services and information through the Internet as a VOW brokerage, that are not imposed on traditional brokers operating a bricks and mortar environment. Innovative, Internet-based brokerages would be prevented from providing valuable information to their customers that traditional brokerages currently provide without any such restrictions. It is instructive to note that, for all the concerns now suddenly expressed by TREB about privacy laws and compliance with RECO, TREB has made no attempt to enact or enforce rules to restrict traditional brokerages from providing, at their sole discretion, all information relating to historical solds, pending solds and other information that they would now propose to exclude from the data feed provided to member brokers who want to operate VOWs under TREB's Proposed Rules.

TREB's Enforcement of the TREB MLS Restrictions

52. 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.

53. 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

54. 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.

55. In the case of TREB's Proposed Rules, TREB has deliberately proposed "changes" to its MLS Rules and Policies that, if passed, will prevent member brokers from operating VOWs as described in this Application, will prevent the entry of new, innovative brokerages into the market for the supply of real estate brokerage services in the GTA and will entrench the existing traditional model of delivering such service to customers.

56. 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

57. 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. Furthermore, TREB's Proposed Rules, if enacted, will continue to lessen and prevent competition substantially. But for the TREB MLS Restrictions, consumers would benefit from substantially greater competition in the relevant market.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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.

63. The increases in efficiency and productivity, outlined immediately above, 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.

64. 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

65. 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

66. 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

- 67. The Applicant requests that this Application be heard in English.
- 68. The Applicant requests that this Application be heard in the City of Toronto.
- 69. The Applicant proposes that documents be filed electronically.
- 70. 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
Toronto, Ontario
M5X 1A4

And to:

Roger Nassrallah
Competition Bureau Legal Services
Department of Justice
50 Victoria Street
Gatineau, Quebec
K1A 0C9

Counsel for the Applicant

Copies to:

Toronto Real Estate Board
1400 Don Mills Road
North York, ON
M3B 3N1

And to:

Donald S. Affleck
Affleck Greene McMurtry
365 Bay Street, Suite 200
Toronto, Ontario
M5H 2V1

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 7th day of July, 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, which include existing and proposed rules and policies, 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 discriminate and 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. CT-2011-003

THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

AMENDED NOTICE OF APPLICATION

BENNETT JONES LLP

Suite 3400, P.O. Box 130
One First Canadian Place
Toronto, ON M5X 1A4

John F. Rook, Q.C. (LSUC #13786N)

Tel. (416) 777-4885

Andrew D. Little (LSUC #34768T)

Tel. (416) 777-4808

Fax (416) 863-1716

Counsel for the Applicant

THIS IS EXHIBIT 1 TO THE
AFFIDAVIT OF Nadia Brault

SWORN BEFORE ME THIS 27 DAY
OF Feb 20 12
Mark Allen
COMMISSIONER FOR OATHS

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.

B E T W E E N :

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

RESPONSE OF THE TORONTO REAL ESTATE BOARD TO THE AMENDED NOTICE OF APPLICATION

PART I: OVERVIEW

1. The Commissioner of Competition's Amended Notice of Application ("Application") seeks an order pursuant to subsections 79(1) and 79(2) of the *Competition Act* ("Act") but ignores the copyright of The Toronto Real Estate Board ("TREB") and its members. Subsection 79(5) of the Act states that the exercise of those rights is not an anti-competitive act. Without proof of an anti-competitive act or acts, the Competition Tribunal ("Tribunal") should decline to make an order under either subsection 79(1) or subsection 79(2).

2. TREB does not compete in the product markets referred to by the Commissioner of Competition (“**Commissioner**”) in the Application. TREB has no market power in those markets and no motivation to exercise any market power for the simple fact that TREB is not a supplier of residential real estate brokerage services. There is simply no basis upon which the Application can succeed.
3. TREB owns the TREB Multiple Listing System (“**TREB MLS®**”). The TREB MLS® is a multiple listing service used by suppliers of residential real estate brokerage services to facilitate trade. Access to the TREB MLS® is unrestricted to qualified brokers who are members of TREB.
4. Rules imposed by TREB over members’ access to and use of the TREB MLS® serve to protect the intellectual property rights of TREB and its members, as well as the privacy rights of those who agree to the use of the TREB MLS® to market their property. In addition, such rules promote the accuracy and reliability of the information on the TREB MLS®.
5. As an organization committed to the success of its members, TREB prides itself on its ability to respond to members’ evolving requirements, including with respect to the use of information on the TREB MLS®. Within this context, TREB formed a task force in July, 2010 to examine how best to facilitate the operation by its members of virtual office websites (“**VOWs**”). The report of that task force was released in June, 2011 and the membership of TREB is presently considering the task force’s proposed VOW Policy and accompanying Rules (“**TREB’s Proposed VOW Policy**”). It is expected that the

membership and the TREB Board of Directors will approve TREB's Proposed VOW Policy without major change.

6. At all times TREB has cooperated with the Commissioner. Commencing in mid-2008 the Commissioner initially sought TREB's assistance in creating a VOW policy that could be utilized throughout Canada. Subsequently, the Commissioner decided to commence negotiations with The Canadian Real Estate Association ("CREA") in respect to creating such a Canada-wide policy. Between September, 2008 and February, 2011, TREB responded to two extensive voluntary information requests received from the Commissioner related to that initiative.
7. When the Commissioner was unable to conclude an agreement on VOWs with CREA, she again turned to TREB. The Commissioner became aware that TREB had formed the VOW task force referred to above in July, 2010. The Commissioner knew of the report of that task force and knew that, pursuant to TREB's corporate guidelines, the report had to be considered by TREB's full membership and ultimately by TREB's Board of Directors. Notwithstanding that knowledge, and despite TREB's direct and forthright approach to its dealings with the Commissioner, the Commissioner commenced this Application before the consideration mandated by TREB's corporate guidelines could be completed.

PART II: ADMISSIONS AND DENIALS

8. TREB admits paragraphs 11, 12, and 25 of the Application.
9. TREB admits the first sentence of paragraph 1 of the Application.

10. TREB admits paragraph 26 of the Application, subject to the rules and policies referenced therein being simply referred to as “TREB’s Rules and Policies” and not “TREB’s MLS Rules and Policies”.
11. TREB admits paragraph 33 of the Application, subject to noting that it announced to its members TREB’s Proposed VOW Policy on June 24, 2011.
12. TREB denies all other allegations contained in the Application, except as expressly admitted below.
13. Contrary to the allegation at paragraph 14 of the Application, TREB denies that only its members have direct access to the TREB MLS®.
14. Contrary to the allegation at paragraph 24 of the Application, TREB denies that the alleged efficiencies realized by VOW brokerages in the United States or elsewhere are passed along to consumers, to the extent that such efficiencies exist at all.
15. TREB specifically denies the allegation at paragraph 42 of the Application and states that there are acceptable substitutes to residential real estate brokerage services. A number of providers offer services to home buyers and sellers that do not rely on those home buyers or sellers acquiring the traditional suite of residential real estate brokerage services offered by “bricks and mortar” brokers (including services that do not make use of the TREB MLS®).
16. Contrary to the allegation at paragraph 50 of the Application, TREB has never issued an interpretation of Rule 430. In fact, TREB yielded enforcement of Rule 430 to the Real Estate Council of Ontario (“RECO”) in 2008.

