

COMPETITION TRIBUNAL

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, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board.

B E T W E E N :

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
August 19, 2011	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 13

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

RESPONSE OF THE TORONTO REAL ESTATE BOARD
TO THE AMENDED NOTICE OF APPLICATION

PART I: OVERVIEW

1. The Commissioner of Competition's Amended Notice of Application ("**Application**") seeks an order pursuant to subsections 79(1) and 79(2) of the *Competition Act* ("**Act**") but ignores the copyright of The Toronto Real Estate Board ("**TREB**") and its members. Subsection 79(5) of the Act states that the exercise of those rights is not an anti-competitive act. Without proof of an anti-competitive act or acts, the Competition Tribunal ("**Tribunal**") should decline to make an order under either subsection 79(1) or subsection 79(2).

2. TREB does not compete in the product markets referred to by the Commissioner of Competition (“**Commissioner**”) in the Application. TREB has no market power in those markets and no motivation to exercise any market power for the simple fact that TREB is not a supplier of residential real estate brokerage services. There is simply no basis upon which the Application can succeed.
3. TREB owns the TREB Multiple Listing System (“**TREB MLS®**”). The TREB MLS® is a multiple listing service used by suppliers of residential real estate brokerage services to facilitate trade. Access to the TREB MLS® is unrestricted to qualified brokers who are members of TREB.
4. Rules imposed by TREB over members’ access to and use of the TREB MLS® serve to protect the intellectual property rights of TREB and its members, as well as the privacy rights of those who agree to the use of the TREB MLS® to market their property. In addition, such rules promote the accuracy and reliability of the information on the TREB MLS®.
5. As an organization committed to the success of its members, TREB prides itself on its ability to respond to members’ evolving requirements, including with respect to the use of information on the TREB MLS®. Within this context, TREB formed a task force in July, 2010 to examine how best to facilitate the operation by its members of virtual office websites (“**VOWs**”). The report of that task force was released in June, 2011 and the membership of TREB is presently considering the task force’s proposed VOW Policy and accompanying Rules (“**TREB’s Proposed VOW Policy**”). It is expected that the

membership and the TREB Board of Directors will approve TREB's Proposed VOW Policy without major change.

6. At all times TREB has cooperated with the Commissioner. Commencing in mid-2008 the Commissioner initially sought TREB's assistance in creating a VOW policy that could be utilized throughout Canada. Subsequently, the Commissioner decided to commence negotiations with The Canadian Real Estate Association ("CREA") in respect to creating such a Canada-wide policy. Between September, 2008 and February, 2011, TREB responded to two extensive voluntary information requests received from the Commissioner related to that initiative.
7. When the Commissioner was unable to conclude an agreement on VOWs with CREA, she again turned to TREB. The Commissioner became aware that TREB had formed the VOW task force referred to above in July, 2010. The Commissioner knew of the report of that task force and knew that, pursuant to TREB's corporate guidelines, the report had to be considered by TREB's full membership and ultimately by TREB's Board of Directors. Notwithstanding that knowledge, and despite TREB's direct and forthright approach to its dealings with the Commissioner, the Commissioner commenced this Application before the consideration mandated by TREB's corporate guidelines could be completed.

PART II: ADMISSIONS AND DENIALS

8. TREB admits paragraphs 11, 12, and 25 of the Application.
9. TREB admits the first sentence of paragraph 1 of the Application.

10. TREB admits paragraph 26 of the Application, subject to the rules and policies referenced therein being simply referred to as “TREB’s Rules and Policies” and not “TREB’s MLS Rules and Policies”.
11. TREB admits paragraph 33 of the Application, subject to noting that it announced to its members TREB’s Proposed VOW Policy on June 24, 2011.
12. TREB denies all other allegations contained in the Application, except as expressly admitted below.
13. Contrary to the allegation at paragraph 14 of the Application, TREB denies that only its members have direct access to the TREB MLS®.
14. Contrary to the allegation at paragraph 24 of the Application, TREB denies that the alleged efficiencies realized by VOW brokerages in the United States or elsewhere are passed along to consumers, to the extent that such efficiencies exist at all.
15. TREB specifically denies the allegation at paragraph 42 of the Application and states that there are acceptable substitutes to residential real estate brokerage services. A number of providers offer services to home buyers and sellers that do not rely on those home buyers or sellers acquiring the traditional suite of residential real estate brokerage services offered by “bricks and mortar” brokers (including services that do not make use of the TREB MLS®).
16. Contrary to the allegation at paragraph 50 of the Application, TREB has never issued an interpretation of Rule 430. In fact, TREB yielded enforcement of Rule 430 to the Real Estate Council of Ontario (“RECO”) in 2008.

