

**FILED / PRODUIT**

Date: March 26, 2010

CT- 2010-002

Chantal Fortin for / pour  
REGISTRAR / REGISTRAIRE

File No. 2010-002

OTTAWA, ONT.

# 11

**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

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**RESPONSE**

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**PART I - OVERVIEW OF RESPONSE**

**A. This Application is Fundamentally Misconceived**

1. The Application brought by the Commissioner of Competition (the "Commissioner") against The Canadian Real Estate Association ("CREA") is fundamentally misconceived. Contrary to the Commissioner's allegations, it is simply untrue that consumers have only one option if they want to sell their house using a MLS® System operated by a local real estate Board or Association (a "MLS® System"). The Commissioner's allegation that

consumers who want their property listed on a Board's MLS® System must hire a real estate broker who will force them to purchase a bundle of services that they may not want is simply false.

2. CREA's member real estate and broker licensees, who are designated and follow a professional code of conduct as REALTORS®, offer a wide range of business models, including "discounted" commission rates, flat-fee arrangements such as listing a property through a REALTOR® on a Board's MLS® System for \$109 or less, as well as various fee-for-service arrangements.

3. As owner of the MLS® certification marks (the "MLS® Marks"), CREA has rules with respect to the operation of a member Board's MLS® System and the use of the MLS® Marks (the "MLS® Rules"). Under CREA's MLS® Rules, as long as REALTORS® comply with minimal and legitimate requirements such as those requiring ethical behaviour, the accuracy of information submitted to a Board's MLS® System and the reporting of sales (so as to ensure, among other things, that Boards' MLS® Systems are accurate and up to date), they are free to do as they choose. Neither CREA (nor its member Boards) tell its members how to run their businesses or what fees or commissions to charge.

4. The unfounded allegations in the Application mischaracterize the very competitive environment in which CREA's 98,000 REALTOR® members compete vigorously every day to help Canadians buy and sell their homes.

#### **B. CREA's Commitment to Competition Law Compliance**

5. CREA is a trade association, governed by an elected board of directors and an executive committee selected from the elected board of directors. All of the elected CREA directors are volunteers who expend very substantial time and effort for the activities of their trade association.

6. CREA has consistently and repeatedly expressed and demonstrated its commitment to comply with competition law. In 1999, CREA promulgated its "Principles of Competition"; under CREA's rules, member Boards of CREA are required to comply with these Principles. CREA employs in-house competition law counsel, who actively promotes

competition law compliance (including via written and audiovisual compliance material and conducting compliance seminars) and provides competition law advice to CREA and its members.

7. CREA has a long history of engaging in dialogue with the Competition Bureau (the "Bureau") and working hard to understand and address the Bureau's concerns, even where CREA does not agree with the Bureau's views. Prior to proposing amendments to its Rules in 2006, 2007 and 2010, CREA advised the Bureau of the proposed amendments and indicated a desire to discuss any issues with the Bureau. While CREA and the Bureau may ultimately disagree, at all times CREA has behaved in a responsible and proactive manner in initiating discussions with the Bureau and attempting to resolve issues where possible.

8. The latest example of CREA's responsible and proactive behaviour can be seen in amendments to CREA's MLS® Rules passed by CREA members at CREA's annual general meeting on March 22, 2010. On February 3, 2010, prior to the issuance of this Application, CREA advised the Commissioner of Competition that it would be moving forward with amendments to the MLS® Rules which address the Bureau's stated concerns, even without a settlement with the Bureau.

9. The amendments to the MLS® Rules clarify the way the Rules actually operated, and make it absolutely clear that the nature of services to be provided by a REALTOR® are a matter of agreement between a REALTOR® and his or her client.

10. By making these amendments, CREA has addressed the issues raised by the Commissioner in the Application. The amendments were passed by CREA members with an overwhelming 87% majority. There is no principled basis upon which this Application should proceed.

11. The Commissioner of Competition has stated (in multiple media statements) that the amendments amount to a "blank cheque" because new anti-competitive rules could be introduced by CREA or its member Boards. In CREA's view, this allegation is preposterous. CREA has and has always had the ability to make rules, as do its member Boards. CREA and member Boards are obliged to, intend to, do and will comply with competition law.