PART III: MATERIAL FACTS ON WHICH TREB RELIES

17. TREB is an Ontario corporation without share capital. It does not engage in business transactions involving residential real estate and has never done so.
18. TREB's corporate objects include the following:
- to advance and promote the interests of those engaged in real estate as brokers, agents, valuers, examiners and experts and to increase public confidence in and respect for those engaged in the calling of real estate broker;
 - to institute, promote and manage listing systems with the object of rendering better service to the public by providing vendors of real estate with a wider potential market.
19. TREB is not licensed under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002 ("REBBA") to trade in real estate and it has never done so.
20. In addition to its ownership and operation of the TREB MLS®, TREB offers additional services to its members, including:
- (a) Internet Data Exchange – a platform that permits participating brokers to share their listings with other participating brokers on their web sites;
 - (b) arbitration services;
 - (c) access to Teranet (Ontario's electronic land registration system) by means of a portal;
 - (d) a commercial real estate website;
 - (e) continuing education seminars attended by some 2,880 members of TREB each month; and
 - (f) enforcement of professional standards.

21. For the purposes of TREB's Proposed VOW Policy, TREB states that a VOW:

... refers to a Member's secure, password-protected internet website, or a feature of a Member's internet website, through which the Member is capable of providing real estate brokerage services to consumers with whom the Member has first established a broker-consumer relationship (as may be designated by provincial and/or federal law) where the consumer has the opportunity to search MLS® data, subject to the Member's oversight, supervision, and accountability.

22. Up until the issuance of the Application, the Commissioner had been adamant that a VOW was:

a website operated by a Member [of TREB] or on behalf of a Member that enables Members to provide real estate brokerage services in an online environment, and where Customers [a person or persons who has an interest in acquiring or selling residential real estate, including, but not limited to, a Member's client] have the opportunity to search and review TREB MLS® Data.

23. For the first time, the Commissioner has in paragraph 4 of the Application referred to a VOW as a "...secure, password-protected "virtual office website"".

24. Paragraphs 3, 32, 46 and 52 of the Application reference a situation in which TREB was forced to terminate the access of a member to the TREB MLS® when that member sought to take or scrape all of the residential listing data for an area of the City of Toronto and republish it on a website of a third party. The member commenced a proceeding in the Ontario Superior Court of Justice against TREB. The Court held that TREB was justified in suspending access to the TREB MLS® and that the member had breached his contract with TREB. The Court dismissed the member's application with costs. The Ontario Court of Appeal dismissed the member's appeal on December 21, 2010 with costs.

25. Despite the inferences set out in the Application, the facts set out above represent the only situation in which TREB has terminated a member's access to the TREB MLS®.
26. At paragraph 18 and elsewhere in the Application it is alleged that information found on the TREB MLS® is not efficiently available to customers of brokers. This is inaccurate. Such information, if not protected by federal privacy legislation or withheld at the request of a vendor, may well be found at www.realtor.ca and on literally hundreds of websites. There are no restrictions whatsoever placed by TREB on its members that preclude members from also making their listings available through the multitude of websites and listing services not affiliated with TREB.

**PART IV: STATEMENT OF THE GROUNDS ON WHICH THE APPLICATION IS
OPPOSED**

27. The Commissioner brings the Application in reliance on section 79 of the *Competition Act* and, as such, bears the burden of satisfying the Tribunal that:
- (a) TREB substantially or completely controls the markets identified by the Commissioner for the purpose of this Application, namely, the supply of residential real estate brokerage services to home buyers and home sellers within the geographic limits of the TREB MLS®;
 - (b) TREB's policies with respect to the use of and access to the TREB MLS® constitutes a practice of anti-competitive acts; and
 - (c) such policies have had, are having or are likely to have the effect of preventing or lessening competition substantially in a market.

28. The elements of subsection 79(1) of the Act are cumulative, such that the Commissioner bears the burden of establishing each element on the balance of probabilities.
29. For the reasons set out below, the Commissioner cannot satisfy even one of the elements required by section 79. Therefore, the Application must necessarily fail.

TREB does not substantially or completely control the Relevant Markets

30. The product markets identified by the Commissioner in paragraphs 41 to 43 of the Application are the supply of residential real estate brokerage services to home buyers and the supply of residential real estate brokerage services to home sellers, in each case defined geographically by the geographic coverage of the TREB MLS® (together, “**the Relevant Markets**”).
31. TREB does not supply residential real estate brokerage services, either to home buyers or to home sellers.
32. While the Commissioner fails to identify the suite of services alleged to comprise “residential real estate brokerage services” for the purposes of the Application, TREB submits that the process of both defining “residential real estate brokerage services” and identifying competitors within the Relevant Markets must accord with applicable legislation.
33. The supply of residential real estate brokerage services in the Relevant Markets is governed by REBBA and regulations made under REBBA (“**REBBA Regulations**”). Pursuant to section 4 of REBBA:

Prohibition against trade in real estate unless registered

4. (1) No person shall,
- (a) trade in real estate as a brokerage unless the person is registered as a brokerage;
 - (b) trade in real estate as a broker unless he or she is registered as a broker of a brokerage;
 - (c) trade in real estate as a salesperson unless he or she is registered as a salesperson of a brokerage; or
 - (d) trade in real estate unless registered under this Act. 2002, c. 30, Sched. C, s.4 (1).

Unregistered persons

- (2) A person who is not registered as a brokerage, broker or salesperson shall not,
- (a) directly or indirectly hold himself, herself or itself out as being a brokerage, broker or salesperson, respectively; or
 - (b) perform any of the functions of a brokerage, broker or salesperson as provided in this Act. 2002, c. 30, Sched. C, s.4 (2).

34. Pursuant to subsection 1(1) of REBBA:

“brokerage” means a corporation, partnership, sole proprietor, association or other organization or entity that, on behalf of others and for compensation or reward or the expectation of such, trades in real estate or holds himself, herself or itself out as such.

“trade” includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for purchase and sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition, acquisition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt, and the verb “trade” has a corresponding meaning.

35. TREB is not registered as a brokerage for the purposes of REBBA and, as such, is legislatively prohibited from supplying residential real estate brokerage services in the Relevant Markets.

36. TREB cannot compete with its members in the supply of residential real estate brokerage services in the Relevant Markets because it would be *ultra vires* the purposes and objects of TREB, as set out in its Letters Patent.
37. While some of TREB's members may supply residential real estate brokerage services in the Relevant Markets, TREB itself cannot. TREB does not offer to consumers in the Relevant Markets any of the services expected from realtors and brokers (such as property identification, providing valuation guidance and conducting open houses); does not guide a buyer or seller through the transaction process; and does not assist in the negotiation of contracts for the sale and purchase of residential property. TREB does not hold itself out as being a brokerage and does not perform any of the functions of a brokerage.
38. TREB has no legislative authority upon which it could supply residential real estate brokerage services in the Relevant Markets and does not supply residential real estate brokerage services in the Relevant Markets.
39. TREB's status as a supplier of an input used in the delivery of residential real estate brokerage services in the Relevant Markets (i.e. the TREB MLS®) does not confer on TREB the status of a competitor in those "downstream" markets. Indeed, this is the position adopted publicly by the Competition Bureau at page 39 of its current *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions* (January 2009):

Where there is no vertical integration, simply charging a monopoly price for access to a facility, imposing conditions on its use*, or choosing not to offer access to downstream purchasers at any price would not, by itself, raise concerns. If a facility owner does not compete in the downstream market(s) in which the facility is used, the Bureau will not consider that supplier to have an incentive to affect downstream competition, and will not consider them to have downstream market power.