PART III: MATERIAL FACTS ON WHICH TREB RELIES

17. TREB is an Ontario corporation without share capital. It does not engage in business transactions involving residential real estate and has never done so.
18. TREB's corporate objects include the following:
- to advance and promote the interests of those engaged in real estate as brokers, agents, valuers, examiners and experts and to increase public confidence in and respect for those engaged in the calling of real estate broker;
 - to institute, promote and manage listing systems with the object of rendering better service to the public by providing vendors of real estate with a wider potential market.
19. TREB is not licensed under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002 ("REBBA") to trade in real estate and it has never done so.
20. In addition to its ownership and operation of the TREB MLS®, TREB offers additional services to its members, including:
- (a) Internet Data Exchange – a platform that permits participating brokers to share their listings with other participating brokers on their web sites;
 - (b) arbitration services;
 - (c) access to Teranet (Ontario's electronic land registration system) by means of a portal;
 - (d) a commercial real estate website;
 - (e) continuing education seminars attended by some 2,880 members of TREB each month; and
 - (f) enforcement of professional standards.

21. For the purposes of TREB's Proposed VOW Policy, TREB states that a VOW:

... refers to a Member's secure, password-protected internet website, or a feature of a Member's internet website, through which the Member is capable of providing real estate brokerage services to consumers with whom the Member has first established a broker-consumer relationship (as may be designated by provincial and/or federal law) where the consumer has the opportunity to search MLS® data, subject to the Member's oversight, supervision, and accountability.

22. Up until the issuance of the Application, the Commissioner had been adamant that a VOW was:

a website operated by a Member [of TREB] or on behalf of a Member that enables Members to provide real estate brokerage services in an online environment, and where Customers [a person or persons who has an interest in acquiring or selling residential real estate, including, but not limited to, a Member's client] have the opportunity to search and review TREB MLS® Data.

23. For the first time, the Commissioner has in paragraph 4 of the Application referred to a VOW as a "...secure, password-protected "virtual office website"".

24. Paragraphs 3, 32, 46 and 52 of the Application reference a situation in which TREB was forced to terminate the access of a member to the TREB MLS® when that member sought to take or scrape all of the residential listing data for an area of the City of Toronto and republish it on a website of a third party. The member commenced a proceeding in the Ontario Superior Court of Justice against TREB. The Court held that TREB was justified in suspending access to the TREB MLS® and that the member had breached his contract with TREB. The Court dismissed the member's application with costs. The Ontario Court of Appeal dismissed the member's appeal on December 21, 2010 with costs.

25. Despite the inferences set out in the Application, the facts set out above represent the only situation in which TREB has terminated a member's access to the TREB MLS®.
26. At paragraph 18 and elsewhere in the Application it is alleged that information found on the TREB MLS® is not efficiently available to customers of brokers. This is inaccurate. Such information, if not protected by federal privacy legislation or withheld at the request of a vendor, may well be found at www.realtor.ca and on literally hundreds of websites. There are no restrictions whatsoever placed by TREB on its members that preclude members from also making their listings available through the multitude of websites and listing services not affiliated with TREB.

**PART IV: STATEMENT OF THE GROUNDS ON WHICH THE APPLICATION IS
OPPOSED**

27. The Commissioner brings the Application in reliance on section 79 of the *Competition Act* and, as such, bears the burden of satisfying the Tribunal that:
- (a) TREB substantially or completely controls the markets identified by the Commissioner for the purpose of this Application, namely, the supply of residential real estate brokerage services to home buyers and home sellers within the geographic limits of the TREB MLS®;
 - (b) TREB's policies with respect to the use of and access to the TREB MLS® constitutes a practice of anti-competitive acts; and
 - (c) such policies have had, are having or are likely to have the effect of preventing or lessening competition substantially in a market.