Remedies exist if, in future, it is determined that some new rule breaches competition law. To suggest that the amended Rules are a “step in the wrong direction” (another frequently repeated statement made by the Commissioner to the media) is (at best) disingenuous.

**C. There is No Abuse of Dominance**

12. The Commissioner’s Application is based at least on three fundamental misconceptions:

- (a) That CREA, a trade association, has market power in the market for residential real estate brokerage services to homesellers;
- (b) That CREA’s MLS® Rules which contain conditions for listing properties for sale on Board MLS® Systems constitute a practice of anti-competitive acts; and
- (c) That any acts or practices of CREA substantially lessen or prevent competition in any relevant product and geographic market in Canada.

13. It is wrong to say that CREA has market power in the product market of residential real estate brokerage services to home sellers. CREA is a trade association that does not provide residential real estate brokerage services. CREA’s members compete vigorously with one another. Given this vigorous competition and the clear absence of market power, the predicate element required to prove abuse of dominance under section 79 of the *Competition Act* (the “Act”), that CREA have “control of a market”, cannot be established in this case.

14. The fact that CREA owns and licenses the MLS® Marks is not sufficient to give it market power in a product market within which it does not compete. CREA’s ownership of the MLS® Marks is not sufficient to establish dominance in the market for residential real estate brokerage services. The existence of vigorous competition among members of CREA demonstrates that neither CREA nor its members are dominant in or control any market.

15. Even if one were to assume that CREA could somehow exercise market power as a result of its control over the usage of the MLS® Marks, the MLS® Rules do not

unreasonably limit access to member Boards' MLS® Systems and do not constitute a practice of anti-competitive acts for the purposes of establishing abuse of dominance under section 79 of the *Act*.

16. Contrary to the Commissioner's allegations, the MLS® Rules do not "prevent entry and impede expansion by competitive business models that provide unbundled residential real estate brokerage service", nor do they "reduce the variety of service packages available in the relevant market". Rather, the MLS® Rules allow for a range of options for residential real estate brokerage services, including the ability to contract for minimal service offerings, "discounted" commission rates, flat-fee product offerings and fee-for-service products.

17. Finally, the MLS® Rules do not substantially lessen or prevent competition in any relevant market. On March 22, 2010 CREA's members adopted amended MLS® Rules which clarify the Rules and negate any contention that the MLS® Rules limit the range of services that may be offered by CREA members. Even prior to the amendments to the MLS® Rules, however, the facts are clear that there exist a range of service offerings, including the provision of access to a Board's MLS® System for a flat fee. While the MLS® Rules have been in place, there has been continued vigorous competition from all levels of service providers offering a spectrum of residential real estate brokerage services at different prices and pricing structures.

## **PART II - GROUNDS ON WHICH THE APPLICATION IS OPPOSED**

18. CREA is a single-industry trade association whose members include more than 98,000 real estate brokers, agents and salespeople working through more than 100 local real estate Boards and Associations across Canada. Contrary to the allegations of the Commissioner, CREA does not, through its members or otherwise, have substantial or complete control over the supply of residential real estate brokerage services for home sellers in any market in Canada. There is vibrant and vigorous competition amongst real estate agents and brokers (many of whom are members of CREA) for the supply of residential real estate brokerage services.

19. The Commissioner's complaint focuses on the MLS® Rules, put in place by CREA to govern the operation of Board MLS® Systems and its members' use of the MLS® Marks. The MLS® Rules ensure the high quality, reliability, and accuracy of the information provided to member Board MLS® Systems which have been built over time using the resources of CREA's members.

20. The MLS® Rules described in the Commissioner's Application constitute reasonable conditions for access to Board MLS® Systems. The MLS® Rules do not have a negative exclusionary effect on REALTORS® seeking to provide discounted real estate brokerage services or limited service offerings. Contrary to the Commissioner's allegations, Canadian consumers have not been denied the benefits of competition in the supply of residential real estate brokerage services as a result of the MLS® Rules. The market for supply of residential real estate brokerage services is vigorously competitive and the conditions for access to member Board's MLS® Systems are reasonable and do not constitute a practice of anti-competitive acts.

