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OTTAWA, ONT.

# 21

**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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**REPLY OF THE COMMISSIONER**

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**PART I: OVERVIEW OF REPLY**

1. The Commissioner of Competition (the "Commissioner") repeats the allegations in her Notice of Application and Statement of Grounds and Material Facts ("Notice of Application") and, except as hereinafter expressly admitted, denies each and every allegation in the Response

of The Canadian Real Estate Association (the "Response"). Capitalized terms below are as defined in the Notice of Application.

2. In reply to CREA's allegations, the Commissioner repeats that CREA has substantial or complete control over the supply of residential real estate brokerage services in Canada. CREA and its members control access to the MLS, which is a key element in the supply of residential real estate brokerage services in Canada. CREA has used that control to impose the exclusionary MLS Restrictions (commonly known as the Three Pillars and the Interpretations) to restrict the basis on which residential real estate brokers compete with one another and offer services to the public. In fact, the MLS Restrictions are specifically designed and enforced to keep the broker at the centre of residential real estate transactions and to prevent others from providing competitive options, such as "mere posting" or other fee-for-service brokerage services. As such, the MLS Restrictions perpetuate the control of traditional, full-service real estate brokers, ultimately at the expense of Canadian consumers.

3. In cases where small-scale entry by alternative business models has occurred, CREA and its members have disciplined such entrants, exploiting the barriers CREA has erected through its rule-making and rule-enforcing powers. In such cases, brokers have been threatened with withdrawal of access to the MLS and/or the MLS Restrictions have served as barriers to expansion of these business models, preventing the entrants from penetrating the market to any meaningful extent. This is attributable to the behaviour of CREA and its members (i) in enacting the MLS Restrictions, (ii) in requiring member Boards and Associations to comply with them, (iii) in disciplining members seeking to provide an alternative where CREA and its members perceive a threat to their dominant position and, most recently, (iv) in passing amendments to the MLS Restrictions that confirm and extend CREA's and its members' control. All of these

activities are intended to maintain CREA and its members' command over the supply of residential real estate brokerage services.

4. As a result of CREA and its members' behaviour, there is less innovation and choice in the supply of residential real estate brokerage services in Canada. As well, most consumers pay a percentage commission based on the sale price of the property, without reference to the services provided or the consumer's desire to purchase those services. By so leveraging their control over the MLS System, CREA and its members deny choice to consumers in one of the most significant transactions they will undertake in their lifetime. Consumers cannot pursue an alternative because one is not generally available.

5. This stagnant state of affairs has persisted for years, notwithstanding attempts by some suppliers of residential real estate brokerage services to provide consumers with alternatives. The absence of dynamism in the market is directly attributable to the MLS Restrictions and CREA and its members' activities in enforcing them.

6. CREA's decision on March 22, 2010 to "clarify" the MLS Restrictions is calculated to maintain control of the supply of residential real estate brokerage services, to restrict the manner in which these services are delivered to consumers, to perpetuate the way in which real estate brokers are compensated, and to frustrate the Commissioner's efforts to have the Competition Tribunal scrutinize the framework in which most residential real estate brokerage services are provided in Canada.

7. Not only do CREA and its members (specifically local boards and associations) have a long history of restrictive rules on the use of the MLS, the recent amendments to the MLS Restrictions underscore CREA and its members' determination to impose restrictions that prevent

or lessen competition, stifle innovation and perpetuate the *status quo* while at the same time proclaiming publicly that the MLS Restrictions benefit consumers. CREA's amended MLS Restrictions will continue to frustrate the ability of alternative suppliers of residential real estate brokerage services to enter into the market, expand their business models and provide consumers with an effective alternative to traditional, full-service real estate services.

8. The MLS Restrictions extend beyond any legitimate intellectual property rights afforded to CREA and its licensees (member Boards and Associations) relating to or arising out of CREA's ownership of the MLS and related trade-marks. Contrary to what is pleaded in CREA's Response, the purported reliance on the trademarks to justify the MLS Restrictions on competition is without foundation, and is intended to deflect attention away from the reality of CREA and its members' anti-competitive behaviour.

9. The Commissioner therefore pleads that, unless CREA and its members are restrained by an Order or Orders of the Competition Tribunal, they will continue to have the incentive, the opportunity and the ability to enact and enforce MLS Restrictions that prevent or will likely prevent competition substantially.

## **PART II: DETAILED REPLY PLEADINGS**

### **A. Generally**

10. In an effort to deflect attention from its anti-competitive practices, CREA refers, in paragraph 8 and 10 of its Response, to certain communications between the Commissioner and representatives of CREA prior to the commencement of this proceeding. These were "without

prejudice" settlement discussions (whether reflected accurately or not in the Response), that are privileged and, in any event, are irrelevant to the disposition of this application.

