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CT-2011-003

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

**RESPONSE OF THE COMMISSIONER
TO THE MOTIONS FOR LEAVE TO INTERVENE FILED BY THE CANADIAN
REAL ESTATE ASSOCIATION AND REALTYSELLERS REAL ESTATE INC.**

1. This Response by the Commissioner of Competition (the "Commissioner") is filed pursuant to rule 44(1) of the *Competition Tribunal Rules* (the "Rules") in response to the motions of The Canadian Real Estate Association ("CREA") and Realtysellers Real Estate Inc. ("Realtysellers") for leave to intervene in this proceeding.¹

¹ Unless otherwise indicated, capitalized terms herein are defined in the Amended Notice of Application (the "Amended Application") or the Reply filed by the Commissioner.

2. **CREA's Motion:** The Commissioner respectfully submits that the Tribunal should dismiss CREA's motion for leave to intervene. Neither CREA nor its members outside Toronto² are directly affected by the matters at issue in this proceeding. CREA has no perspective that is unique or distinct from TREB's on the matters at issue.

3. This case concerns whether TREB's rules, policies and agreements governing TREB's member brokers' access to and use of TREB MLS data prevent or lessen competition substantially in Toronto. This is a local case, not a national one, as it concerns a real estate board's practices in one specific geographic area. The Tribunal is not asked to decide, or even consider, what VOW rules and policies are generally appropriate or acceptable across Canada, nor to adjudicate the rules and policies of any real estate board other than TREB. The *lis* in this case is much narrower than CREA's motion assumes.

4. Any of CREA's members operating in Toronto are also TREB members. CREA will apparently support TREB's restrictions on its member brokers' use of information in the TREB MLS system. As such, CREA will provide no distinct or unique perspective to the Tribunal. The "precedential effect" of this matter outside Toronto is no basis for intervenor status. CREA itself is not directly affected because it gathers no listing data directly from its members and its trademarks are simply not at issue. In reality, CREA wants to fight TREB's battle. But there is nothing to justify CREA being granted the opportunity to address TREB's issues before the Tribunal.

5. CREA seeks full participation in the hearing as though it were a party. Yet, it is not prepared to assume any of the corresponding responsibilities of a party, such as documentary disclosure or oral discovery by the Commissioner. If CREA's motion is granted on the terms it proposes, it would be in a position to ambush the Commissioner by seeking to introduce additional issues not raised in the pleadings, such as trademarks.

6. CREA's motion does not fall within the criteria for leave to intervene and should be dismissed by the Tribunal. To grant leave to CREA would only expand the length,

² Unless the context requires otherwise, "Toronto" in this Response refers to the geographic market as defined in the Amended Application.

breadth and complexity of this proceeding contrary to subsection 9(2) of the *Competition Tribunal Act*.

7. **Realtysellers' Motion:** The Commissioner does not oppose Realtysellers' motion for leave to intervene. Realtysellers is a brokerage currently competing in Toronto. Realtysellers would apparently like to expand its service offerings by using the Internet to more efficiently offer the same information to consumers as traditional brokers do, something currently precluded because of TREB's practices. Realtysellers' evidence indicates that TREB's practices make it "impossible" for Realtysellers to compete on a level playing field with traditional brokers and brokerages in Toronto.

I. THE TEST FOR LEAVE TO INTERVENE

8. Subsection 9(3) of the *Competition Tribunal Act* provides that the Tribunal may grant intervenor status to a non-party. It reads:

Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

9. Rule 46(2) of the *Rules* provides that "[t]he Tribunal may allow a motion for leave to intervene, with or without conditions, or refuse the motion."