21. Notwithstanding that the MLS® Rules allowed for innovative business models and a wide and diverse range of product offerings, in light of concerns raised by the Commissioner, CREA voluntarily and proactively agreed to amend the MLS® Rules in order to clarify the way in which the MLS® Rules operate in practice. CREA advised the Commissioner, prior to the commencement of the Commissioner's Application, of its intention to make these amendments. The amended MLS® Rules were formally adopted by CREA's members on March 22, 2010.

22. The Commissioner makes no reference in the Application to the fact that CREA made changes to the MLS® Rules, but instead bases the Application on a historical set of circumstances. As a result, the Commissioner's Application is moot. Furthermore, the amended MLS® Rules do not and cannot result in a substantial lessening or prevention of competition in a market as alleged by the Commissioner.

23. There is simply no legal, economic or factual basis upon which to order the remedy sought by the Commissioner.

### **PART III - RESPONSE TO PARTICULARS OF COMMISSIONER'S STATEMENT OF GROUNDS AND MATERIAL FACTS**

24. CREA denies each and every allegation in the Commissioner's Statement of Grounds and Material Facts, except as expressly admitted herein.

### **PART IV - MATERIAL FACTS RELIED UPON BY CREA**

#### **A. CREA**

25. CREA is a trade association, governed by a volunteer board of directors. Contrary to the allegations in the Commissioner's Application, CREA's members include a wide and diverse group of real estate brokers and agents offering a wide and diverse selection of services and pricing structures to meet the real estate brokerage service needs of Canadian consumers.

26. CREA's members also include real estate Boards that typically operate at the local level (e.g. the Toronto Real Estate Board). Local real estate Boards process membership and operate MLS® Systems that are based on data provided by CREA's members. At the provincial level, there are Associations that are also members of CREA, which, among other things, handle membership processing in non-Board areas, and in some cases operate MLS® Systems.

#### **B. Residential Real Estate Industry**

27. Residential real estate properties in Canada are mainly sold in one of three ways: (i) privately; (ii) through a real estate broker under an "exclusive listing contract"; or (iii) through a real estate broker under a "multiple listing contract". Private sales include for-sale-by-owner ("FSBO") listings as well as sales of new homes by real estate developers using their own dedicated sales staff.

28. An exclusive listing contract between a seller and real estate broker typically provides that the property will be sold by the listing broker "in-house" without an invitation to other brokers to participate in the transaction. Under an exclusive listing, the

seller and the listing broker have greater control over who is given access to information about the seller's property and are able to limit or control the set of visitors to the property.

29. Under a multiple listing contract, the seller still typically has an exclusive contract with the listing broker or brokers of the property to list the property in the sense that the seller agrees to sell the property "exclusively" through one agent, but the listing broker invites cooperation from other brokers for the purpose of bringing the property to the attention of other brokers who represent buyers, in exchange for compensation if one of these buyers purchases the property.

### **C. Board MLS® Systems**

30. To facilitate the efficient exchange of information between CREA members, local real estate Boards or Associations operate MLS® Systems to serve the needs of CREA members in a specific locale. An MLS® System is defined in CREA's rules as "a co-operative selling system operated and promoted by a Board or Association in association with the MLS® Marks. An MLS® System includes an inventory of listings of participating REALTORS®, and ensures a certain level of accuracy of information, professionalism and co-operation amongst REALTORS® to effect the purchase and sale of real estate".

31. The term REALTOR® is a certification trademark identifying real estate licensees in Canada who are members of CREA. REALTORS® must provide real estate services in compliance with CREA's By-laws and Rules and a strict code of ethics called the REALTOR® Code. MLS® Systems operated by local Boards and Associations across Canada are maintained for the purpose of effecting the efficient selling of properties through REALTORS®.