*Such conditions could include exclusive territories or field-of-use restrictions that limit the geographic and/or product markets in which downstream purchasers can use the facility.
(emphasis added)

40. TREB is not a competitor in the Relevant Markets and, as such, cannot have market power in the Relevant Markets. Without market power, TREB does not and cannot substantially or completely control the Relevant Markets.
41. Furthermore, the TREB MLS® is “owned” by TREB’s members. TREB has no incentive to exercise any market power against its broker members. Instead, TREB has an incentive to operate the TREB MLS® to facilitate buying and selling of real estate.

TREB has not and is not engaged in a practice of anti-competitive acts

42. The conduct impugned by the Commissioner does not constitute a practice of anti-competitive acts for the purpose of subparagraph 79(1)(b) of the Act.
43. Conditions TREB places on members’ access to and use of the TREB MLS®, including by way of TREB’s By-Law, TREB’s Rules and Policies and the requirement that members execute an Authorised User Agreement (together, “TREB’s Access Terms”) do not constitute a practice of anti-competitive acts.
44. As acknowledged by the Commissioner, TREB is the owner of the electronic database that constitutes the TREB MLS®, as well as its author. As the author of the TREB MLS®, TREB owns the copyright in the TREB MLS®. Pursuant to subparagraph 3(1)(a) of the *Copyright Act*, this right includes the sole right “to produce, reproduce, perform or publish any translation of the [TREB MLS®], ... and to authorize any such acts”.

45. While “anti-competitive act” is not exhaustively defined by the Act, subsection 79(5) of the Act specifically excludes from the definition the lawful exercise of intellectual property rights. Subsection 79(5) of the Act provides:

... an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

46. TREB’s Access Terms constitute no more than the mere exercise of the rights derived by TREB from the *Copyright Act*. In the context of the Relevant Markets, TREB’s Access Terms confer on TREB no advantage other than that derived from the *Copyright Act* itself.
47. As summarised by the Bureau itself at page 7 of its long-standing *Intellectual Property Enforcement Guidelines* (September, 2000):

The unilateral exercise of the IP right to exclude does not violate the general provisions of the Competition Act no matter to what degree competition is affected.

To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural and educational benefits created by them and be inconsistent with the Bureau’s underlying view that IP and competition law are generally complementary.

48. Neither TREB’s Access Terms nor TREB’s Proposed VOW Policy are informed by the requisite purpose of having a negative effect on a competitor that is predatory, exclusionary or disciplinary:
- (a) TREB is not a competitor in either of the Relevant Markets. Even if TREB’s Access Terms negatively affect competition in the Relevant Markets, which is expressly

denied, any such effects are irrelevant for the purpose of subparagraph 79(1)(b) of the Act as they do not manifest a negative effect on a competitor of TREB.

- (b) TREB's Access Terms are informed by TREB's legitimate interest in preserving the value of the TREB MLS® for the benefit of TREB's members.
- (c) TREB's Access Terms have been formulated to safeguard the privacy rights of TREB's members and TREB's members' customers (both buyers and sellers of residential real estate in the Relevant Markets) in their individual listings and to ensure TREB and its members are compliant with their respective statutory obligations, including those arising from the *Personal Information Protection and Electronic Documents Act*, SC 2000, and the Code of Ethics established by Ontario Regulation 580/05 to REBBA.
- (d) TREB's Access Terms are a legitimate exercise of the intellectual property rights of TREB and its members, including by operation of the *Copyright Act*.

TREB'S Access Terms do not substantially prevent or lessen competition

- 49. The Tribunal is not required to consider whether TREB's Access Terms substantially prevent or lessen competition in the relevant markets because the Commissioner is unable to satisfy the burden with respect to either subparagraph 79(1)(a) or subparagraph 79(1)(b) of the Act.
- 50. TREB's Access Terms do not substantially prevent or lessen competition, whether in the manner alleged by the Commissioner or at all.

51. Neither TREB's Access Terms, nor TREB's Proposed VOW Policy, will or are likely to substantially prevent or lessen competition, whether in the manner alleged by the Commissioner or at all.
52. No business model or subset of members is preferred by TREB's Access Terms, either in practice or in reality. TREB serves, represents and treats its members equally, in accordance with its By-Law, Rules and Policies, and constating documents.
53. TREB's Access Terms are neither static nor entrenched. TREB's Access Terms are, and have historically been, developed and amended in consultation with TREB's members in response both to members' evolving requirements (including in answer to consumer demand) and legislative developments. It was within this context that TREB's VOW Task Force was struck in July 2010, and is within this context that TREB's Proposed VOW Policy is now under consideration by its members.
54. There is no basis for the Commissioner's allegation that "but for" certain of TREB's Access Terms, the Relevant Markets might benefit from "more innovation, enhanced quality of service and increased price competition, through such means as commission rebates."
55. TREB's Access Terms do not prescribe the commission structures that must be adopted by its members. There is clear evidence of price competition among participants in the Relevant Markets.
56. Consumers of residential real estate brokerage services already have a number of search tools open to them for the purpose of identifying and then narrowing the search to those properties of interest to them. A number of providers offer services to home buyers and sellers that do not rely on those home buyers or sellers acquiring the traditional suite of

residential real estate brokerage services offered by “bricks and mortar” brokers (including services that do not make use of the TREB MLS®). Further, there are no restrictions whatsoever placed by TREB on its members that preclude members from also making their listings available through the multitude of websites and listing services not affiliated with TREB.

57. The Commissioner’s Application significantly undervalues both the services that many brokerages offer home buyers and the very real role brokers play in stimulating trade in the Relevant Markets. The work of a broker is not meaningfully lessened by reason of home buyers having undertaken their own searches. Brokers must still discharge their obligations under REBBA’s Code of Ethics.
58. Services offered by buyers’ brokers include market education, liaising with selling agents to obtain viewings, taking prospective buyers to inspect properties, guiding buyers through the financing and purchasing process, advising on and negotiating price and preparing and submitting offers. While identifying properties of interest is certainly an important aspect of the buying process, it is by no means either the most time intensive aspect of the service brokers provide, nor the aspect of service that is of greatest value to the home buyer. Any suggestion to the contrary is simply inaccurate.
59. TREB’s Access Terms encourage the continued use of the TREB MLS® as a viable business tool, both from the perspective of TREB’s members and the consumers they serve. In circumstances where concerns such as privacy and intellectual property rights are prevalent, the protections built in to TREB’s Access Terms act to encourage consumers and members to continue to use and allow to be used in the marketing of their property, the

TREB MLS®. Without these protections, buyers and sellers would be less likely to use the TREB MLS®, with the likely result of a reduction in the value and volume of trade.

60. Neither TREB's Access Terms, nor TREB's Proposed VOW Policy substantially lessen or prevent competition in the Relevant Markets.

