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Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

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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 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:

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And to:

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And to:

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Competition Tribunal
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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.

THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

AMENDED NOTICE OF APPLICATION

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