32. MLS® is a certification mark owned by CREA and which has been used by REALTORS® for over 50 years to represent real estate services of a recognized standard. MLS® Marks communicate to the Canadian public that they can have confidence in the professionalism and integrity of REALTORS® who display the MLS® Marks and can expect that those agents will be able to provide a level of professional services to meet the individual needs of the members of the Canadian public.



33. MLS® Systems have evolved over time as a result of the significant commitment and contributions of REALTORS®. Prior to the introduction of Board MLS® Systems, REALTORS® relied on sporadically published newsletters to notify other REALTORS® of their real estate listings. CREA's predecessor organization, the Canadian Association of Real Estate Boards ("CAREB"), developed the concept of the "Photo Co-op Listing" in or about 1956 to promote the more effective sale of real estate. In 1966, CREA applied to register the MLS® as a certification trademark with the Canadian Trade-marks Office. In the 1990s, Board MLS® Systems evolved into local Internet-based systems whereby REALTORS® could upload or arrange for real estate listings to be uploaded to a local Board or Association's MLS® System for display to other REALTORS®.

34. In order for a member Board's MLS® System to operate effectively and to maintain the distinctiveness of the MLS® Marks, it is necessary that contributing REALTORS® follow and maintain certain standards associated with MLS® Systems and which reflect a distinct set of professional services. Only REALTORS® can enter information concerning properties for sale on Board MLS® Systems and access all information relating to other properties entered by other REALTORS®.

35. A portion of the listing information contained within an MLS® System is uploaded by local Boards to a public website REALTOR.ca (formerly known as MLS.ca), which essentially operates as an advertising vehicle for properties listed by REALTORS® across Canada.

#### **D. Types of Services Provided by Real Estate Agents and Brokers**

36. Real estate agents or brokers may offer potential property sellers a wide array of agency services. Examples of only some of these services include:

- (a) Market advice;
- (b) Comparative evaluations;
- (c) Listing preparation advice ;
- (d) Advice about pre-sale home inspections;

- (e) Information about listing options;
- (f) Privacy protections from the public;
- (g) Showings of the home;
- (h) Marketing the home, including advertising to maximize exposure, listing the property in the local MLS® System, placing advertisements in the local media and on the Internet;
- (i) Coordination of multiple offers to the seller's advantage;
- (j) Guidance through the transaction including coordinating with the seller's solicitor;
- (k) Reviewing contracts; and
- (l) Negotiating with potential home buyers.

37. Contrary to the allegations of the Commissioner, there are no limitations on the range of services provided by either seller or buyer agents or real estate brokers. The services to be provided in any particular circumstance are subject to negotiation and agents and real estate brokers in all geographic locations in Canada compete vigorously with one another on both price and the level of services offered.

#### **E. Types of Services Offered for Residential Real Estate Sales**

38. Contrary to the Commissioner's allegations, CREA's members are comprised of a range of REALTORS® who provide a spectrum of services ranging from so called "full-service" real estate broker services to fee-for-service arrangements, to flat-fee arrangements to discount brokers with minimal service offerings.

39. The Commissioner's allegation that "consumers have been denied the benefits of competition in the supply of residential real estate brokerage services" as a result of any actions taken by CREA simply ignores the factual reality that there is significant choice of service levels and pricing options available to consumers in the relevant market.

40. There are extensive examples of CREA members who list properties on their local MLS® System and offer discounted real estate broker product offerings, including but not limited to:

- (a) “Discounted” commissions;
- (b) MLS® Listings from 0% or flat rate fees from \$109 - \$999;
- (c) Unbundled/pay per service arrangements;
- (d) Open-house service only fees;
- (e) Commission rebates;
- (f) Weekly flat fee services (i.e. list on MLS for \$79 per week); and
- (g) Flat fee packages.

41. This wide range of services is currently being provided by CREA members. The Commissioner’s allegations that the MLS® Rules leave “consumers with only one option if they want to sell their home using the MLS System” is completely unfounded.

**F. Relevant Product Market**

42. The market for residential real estate brokerage services is a differentiated product market with some suppliers in the market providing a full set of services and others providing a bare minimum level of service. FSBO arrangements provide a competitive alternative, particularly in respect of the services offered by discount brokers and other minimum service providers.