PART V: STATEMENT OF ECONOMIC THEORY

61. TREB's Concise Statement of Economic Theory is set out in Schedule "A" to this Response.

PART VI: RELIEF SOUGHT

62. TREB requests an Order dismissing the Application with costs payable to TREB. TREB submits that the circumstances surrounding the commencement of this Application warrant the awarding of costs to TREB on a full indemnity basis.

PART VII: PROCEDURAL MATTERS

63. TREB agrees that the Application be heard in English.
64. TREB agrees that the Application be heard in the City of Toronto.
65. TREB agrees with the Commissioner's proposal that documents be filed electronically.

DATED AT Toronto, this 19th day of August, 2011.



Donald S. Affleck

Affleck Greene McMurtry LLP
365 Bay Street
Suite 200
Toronto, Ontario
M5H 2V2

Donald S. Affleck Q.C.
Phone: (416) 360 1488
Fax: (416) 360 5960
Email: dsaffleck@agmlawyers.com

Renai E. Williams
Phone: (416) 360 2668
Email: rwilliams@agmlawyers.com

Michael Binetti
Phone: (416) 360 0777
Email: mbinetti@agmlawyers.com

Counsel for The Toronto Real Estate Board

To: **John F. Rook**
Andrew D. Little
Bennett Jones LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

And To: **Roger Nassrallah**
Competition Bureau Legal Services
Department of Justice
50 Victoria Street
Gatineau, Quebec
K1A 0C9

Counsel for the Applicant

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

**SCHEDULE A:
CONCISE STATEMENT OF ECONOMIC THEORY**

Background on The Toronto Real Estate Board

1. The Toronto Real Estate Board (“**TREB**”) represents over 31,000 real estate brokers and salespersons licensed to trade in real estate in the Greater Toronto Area (“**GTA**”). TREB operates a multiple listing service (“**MLS®**”) system. The TREB MLS® is an electronic database of available properties that has two relevant aspects. First, it compiles listings of current residential property for sale in the GTA by TREB members. Second, it contains historical information regarding the sale of residential real estate.
2. Sellers of residential property sign a listing agreement with a broker or the agent of a broker (“**broker**”). Listing agreements identify the property for sale, the seller’s asking price, and the broker’s commission. Listings may also contain other information related to the property, such as the seller’s contact information and remarks intended for cooperating brokers, e.g., information regarding showing the property. TREB’s member brokers post this information, along with the portion of the commission that they are willing to share with the buyer’s broker, on the TREB MLS®. A participating TREB member broker, whether representing sellers or buyers, receives access to the listings of all other member brokers.
3. Posting a house on the TREB MLS® enables a seller’s broker to communicate with all TREB members, increasing the pool of potential buyers. Prior to the institution of multiple listing services, sellers would list their homes with a broker, and buyers (or their brokers) would have to search the inventory of each broker that represented sellers. Multiple listing

service (“MLS”) systems therefore are typically acknowledged as efficient because they reduce search costs for buyers. MLS systems also increase the liquidity of local real estate markets because of indirect network effects, leading to an enhanced chance of a match and better matches between buyers and sellers. Indirect network effects arise because more sellers mean more demand for access by buyers, and more buyers mean more demand for access by sellers. Increases in access to a MLS on both sides of the platform implies more transactions.

4. TREB is a membership organization that encourages professional standards in the industry and provides other services to members. Membership is open to all licensed real estate brokers in the GTA. Its activities are guided by an elected Board of Directors. TREB also has a full time staff providing services that include the TREB MLS® as well as arbitration, education, professional standards, communications, government relations and member outreach. TREB is a non-profit organization and has an incentive to operate the TREB MLS® to maximize the extent of trade in the GTA.
5. Brokers assist buyers and sellers in all stages of the real estate process. For sellers, among other things, they assist in determining the list price, marketing the listing and including it in a MLS, negotiate the terms of sale, and facilitate closing. Not only do they find buyers, but they also assist buyers, for instance by providing buyers with information useful in selecting houses—including accessing and interpreting information on a MLS, advising on offers and negotiations, and completing paper work. Brokers provide value to buyers and sellers because of their expertise in completing transactions and local market conditions. Given

how infrequently most individuals buy and sell homes and the complexity and size of the investment, brokers are valued for their professional assistance.

Economics of Two-Sided Platforms

6. MLS systems are two-sided platforms. Characteristics of two-sided platforms are that two distinct groups of users are connected by an intermediary platform, and demand for the intermediary service on one side of the platform increases as the number of participants on the other side increases (i.e., demand is interdependent). Examples include newspapers, which connect advertisers to subscribers, and payment card systems, which connect merchants to cardholders.
7. A MLS is a two-sided platform that connects buyers and sellers of real estate. The more buyers that access the platform (MLS) the greater the value to a seller from listing; the more sellers that market their property using the platform (MLS) the greater the value to buyers. Economically, a MLS acts as a means to match buyers and sellers, and its owner/operator will try to do so in a way that encourages the participation of both sides (buyers and sellers, with their respective brokers), thereby maximizing the value of the platform. Efforts to encourage participation by buyers and sellers involve trying to reward buyers and sellers for the benefit they create for other users of the system. Novel institutional arrangements will arise that attempt to internalize or capture and transfer the external value created by participation. For instance, the platform operator may be able to do this by setting the structure of its prices appropriately.

Pricing in two-sided platforms

8. A feature of two-sided platforms is the use of the price structure to encourage usage of the platform and determine the incidence of the costs of operating the platform. The price charged each side will reflect its elasticity of demand and the extent of cross platform externalities. The side with the more inelastic demand for services will generally pay a higher price (*ceteris paribus*) and hence bear more of the costs. The side whose size has a smaller effect on the value to the other side of joining the platform will pay a higher price (*ceteris paribus*) and hence bear more of the costs. The real estate market and operation of a MLS is an example where sellers whose houses are sold bear the cost of sale via the selling broker's commission, which is then shared with the buyer's broker. Typically the buyer pays nothing directly to the broker, whether they buy or not. Also, if a seller lists a house and does not sell it they do not pay. In economic terms, the subsidy from sellers to other participants is a way to partially internalize the network benefits buyers and unsuccessful sellers create when they use a MLS. That is, the subsidy is a means to return to buyers and unsuccessful sellers part of the benefits they create for others when they participate in a MLS. This implies, in short, that the current structure of prices (commissions) facilitates transactions in the real estate market.
9. Moreover, in a two-sided platform, the price paid on one side does not necessarily reflect the costs of providing services to that side. For profitable service, the sum of prices for a transaction must at least cover the costs of facilitating the transaction. This also means that a comparison between the costs of providing access to one side of the market and the price charged that side is not indicative of market power or overall efficiency.

