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OTTAWA, ONT.

# 22

**THE COMPETITION TRIBUNAL**

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

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

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

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**THE TORONTO REAL ESTATE BOARD**

Respondent

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**AFFIDAVIT OF LAWRENCE MARK DALE**

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1. I, Lawrence Mark Dale, real estate sales person, businessman, lawyer and resident of the City of Toronto, in the Municipality of Metropolitan Toronto, MAKE OATH AND SAY AS FOLLOWS:

2. I am the founder and President and CEO of Realtysellers Real Estate Inc. ("Realtysellers") and as such I have personal knowledge of the matters deposed to herein. Realtysellers is a residential real estate brokerage and a member of the Toronto Real Estate Board ("TREB") and the Canadian Real Estate Association ("CREA").

3. I first became licensed as a real estate salesperson in early 2001. Since that time, I have pursued building non-traditional residential real estate brokerages. My objectives were to provide consumers with a different approach to obtaining residential real estate brokerage services at better value than provided by traditional agents and brokerages. My business philosophy was to offer a choice of services to consumers so that they only needed to purchase the services they desired and to utilize all available technology to provide an efficient delivery of services and MLS property information at better value than provided by traditional agents and brokerages.

4. At my every step in the development of my former residential real estate brokerage businesses over the past decade, I was met with resistance from both TREB, the respondent in this proceeding, and its parent organization CREA.

5. All of this targeted activity surrounded preventing or limiting my ability to use the Multiple Listing Service ("MLS") in connection with my previous businesses. If my access to MLS was limited or prevented, I could not operate my businesses and compete with traditional agents and brokerages as it is a practical reality of the market that a realtor who wishes to trade in resale residential properties in the Greater Toronto Area requires access to the MLS to carry on an effective business.

6. At various times over the past decade I had partnered with large companies to pursue my business objectives including companies such as eBay and Bell Canada. At each instance my residential real estate brokerage businesses were targeted and forced out of business as a result of the limiting or preventing of my access to the MLS.

7. The settlement of the CREA proceedings that were before the Competition Tribunal last year (the "CREA Proceedings") has now permitted me to offer unbundled MLS services. However the other impediments to me properly developing my entire business plans needed to be removed, namely the ability to provide my customers and potential customers with the same MLS information that traditional

agents and brokerages provide by hand through my more cost effective and efficient process through my virtual office..

8. On May 25, 2011 the Commissioner took action in relation to these matters and filed a Notice of Application against TREB pursuant section 79 of the Act resulting in these proceedings.

9. The Greater Toronto Area serviced by TREB and its MLS is by far the largest residential marketplace in Canada. According to CREA's MLS statistics for 2010, approximately 25% of the total dollar volume of all residential MLS transactions in Canada took place in the Greater Toronto Area through the TREB MLS representing over \$38 billion in transaction value.

10. As a result of the Commissioner commencing these proceedings, I made the business decision in June to re-enter the residential real estate brokerage marketplace. My brokerage operating in the Greater Toronto Area is Realtysellers, the party seeking to intervene in these proceedings.

11. In the past two months, Realtysellers and its related parties (collectively "Realtysellers") have acquired brokerages in other provinces, became licensed as a brokerage or have taken steps to become licensed as a brokerage in several provinces and made a strategic investment in PropertyGuys.com Inc., Canada's largest franchise network helping private sellers sell their homes. Realtysellers is committed to finally being able to offer the full offering of services to consumers that I have wanted to provide for years but have been prevented from doing so by CREA and TREB and their respective rules and policies. The Consent Agreement in the CREA Proceedings was a first step in the process but the anti-competitive rules and policies of TREB challenged in this proceedings still need to be removed.

12. Even though Realtysellers has only been operating for less than two months offering very limited programs, Realtysellers has established itself as TREB's largest non-traditional brokerage.



13. Realtysellers is only offering limited ala carte MLS services concentrating on the “sell side of the business” such as a simple MLS posting for consumers who do not want to purchase any other brokerage services.

14. In the less than two months since Realtysellers has launched its first programs, Realtysellers has posted more than 600 properties on realtor.ca and has additional commitments with more than 1000 additional customers to post their properties on realtor.ca. Realtysellers currently is signing up more than 100 customers per week, with that number growing each week. Realtysellers anticipates assisting over 30,000 consumers with only its current limited program offerings in the next 12 months representing approximately \$4 billion in property transaction value.

15. However, Realtysellers is unable to materially expand its service offerings into the “buy” side of the business, given the current restrictions that TREB has placed on our ability to provide the same MLS information that traditional agents and brokerages can provide to consumers by hand delivery. We simply need to provide the same information that is currently provided by the traditional agents and brokerages, but we want to use what we think is a better and more efficient delivery process to get this information to consumers, namely the internet through a virtual office as apposed to by hand at a bricks and mortar office.

16. The current TREB rules and policies are designed to protect the traditional agents and brokerages who operate bricks and mortar offices and provide MLS information through in person meetings and prevents new innovative brokerage models like Realtysellers that want to use the internet to provide a more cost effective and some would say more consumer friendly experience for the delivery of this MLS information.

17. TREB’s current rules and policies allow agents and brokerages to provide customers and potential customers with all of MLS information in the TREB MLS system on properties for sale, properties that have sold and closed, properties that have sold but not yet closed and properties that are

conditionally sold. However, the current TREB rules prevent Realtysellers from providing this identical information to its customers and potential customers through a virtual office environment.