10. The person seeking leave to intervene must demonstrate to the Tribunal that:

- (a) it is directly affected by the proceeding in question;
- (b) the matter alleged to affect the person is legitimately within the scope of the Tribunal's consideration or sufficiently relevant to the Tribunal's mandate under the *Competition Act*;
- (c) all representations proposed to be made by the person seeking leave to intervene are relevant to an issue specifically raised by the Commissioner; and

- (d) the person seeking leave to intervene will bring a unique or distinct perspective, separate and apart from that provided by the parties, that will assist the Tribunal in deciding the issues before it.³

11. In its application of these standards to the facts of any motion to intervene, the Tribunal must also consider whether a proposed intervention may prolong or complicate the proceeding before it.⁴ Subsection 9(2) of the *Competition Tribunal Act* states that:

All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

12. Thus, even where a proposed intervenor satisfies the evidentiary and legal rigours of the above four-part test, in deciding whether to grant leave, the Tribunal should still consider the impact of the proposed intervention on the proceedings in light of the express direction in subsection 9(2).

II. WHAT THIS PROCEEDING IS AND IS NOT ABOUT

13. The central issue in this proceeding is whether TREB's practices applicable to TREB's member brokers' access to and use of the TREB MLS system prevent or lessen competition substantially. Specifically, this case is about whether TREB's restrictions on its member brokers' ability to provide certain TREB MLS information over the Internet, such as through a VOW, inhibit innovative brokers from competing with traditional brokers in Toronto.

14. Despite CREA's assertions to the contrary, this proceeding does not concern the rules and policies of any real estate board other than TREB. Likewise, it does not concern what general rules may be appropriate for VOWs across Canada, or what rules should apply to all (or any other) local boards' listing data. The purported precedential

³ See *Canada (Commissioner of Competition) v. Canadian Real Estate Assn.*, [2010] CCTD No 12 at para 9 (QL) ("*CREA*") and *Canada (Commissioner of Competition) v. Visa Canada Corp.*, [2011] CCTD No 2 (QL) ("*Visa/MasterCard*"), at para 19.

⁴ See *Canada (Director of Investigation and Research, Competition Act) v. Air Canada*, [1992] CCTD No 24 at 4 (QL) ("*Air Canada (1992)*").

effect of this proceeding in other parts of Canada is simply not relevant, nor are the other issues CREA raises, namely, trademark issues and general service offerings by brokers.

15. The Commissioner's Amended Application, the scope of which defines the issues that may be the subject of a motion to intervene, seeks relief only with respect to TREB. No remedy is sought against CREA or CREA's members outside Toronto. The Commissioner requests an Order prohibiting TREB from enacting, interpreting or enforcing any restrictions that exclude, prevent or discriminate against TREB's member brokers who wish to use the information in the TREB MLS system to offer services over the Internet, such as through a VOW. The relief does not extend to real estate boards other than TREB, or to any brokers outside Toronto.

III. CREA'S MOTION TO INTERVENE

16. The Commissioner respectfully submits that the Tribunal should dismiss CREA's motion for leave to intervene. CREA and its members outside Toronto are not directly affected by the matters at issue in this proceeding. CREA does not have a perspective that is unique or distinct from TREB's on the matters at issue. Finally, TREB is fully capable and the only competent party to address the topics legitimately before the Tribunal, meaning that CREA's intervention will necessarily result in inappropriate duplication.

17. If the Tribunal does grant CREA leave to intervene, the Commissioner submits that the Tribunal should restrict the scope of CREA's intervention.

A. CREA's members are not directly affected

18. The Tribunal has recognized that member associations are themselves rarely directly affected by issues raised by the Commissioner. It has only permitted member associations to intervene where the association has demonstrated that its members are directly affected by the issues raised by the Commissioner in the proceeding.⁵

⁵ *Visa/MasterCard*, at para 41; *Canada (Director of Investigation and Research) v. Bank of Montreal*, [1996] CCTD No 1 at para 7 (QL) & *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*, [1994] CCTD No 19 (QL) ("Nielsen").

19. This intervention motion is novel because both the respondent, TREB, and the proposed intervenor, CREA, are trade associations in the same industry. Any of CREA's members who may be directly affected by the issues raised by the Commissioner are also TREB members.⁶ CREA intends to adopt the same position as TREB in opposing the Commissioner's Amended Application. Thus, with respect to CREA's Toronto member brokers, CREA's participation in this proceeding is redundant. CREA will contribute no fresh insight or information to the hearing or to the decisions this Tribunal will be asked to make. Its participation will only lengthen, confuse, and slow down the proceeding, all contrary to subsection 9(2) of the *Competition Tribunal Act*.