Non-Price Competition

10. In a two-sided platform, like a MLS, the platform operator will typically also engage in conduct that facilitates liquidity, i.e., increases the use of a MLS by buyers and sellers. Similarly the platform operator will have an incentive to impose restrictions on conduct that reduces liquidity, i.e., decreases the use of a MLS by buyers and sellers.
11. TREB, sellers and sellers' brokers will have an interest in the incentives provided to brokers working for buyers, and in particular, that buyers' brokers have the right mix of incentives between price and non-price competition to attract buyers and close sales. Brokers can earn the right to represent buyers by rebating some of their commission, or through better or more innovative services. Sellers will want to make sure that brokers interested in representing buyers do not focus too much on representing buyers that are already in the market (inframarginal buyers) and not enough on widening the pool of buyers, i.e., bring into the market new buyers (marginal buyers). To the extent that price and non-price competition affect marginal and inframarginal buyers differentially, sellers will want to provide the optimal mix of incentives for brokers that represent buyers. Non-price competition to close sales involves effort and investment in activities beyond listing prices on a MLS or website, e.g., providing guidance on pricing, showing houses, negotiating the deal, etc.
12. Recognizing that the TREB MLS® is a two-sided platform has implications for market definition, market power, and understanding TREB's policies and rules (i.e., TREB's Access Terms and TREB's Proposed VOW Policy) as they apply to the operation and use of the TREB MLS®.

Market Definition and Market Power

Market Definition

13. In assessing market power there are three relevant services—two downstream services (buyers' brokerage and sellers' brokerage) and one upstream service (a MLS). The upstream service is a two-sided platform, with access provided to brokers representing buyers and sellers. While demand for the upstream service comes from these brokers, it is a derived demand, i.e., based on the demand by brokers' customers, buyers and sellers of real estate.
14. The upstream service provided by a MLS is not just access to one of the two downstream services. Instead, the ultimate "product" is a transaction, i.e., a successful sale. This follows immediately from understanding that a MLS is a platform that matches buyers and sellers. If this was not the case then the derived demand to list and access listings would be zero. The price of using the upstream service (in this case, the TREB MLS® platform) is the total price paid by the brokers for using a MLS when completing a downstream transaction (i.e. buying or selling real estate).
15. Proper market definition for the upstream service therefore involves considering the competitive constraint of other "platforms" on the TREB MLS®. Other platforms include other methods, technologies, and means whereby a buyer and a seller (or their brokers) could meet and make a transaction and would include, in particular, consideration of the competitive importance of competing services/platforms enabled by the internet.
16. The cost of a transaction to participants on a MLS equals the prices charged to brokers for placing a listing plus the price for accessing listings. These two services are both required

for a transaction on a MLS. It is the total price for these two complementary services which should be the price used in the hypothetical monopoly test.

17. In the context of a two-sided platform (such as the TREB MLS®), care must be taken when using the hypothetical monopoly test to define relevant markets. Applying it to one side of the platform by considering the impact of a small but significant non-transitory impact on price (“SSNIP”) without considering the potential for feedback effects from the other side may lead to defining one side of the platform as a relevant market when in fact a SSNIP would not be profitable because of feedback effects.

Market Power

18. Similarly, in assessing the market power of TREB, the relevant issue is whether the aggregate price of the two services required to transact on the TREB MLS® is above competitive levels. If TREB had market power, the total price of the two services (access to brokers of buyers and sellers) would be raised above the cost of using a MLS to complete a transaction, the total price if there is no exercise of market power.
19. Because of the governance of TREB and the availability of alternative means of listing and advertising residential real estate, it is unlikely that TREB will exercise market power.
20. While theoretically there might be market power in the provision of access to the TREB MLS® (e.g., due to network externalities and economies of scale in a large comprehensive listing base), the TREB MLS® is operated not-for-profit and is “owned” by TREB’s members. TREB has no incentive to exercise any market power against its broker members. Instead TREB has an incentive to operate TREB’s MLS® to facilitate buying and selling of

real estate. Further, brokers who use the TREB MLS® are free to list on any competing MLS or similar service. For these reasons, TREB does not exercise significant market power, i.e., TREB is not dominant, even if the market is assumed to be the TREB MLS® in the GTA and excludes other platforms used to match buyers and sellers of residential real estate in the GTA.

TREB's Access Terms and Proposed VOW Policy

21. TREB's Access Terms and Proposed VOW Policy must be assessed and understood within the context of the incentives of TREB to promote usage of the TREB MLS® and in particular the potential of VOWs to affect, either positively or negatively the incentives of buyers and sellers to use the TREB MLS®.
22. The Commissioner's narrow focus on price competition and service differentiation on one side of the platform is a partial and incomplete analysis of the effects of TREB's Proposed VOW Policy. If VOWs or other innovations reduce costs without negatively affecting the TREB MLS®, then TREB and its members would adopt these practices, or they would determine how these practices and innovations could be incorporated into the TREB MLS®, by incorporating rules and restrictions that allow the benefits to be realized while at the same time minimizing any negative effects on the operation of the system in its entirety.
23. Restrictions on VOWs that draw data from the TREB MLS® may be pro-competitive if they limit negative effects on the liquidity of the TREB MLS®, i.e., without the restriction the number of buyers and sellers using the MLS system would be negatively impacted.

24. The restrictions contained in TREB's Proposed VOW Policy may be pro-competitive for a number of reasons, including the following:

- VOWs may deplete the value the TREB MLS®. For example, VOWs may add information that reduces the reputation of the TREB MLS® in general for accuracy. Or VOWs may result in the addition of information that is private. Both of these effects may negatively impact the incentives of buyers and sellers to participate in the TREB MLS®, reducing its overall value.
- Unrestrained VOWs may create excessive incentives for price competition among buyers' brokers and divert the focus away from non-price competition. This may reduce the effectiveness of the TREB MLS® from the perspective of sellers, resulting in fewer listings.
- Similarly, sellers may prefer to ensure that brokers have an incentive to enlarge the pool of potential buyers. Rather than compete over price (by offering a discount) to a buyer already in the market, sellers may prefer instead to provide incentives for finding new buyers by promising a large commission.
- VOWs may result in listing brokers leaving a MLS or reducing their incentive to find listings. This will be true, for instance, if listings generate additional listings and the link between the broker and a listing is weakened by posting on VOWs. That is, if a key factor to generate new listings is a stock of existing listings associated with a broker, then to the extent a VOW reduces the ability of sellers to assess the stock of existing listings, brokers do not have the same incentive to find listings.
- Because of network effects, a VOW might become the public face of the TREB MLS®, creating market power for the VOW. If this market power is used to charge fees above costs for referral, the total costs of a transaction could be raised. Alternatively, VOWs might decrease the incentive of buyers to participate, by charging an access fee or subjecting them to other implicit costs.
- VOWs may also have little incentive or capability to recruit new sellers/buyers compared to full service brokers. An important role of brokers is to locate new sellers and buyers who might otherwise not participate in the market, expanding the market and

increasing liquidity. To the extent that VOWs result in a reduction in the number of active traditional brokers, liquidity could be harmed.