28. The elements of subsection 79(1) of the Act are cumulative, such that the Commissioner bears the burden of establishing each element on the balance of probabilities.
29. For the reasons set out below, the Commissioner cannot satisfy even one of the elements required by section 79. Therefore, the Application must necessarily fail.

TREB does not substantially or completely control the Relevant Markets

30. The product markets identified by the Commissioner in paragraphs 41 to 43 of the Application are the supply of residential real estate brokerage services to home buyers and the supply of residential real estate brokerage services to home sellers, in each case defined geographically by the geographic coverage of the TREB MLS® (together, “**the Relevant Markets**”).
31. TREB does not supply residential real estate brokerage services, either to home buyers or to home sellers.
32. While the Commissioner fails to identify the suite of services alleged to comprise “residential real estate brokerage services” for the purposes of the Application, TREB submits that the process of both defining “residential real estate brokerage services” and identifying competitors within the Relevant Markets must accord with applicable legislation.
33. The supply of residential real estate brokerage services in the Relevant Markets is governed by REBBA and regulations made under REBBA (“**REBBA Regulations**”). Pursuant to section 4 of REBBA:

Prohibition against trade in real estate unless registered

4. (1) No person shall,

- (a) trade in real estate as a brokerage unless the person is registered as a brokerage;
- (b) trade in real estate as a broker unless he or she is registered as a broker of a brokerage;
- (c) trade in real estate as a salesperson unless he or she is registered as a salesperson of a brokerage; or
- (d) trade in real estate unless registered under this Act. 2002, c. 30, Sched. C, s.4 (1).

Unregistered persons

- (2) A person who is not registered as a brokerage, broker or salesperson shall not,
 - (a) directly or indirectly hold himself, herself or itself out as being a brokerage, broker or salesperson, respectively; or
 - (b) perform any of the functions of a brokerage, broker or salesperson as provided in this Act. 2002, c. 30, Sched. C, s.4 (2).

34. Pursuant to subsection 1(1) of REBBA:

“brokerage” means a corporation, partnership, sole proprietor, association or other organization or entity that, on behalf of others and for compensation or reward or the expectation of such, trades in real estate or holds himself, herself or itself out as such.

“trade” includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for purchase and sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition, acquisition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt, and the verb “trade” has a corresponding meaning.

35. TREB is not registered as a brokerage for the purposes of REBBA and, as such, is legislatively prohibited from supplying residential real estate brokerage services in the Relevant Markets.

36. TREB cannot compete with its members in the supply of residential real estate brokerage services in the Relevant Markets because it would be *ultra vires* the purposes and objects of TREB, as set out in its Letters Patent.
37. While some of TREB's members may supply residential real estate brokerage services in the Relevant Markets, TREB itself cannot. TREB does not offer to consumers in the Relevant Markets any of the services expected from realtors and brokers (such as property identification, providing valuation guidance and conducting open houses); does not guide a buyer or seller through the transaction process; and does not assist in the negotiation of contracts for the sale and purchase of residential property. TREB does not hold itself out as being a brokerage and does not perform any of the functions of a brokerage.
38. TREB has no legislative authority upon which it could supply residential real estate brokerage services in the Relevant Markets and does not supply residential real estate brokerage services in the Relevant Markets.
39. TREB's status as a supplier of an input used in the delivery of residential real estate brokerage services in the Relevant Markets (i.e. the TREB MLS®) does not confer on TREB the status of a competitor in those "downstream" markets. Indeed, this is the position adopted publicly by the Competition Bureau at page 39 of its current *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions* (January 2009):

Where there is no vertical integration, simply charging a monopoly price for access to a facility, imposing conditions on its use*, or choosing not to offer access to downstream purchasers at any price would not, by itself, raise concerns. If a facility owner does not compete in the downstream market(s) in which the facility is used, the Bureau will not consider that supplier to have an incentive to affect downstream competition, and will not consider them to have downstream market power.

