

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.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Respondent

AFFIDAVIT OF LAWRENCE MARK DALE

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

2. I am a co-founder, major investor and secured creditor of Realtysellers (Ontario) Limited ("Realtysellers") and a developer of the New Business concept, and as such I have personal knowledge of the matters deposed to herein. For the sake of brevity, all defined terms used in my affidavit have the same meaning as in the Notice of Application filed in this matter or my Request for Leave to Intervene.

3. These proceedings have arisen, primarily, as a result of complaints made both personally and in my capacity as a co-founder of Realtysellers concerning CREA's, and its members' restricting access to the MLS system for my New Business and Realtysellers, which was my primary vehicle at the time.

4. Since starting Realtysellers in 2000, my business partner, Moranis, and I have faced concerted efforts by CREA and its members to drive us out of business. By imposing the MLS Restrictions, which prevented our businesses from accessing the MLS system, CREA and its members have foreclosed the residential real estate brokerage services market to innovative businesses offering fee-for service and ala carte services, including offering consumers the ability to purchase "mere posting" or "MLS-only listing" services if they so chose.

5. Before CREA passed the so called "Three Pillars of MLS" at its Special General Assembly on October 26, 2002, Moranis and I had several meetings and correspondences with CREA's representatives; so CREA was completely aware of Realtysellers' innovative business model. It was in direct response to many of the innovative programs that Realtysellers was offering in late 2001 and early 2002, that CREA initiated the concept of the Three Pillars in the context of the MLS system.

6. As a result of CREA's targeted actions against Realtysellers, Moranis and I caused a civil claim to be issued against CREA and others. The 2002 claim sought to require CREA and others to rescind the restrictions on Realtysellers ability to list homes on the MLS system under its Flat Fee Program and other similar programs. Prior to the settlement of the 2002 claim, I was informed by CREA's counsel that they looked at our programs, decided which programs they did not want on the MLS system and passed rules to prevent these programs.

7. In 2004, CREA settled the claim. While the terms of the settlement are confidential, they were sufficient to permit the New Business and Realtysellers to operate. In fact, CREA made a public statement attesting to Realtysellers operating in good standing and compliance with the rules of MLS.

8. Unfortunately that was not the end of the matter. In 2006, CREA publicly announced its plans to amend its rules. The proposed amendments were clearly targeted at preventing Realtysellers from again being able to list homes on the MLS system under the Flat Fee Program or similar programs. In March 2007, CREA implemented the “Interpretations of the Three Pillars of the MLS Mark”, which no longer permitted our Flat Fee Program or similar program listings on the MLS system. One of the reasons was that under these programs Realtysellers did not provide any offer process assistance and under Interpretation 1, the listing agent was required to be involved in the offer process.

9. The MLS system is the dominant and essential tool for selling residential real estate in Canada. CREA’s own CEO Pierre Beauchamp stated this in a speech he made at the CREA Special Meeting on April 13, 2002 which I attended. Without access to the MLS system it is not possible to effectively conduct a resale residential real estate brokerage business or provide real estate agency services. The restrictions on access and use of the MLS system imposed by CREA were intended to and did restrict or prevent competition from innovative and non-traditional brokerages and agents such as Realtysellers and others wishing to offer varying bundles of services including in a fee-for-service model.

10. As a direct result of the actions of CREA and the associated uncertainty regarding the sustainability of Realtysellers’ business model without the guarantee of access to the MLS system, Realtysellers’ operations and the entire New Business were suspended in November, 2006. Contrary to the implication of paragraph 60 of the Response, there have never been any findings of impropriety against Moranis or Realtysellers. There were no impending disciplinary proceedings against Realtysellers at the time that its operations were suspended. In 2009, I along with Moranis initiated a further civil action against CREA and others seeking damages stemming from, among other things, CREA’s conduct.

11. While I support the Commissioner’s position generally, I am better able to describe and explain the anti-competitive effects of the Respondent’s impugned conduct on the Canadian market for