- VOWs may access TREB MLS® data at only the incremental cost of providing the data and without contributing to the database directly by adding new listings. As such, they would be free riding on the efforts of full service brokers because they do not contribute appropriately to the cost of maintaining the TREB MLS® and because they do not contribute to the number of listings.
 - The success of a VOW might encourage brokers to withdraw (opt out) from the TREB MLS® and compete for listings directly. This could lead to fragmentation of the listings into different platforms, with different VOWs covering only parts of the market. This would likely reduce the value of the listings compared to a single comprehensive listing service. Since these VOW listings may be operated with different aims than the TREB MLS®, which exists as a means of facilitating the real estate market, this may reduce the efficiency of the real estate market.
 - A VOW that only refers buyers might not save significant costs for the buyer's broker handling the purchase. Yet the VOW referral could become an established route for buyers to enter the market, with the buyer's broker now needing to bear an additional cost of the referral, without corresponding reductions in the broker's subsequent costs. In other words, separating out the VOW from the buyer's broker may incur some doubling of costs compared to performing all functions within a single buyer agent. If a VOW acts as an additional search mechanism this *might* improve buyer broker efficiency and cut total buyer costs. If, however, it acts as an additional front end service, and merely shifts activity between different types of buyer brokers (which might *appear* to be increased competition on the buyer side but which in fact does not reduce costs or increase the efficiency of the matching process) then it might act as an additional cost to the system.
25. The Commissioner's narrow focus on price competition in buyer brokerage appears to mischaracterize the rationale for restrictive VOW policies and rules. There is in fact no market power to preserve or enhance in the operation of the TREB MLS®. Instead an

efficient VOW policy may have certain restrictions which are aimed to reduce overall costs and to promote usage of the TREB MLS®, thereby preserving its value. That is, a restrictive VOW policy is likely efficiency enhancing. The design and control of the TREB MLS® is intended to facilitate trade, not to create or maintain market power.

26. The *Competition Act* does not exist to regulate industry practice but only to remedy the abuse of market power.

CT-2011-003

COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

RESPONSE OF THE TORONTO REAL ESTATE BOARD

AFFLECK GREENE McMURTRY LLP

365 Bay Street, Suite 200

Toronto, Ontario M5H 2V1

Donald S. Affleck, Q.C.

Tel: (416) 360-1488

Email: dsaffleck@agmlawyers.com

Renai E. Williams

Tel: (416) 360-0668

Email: rwilliams@agmlawyers.com

Michael I. Binetti

Tel: (416) 360-0777

Email: mbinetti@agmlawyers.com

Counsel for The Toronto Real Estate Board

THIS IS EXHIBIT M TO THE
AFFIDAVIT OF Nadia Braut

SWORN BEFORE ME THIS 27 DAY
OF Feb 20 12
Melanie
COMMISSIONER FOR OATHS
THE COMPETITION TRIBUNAL

CT-2011-003

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

REPLY OF THE COMMISSIONER

PART I: OVERVIEW

1. The Commissioner of Competition (the "Commissioner") repeats and relies upon the allegations in her Amended Notice of Application, Statement of Grounds and Material Facts and Concise Statement of Economic Theory (the "Amended Application") and, except as hereinafter expressly admitted, denies the allegations in the Response filed by TREB (the "Response"). Capitalized terms used below are as defined in the Amended Application.

2. On or about August 25, 2011, TREB's Board of Directors (the "Board") adopted a binding policy and rules governing how and to what extent brokers could use information in the TREB MLS system on their websites (the "Website Rules"). TREB had previously released the Website Rules in draft in late June 2011, approximately one month after the Commissioner filed her application. In the Amended Application filed on July 7, 2011, the Commissioner identified serious deficiencies in TREB's draft Website Rules. However, TREB's Board adopted the Website Rules without changes, despite any comments from TREB members and the Commissioner's Amended Application. As a result, while it labels the Website Rules as a "VOW" policy and rules, TREB continues to prevent genuine VOWs.

3. TREB has therefore not resolved the issues raised in the Commissioner's Amended Application. As a result of TREB's restrictions, brokers who wish to operate a VOW remain unable to offer the same real estate brokerage services available from a traditional broker in a "bricks and mortar" setting, including providing valuable MLS information to consumers through a VOW. The Website Rules do not change TREB's anti-competitive practices, nor their stifling effect on innovation, all to the detriment of consumers and brokers. In this proceeding, TREB's Website Rules comprise part of the "TREB MLS Restrictions" as defined in the Amended Application.

4. In its Response filed on August 19, 2011, TREB did not address several key aspects of the Amended Application. In particular, TREB's Response offered no defence for its discriminatory treatment of TREB members who wish to operate a VOW, versus those who operate a traditional model.

5. Further, TREB did not respond to the Commissioner's position that TREB substantially or completely controls the relevant market 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. As a trade association, TREB's argument that it has no such control because it does not compete in the market, is a technicality favouring form over substance. It ignores the reality that TREB's members do compete in the market and TREB enacts and enforces its rules, policies and agreements for their benefit.

6. Indeed, TREB's enactment of the Website Rules on August 25, 2011 aptly demonstrates its ongoing control of the relevant market. The Website Rules are calculated to restrict how innovative brokers provide services to consumers, to further entrench the dominant traditional model of providing real estate brokerage services to consumers, and to impede the Commissioner's efforts to have the Tribunal scrutinize TREB's practices.

7. The copyright arguments raised by TREB are not relevant to this application and subsection 79(5) of the Act does not apply. TREB's conduct is anti-competitive and cannot qualify as an "act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act* ...", as subsection 79(5) requires. TREB uses its ownership of the TREB MLS system to create and enforce anti-competitive access terms that restrict how brokers compete. Doing so goes well beyond a mere exercise of TREB's rights (if any) under the *Copyright Act*. As such, TREB cannot rely upon the exception in subsection 79(5).

8. TREB glosses over the fact that while its Website Rules, in purported defence of privacy rights, do not allow innovative brokers to provide consumers with valuable MLS information, TREB imposes no such restrictions on traditional brokers. If TREB is genuinely contesting the Commissioner's position on privacy grounds, then TREB's traditional member brokers must already be in widespread violation of the very privacy rules TREB claims to be concerned about. TREB cannot have it both ways.

9. Remarkably, TREB even claimed that the restrictions in its Website Rules may be pro-competitive because "[u]nrestrained VOWs may create excessive incentives for price competition among buyers' brokers ..." In fact, the Website Rules are demonstrably anti-competitive, and "too much" price competition among real estate brokers in the GTA is hardly a concern.

10. 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. The TREB MLS Restrictions are a practice of anti-competitive acts that has had, is having or is likely to have the effect of substantially preventing or lessening competition in that market.

Accordingly, the Tribunal should make an Order under section 79 of the Act and grant the relief requested by the Commissioner.

PART II: DETAILED REPLY PLEADINGS

General

11. TREB selectively referred in paragraphs 6, 7, 22 and 23 of the Response to certain communications between the parties prior to the commencement of this proceeding. These communications were "without prejudice" settlement discussions (whether reflected accurately or not in the Response) that are privileged and, in any event, are irrelevant to the disposition of this application. Paragraphs 6, 7, 22 and 23 of the Response should be struck, or disregarded.

12. TREB's summary of its enforcement record of the TREB MLS Restrictions in paragraph 24 of the Response is neither accurate nor complete. In addition, as noted in paragraph 52 of the Amended Application, the narrow Ontario court decision in question was rendered without deciding the issues raised under the Act. As TREB itself agreed, "the issue of whether TREB's rules and policies regarding its members' use of the MLS Database conformed to, or infringed, Canadian competition law was not before [the court] to decide" in that proceeding.

Product Market

13. TREB's Response avoids taking a position on product market definition. The Commissioner maintains the position taken in the Amended Application, particularly at paragraphs 41-42.