20. Thus, to consider the direct effect of the proposed relief on CREA, if any, the Tribunal must look beyond CREA's Toronto membership and determine whether CREA's member brokers outside Toronto are directly affected by the issues raised by the Commissioner. The Commissioner submits that they are not.

21. In the *Nielsen* case, members of the Canadian Council of Grocery Distributors' ("CCGD") were counterparties to the very contracts that were challenged by the Director as anti-competitive and that were the focus of remedies requested in the application.⁷ The contracts were for the supply of scanner data, in which members of the CCGD also claimed a proprietary interest. The Tribunal granted leave to intervene solely on the issue of remedies. In *Visa/MasterCard*, the Tribunal relied upon evidence that the merchant contracts in certain Canadian Bankers Association ("CBA") members businesses would change if the proposed order were granted and that the CBA was certain that cardholders would cancel their credit cards with its members if these cards were refused by merchants (as the CBA alleged would happen if the Tribunal granted the Commissioner's proposed relief). The Tribunal granted leave to intervene but curtailed the CBA's proposed areas of intervention.⁸

⁶ Of CREA's approximately 100,000 members, more than 30,000 are members of TREB.

⁷ See *Nielsen*, *supra* at 3.

⁸ See *Visa/MasterCard*, *supra* at para 39-4-.

22. In contrast, CREA has failed to adduce any specific evidence of this application having a direct effect on its individual members outside of Toronto or on the rules of any real estate board outside Toronto, and CREA can claim no proprietary interest in the TREB MLS data. Mr. Simonsen (CREA's affiant and Chief Executive Officer) baldly asserts that "any Order issued by the Tribunal will directly affect how CREA's members across Canada provide services using the Internet"⁹ but does not explain how or why this will occur.

23. Further, the differences that Mr. Simonsen alleges exist across the Canadian real estate landscape¹⁰ (assuming they exist) demonstrate the fallacy of CREA's position. Circumstances and law must be similar for any order to have broad application. If regulatory regimes and local circumstances vary widely by region, as CREA contends, it is doubtful that the proposed order could have the national impact claimed by CREA.

24. Even if CREA's evidence alleged a specific effect on the real estate industry nationally, or a precedential effect on the rules and policies adopted by real estate boards elsewhere in Canada, there is no basis on which to grant leave to intervene. The Tribunal has rejected this very argument.

25. In *Tele-Direct*, Anglo-Canadian applied to intervene on five discrete issues on the basis that it licensed Yellow Pages trademarks from Tele-Direct and published Yellow Pages directories in British Columbia and parts of Quebec. The Tribunal rejected the motion on all but one issue and held that the effect of the Tribunal's decision on a national industry was not evidence of a "direct effect" so it could not grant Anglo-Canadian's intervention:

With respect to the remaining issues raised in its request for leave to intervene, Anglo-Canadian appears to be largely concerned about the precedential effect of the tribunal's decisions in this proceeding on the other major players in Yellow Pages publishing in Canada. It is evident that the decisions of the tribunal will affect the Director's decisions on whether to proceed against any other potential

⁹ Simonsen Affidavit para 3. See also para 40-41 where Mr. Simonsen repeats this bald assertion.

¹⁰ See Simonsen Affidavit at paras 35-37.

respondents and may also affect how the industry conducts its business in light of the possibility of further applications. While this may be a more direct effect than the effect on the public at large of a court ruling of general application, we do not think that, in and of itself, it is sufficient to justify intervener status. Therefore, we see no reason to permit Anglo-Canadian to address these issues.¹¹ [Emphasis added]

26. In this case, the Commissioner has commenced proceedings against TREB. The Commissioner has not commenced an application against CREA. It is not appropriate for CREA to attempt to expand this proceeding into one with purported national scope, and then use that artificial basis to argue it has a right to intervene. CREA cannot demonstrate any direct effect on its members outside Toronto and its motion to intervene must fail.