**G. Geographic Market**

43. The geographic market for residential real estate broker services is local in nature.

## **H. CREA Does Not Control A Market**

44. The market for residential real estate brokerage services in Canada is highly competitive with thousands of small businesses, independent agents, brokers and franchises competing to provide a wide variety of services every day. Individual real estate brokers do not have market power in any local markets in which they operate. Barriers to entry to becoming a registered real estate agent are low.

45. There is no basis to suggest that CREA “controls the market for residential real estate brokerage services through its ability to adopt and impose rules regarding the conditions of access to and use of the MLS® System”.

46. The fact that CREA has successful MLS® Marks does not give it market power in the market for residential real estate brokerage services. CREA does not operate in the market for these services. CREA members do not have joint or collective dominance. The rules that CREA imposes for listing on Board MLS® Systems do not limit competition among REALTORS®.

## **I. CREA’s MLS® Rules: The Three Pillars and Interpretations**

47. Traditionally and historically, MLS® listings have had standard elements associated with them aimed at protecting the efficiency of the MLS® Systems as well as preserving the distinctiveness of the certification mark. These elements have traditionally been referred to as the “three pillars” of MLS®, namely (i) membership; (ii) agency; and (iii) remuneration sharing and are embodied in the MLS® Rules.

### *The Membership Pillar*

48. The membership pillar of the MLS® Rules provides that “only REALTORS® may place a listing on a Board/ Association’s MLS® System”.

### *The Agency Pillar*

49. The agency pillar requires that the REALTOR® must act as agent for the seller to sell the property. In practice, the level of involvement of the REALTOR® that is needed in order

to meet the requirements of the agency pillar has been very minimal. With the amendments to the MLS® Rules passed on March 22, 2010, the pillar now states:

A listing REALTOR® must act as agent for the seller in order to post, amend or remove a property listing in a Board's MLS® System. The nature of any additional services to be provided by the listing REALTOR® is determined by agreement between the listing REALTOR® and the seller, subject to applicable regulatory requirements and the Rules of CREA and Boards/Associations.

50. Prior to the amendments, in practice, compliance with the agency pillar did not create any sort of barrier or exclusion for so-called "alternative business models". Following the amendments, it is crystal clear that the nature of services to be provided by a REALTOR® is a matter of agreement between a listing REALTOR® and his or her client, subject only to regulatory requirements and CREA and Board rules.

#### *The Remuneration Sharing Pillar*

51. The MLS® Rules provide that the listing REALTOR® agrees to pay the co-operating (i.e. buyer's) REALTOR® compensation for the co-operative selling of the property. There are no minimum payment requirements: the only restriction is that the offer of compensation to the co-operating REALTOR® must be more than zero.

52. In March 2007, CREA published Interpretations to the MLS® Rules which did not change the MLS® Rules, but were intended to indicate how the MLS® Rules should be interpreted and applied when dealing with usage of the MLS® Marks.

53. In February 2010, CREA advised the Commissioner that notwithstanding CREA's view that the MLS® Rules allow for innovative business models and a broad range of choice for consumers, CREA was prepared to make certain changes to the MLS® Rules to clarify the way in which the MLS® Rules operate in practice.

54. Interpretations 1 and 3 (as described in the Commissioner's Application at paragraph 25) were determined to be unnecessary and have been removed in their entirety. Interpretation 6 (now Interpretation 4) has been amended to provide:

Where the seller directs the listing REALTOR® in writing to do so, the seller's contact information may appear in the REALTOR® only remarks (non-public) section of a listing on a Board/Association's MLS® System. The seller's contact information shall not appear on REALTOR.ca or in the general (public) remarks section of a listing on a Board/Association's MLS® System. The listing REALTOR® may include a direction in the General Description section on REALTOR.ca or on websites operated by CREA or a Board/Association to visit the REALTOR® website to obtain additional information about the listing (but the nature of such additional information shall not be specified).