TREB Substantially or Completely Controls a Class or Species of Business

14. Although TREB repeatedly alleges in its Response that it has no market power because it does not compete in the market, it fails to respond directly to the Commissioner's position that TREB and its members have: (i) the ability to enact, interpret, and enforce rules, policies and agreements, such as the Website Rules, that govern the use of and access to the TREB MLS system; and (ii) the power to exclude from the TREB MLS system any brokers and brokerages that do not abide by those rules, policies and agreements. As brokers cannot realistically compete

without access to the TREB MLS system, TREB and its members substantially or completely control the supply of residential real estate brokerage services in the GTA.

15. Contrary to its Response at paragraphs 2 and 41 and its Concise Statement of Economic Theory at paragraphs 19-20, TREB has a compelling incentive to exert its control for the benefit of TREB and its members. TREB's practices protect the interests of the majority of its traditional, dues-paying members from the competitive threat of innovative brokers who want to use VOWs to enter or expand in the market and offer more attractive services to consumers. As a trade association, TREB has used and is using its rule-making ability and power of exclusion to maintain the *status quo*, stifle innovation and significantly harm competition. Those members of TREB who provide services using a traditional model benefit from TREB's anti-competitive conduct. Those members, or potential members, of TREB who wish to innovate and deliver key MLS information to consumers through a VOW, are prohibited from doing so. As a consequence, consumers who could benefit from innovative services offered through VOWs are unable to take advantage of them.

16. For these same reasons (*inter alia*), TREB cannot rely, as it purports to do in paragraph 39 of the Response, on the draft Competition Bureau guidelines. TREB is hardly a mere supplier of an input used in the delivery of residential real estate brokerage services.

Practice of Anti-competitive Acts

17. 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 traditional member brokers. TREB's restrictions constrain the ability of its 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. 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.

"Sold" and other Historical Data

18. Through the Website Rules, TREB continues to protect the traditional model of delivering residential real estate brokerage services to consumers, by restricting the nature and

extent of MLS data that is available on a VOW. TREB's Website Rules prohibit brokers from displaying highly valuable information on their websites about properties that have already sold, or been agreed to be sold but are not yet closed. TREB thereby imposes unnecessary and costly service requirements on innovative brokers (rather than allowing them to automate) and requires consumers to contact brokers at an earlier point in time in their search for a home (or when selling their home) than they may wish to do, to obtain the information they need. In simple terms, TREB's Website Rules protect the incumbents' business model and hinder the development of new and more efficient models.

19. TREB's Response attempts to deflect attention away from its restriction on MLS data and onto brokers' use of advertising websites such as realtor.ca. While brokers may arrange to display their own, current listings on public websites and on one another's websites through Internet data exchanges, this is a far cry from allowing brokers to deliver real estate brokerage services in an innovative way, such as by operating a VOW that contains a complete inventory of current listings, sold data and other highly pertinent residential property information that is readily available from the TREB MLS system.

Discrimination

20. TREB's Response fails to address the Commissioner's fundamental concern that the Website Rules are discriminatory. They deny members' ability to provide certain MLS data through a VOW, yet TREB imposes no corresponding restrictions on brokers who provide the very same MLS information to consumers by means other than an Internet website. The Response did not even attempt to defend or explain TREB's conduct.

21. Further, TREB did not provide any specific response to paragraph 51 of the Amended Application, which states that TREB has made no attempt to enact or enforce rules to restrict traditional brokerages (as distinct from innovative brokerages) from providing, at their sole discretion, all information relating to historical solds, pending solds and other information that TREB insists upon excluding from the data feed provided to member brokers who want to operate VOWs.

Exclusionary or Disciplinary Effect

22. Contrary to the allegations at paragraph 48 of the Response, the TREB MLS Restrictions have a negative effect that is exclusionary and disciplinary. The TREB MLS Restrictions exclude both potential competitors who are not yet in the market and those innovative member brokers who are already eager to compete using a VOW.

23. In addition, the TREB MLS Restrictions do not allow brokers currently operating a traditional brokerage to implement a hybrid business model that would provide consumers with a choice of obtaining services, including TREB MLS information, from the broker personally, or through the broker's VOW, or by some combination of the two.

Copyright Issues Raised in TREB's Response

24. The copyright issues raised by TREB are not relevant to this application because subsection 79(5) of the Act does not apply to TREB's conduct.

25. Paragraphs 1 and 45 of TREB's Response inaccurately summarize subsection 79(5) of the Act by omitting an essential element. Subsection 79(5) does not state that "the exercise of those rights is not an anti-competitive act" as TREB alleged in paragraph 1, nor does subsection 79(5) exclude from the definition of anti-competitive act "the lawful exercise of intellectual property rights", as alleged in paragraph 45.

26. Rather, subsection 79(5) provides that an act engaged in pursuant "only" to the exercise of any right or enjoyment of any interest derived under the *Copyright Act* is not an anti-competitive act. Only an act that is the mere exercise of a right, and nothing else, may fall within the statutory exception under subsection 79(5) of the Act.

27. TREB selectively licenses its intellectual property in the TREB MLS system solely to member brokers who comply with the TREB MLS Restrictions. As discussed in paragraph 48 of the Amended Application, brokers cannot realistically compete in the relevant market unless they have access to the TREB MLS system. By using its ownership of the TREB MLS system to create and enforce anti-competitive access terms, and by licensing access to the TREB MLS system, TREB limits the manner in which brokers compete in the market for residential real

estate brokerage services. Doing so goes well beyond a mere exercise of TREB's rights (if any) under the *Copyright Act*. Subsection 79(5) of the Act simply does not apply.

28. Indeed, even TREB's own argument at paragraph 4 of the Response conceded that "rules imposed by TREB over its members' access to and use of the TREB MLS" protect other interests beyond just the "intellectual property rights of TREB and its members".

29. In addition, the limited access to and use of the TREB MLS system achieved through the TREB MLS Restrictions confer on TREB and some of its members numerous competitive advantages other than those derived from the *Copyright Act*. TREB's Concise Statement of Economic Theory, attached to the Response, itself concedes such benefits. TREB has chosen to protect the interests of its traditional brokers by using its intellectual property rights to shield them from competition from innovative business models such as VOWs. Such conduct is far outside subsection 79(5) and is anti-competitive within the meaning of sections 78 and 79(1) of the Act.

30. TREB's attempt to exculpate itself under the Competition Bureau's *Intellectual Property Enforcement Guidelines*, published in 2000, has no merit. TREB's Response quotes two paragraphs from those guidelines to support its position, yet fails to refer to the paragraphs immediately before and after its quotation – paragraphs that support the Commissioner's position in this application. For the reasons set out above, particularly in paragraph 27, the omitted paragraphs do not support TREB's position.

Privacy Issues Raised by TREB

31. TREB seeks to distract from the clear merits of the Commissioner's objection to TREB's discriminatory treatment of its members by raising the false spectre of "privacy concerns" and casting itself as the protector of consumers. The information at issue is data such as the selling price of a residential property, the number of days it was for sale on the market and price changes during that time, all of which is currently and freely distributed by traditional brokers to consumers on a regular basis by means other than a VOW. TREB cannot realistically characterize itself as the protector of consumers' privacy, given that it does nothing to stop its members from sharing all of that information with consumers – provided that they do so in a

traditional manner that reinforces the "bricks and mortar" model of doing business that is so profitable to those members at the expense of other brokers and consumers.