*Such conditions could include exclusive territories or field-of-use restrictions that limit the geographic and/or product markets in which downstream purchasers can use the facility.
(emphasis added)

40. TREB is not a competitor in the Relevant Markets and, as such, cannot have market power in the Relevant Markets. Without market power, TREB does not and cannot substantially or completely control the Relevant Markets.
41. Furthermore, the TREB MLS® is “owned” by TREB’s members. TREB has no incentive to exercise any market power against its broker members. Instead, TREB has an incentive to operate the TREB MLS® to facilitate buying and selling of real estate.

TREB has not and is not engaged in a practice of anti-competitive acts

42. The conduct impugned by the Commissioner does not constitute a practice of anti-competitive acts for the purpose of subparagraph 79(1)(b) of the Act.
43. Conditions TREB places on members’ access to and use of the TREB MLS®, including by way of TREB’s By-Law, TREB’s Rules and Policies and the requirement that members execute an Authorised User Agreement (together, “**TREB’s Access Terms**”) do not constitute a practice of anti-competitive acts.
44. As acknowledged by the Commissioner, TREB is the owner of the electronic database that constitutes the TREB MLS®, as well as its author. As the author of the TREB MLS®, TREB owns the copyright in the TREB MLS®. Pursuant to subparagraph 3(1)(a) of the *Copyright Act*, this right includes the sole right “to produce, reproduce, perform or publish any translation of the [TREB MLS®], ... and to authorize any such acts”.

45. While “anti-competitive act” is not exhaustively defined by the Act, subsection 79(5) of the Act specifically excludes from the definition the lawful exercise of intellectual property rights. Subsection 79(5) of the Act provides:

... an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

46. TREB’s Access Terms constitute no more than the mere exercise of the rights derived by TREB from the *Copyright Act*. In the context of the Relevant Markets, TREB’s Access Terms confer on TREB no advantage other than that derived from the *Copyright Act* itself.
47. As summarised by the Bureau itself at page 7 of its long-standing *Intellectual Property Enforcement Guidelines* (September, 2000):

The unilateral exercise of the IP right to exclude does not violate the general provisions of the Competition Act no matter to what degree competition is affected.

To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural and educational benefits created by them and be inconsistent with the Bureau’s underlying view that IP and competition law are generally complementary.

48. Neither TREB’s Access Terms nor TREB’s Proposed VOW Policy are informed by the requisite purpose of having a negative effect on a competitor that is predatory, exclusionary or disciplinary:

- (a) TREB is not a competitor in either of the Relevant Markets. Even if TREB’s Access Terms negatively affect competition in the Relevant Markets, which is expressly

denied, any such effects are irrelevant for the purpose of subparagraph 79(1)(b) of the Act as they do not manifest a negative effect on a competitor of TREB.

- (b) TREB's Access Terms are informed by TREB's legitimate interest in preserving the value of the TREB MLS® for the benefit of TREB's members.
- (c) TREB's Access Terms have been formulated to safeguard the privacy rights of TREB's members and TREB's members' customers (both buyers and sellers of residential real estate in the Relevant Markets) in their individual listings and to ensure TREB and its members are compliant with their respective statutory obligations, including those arising from the *Personal Information Protection and Electronic Documents Act*, SC 2000, and the Code of Ethics established by Ontario Regulation 580/05 to REBBA.
- (d) TREB's Access Terms are a legitimate exercise of the intellectual property rights of TREB and its members, including by operation of the *Copyright Act*.

TREB'S Access Terms do not substantially prevent or lessen competition

- 49. The Tribunal is not required to consider whether TREB's Access Terms substantially prevent or lessen competition in the relevant markets because the Commissioner is unable to satisfy the burden with respect to either subparagraph 79(1)(a) or subparagraph 79(1)(b) of the Act.
- 50. TREB's Access Terms do not substantially prevent or lessen competition, whether in the manner alleged by the Commissioner or at all.