B. CREA is not directly affected by virtue of its trademarks

27. Like its evidence about "national effect", CREA's evidence about the potential impact on its trademarks is threadbare. Mr. Simonsen asserts that, with respect to VOWs, CREA has an interest in ensuring that any information sourced from an MLS system is subject to rules and policies that protect standards of professionalism and accuracy.¹²

28. CREA's own evidence reveals that, in fact, it has no such interest. It has not enacted rules to protect professionalism and accuracy on VOWs. CREA's "Rules and guidelines for the sharing of real estate information",¹³ which Mr. Simonsen attaches to his affidavit, reveal that CREA has not implemented any rules with respect to these issues:

The MLS and Technology Counsel, or MTC, has approved a policy of "no national rules or standards" for these type of services. Instead, the MTC has developed a series of suggested guidelines Boards or Associations may use in setting up their own IDX or VOW services (when provided directly by a Board or Association). These were published in the EDU Task Force Report in 2003... [Emphasis added]

¹¹ See *Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc.*, (1995), 61 C.P.R. (3d) 528 at 534. The issue on which the Tribunal granted Anglo-Canadian leave to intervene is not comparable to the issues raised by the Commissioner in this proceeding.

¹² Simonsen Affidavit at para 42.

¹³ Attached as Exhibit A to Simonsen's Affidavit.

29. If CREA were genuinely concerned about protecting its trademarks as Mr. Simonsen claims, one would have expected it to do more than merely direct members to non-binding guidelines published eight years ago. Similarly, one would have expected CREA's EDU Task Force Report (defined in paragraph 38) to support its proposed VOW rules with reference to the standards CREA now alleges are associated with its trademarks. But CREA did not.

30. Moreover, CREA does not own or gather any of the listing data directly from its member brokers. Yet the data in the TREB MLS system is at the heart of this proceeding. CREA does not own or operate the MLS system at issue in this proceeding. CREA simply receives the current listing data from TREB and other local boards and uploads it to its website, www.realtor.ca.

31. In any event, TREB is better positioned than CREA to address professionalism and accuracy concerns because these are only relevant to the extent they apply to TREB's own member brokers and its own MLS system. In fact, CREA's By-laws concede that it is the role of members and boards, not CREA, to ensure accuracy of MLS information. Moreover, TREB's Response confirms that it will address these very issues.¹⁴

32. Accordingly, there is no basis to conclude that CREA will be directly affected by virtue of its trademarks. Its motion for leave to intervene should be denied.

¹⁴ See for example: Response, paragraph 4: "In addition, such rules promote the accuracy and reliability of the information on the TREB MLS."

Response, paragraph 48(b): "TREB's Access Terms [to its MLS] are informed by TREB's legitimate interests in preserving the value of the TREB MLS for the benefit of TREB's members."

Response, paragraph 48(c): "TREB's Access Terms [to its MLS] have been formulated... to ensure that TREB and its members are compliant with their respective statutory obligations... and the Code of Ethics..."

CSET, paragraph 24: "VOWs may add information that reduces the reputation of the TREB MLS in general for accuracy..."

CSET, paragraph 24: "...This may reduce the effectiveness of the TREB MLS from the perspective of sellers, resulting in fewer listings."

C. CREA does not offer a unique perspective

i. CREA's perspective is identical to TREB's

33. Even if the Tribunal finds that CREA is directly affected by the proposed relief, CREA must still establish that it will offer a unique perspective to assist the Tribunal in deciding the issues before it. The Tribunal has denied intervention motions when the interests of the intervenor are completely aligned with one of the parties.¹⁵ In *Southam*, the Tribunal commented as follows:

This application is indeed most unusual in that the interests of the intervenor and of Southam are entirely the same. Both will seek to establish that Mr. Delesalle's plans provide for an effective remedy and that the Tribunal which heard the original application would not have made the order which it made if the current remedy had been before it at the time. I do not believe that the rules respecting intervention contemplate that an intervenor be called upon to make the very case that an applicant is called upon to make.