32. The Commissioner pleads that TREB must enact, apply and enforce rules, policies and agreements that are the same for all brokers. To do otherwise, as the TREB MLS Restrictions provide, is discriminatory and substantially prevents or lessens competition in the relevant market.

The TREB MLS Restrictions Lessen or Prevent Competition Substantially

33. Contrary to paragraphs 49 to 60 of the Response, 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.

34. TREB's control of the relevant market through the TREB MLS Restrictions gives it the power to exclude and discipline innovative brokerage models, thereby protecting and perpetuating the static traditional brokerage model for the delivery of residential real estate brokerage services. The TREB MLS Restrictions also prevent existing brokerages from offering innovative hybrid or mixed-model services to consumers, as described above. TREB's restrictions on innovative, Internet-based business models, such as VOWs, have negatively affected the range of services being offered over the Internet by brokers to their customers and have denied consumers the benefits of the downward pressure on commission rates that would otherwise exist.

35. With respect to prices and price competition, TREB claims:

- (a) that there is "clear evidence of price competition" amongst brokers in the GTA (in paragraph 55 of the Response);
- (b) that TREB's rules "do not prescribe the commission structures that must be adopted by its members" (also in paragraph 55 of the Response); and
- (c) that "[u]nrestrained VOWs may create excessive incentives for price competition among buyers' brokers ..." (CSET, paragraph 24).

TREB must strictly prove these allegations using current and historical sales and commission data of its members using the TREB MLS system.

TREB's Concise Statement of Economic Theory ("CSET")

36. The Commissioner will respond fully to TREB's economic theories at the hearing of this matter. At this time, the Commissioner will limit her reply to the following.

37. In the CSET, TREB appears to characterize itself as a neutral platform operator whose incentives are merely "to operate the TREB MLS to maximize the extent of trade in the GTA", maintain liquidity and facilitate transactions in the market (CSET, paragraphs 4, 7, 10 and 20). In reality, TREB is by no means a neutral or disinterested entity. Its mandate is to advance the interests of its member brokers. TREB's Board is made up almost exclusively of brokers who actively participate in the market for the supply of residential real estate brokerage services, and whose brokerage firms do so. Most, if not all, carry on business using a traditional model and charge their clients based on commission rates that are a percentage of the purchase price of the property. As noted above, TREB has powerful incentives to exercise control over brokers' conduct in that market and to promote and perpetuate a model that has compensated traditional brokers well, while stifling innovation and vigorous competition.

38. TREB raises "two-sided markets" in an attempt to obfuscate legitimate issues raised by the Commissioner. The Commissioner rejects TREB's argument that the remedies requested in this application will have any material impact on the TREB MLS system as a platform. Any impact on TREB's broker members will be the result of positive competitive forces in the marketplace, which can only be good for the market and consumers.

39. Contrary to paragraph 24 of the CSET, TREB's Website Rules are not pro-competitive. The Commissioner pleads as follows:

- (a) **VOWs Depleting the Value of the TREB MLS System:** This argument is not relevant to the present proceedings. In any event, TREB's resistance to VOWs and its imposition of restrictive Website Rules cannot be supported by a concern for accuracy on the TREB MLS system. Rules and policies related to accuracy should apply equally to all brokers' activities regardless of their business models.

- (b) **Excessive Incentive for Price Competition Amongst Buyers' Brokers:** the Commissioner puts TREB to strict proof of these allegations and states that price competition is to be encouraged. In addition, for economic analysis purposes, much of the non-price competition that occurs in the real estate industry, which takes the form of brokers prospecting for new listings, is economically wasteful and inefficient activity that is reduced or eliminated by VOWs.
- (c) **VOWs Obtaining Market Power:** TREB alleges in paragraph 24 of its CSET that "[b]ecause of network effects, a VOW might become the public face of the MLS, creating market power for the VOW". It is incongruous for TREB to argue, on one hand, that it has no market power despite its ownership of the TREB MLS system and its rule-making ability and, on the other hand, that if a VOW becomes the public face of TREB's MLS, it would have market power.
- (d) **Harm to Liquidity:** while TREB appears to equate the liquidity of the residential real estate market in the GTA with the number of brokers who participate in the TREB MLS system, in fact liquidity is a function of the number of listings on the TREB MLS system. If increased competition from VOWs reduces the number of brokers participating in the market (traditional or otherwise), liquidity should not be affected as it should not affect home sellers from listing properties on the TREB MLS system. VOWs containing complete MLS data may make it more attractive to list on the TREB MLS system, compared with other less effective means to buy or sell a property.
- (e) **Free Riding:** there is no free riding issue, as VOWs will not disadvantage listing agents. Rather, VOWs give greater exposure to homes for sale, which benefits brokers. VOWs do not cause consumers to withdraw from the TREB MLS system.
- (f) **Brokers Withdrawing from the TREB MLS system:** given the critical importance of the TREB MLS system to the provision of residential real estate brokerage services in the GTA, and the benefits received by brokers from it, it is highly unlikely that brokers will withdraw from the TREB MLS because of VOWs. Even if some weaker competitors were to exit the market, it would not affect competition or liquidity generally.
- (g) **Increased Costs due to Referral Fees:** even if referral fees were to emerge and be material, competition among referral VOWs would keep fees low. In addition, brokers may decide for themselves whether or not to work with referral VOWs.

PART III: CONCLUSION

40. The Commissioner maintains her position in the Amended Application and respectfully requests that the Tribunal make an Order under subsections 79(1) and (2) of the Act, as requested in paragraph 66 of the Amended Application.

Dated at Toronto this 1st day of September, 2011.

John F. Rook
Andrew D. Little
Bennett Jones LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, ON M5X 1A4

Counsel for the Applicant

Roger Nassrallah
Competition Bureau Legal Services
Department of Justice
50 Victoria Street
Gatineau, Quebec K1A 0C9

Counsel for the Applicant

Copy to:

Donald S. Affleck
Affleck Greene McMurtry
365 Bay Street, Suite 200
Toronto, ON M5H 2V1

Counsel for the Respondent

And to:

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

File No. CT-2011-003

THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

REPLY OF THE COMMISSIONER OF COMPETITION

BENNETT JONES LLP

Suite 3400, P.O. Box 130
One First Canadian Place
Toronto, ON M5X 1A4

John F. Rook, Q.C. (LSUC #13786N)

Tel. (416) 777-4885

Andrew D. Little (LSUC #34768T)

Tel. (416) 777-4808

Fax (416) 863-1716

Counsel for the Applicant

THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

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

Intervenors

AFFIDAVIT OF NADIA BRAULT

BENNETT JONES LLP

Suite 3400, P.O. Box 130
One First Canadian Place
Toronto, ON M5X 1A4

John F. Rook, Q.C. (LSUC #13786N)

Tel: (416) 777-4885

Andrew D. Little (LSUC #34768T)

Tel: (416) 777-4808

Emrys Davis (LSUC #57391B)

Tel: (416) 777-6242

Fax: (416) 863-1716

Counsel for the Commissioner of Competition