51. Neither TREB's Access Terms, nor TREB's Proposed VOW Policy, will or are likely to substantially prevent or lessen competition, whether in the manner alleged by the Commissioner or at all.
52. No business model or subset of members is preferred by TREB's Access Terms, either in practice or in reality. TREB serves, represents and treats its members equally, in accordance with its By-Law, Rules and Policies, and constating documents.
53. TREB's Access Terms are neither static nor entrenched. TREB's Access Terms are, and have historically been, developed and amended in consultation with TREB's members in response both to members' evolving requirements (including in answer to consumer demand) and legislative developments. It was within this context that TREB's VOW Task Force was struck in July 2010, and is within this context that TREB's Proposed VOW Policy is now under consideration by its members.
54. There is no basis for the Commissioner's allegation that "but for" certain of TREB's Access Terms, the Relevant Markets might benefit from "more innovation, enhanced quality of service and increased price competition, through such means as commission rebates."
55. TREB's Access Terms do not prescribe the commission structures that must be adopted by its members. There is clear evidence of price competition among participants in the Relevant Markets.
56. Consumers of residential real estate brokerage services already have a number of search tools open to them for the purpose of identifying and then narrowing the search to those properties of interest to them. A number of providers offer services to home buyers and sellers that do not rely on those home buyers or sellers acquiring the traditional suite of

residential real estate brokerage services offered by “bricks and mortar” brokers (including services that do not make use of the TREB MLS®). Further, there are no restrictions whatsoever placed by TREB on its members that preclude members from also making their listings available through the multitude of websites and listing services not affiliated with TREB.

57. The Commissioner’s Application significantly undervalues both the services that many brokerages offer home buyers and the very real role brokers play in stimulating trade in the Relevant Markets. The work of a broker is not meaningfully lessened by reason of home buyers having undertaken their own searches. Brokers must still discharge their obligations under REBBA’s Code of Ethics.
58. Services offered by buyers’ brokers include market education, liaising with selling agents to obtain viewings, taking prospective buyers to inspect properties, guiding buyers through the financing and purchasing process, advising on and negotiating price and preparing and submitting offers. While identifying properties of interest is certainly an important aspect of the buying process, it is by no means either the most time intensive aspect of the service brokers provide, nor the aspect of service that is of greatest value to the home buyer. Any suggestion to the contrary is simply inaccurate.
59. TREB’s Access Terms encourage the continued use of the TREB MLS® as a viable business tool, both from the perspective of TREB’s members and the consumers they serve. In circumstances where concerns such as privacy and intellectual property rights are prevalent, the protections built in to TREB’s Access Terms act to encourage consumers and members to continue to use and allow to be used in the marketing of their property, the

TREB MLS®. Without these protections, buyers and sellers would be less likely to use the TREB MLS®, with the likely result of a reduction in the value and volume of trade.

60. Neither TREB's Access Terms, nor TREB's Proposed VOW Policy substantially lessen or prevent competition in the Relevant Markets.

PART V: STATEMENT OF ECONOMIC THEORY

61. TREB's Concise Statement of Economic Theory is set out in Schedule "A" to this Response.

PART VI: RELIEF SOUGHT

62. TREB requests an Order dismissing the Application with costs payable to TREB. TREB submits that the circumstances surrounding the commencement of this Application warrant the awarding of costs to TREB on a full indemnity basis.

PART VII: PROCEDURAL MATTERS

63. TREB agrees that the Application be heard in English.
64. TREB agrees that the Application be heard in the City of Toronto.
65. TREB agrees with the Commissioner's proposal that documents be filed electronically.

DATED AT Toronto, this 19th day of August, 2011.



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**SCHEDULE A:
CONCISE STATEMENT OF ECONOMIC THEORY**

Background on The Toronto Real Estate Board

1. The Toronto Real Estate Board (“**TREB**”) represents over 31,000 real estate brokers and salespersons licensed to trade in real estate in the Greater Toronto Area (“**GTA**”). TREB operates a multiple listing service (“**MLS®**”) system. The TREB MLS® is an electronic database of available properties that has two relevant aspects. First, it compiles listings of current residential property for sale in the GTA by TREB members. Second, it contains historical information regarding the sale of residential real estate.
2. Sellers of residential property sign a listing agreement with a broker or the agent of a broker (“**broker**”). Listing agreements identify the property for sale, the seller’s asking price, and the broker’s commission. Listings may also contain other information related to the property, such as the seller’s contact information and remarks intended for cooperating brokers, e.g., information regarding showing the property. TREB’s member brokers post this information, along with the portion of the commission that they are willing to share with the buyer’s broker, on the TREB MLS®. A participating TREB member broker, whether representing sellers or buyers, receives access to the listings of all other member brokers.
3. Posting a house on the TREB MLS® enables a seller’s broker to communicate with all TREB members, increasing the pool of potential buyers. Prior to the institution of multiple listing services, sellers would list their homes with a broker, and buyers (or their brokers) would have to search the inventory of each broker that represented sellers. Multiple listing