In this instance, Southam, as the applicant, bears the burden of proving every element necessary to support the variation application, failing which it will fail. It cannot delegate this task to someone else in whole or in part. Intervenors are intended to supplement the case of a party by bringing to the Tribunal their own and distinct perspective of the subject matter in dispute. Here nothing of the sort would be achieved by granting Mr. Delesalle intervenor status as Southam has already assumed the task of providing the Tribunal with Mr. Delesalle's contribution to the matter in issue.¹⁶ [Emphasis added]

34. CREA's perspective is identical to TREB's on the issues that are raised by the Commissioner in this proceeding. Its intervention is merely an impermissible attempt by CREA to fight TREB's battle and the Tribunal should deny it leave to do so.

¹⁵ See *Southam Inc. v. Canada (Competition Act, Director of Investigation and Research)*, [1997] CCTD No 47 (QL) ("*Southam*") & *Canada (Commissioner of Competition) v. Canadian Real Estate Assn.*, [2010] CCTD No 11 (QL) ("*CREA 2*").

¹⁶ *Southam*, *supra* at paras 12-13.

ii. CREA does not have unique Internet/data expertise

35. In his affidavit, Mr. Simonsen describes CREA's experience with Internet and data issues at length. But he does not acknowledge TREB's experience with these very issues.

36. In fact, TREB's Response reveals that it too has ample experience with the Internet and data issues raised by the Commissioner in this proceeding. TREB pleads (like CREA) that it developed its own VOW task force to examine how best to facilitate the operation of VOWs by its members.¹⁷ It also pleads that it offers an Internet Data Exchange to its members.¹⁸

37. The Tribunal must remember that CREA does not operate its own MLS system. Nor does it collect listing data directly from its individual members. Rather, CREA aggregates a subset of information available from MLS systems operated by local boards and operates a national current listing website located at www.realtor.ca. It strains credulity to suggest that CREA somehow has greater expertise with data issues related to MLS systems than do the member boards, such as TREB, that operate those very underlying MLS systems.

38. Mr. Simonsen refers to CREA's MLS and Technology Council ("MTC") and its establishment of the Electronic Data Usage Task Force ("EDU Task Force") as support for his assertion of CREA's experience with Internet and data issues. However, he fails to mention that two key people in TREB's current senior executive management, John DiMichele (TREB's current Chief Information Officer and Associate Chief Executive Officer) and Richard Silver (TREB's current President) participated in the EDU Task Force and its 2003 report. In fact, Mr. DiMichele also chaired the MTC during the development and release of the report, which proposed lengthy guidelines concerning VOWs for use by local boards. CREA offers no witness better suited to provide evidence on the MTC or EDU Task Force than Mr. DiMichele or Mr. Silver. Thus, there is no reason to believe that the information gleaned by the EDU Task Force or its conclusions

¹⁷ TREB Response at para 5.

¹⁸ TREB Response at para 20.

will not be before the Tribunal.¹⁹ And, of course, there is no need for CREA to become an intervenor in order to have its evidence led by TREB, if indeed there is any evidence that is probative of relevant issues.

39. In light of the above facts, there is no reason to believe that CREA offers a unique perspective merely because of its experience with Internet and data issues. It is TREB's rules and policies that are in dispute before the Tribunal, not CREA's; as such, TREB is better positioned to address these issues and, indeed, the only legitimate party to do so.

iii. CREA's competition law experience is not helpful to the Tribunal

40. Mr. Simonsen asserts that CREA "has also taken a leadership role in ensuring that competition issues are properly addressed within the Canadian real estate industry."²⁰ Competition law experience is no basis to support a motion for leave to intervene;²¹ thus, CREA's purported "leadership" role in these regard is irrelevant.

41. TREB is represented by experienced competition law counsel in this matter and can reasonably be expected to hire experts and provide first-hand evidence to respond to the Commissioner's Amended Application. It does not require CREA's assistance or support to defend itself.

iv. CREA's "national perspective" is not relevant

42. As set out above, evidence of "national effects" is not relevant and cannot ground CREA's motion to intervene. It follows that CREA's perspective as a national real estate association is not a relevant unique perspective.

¹⁹ This overlap of TREB and CREA leadership on the EDU Task Force is reflective of the significant overlap in the TREB and CREA leadership over the last several years. Other TREB current and former directors/executives that have also had leadership roles with CREA include Don Richardson, Ann Bosley, Hugh Foy, and Dianne Usher.