11. CREA also seeks to distract from the merits of the Commissioner's application by a personal attack on the Commissioner. These allegations are improper and have no place in a Tribunal pleading.

12. In paragraphs 5 to 11 of the Response, CREA attempts to portray itself as "responsible and proactive" on competition law matters generally, and on amendments to the MLS Restrictions specifically. Yet CREA has repeatedly demonstrated that it is determined to take whatever steps are necessary to protect the traditional, full-service business model by keeping the broker at the centre of the transaction and preventing the disintermediation that would have occurred but for the MLS Restrictions.

13. With respect to paragraph 22 of the Response, the Commissioner's application is not moot. It was not moot when the Commissioner's Notice of Application was issued on February 8, 2010 (well before CREA amended its MLS Restrictions on March 22, 2010), and is not moot today.

14. Apart from the fact that the amendments continue (and even extend) CREA's and its members' control and ability to impose their anti-competitive practices, section 79 of the *Competition Act* specifically permits the Tribunal to make an Order where a person or persons "have engaged in or are engaging in" a practice of anti-competitive acts and where the practice "has had, is having or is likely to have" the effect of preventing or lessening competition substantially in a market. Whether the Commissioner's application is analyzed based on CREA's MLS Restrictions when the application was commenced in February 2010, or based on the MLS Restrictions after CREA's amendments in March 2010, the application is not moot. To the

contrary, the issues are live and CREA and its members have engaged in, and are engaging in, a practice of anti-competitive acts that have had, are having, and are likely to continue to have, the effect of preventing or lessening competition substantially in the relevant market to the ultimate detriment of consumers. In any event, CREA and its members cannot evade examination by the Tribunal of their longstanding anti-competitive conduct by purporting to suspend that behaviour, particularly when it can be reinstated at any time. The Commissioner may commence an application under section 79 at any time and is not constrained by the potential passage of another iteration of the MLS Restrictions. Practices that are capable of repetition yet evasive of review are justiciable and ought to be heard, particularly where the practices are within the Respondent's own control.

15. With respect to the allegations concerning Realtysellers in paragraph 60 of CREA's Response, the Commissioner reserves her position and response because Lawrence Mark Dale has moved to intervene in this matter.

## **B. The Overall Elements of Abuse of Dominant Position**

### *Substantial or Complete Control*

16. CREA and its members have substantial or complete control or "market power" in the supply of residential real estate brokerage services. The MLS system is a key input for the provision of residential real estate services in Canada. Access to the MLS and related trade-marks is necessary in order for brokers to be able to use the MLS system. CREA and its members have used their ownership of the MLS and related trade-marks - and thus the MLS

system - to control the supply of residential real estate brokerage services in Canada by imposing conditions on its members for the use of the MLS and related trade-marks and the MLS system (including the MLS Restrictions).

17. CREA's unilateral ability to change its rules (as it exercised in 2006 and 2007 despite clear concerns communicated by the Commissioner at the time), combined with CREA's history of changing its rules to cripple emerging innovative business models, has resulted in fewer (and very few) alternative brokerage services being offered in Canada. By excluding these potential market participants and by preventing and/or discouraging other alternative business models from investing necessary capital or producing innovative products to enter or expand in the market, CREA has succeeded in restricting competition and consumer choice.

18. CREA exercises a powerful rule-making function. This rule-making function (which has been exercised both by CREA's Board of Directors and by its membership at annual meetings) distinguishes CREA from ordinary "trade associations" that engage in lobbying focused on government and public relations. CREA's power to make rules is how the MLS Restrictions have materialized (as amended from time to time). CREA's rules also require local real estate boards and provincial associations to include in their own rules and regulations, provisions that give general effect to the MLS Restrictions. Local member boards and associations must, every two years, submit to CREA a form certifying that (i) they have complied with CREA's By-laws, Rules and Policies dealing with the proper use, reproduction and display of CREA's marks, and (ii) they have also taken reasonable precautions to ensure that users of their MLS systems (*i.e.*, individual brokers) have also complied with CREA's By-laws, Rules and Policies. Failure to comply can result in local boards and associations (and their brokers) losing both membership in CREA and use of the MLS and related trade-marks. Failure to comply by an individual broker

risks a substantial penalty: the loss of access to the MLS system, a valuable and practical necessity in offering real estate brokerage services in Canada.

***Practice of Anti-Competitive Acts***

19. Contrary to CREA's allegations, the MLS Restrictions, both prior to and following the amendments, amount to a practice of anti-competitive acts. The MLS Restrictions were intended to, have had and continue to have a negative exclusionary effect on brokers who seek to provide alternatives to a full suite of residential real estate brokerage services.

