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CT- 2010-002

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

CT-2010-002

OTTAWA, ONT.

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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, regulations and policies of The Canadian Real Estate Association.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Respondent

**RESPONSE OF THE COMMISSIONER TO MOTION TO INTERVENE
OF NATIONAL FSBO NETWORK INC.**

1. The Commissioner does not support the motion of the proposed intervenor, National FSBO Network Inc. ("NFN"), for leave to intervene in this proceeding. The Commissioner's position is that the grounds submitted by NFN in its motion materials are insufficient to grant leave to intervene in this matter. The Commissioner submits that an oral hearing is unnecessary on this motion for intervention.

2. There are two issues on this application:
 - (a) Whether NFN should be granted leave to intervene and, if so,
 - (b) The terms on which such intervention should be granted.

The Product Market and the MLS System

3. The Commissioner's position is that CREA has substantial or complete control over the supply of residential real estate brokerage services throughout Canada; that CREA and its members have used CREA's control of the MLS and related trademarks to impose exclusionary restrictions (the "MLS Restrictions") on their use; that CREA has enacted these restrictions with the intent of having a negative exclusionary effect on real estate brokers seeking to provide less than a full package of those services; and that these restrictions lessen or prevent competition substantially in the market for residential real estate brokerage services in Canada.

Notice of Application and Statement of Grounds and Material Facts ("Notice of Application"), paragraph 1

4. As the pleadings disclose, the relevant product market in this proceeding is the market for residential real estate brokerage services. The Notice of Application alleges that CREA and its members have used their control over access to the MLS system to impose exclusionary rules that restrict the basis on which brokers compete with each other and offer services to the public. The exclusionary effect of the MLS Restrictions is principally on brokers who want to provide innovative services or operate businesses other than the traditional, full-service model of providing residential real estate brokerage services.

5. The Commissioner's position is that the MLS system is a key input in the supply of residential real estate brokerage services in Canada. Paragraph 2 of the Notice of Application states in part:

[...] The MLS system is widely used by real estate brokers and is a key element in the supply of residential real estate brokerage services across Canada. The MLS system provides CREA's members with the only comprehensive listing of homes for sale in Canada. CREA also provides sellers and purchasers of real estate with access to a subset of the listing information through a public website, realtor.ca (formerly mls.ca). No

listing source provides as much exposure or information to sellers and purchasers as does the MLS system. While other options exist for marketing a home for sale, such as newspaper advertising, they are not adequate substitutes for an MLS listing.

Notice of Application, para. 2

6. The Commissioner also pleads that the MLS system is a critical mechanism for ensuring that homes for sale are given broad exposure. It provides CREA members with key data such as historical sales data (which market participants use to price bids and evaluate offers). There are no substitutes for the MLS system. To brokers, access to the MLS system is a valuable and practical necessity in offering residential real estate brokerage services in Canada.

Notice of Application, para. 2, 8, 10, 12

Reply of the Commissioner, para. 2, 16, 18

Is NFN Directly Affected by this Proceeding?

7. NFN does not participate in the relevant product market. From the evidence on this motion, NFN does not offer residential real estate brokerage services. As such, it is not directly affected by the MLS Restrictions.

(a) Participation in the Relevant Product Market

8. There is no suggestion that NFN offers residential real estate brokerage services, or that it is a member of CREA. There is likewise no suggestion that NFN's business is directly affected by the MLS Restrictions.

9. Mr. Skelly's evidence is that NFN was incorporated in 2009 to "fill a void" within the "'for sale by owner' (FSBO) market", which is not the relevant product market.

Affidavit of Stephen John Skelly sworn April 5, 2010 ("Skelly Affidavit"), at para 5

10. Mr. Skelly's evidence is also that NFN is in a unique position to provide the Tribunal with an "understanding of the role played by FSBO businesses in the Canadian real estate market". Accurate or not, the Canadian real estate market is not the relevant product market in this proceeding.

Skelly Affidavit, para 6

11. According to Mr. Skelly's Affidavit, NFN operates an Internet website that seeks to be a "national listing network" for FSBO businesses. The purpose of NFN's network is to "enable FSBO businesses to showcase their segment of the real estate market across Canada and [to] give prospective purchasers a single portal through which all such FSBO properties can be accessed".

Skelly Affidavit, at para 5

12. Some FSBO businesses may be poised entrants into the relevant product market; that is, in the absence of the MLS Restrictions, some businesses currently operating in the FSBO market could enter the market for residential real estate brokerage services. However, there is no evidence before the Tribunal to suggest that NFN is a proper intervenor or witness on these issues.

(b) Potential Future Impact of the Tribunal's Remedy

13. NFN's position is that the remedy that the Tribunal may order "may not produce the result the Commissioner is seeking". If the Commissioner's application is successful, it is claimed in NFN's motion materials that there is "serious concern in the FSBO community" that it would be "very difficult for FSBO businesses to compete with agents who would have full use of the MLS and 'related trademarks' and who would have all the advertising and marketing recourses of the CREA and its members". This "could ultimately lead to the demise of the FSBO businesses and the cost effective services they provide and effectively [result in] a monopoly situation".

Motion for Leave to Intervene, at page 3, #3

14. NFN's position is contingent on a prediction of future events that confirms that NFN, to the extent it could be affected at all (which has not been demonstrated), could only potentially be affected very indirectly by the present proceedings.

15. While NFN does not specify the product market to which it refers, NFN's premise is that if and when the MLS Restrictions are removed by Order of the Tribunal, there will be enhanced competition and that the FSBO businesses may not be able to compete successfully. It is

submitted that an applicant cannot be granted leave to intervene on the basis that a possible Order of the Tribunal may enhance competition in a market.


16. For these reasons, the Commissioner submits that the grounds submitted by NFN in its motion materials are insufficient to grant leave to intervene in this matter. The Commissioner takes no position at this time on the ability of FBSO businesses or NFN to be an admissible witness in this proceeding.

Terms of Intervention (If Leave is Granted)

17. If leave is granted to NFN to intervene in this matter, the Commissioner's position is that the terms should be as follows:

- (a) there should be no order granting rights to discovery of or by NFN;
- (b) NFN should only be able to adduce evidence at the hearing that is non-duplicative of the evidence presented by the Commissioner and the Commissioner declines to adduce the evidence;
- (c) NFN may make oral and written submissions to the Tribunal.

Dated at Toronto this 20th day of April, 2010.



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