55. Interpretation 7 (now Interpretation 5) has been amended to provide: "Where a seller has reserved the right to sell the property himself/herself, that fact shall be specified in the Board/Association's MLS® System".

56. Rather than recognize the fact that the amendments to the MLS® Rules address the concerns the Commissioner raised in the Application, the Commissioner now takes the view that the amendments are "a step in the wrong direction" ostensibly on the basis that the nature of any additional services to be provided by the listing REALTOR® is subject to "applicable regulatory requirements and the Rules of CREA and Boards/Associations".

57. There is no basis for the Commissioner's publicly stated position that the amendments "amount to a blank cheque allowing CREA and its members to create rules that could have even greater anti-competitive consequences". Further, there is no basis to suggest that compliance with applicable regulatory requirements and the Rules of CREA or the local Boards will have any anti-competitive consequences whatsoever. Notably, the Commissioner is unable to point to any existing CREA or Board/Association rule that yields this result. CREA and its member Boards have rules today, and they have the right to make rules in the future. CREA and its member Boards are committed to competition law compliance, now and in the future. An abuse of dominance case cannot be based on the Commissioner's unfounded speculation that anti-competitive rules will be created some time in the future.

**J. MLS® Rules Do Not Constitute a Practice of Anti-Competitive Acts**

58. The MLS® Rules (either in their pre- or post- amendment form) are not designed to and do not prevent or exclude competitors from competing in the relevant markets. In addition to the fact that the MLS® Rules promote the efficient operation of Board MLS® Systems, the MLS® Rules are also an expression of CREA's fair and reasonable right to control the use of its trademarks. Such conduct is validly justified from a business perspective and does not amount to an anti-competitive act or a practice of anti-competitive acts.

59. Contrary to the Commissioner's allegation that "the MLS® Restrictions have virtually eliminated suppliers for fee-for-service real estate brokerage services in Canada", there are numerous suppliers of discount brokerage services including fee-for-service product offerings in markets across Canada as described herein.

60. Contrary to the Commissioner's allegation at paragraph 44 of the Application, the MLS® Rules did not cause Realtysellers of Toronto to exit the relevant market. Realtysellers suspended operations because of impending disciplinary proceedings. The Real Estate Council of Ontario ("RECO") commenced proceedings to strip Realtysellers of its broker registration because the conduct of its principal Stephen Moranis afforded "reasonable grounds for belief that he will not carry on business in accordance with the law and with integrity and honesty." In May 2009, RECO revoked the licenses of both Mr. Moranis as a broker and Realtysellers as a brokerage. These regulatory investigation and proceedings against Realtysellers were commenced prior to CREA's March 2007 introduction of the Interpretations to the MLS® Rules.

61. The Commissioner asserts that the MLS® Rules are anti-competitive and were implemented "for the purpose of preventing or excluding competitors in the relevant markets. This allegation is completely unsupported by the evidence; the facts make it abundantly clear that there is no effort to use the MLS® Rules as a way to exclude anyone. It is telling that from the period 2000 to 2007, based on information provided by member Boards, only 62 listings out of 3,834,369 MLS® listings were rejected for failure to comply with the MLS® Rules. In percentage terms, this means that .0016% of all MLS® listings

were refused for failure to meet the MLS® Rules. The MLS® Rules are not anti-competitive and there is no practice of anti-competitive acts by CREA or its members.

62. There is also no basis to suggest that the MLS® Rules have had any impact on entry or expansion of competitors using fee-for-service brokerage models. To the extent that the market share of discount brokers in Canada is lower than that of brokers offering more services, this reflects the relative demand for services offered by discount brokers and is unrelated to the MLS® Rules.

63. In any event, the amendments that have been made to the MLS® Rules remove any possible basis to assert that the MLS® Rules are intended to preclude or prevent competition from REALTORS® who provide minimal or discounted service offerings.

**K. MLS® Rules Do Not Substantially Lessen or Prevent Competition**

64. The Commissioner's suggestion that consumers have "only one option if they want to sell their home on the MLS® system" is completely unsupported and the Commissioner's suggestion that fee-for-service competitors are absent from the relevant market reflects a serious misstatement of the facts.