service (“MLS”) systems therefore are typically acknowledged as efficient because they reduce search costs for buyers. MLS systems also increase the liquidity of local real estate markets because of indirect network effects, leading to an enhanced chance of a match and better matches between buyers and sellers. Indirect network effects arise because more sellers mean more demand for access by buyers, and more buyers mean more demand for access by sellers. Increases in access to a MLS on both sides of the platform implies more transactions.

4. TREB is a membership organization that encourages professional standards in the industry and provides other services to members. Membership is open to all licensed real estate brokers in the GTA. Its activities are guided by an elected Board of Directors. TREB also has a full time staff providing services that include the TREB MLS® as well as arbitration, education, professional standards, communications, government relations and member outreach. TREB is a non-profit organization and has an incentive to operate the TREB MLS® to maximize the extent of trade in the GTA.
5. Brokers assist buyers and sellers in all stages of the real estate process. For sellers, among other things, they assist in determining the list price, marketing the listing and including it in a MLS, negotiate the terms of sale, and facilitate closing. Not only do they find buyers, but they also assist buyers, for instance by providing buyers with information useful in selecting houses—including accessing and interpreting information on a MLS, advising on offers and negotiations, and completing paper work. Brokers provide value to buyers and sellers because of their expertise in completing transactions and local market conditions. Given

how infrequently most individuals buy and sell homes and the complexity and size of the investment, brokers are valued for their professional assistance.

Economics of Two-Sided Platforms

6. MLS systems are two-sided platforms. Characteristics of two-sided platforms are that two distinct groups of users are connected by an intermediary platform, and demand for the intermediary service on one side of the platform increases as the number of participants on the other side increases (i.e., demand is interdependent). Examples include newspapers, which connect advertisers to subscribers, and payment card systems, which connect merchants to cardholders.
7. A MLS is a two-sided platform that connects buyers and sellers of real estate. The more buyers that access the platform (MLS) the greater the value to a seller from listing; the more sellers that market their property using the platform (MLS) the greater the value to buyers. Economically, a MLS acts as a means to match buyers and sellers, and its owner/operator will try to do so in a way that encourages the participation of both sides (buyers and sellers, with their respective brokers), thereby maximizing the value of the platform. Efforts to encourage participation by buyers and sellers involve trying to reward buyers and sellers for the benefit they create for other users of the system. Novel institutional arrangements will arise that attempt to internalize or capture and transfer the external value created by participation. For instance, the platform operator may be able to do this by setting the structure of its prices appropriately.

Pricing in two-sided platforms

8. A feature of two-sided platforms is the use of the price structure to encourage usage of the platform and determine the incidence of the costs of operating the platform. The price charged each side will reflect its elasticity of demand and the extent of cross platform externalities. The side with the more inelastic demand for services will generally pay a higher price (*ceteris paribus*) and hence bear more of the costs. The side whose size has a smaller effect on the value to the other side of joining the platform will pay a higher price (*ceteris paribus*) and hence bear more of the costs. The real estate market and operation of a MLS is an example where sellers whose houses are sold bear the cost of sale via the selling broker's commission, which is then shared with the buyer's broker. Typically the buyer pays nothing directly to the broker, whether they buy or not. Also, if a seller lists a house and does not sell it they do not pay. In economic terms, the subsidy from sellers to other participants is a way to partially internalize the network benefits buyers and unsuccessful sellers create when they use a MLS. That is, the subsidy is a means to return to buyers and unsuccessful sellers part of the benefits they create for others when they participate in a MLS. This implies, in short, that the current structure of prices (commissions) facilitates transactions in the real estate market.
9. Moreover, in a two-sided platform, the price paid on one side does not necessarily reflect the costs of providing services to that side. For profitable service, the sum of prices for a transaction must at least cover the costs of facilitating the transaction. This also means that a comparison between the costs of providing access to one side of the market and the price charged that side is not indicative of market power or overall efficiency.