***Substantial Prevention or Lessening***

20. Contrary to CREA's allegations, the rule amendments of March 22, 2010 do not eliminate the existing substantial prevention or lessening of competition. CREA's rules continue to prohibit real estate brokers from offering fully unbundled services to home sellers and continue to prevent entry and expansion of alternatives to the traditional, full-service real estate model. Further, CREA (and member boards) have expressly protected the freedom to pass further rules at any time that may hinder or exclude (or have the effect of hindering or excluding) competitors from offering alternative services in the relevant market. Particularly when viewed through the prism of CREA's historical and ongoing behaviour, it is apparent that the most recent version of the rules will continue to lessen and prevent competition substantially. It is equally clear that, if the requested Orders are granted by this Tribunal, there would be substantially more competition in the relevant market.



**C. The Alleged Current "Vigorous" Competition Among CREA Members**

21. As to CREA's repeated reliance on the "vigorous" competition among its numerous individual member brokers, the fact is that any such competition is limited to competition within the rules of the game set by CREA. In effect, "competition" is confined to competition for one service model, with one compensation structure, and terms limited by CREA. Regardless of the number of CREA members competing in the relevant market, CREA, through its MLS Restrictions, sets the terms of competition among *all* members, restricting the degree to which members can compete with one another. The Response offers no statistical or other empirical data to support its allegations in paragraphs 38 to 40 concerning the purported "factual reality" of "significant choice of service levels and pricing options available to consumers in the relevant market". Rather, CREA's MLS Restrictions reduce the competitive vigour among its members by keeping the traditional, full-service business model insulated from innovative, alternative business models. For consumers, there is little real alternative to traditional, full-service, commission-based, real estate brokerage services. The market for residential real estate brokerage services would be substantially more competitive but for CREA's anti-competitive practices, including the MLS Restrictions.

**D. The Recent Amendments to the Three Pillars and Interpretations**

22. CREA's "clarifications" in March 2010 to the Three Pillars and the Interpretations underscore CREA and its members' determination to impose restrictions that prevent or lessen competition. The recent amendments are further evidence of CREA's high degree of control in the market for residential real estate services. Given CREA's high degree of control, even a

small impact on competition resulting from the MLS Restrictions is "substantial" for the purposes of section 79 of the *Competition Act*.

***The Agency Pillar and Related Interpretations***

23. Regarding the Agency Pillar as amended in March 2010, the words "subject to... the Rules of CREA and Boards/Associations," vest CREA and local boards and associations with unilateral authority, at any time, to change (again) how the Agency Pillar operates. Absent Order(s) from this Tribunal, potential entrants and existing brokers who would otherwise expand their business will continue to be deterred from offering innovative alternatives to traditional brokerage services to the market, owing to past practices and the continuing ability of CREA and local boards and associations to pass additional rules that may hinder or exclude (or have the effect of hindering or excluding) competitors from offering such alternatives.

24. The Agency Pillar also continues to require an "agency" relationship. A listing agent "must act as agent for the seller" in order to "post, amend or remove a property" on the MLS System – in other words, at the beginning, middle and end of the process of selling a residential property using the MLS System. There is no justification for why CREA's rules should require any formal agency, and CREA should not be permitted to stipulate that "agency" for the purpose of participation in the MLS system is different from that which satisfies provincial real estate regulators.

25. Interpretation 17.2.4 (formerly Interpretation 6) continues to prevent true "mere posting", impeding the entry of innovative business models into the marketplace and ensuring the broker remains at the centre of all residential real estate transactions. Specifically, the restriction continues to prohibit a listing broker from posting the home seller's contact information on

realtor.ca, or in the public remarks section of the MLS system. As such, CREA continues to deny real estate brokers' ability to offer true mere postings, as any interested buyer must go through the listing agent for information about the property. In a market without the MLS Restrictions, listing services could be completely unbundled from ongoing agency services, such that home sellers and their listing agents could together agree on what level of services would be provided by the agent beyond listing the property on the MLS. With the amended Agency Pillar and Interpretation 17.2.4 in place, CREA has removed the restriction on mere posting in name only.

### ***The Membership Pillar***

26. The Membership Pillar was not amended in March 2010. In addition to the allegations made elsewhere in this Reply, the Commissioner repeats and relies upon the allegations in the Notice of Application.

### ***The Compensation Pillar***

27. The Compensation Pillar, formally entitled "Compensation to Co-operating Broker", was not amended in March 2010. At paragraph 51 and following of the Response, CREA offers no justification for the Compensation Pillar (which it now calls the "Remuneration Sharing Pillar"). The Commissioner repeats and relies upon the contents of the Notice of Application and, in addition, states as follows.