²⁰ Simonsen Affidavit para 18.

²¹ See *Canada (Director of Investigation and Research, Competition Act) v. A.C. Nielsen Company of Canada Limited*, [1994] CCTD No 9 at 2 (QL).

D. TREB can better address CREA's proposed topics

43. Even where the Tribunal finds that a proposed intervenor is directly affected by the issues raised by the Commissioner and offers a unique perspective, it will not permit that intervenor to duplicate a party's evidence or address a topic better addressed by one of the parties.²² For example, in *Air Canada (1992)*, the Tribunal noted that:

I am somewhat narrowly defining the matter upon which I am allowing IBM, VIA and Unisys to intervene. IBM and Unisys are suppliers to Gemini and VIA is a user of Gemini services. No doubt they would all be directly affected if, as several of the respondents predict, Gemini were to fail as a result of an order of this tribunal allowing Canadian to terminate its hosting contract with Gemini. However, it is not clear that they can make any useful representations beyond those of the respondents with respect to the question of whether the order should be granted: Gemini and the members of the Gemini partnership represented by the respondents can be relied upon. I think, to say everything that can be said for the continued existence of Gemini.

[...]

As I cannot foresee how any expert evidence would be particularly useful in respect of framing the order, however, I have not thought that fairness requires the possibility of these intervenors introducing expert evidence.²³ [Emphasis added]

44. That CREA does not offer a unique perspective is even more apparent when the Tribunal considers the topics CREA proposes to address.²⁴ Each is better addressed, and only appropriately addressed, by TREB. CREA's submissions on these topics will serve no useful purpose.

- (a) **Appropriate definitions of product and geographic market:**
TREB can better address these issues. It is TREB's broker members who carry on business in the relevant affected markets.

²² See *Visa/MasterCard, supra* at para 49.

²³ *Air Canada 1992, supra* at 5-6.

²⁴ CREA's Request for Leave to Intervene at para 11.

- (b) **Use and likely competitive effects of VOWs and other data sharing vehicles:** TREB's Response indicates that it intends to address this issue.²⁵
- (c) **Suitability and/or effectiveness of proposed remedies:** Given that the remedy is directed at TREB, relates to the TREB MLS system, and affects TREB's member brokers, there is no reason, and no legitimate rationale, for CREA to address these issues. As set out above, any "national perspective" is not relevant to the Tribunal's proceedings herein.
- (d) **Appropriate relationship between VOWs and traditional "bricks and mortar" services:** As set out above, TREB can adequately represent its member brokers. Moreover, TREB has developed and implemented its own policy and rules related to VOWs, while CREA continues to study the issue. It is not apparent what CREA can add that could be relevant to the Tribunal.
- (e) **Whether the proposed order will lead to innovative services and reduced fees for consumers:** TREB is perfectly competent to address issues related to innovation and prices charged to consumers in Toronto and its Response indicates that it intends to do so.²⁶ As explained above, any "national perspective" is not relevant to the Tribunal.
- (f) **Effect of the availability of a variety of Internet data sharing vehicles on competition in the market:** Again, because the market is restricted to Toronto, CREA has nothing to add to the information already before the Tribunal. Information about how a

²⁵ See for example paras 21-24 of TREB's Concise Statement of Economic Theory.

²⁶ See for example TREB's Response at para 54 and TREB's Concise Statement of Economic Theory at paras 24-25.

variety of data sharing vehicles affect competition outside Toronto is not relevant to the Tribunal in this proceeding.

E. The Tribunal should restrict CREA's role

45. Alternatively, if the Tribunal grants CREA leave to intervene, it should restrict the scope of CREA's proposed intervention. In particular, there is no reason for CREA to submit expert evidence. Given the factual nature of its alleged unique perspective, any assistance it can offer the Tribunal should only be in the form of a fact witness.

