

**FILED / PRODUIT**

Date: April 20, 2010

CT-2010-002

Chantal Fortin for / pour  
REGISTRAR / REGISTRAIRE

File No. 2010-002

OTTAWA, ONT.

# 28

**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 RESPONDENT TO THE REQUEST OF THE NATIONAL FSBO  
NETWORK INC. FOR LEAVE TO INTERVENE**

---

1. The Respondent, The Canadian Real Estate Association ("CREA"), submits this response to the request of the National FSBO Network Inc. ("NFN") for leave to intervene in this Application.
2. The affidavit of Stephen John Skelly, sworn April 5, 2010 in support of NFN's request to intervene (the "Skelly Affidavit"), deposes that "NFN was incorporated in 2009 to fill a void within the 'for sale by owner' (FSBO) market, by creating a national listing network for FSBO businesses which would be equivalent to and would compliment the Canadian Real

Estate Association's MLS" and enable "FSBO businesses to showcase their segment of the real estate market across Canada and give prospective purchasers a single portal through which all such FSBO properties can be accessed". The Skelly Affidavit further deposes that "NFN believes that it is important that the Tribunal be provided with an understanding of the role played by FSBO businesses in the Canadian real estate market."

Skelly Affidavit, paras. 5 and 6

3. Subject to the discussion below of the terms and conditions of NFN's intervention, if permitted, CREA does not oppose the request for leave to intervene.

**CREA's Position on the Terms of NFN's Intervention, If Permitted**

4. CREA submits that, on the basis of the materials submitted in support of its request for leave to intervene, NFN likely has information that is relevant to disputed issues in this proceeding.

5. In her Statement of Grounds and Material Facts, the Commissioner of Competition (the "Commissioner") alleges that "the MLS system ... is a key element in the supply of residential real estate brokerage services across Canada", that "[w]hile other options exist for marketing a home for sale, such as newspaper advertising, they are not adequate substitutes for an MLS listing", and that the so-called "MLS Restrictions" "lessen or prevent competition substantially" in the alleged relevant market "for residential real estate brokerage services to home sellers."

Statement of Grounds and Material Facts, paras. 2-3

6. In its Response, CREA has denied the Commissioner's allegations and specifically stated that 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," and that "FSBO arrangements provide a competitive alternative, particularly in respect of the services offered by discount brokers and other minimum service providers."

CREA's Response, paras. 17, 27, 42

7. In its motion for leave to intervene, NFN states that, "by focusing only on the services offered by registered agents to Canadians who wish to sell their property, the Commissioner fails to present a complete picture of the Canadian real estate market", that "over the last 8 years, in response to market demands, FSBO businesses have grown up across Canada", and that "estimates suggest that in some areas as high as 25-30% of property listings go through FSBO businesses."

NFN's Motion for Leave to Intervene, para. 2

8. NFN seeks permission to "submit written evidence to the Tribunal in regard to the role of FSBO businesses in the Canadian real estate market, the services provided, the fees for such services and further information in regard to market share." It also seeks an order that "CREA not be permitted to seek documentary or oral discovery of the NFN."

NFN's Motion for Leave to Intervene, para. 6

9. CREA agrees with NFN that the Tribunal should "be provided with a complete understanding of the real estate market place before making a decision on the Commissioner's application." In CREA's view, that objective would be properly served by granting NFN intervenor status in this Application and providing CREA the right to documentary and oral discovery of NFN. Matters and information referred to by NFN on its motion to intervene are directly relevant to issues and defences raised by CREA in its Response to this Application. Accordingly, CREA respectfully submits that, if the Tribunal grants NFN's request to intervene, it should also order that CREA is entitled to documentary and oral discovery of NFN, subject to appropriate confidentiality provisions and any other reasonable limitations as the Tribunal may direct.

10. CREA also respectfully submits that, if NFN is permitted to intervene and submit written evidence on this Application, the Tribunal should direct that such sworn evidence is to be disclosed by the date on which the parties are required to exchange their witness statements, in order to ensure sufficient time to review NFN's evidence in advance of the hearing. CREA requests that the Tribunal direct that CREA will be permitted to examine an NFN witness orally at the hearing, if CREA requests that such an oral examination be

conducted, again subject to appropriate confidentiality provisions and other limitations as the Tribunal may direct.

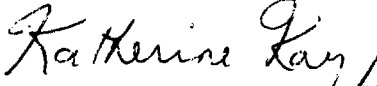
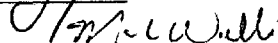
11. CREA respectfully submits that the foregoing terms and conditions of NFN's intervention are necessary to ensure the preservation of CREA's rights to procedural fairness in the prosecution of this Application, would further the objective of providing a "complete picture" of the Canadian real estate market for home sellers, and would not impose a burden on NFN.

12. Pursuant to Rule 44(2)(b) of the *Competition Tribunal Rules*, SOR/2008-141, CREA states that a hearing should be held to consider NFN's Request to Intervene.

13. CREA reserves the right to make further submissions in respect of NFN's request for leave to intervene after review of the Commissioner's Response thereto.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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

  
Katherine L. Kay 

**STIKEMAN ELLIOTT LLP**  
5300 Commerce Court West  
199 Bay Street  
Toronto, Ontario, M5L 1B9

**Katherine L. Kay**  
Phone: (416) 869-5507  
Fax: (416) 947-0866  
Email: [kkay@stikeman.com](mailto:kkay@stikeman.com)

**Danielle K. Royal**  
Phone: (416) 869-5254  
Email: [droyal@stikeman.com](mailto:droyal@stikeman.com)

**Mark E. Walli**  
Phone: (416) 869-5277  
Email: [mwalli@stikeman.com](mailto:mwalli@stikeman.com)

Counsel for The Canadian Real Estate  
Association

**TO:** **BENNETT JONES LLP**  
One First Canadian Place  
Suite 3400, P.O. Box 130  
Toronto, Ontario  
M5X 1A4

**John F. Rook**  
Phone: (416) 777-4885

**AND TO:** **DEPARTMENT OF JUSTICE CANADA**  
Compétition Bureau Légal Services  
Place du Portage, Phase 1  
50 Victoria Street, 22nd Floor  
Gatineau, Quebec  
K1A 0C9

**Roger Nassrallah**

Counsel for the Applicant

**AND TO:** **Stephen J. Skelly, Q.C.**  
  
29 Okanagan Drive  
Ottawa, ON K2N 7E9  
Phone: (613) 596-0615  
Email: [sjskelly@fsbo-network.ca](mailto:sjskelly@fsbo-network.ca)

Vice-President Operations, National FSBO Network Inc.

**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

---

**RESPONSE OF THE RESPONDENT TO THE  
REQUEST OF THE NATIONAL FSBO NETWORK  
INC. FOR LEAVE TO INTERVENE**

---

**Stikeman Elliott LLP**  
5300 Commerce Court West  
199 Bay Street  
Toronto, Ontario  
M5L 1B9

**Katherine L. Kay**  
Tel: (416) 869-5507  
Fax: (416) 947-0866  
Email: [kkay@stikeman.com](mailto:kkay@stikeman.com)

**Danielle K. Royal**  
Tel: (416) 869-5254  
Email: [droyal@stikeman.com](mailto:droyal@stikeman.com)

**Mark E. Walli**  
Phone: (416) 869-5277  
Email: [mwalli@stikeman.com](mailto:mwalli@stikeman.com)

Counsel for The Canadian Real  
Estate Association