28. The Compensation Pillar perpetuates the coordinated behaviour in the market that results in significant benefits to traditional, full-service real estate brokers, while imposing transaction costs on consumers that are not driven by competitive market forces.

29. The Compensation Pillar requires the listing agent to offer to pay compensation to the buyer's agent for the "co-operative selling" of the property. Under the MLS Restrictions, an offer of compensation of zero is "not acceptable". Agents are also not permitted to make an offer of compensation that is "to be negotiated" later. The individual brokers typically share a commission calculated as a percentage of the selling price of the property.

30. The requirements imposed by CREA to make an offer of compensation for such "co-operative" selling impose a minimum mandatory level of service. Necessarily, by attaching this condition to access to the MLS, CREA stifles the emergence of innovative pricing models for residential real estate brokerage services. By making the decision for the home seller that he or she must include an offer of compensation to the "co-operating" broker when listing a property for sale, CREA inhibits the ability of buyers to negotiate separate compensation agreements with their brokers. In sum, the Compensation Pillar serves to do just what CREA wants: to perpetuate the traditional, full-service model, including its compensation structure.

31. Finally, the Compensation Pillar and Interpretation 17.2.5 facilitate "steering" behaviour, whereby "co-operating" brokers have both the incentive and the ability to "steer" their buyers away from those properties for which the listing broker is offering a discount commission rate payable to the "co-operating" broker. This serves further to entrench CREA's traditional model for selling residential properties under which consumers pay a commission that is not subject to the natural forces of competition fielded by product choice.

**E. The Alleged Business Justification and the Distinctiveness of the MLS and related Trade-marks**

32. In March 2010, CREA and its members removed or amended certain Interpretations that CREA claimed in 2007 were necessary for the protection of the MLS and related trade-marks.

The Interpretations never were necessary to protect the MLS and related trade-marks; in fact, they were designed expressly to discipline and exclude emerging competitive models offering unbundled services.

33. The MLS Restrictions are not required, nor even reasonably related to, preserving the distinctiveness of the MLS and related trade-marks. The distinctiveness of the MLS and related trade-marks is not rationally connected to whether a single, or a suite, of services is supplied to home sellers by CREA members. What CREA's conduct is inextricably bound to, and defined by, is its intention to preclude or inhibit fee-for-service brokers, and others offering alternatives to the traditional model, from listing homes on the MLS system.

34. The MLS Restrictions were not implemented for a valid business purpose. Rather, CREA's intent in implementing the MLS Restrictions and the reasonably foreseeable consequences of the MLS Restrictions were, equally, to prevent competition from innovative and alternative models, such as fee-for-service real estate brokers. By alleging that there is a valid business justification underlying the MLS Restrictions, CREA disavows responsibility for the reasonably foreseeable effects of the MLS Restrictions that were long ago identified to CREA by the Commissioner as anti-competitive.

#### **F. Conclusion**

35. The MLS Restrictions have prevented or lessened (and continue to prevent or lessen) competition substantially, stifle innovation and perpetuate the anti-competitive *status quo* in the market for residential real estate brokerage services in Canada. Only an Order under section 79(1), or both sections 79(1) and 79(2), will end CREA and its members' abuse of dominant position contrary to section 79 of the *Competition Act*.

Dated at Toronto this 9th day of April, 2010.

**John F. Rook, Q.C.**  
Bennett Jones LLP  
One First Canadian Place  
Suite 3400, P.O. Box 130  
Toronto, Ontario  
M5X 1A4

Copy to:

**Roger Nassrallah**  
Department of Justice Canada  
Competition Bureau Legal Services  
Place du Portage, Phase 1  
50 Victoria Street, 22<sup>nd</sup> Floor  
Gatineau, Quebec  
K1A 0C9

Counsel for the Applicant

To:

**Canadian Real Estate Association**  
200 Catherine Street, 6<sup>th</sup> Floor  
Ottawa, Ontario  
K2P 2K9

Copy to:

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

Counsel for the Respondent

File No. CT-2010-002

**THE COMPETITION TRIBUNAL**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

- and -

**CANADIAN REAL ESTATE ASSOCIATION**

**Respondent**

**REPLY OF THE COMMISSIONER OF COMPETITION**

**BENNETT JONES LLP**

Suite 3400, P.O. Box 130  
One First Canadian Place  
Toronto, Ontario  
M5X 1A4

**John F. Rook, Q.C. (LSUC #13786N)**

Tel: (416) 777-4885

Fax: (416) 863-1716

**Counsel for the Applicant**