46. The Commissioner proposes that CREA's intervention be limited as follows in accordance with the objectives of subsection 9(2) of the *Competition Tribunal Act*:

- (a) CREA should immediately produce copies of the documents Mr. Simonsen mentions in his affidavit but which he does not attach as exhibits;
- (b) with respect to documentary discovery, the Tribunal should require CREA to deliver an affidavit of documents relevant to the issues on which it is granted leave to intervene;
- (c) the Commissioner should be permitted to cross-examine CREA's representative on its affidavit of documents;
- (d) the Commissioner should be permitted oral discovery of CREA's representative;
- (e) CREA should only be permitted to review those portions of the discovery transcripts and exhibits directly relevant to the issues on which CREA is permitted to intervene;
- (f) CREA should deliver the relevant, non-repetitive evidence of one witness, by witness statement only, with respect to the issues on which CREA is permitted to intervene;

- (g) CREA should not be permitted to cross-examine witnesses at the hearing;
- (h) CREA should not be permitted to lead expert evidence;
- (i) CREA should only be permitted to make relevant, non-repetitive legal arguments at the hearing, pre-hearing motions, case conferences, or scheduling conferences with respect to the issues on which CREA is permitted to intervene; and
- (j) CREA should only be permitted to make relevant, non-repetitive submissions on the proposed relief with respect to the issues on which CREA is permitted to intervene.

IV. REALTYSELLERS' MOTION FOR LEAVE TO INTERVENE

47. As noted above, the Commissioner does not oppose Realtysellers' motion for intervenor status.

48. Although a TREB member, it is apparent that Realtysellers' interests do not align with TREB's.

49. Regarding direct effect, Mr. Dale stated in his affidavit that Realtysellers:

- (a) is TREB's largest non-traditional brokerage (para 12);
- (b) wishes to expand its business offerings to the "buy" side but cannot do so because of TREB's rules and policies which the Commissioner challenges (paras 15 and 36);
- (c) cannot compete with traditional agents and brokerages in the Greater Toronto Area because of TREB's rules and policies (para 18).

50. Mr. Dale has also testified that TREB's policies discriminate against VOWs (which Realtysellers would like to operate) in favour of communication delivery methods

offered by traditional "bricks and mortar" brokerages. He stated that Realtysellers needs to operate a VOW to provide its services in a cost effective manner but cannot compete if it cannot provide the same information to a prospective purchaser as its competitors.

51. Regarding Realtysellers' unique perspective, Mr. Dale testified that:

- (a) he has operated both traditional and non-traditional brokerages (para 27);
- (b) Realtysellers is currently TREB's largest non-traditional brokerage (para 12); and
- (c) Realtysellers has a unique private interest distinct from the Commissioner's broader public interest, which will enable it to make helpful submissions to the Tribunal (para 36).

52. Moreover, the Commissioner recognizes that Realtysellers' perspective as a current market participant may be different from the Commissioner's.²⁷ Private actors may desire broader relief than the Commissioner, in the exercise of her public interest mandate, may require. In that sense, Realtysellers may be in a unique position to inform the Tribunal about the adequacy of the proposed relief sought by the Commissioner.

53. If Realtysellers is granted leave, the Commissioner submits that Realtysellers' participation should be tailored to the scope of its intervention in accordance with the objectives in subsection 9(2) of the *Competition Tribunal Act*. The Commissioner proposes that the Tribunal tailor Realtysellers' rights and obligations in the manner proposed by the Commissioner in paragraph 46.

V. HEARINGS IN RESPECT OF THE MOTIONS

54. The Commissioner requests that an oral hearing be scheduled by the Tribunal to address CREA's motion for leave to intervene. The Commissioner does not consider that

²⁷ See for example Iacobucci J.A.'s comments in *American Airlines, Inc. v Canada (Competition Tribunal)*, [1988] FCJ No. 1049 at 7 (CA) (QL) where he contemplated that the Commissioner and an intervenor may disagree on facts or evidence of which the Tribunal should be apprised.

a hearing is required to determine Realtysellers' motion for leave to intervene, unless the motion is opposed by TREB or a hearing is requested by Realtysellers.

Dated at Toronto this 14th day of September, 2011.

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THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

**RESPONSE OF THE COMMISSIONER TO THE MOTIONS FOR
LEAVE TO INTERVENE FILED BY THE CANADIAN REAL ESTATE
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