65. There is no reasonable basis to suggest the MLS® Rules (either pre- or post-amendment) foreclose or prevent competition from discount or fee-for-service providers of real estate brokerage services. Rather, there is and will continue to be vigorous competition amongst real estate brokers including from discount and fee-for-service real estate brokerage providers.

66. There is no substantial lessening or prevention of competition as a result of the MLS® Rules and the relief sought by the Commissioner should be denied in its entirety.

**PART V - STATEMENT OF ECONOMIC THEORY**

67. As set out in Schedule "A" hereto.



**PART VI - RELIEF SOUGHT**

68. CREA requests an Order dismissing the Application with costs payable to CREA in an amount to be determined by the Tribunal after hearing submissions from the parties.

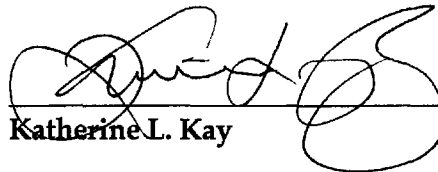
**PART VII - PROCEDURAL MATTERS**

69. The Respondent agrees that the Application be heard in English.

70. The Respondent agrees that the Application be heard in Ottawa.

71. The Respondent agrees that documents be filed electronically.

Dated at Toronto, this 26<sup>th</sup> day of March, 2010



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## Schedule "A"

### CREA's Concise Statement of Economic Theory

#### Introduction

1. The requirements in CREA's MLS® Rules for use of the MLS® Marks and access to Boards' MLS® Systems do not result in a substantial lessening or prevention of competition and no remedial relief for abuse of dominance under section 79 of the *Competition Act* is appropriate or necessary in this case.

#### Market Definition

2. The Commissioner alleges that the relevant product market at issue is the supply of residential real estate brokerage services for home sellers. The market for residential real estate brokerage services for home sellers is a differentiated product market, with some suppliers in the market providing a full set of services and others providing a bare minimum. The geographic market for supply of residential real estate brokerage services is local.

#### Market Power

3. The Commissioner's economic analysis of market power is premised on the hypothesis that CREA exerts control over the market for residential real estate brokerage services through its "ability to enact rules that govern the access to and use of the [MLS® System]".

4. CREA is a cooperative trade association that owns the MLS® Marks. CREA does not provide residential real estate brokerage services. CREA's members are real estate brokers and agents. Barriers to entry into the market for residential real estate brokerage services are low and real estate brokers and agents do not individually possess market power. Moreover, members of CREA do not collectively possess market power or exercise "control over a market" because (i) they compete vigorously with one another, and (ii) there are competitive alternatives available to home sellers.

## No Practice of Anti-Competitive Acts

5. The minimal impact of the MLS® Rules on access to Board MLS® Systems does not constitute a practice of anti-competitive acts.

6. As a factual matter, the Commissioner's allegation that brokers offering low cost, flat fee or fee-for-service arrangements are excluded from the market by the MLS® Rules is incorrect. Even a cursory Internet search reveals that real estate brokers offer access to Board MLS® Systems for flat fees (some as low as \$109) and that brokers across Canada provide services on an unbundled basis and provide a wide range of service levels at different prices to home sellers.<sup>1</sup> The Commissioner's allegation that CREA's MLS® Rules exclude from the market for residential real estate brokerage services those brokers offering less than a full set of services is demonstrably false.

7. The MLS® Rules do not deny access to low cost competition. The price that a listing broker charges a home seller for listing on a Board's MLS® System is entirely unregulated; brokers can charge clients whatever price they wish. Therefore the market can, if demanded, provide very low cost access to a Board's MLS® System.

8. The existence of firms offering minimal services or flat-fee arrangements to list properties on Board MLS® Systems is enough to demonstrate that there is no barrier to purchasing such an unbundled service at low cost. The fact that such an option is already available in the market, and not adopted by many home sellers, is clear evidence against the Commissioner's argument that the MLS® Rules prohibit these minimal services.