18. The current TREB rules and policies result in consequences that make it impossible for Realtysellers to compete with traditional agents and brokerages in the Greater Toronto Area as we cannot give our customers the same information unless we change our delivery method which is not possible in our model of providing better value by using efficient processes; if we cannot use efficient processes we cannot provide better value and lower costs for consumers.

19. For example, a prospective home buyer that walks into a bricks and mortar real estate office can receive from the agent or brokerage all of the information in the TREB MLS database on all properties that are for sale in a particular area, all properties that have recently sold and closed in that area, all properties that have sold but not yet closed in that area and all properties that have conditionally sold in that area. The agent or brokerage is permitted under TREB's current rules and policies to forward this information either by hand or by fax but under these anti-competitive rules established by TREB, Realtysellers can not provide the same person with the same information through the virtual office environment that exists at Realtysellers.

20. TREB has stated both publically and in its Response in these proceedings that it has privacy concerns relating to brokerages like Realtysellers providing MLS information over the internet through a virtual office. It cannot be the case that providing information electronically raises privacy concerns, while providing the same information by hand does not.

21. TREB has chosen to restrict disclosure of MLS information only through those types of communication delivery methods offered by traditional agents and brokerages in their bricks and mortar offices and not by any progressive and technologically advanced new way like over the internet through a virtual office that Realtysellers needs to use in order to provide our services in a cost effective manner.

Realtysellers cannot obviously compete without being able to provide the same information to prospective purchasers.

22. The development of the Realtysellers' business is directly affected by the result of these proceedings. Realtysellers is limited in the services it can provide to consumers if it cannot provide the same MLS information over its preferred chosen medium as opposed to by hand or by fax like a traditional agent or brokerage.

23. Realtysellers is TREB's largest innovative non-traditional brokerage member. Realtysellers can provide a unique perspective on how the TREB rules and policies restrict the ability of a party wanting to use a virtual to operate and compete as well as what relief is required to provide a fair and competitive marketplace for innovative brokerages like Realtysellers and any others that decide to enter the marketplace once these proceedings are resolved.

24. In less than two months, Realtysellers has established itself as a real market competitor to the traditional agent and brokerage while operating almost exclusively on the "sell" side of the business. Realtysellers' market share will substantially increase once it is able to operate a virtual office and attract prospective home buyers. The development and growth of the Realtysellers business is directly affected by the outcome of these proceedings.

25. The recently passed TREB VOW rules and policies do not eliminate the restrictions placed on providing MLS information over the internet as opposed to by hand. These VOW rules and policies in fact codify the advantages given to traditional agents and brokerages who want to continue providing MLS information by hand and prevent virtual operators from providing the same information over the internet to the same consumer.



26. Two senior members of the Realtysellers executive group, Fraser Beach and myself, are the only current non-traditional realtors who have ever operated a virtual office in TREB, albeit both for limited time frames until TREB stopped their previous activities.

27. I bring a unique and distinct perspective to these proceedings as I have more experience operating and attempting to operate non-traditional brokerages than any member of TREB, having been pursuing the cause for over a decade. I have also been involved with some of TREB's largest traditional brokerage members including being President and CEO of the group of that in 2007 purchased 80% of Chestnut Park Real Estate Limited, one of TREB's largest traditional brokerage members. My knowledge and experience that I acquired owning and operating both non-traditional and traditional brokerages will provide a distinct and unique perspective on the subject matter of these proceedings that cannot be provided by any other TREB member.

28. If Realtysellers is granted leave to intervene, the topics that we would like to intervene on are as follows:

- (a) How a brokerage like Realtysellers would operate a virtual office and provide MLS information to consumers over the internet as opposed to through a bricks and mortar office and by hand;
- (b) The cost savings and operational efficiencies of operating a virtual office and the savings that can be passed along to consumers;
- (c) The impact of the current TREB rules and policies, including its recent VOW policy, on a non-traditional brokerage like Realtysellers who wants to provide consumers with MLS information in a virtual office environment over the internet as opposed to through a bricks and mortar office by hand;
- (d) The absence of any privacy issues and regulatory issues preventing fully functioning virtual offices; and
- (e) The Proposed Order and the impact it will have on non-traditional brokerages who want to provide consumers with MLS information through a virtual office over the internet as opposed to through a bricks and mortar office by hand.

29. If granted leave to intervene, Realtysellers intends to call a maximum of three witnesses provided that the evidence to be presented by the witness is relevant to the topics of its intervention and is not duplicative.

30. If granted leave to intervene, Realtysellers is prepared to produce all documents relevant to the topics of its intervention and deliver an affidavit of documents related thereto.

31. If granted leave to intervene, Realtysellers will produce a witness for discovery in relation to the topics of its intervention.

32. If granted leave to intervene, Realtysellers asks that, subject to any confidentiality orders, Realtysellers is to be served with the parties' productions and affidavits of documents as they become available.

33. If granted leave to intervene, Realtysellers asks that it be entitled to be present at the discoveries and can ask questions only on the topics of its intervention but not to repeat any questions already asked by other counsel.

34. If granted leave to intervene, Realtysellers asks that at the hearing it be entitled to cross-examine witnesses only on the topics of its intervention but not to repeat any questions already asked by other counsel.

35. If granted leave to intervene, Realtysellers asks that it can make oral and written submissions which are not repetitive only on the topics of its intervention as well as final oral and written argument, including submissions on the Proposed Order.

36. While Realtysellers supports the Commissioner's position generally, Realtysellers is in a unique and distinct position to participate in these proceedings in the limited way proposed. Realtysellers is the largest and only operator to my knowledge in TREB wanting to offer the very type of services that the