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<sup>1</sup> See: Best Value Realty in Ottawa - \$109 flat fee for MLS® listing (<http://www.bestvalue.biz/>); ReMax - 1% commission; Assist to Sell – “low flat fees” (<http://www.saveoncommission.ca/>); Calgary Discount Real Estate - \$579 flat fee (<http://www.calgarydiscountrealestate.com/>); Donald Hewie Brokerage – flat MLS® fee and 1%-3% commissions (<http://www.hewie.com/>); Bloom Key - \$225 flat fee (<http://www.bloomkey.com/selectProvince.php>); Coldwell Banker Trail Blazers Realty – 1% Commission (<http://www.welistfree.ca/>); MLSByOwner - \$279-\$599 flat fee (<http://www.mlsbyowner.net/broker-detail.php?state=on>); Seller Direct – unbundled/fee-for-service arrangements (<http://sellerdirect.com/selling-real-estate/discount-commissions.aspx>).

9. The fact that brokers offering very minimal services may have a relatively small share of the market for residential real estate brokerage services for home sellers reflects that the vast majority of home sellers choose to purchase much more than the minimum service offered by those firms. The MLS® Rules are not responsible for the low presence of these providers in any market.

10. Additionally, CREA has recently made amendments to the MLS® Rules which clarify the operation of the Rules. These changes include amendments to the “agency pillar” to reflect the existing practice that REALTORS® routinely offer only minimal service pursuant to agreements with sellers, and the removal of Interpretations 1 and 3. At this time, the only substantive remaining condition about which the Commissioner has expressed particular concern in the Application is the requirement that the home seller’s name shall not appear on the website REALTOR.ca or in the public remarks section of a Board’s MLS® System. Valid business justifications support this requirement, including the need to protect the distinctiveness of the MLS® Marks and the quality, reliability and accuracy of the information on Board MLS® Systems. There is no material negative exclusionary impact from the MLS® Rules.

#### **No Substantial Lessening or Prevention of Competition**

11. The MLS® Rules do not cause a substantial lessening or prevention of competition in the market for residential real estate brokerage services to home sellers. CREA’s members compete vigorously with each other for the listings of home sellers (as well as the right to represent buyers when they are purchasing homes). A wide variety of service and price offerings is made available to home sellers by competing real estate agents and brokers from which home sellers choose the price and service offering that best suits their needs. The amendments to the Rules make it absolutely clear that the nature of services to be provided by a REALTOR® are a matter of agreement between the REALTOR® and his or her client. The only potential impact of the MLS® Rules is to require brokers to comply with minimal conditions such as those requiring ethical behaviour, the accuracy of the information added to Boards’ MLS® Systems and the reporting of sales, all of which have reasonable business justifications.

12. Even if the MLS® Rules were found, because of minimal service requirements, to exclude an MLS®-listing only service, the potential impact of this exclusion on the market for residential real estate brokerage services is *de minimus*, and cannot be construed to be substantial or even material in any respect.

13. The MLS® Rules do not preclude matching by buyers and sellers on the MLS® System, with minimal involvement by a broker. Buyers do not need to use brokers, and home sellers and buyers have the option of purchasing unbundled services including very minimal service offerings from a REALTOR® or using a broker who provides the specific services desired by the home seller. The market alternative of minimal involvement by brokers in the matching of buyers and sellers of real estate is a feasible service offering in the current market. That this option is chosen by few home sellers in a market is a result of the preference for greater services from brokers, not as the result of conditions by CREA on the listing of properties on Board's MLS® Systems.

14. The present case does not satisfy the conditions necessary for the Bureau to establish that CREA has abused a dominant position in respect of its rules around access to the MLS® System. It is also important to note that any public policy favouring granting of access (or in this case removing minimal conditions on access) is not engaged where such action would violate the intellectual property rights of the owner and the minimal conditions imposed do not substantially lessen or prevent competition.

**THE COMPETITION TRIBUNAL**

**AND 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,  
regulations and policies of the Canadian Real  
Estate Association.

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**THE CANADIAN REAL ESTATE ASSOCIATION**

Respondent

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**RESPONSE**

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