Non-Price Competition

10. In a two-sided platform, like a MLS, the platform operator will typically also engage in conduct that facilitates liquidity, i.e., increases the use of a MLS by buyers and sellers. Similarly the platform operator will have an incentive to impose restrictions on conduct that reduces liquidity, i.e., decreases the use of a MLS by buyers and sellers.
11. TREB, sellers and sellers' brokers will have an interest in the incentives provided to brokers working for buyers, and in particular, that buyers' brokers have the right mix of incentives between price and non-price competition to attract buyers and close sales. Brokers can earn the right to represent buyers by rebating some of their commission, or through better or more innovative services. Sellers will want to make sure that brokers interested in representing buyers do not focus too much on representing buyers that are already in the market (inframarginal buyers) and not enough on widening the pool of buyers, i.e., bring into the market new buyers (marginal buyers). To the extent that price and non-price competition affect marginal and inframarginal buyers differentially, sellers will want to provide the optimal mix of incentives for brokers that represent buyers. Non-price competition to close sales involves effort and investment in activities beyond listing prices on a MLS or website, e.g., providing guidance on pricing, showing houses, negotiating the deal, etc.
12. Recognizing that the TREB MLS® is a two-sided platform has implications for market definition, market power, and understanding TREB's policies and rules (i.e., TREB's Access Terms and TREB's Proposed VOW Policy) as they apply to the operation and use of the TREB MLS®.

Market Definition and Market Power

Market Definition

13. In assessing market power there are three relevant services—two downstream services (buyers' brokerage and sellers' brokerage) and one upstream service (a MLS). The upstream service is a two-sided platform, with access provided to brokers representing buyers and sellers. While demand for the upstream service comes from these brokers, it is a derived demand, i.e., based on the demand by brokers' customers, buyers and sellers of real estate.
14. The upstream service provided by a MLS is not just access to one of the two downstream services. Instead, the ultimate "product" is a transaction, i.e., a successful sale. This follows immediately from understanding that a MLS is a platform that matches buyers and sellers. If this was not the case then the derived demand to list and access listings would be zero. The price of using the upstream service (in this case, the TREB MLS® platform) is the total price paid by the brokers for using a MLS when completing a downstream transaction (i.e. buying or selling real estate).
15. Proper market definition for the upstream service therefore involves considering the competitive constraint of other "platforms" on the TREB MLS®. Other platforms include other methods, technologies, and means whereby a buyer and a seller (or their brokers) could meet and make a transaction and would include, in particular, consideration of the competitive importance of competing services/platforms enabled by the internet.
16. The cost of a transaction to participants on a MLS equals the prices charged to brokers for placing a listing plus the price for accessing listings. These two services are both required

for a transaction on a MLS. It is the total price for these two complementary services which should be the price used in the hypothetical monopoly test.

17. In the context of a two-sided platform (such as the TREB MLS®), care must be taken when using the hypothetical monopoly test to define relevant markets. Applying it to one side of the platform by considering the impact of a small but significant non-transitory impact on price (“SSNIP”) without considering the potential for feedback effects from the other side may lead to defining one side of the platform as a relevant market when in fact a SSNIP would not be profitable because of feedback effects.

Market Power

18. Similarly, in assessing the market power of TREB, the relevant issue is whether the aggregate price of the two services required to transact on the TREB MLS® is above competitive levels. If TREB had market power, the total price of the two services (access to brokers of buyers and sellers) would be raised above the cost of using a MLS to complete a transaction, the total price if there is no exercise of market power.
19. Because of the governance of TREB and the availability of alternative means of listing and advertising residential real estate, it is unlikely that TREB will exercise market power.
20. While theoretically there might be market power in the provision of access to the TREB MLS® (e.g., due to network externalities and economies of scale in a large comprehensive listing base), the TREB MLS® is operated not-for-profit and is “owned” by TREB’s members. TREB has no incentive to exercise any market power against its broker members. Instead TREB has an incentive to operate TREB’s MLS® to facilitate buying and selling of

real estate. Further, brokers who use the TREB MLS® are free to list on any competing MLS or similar service. For these reasons, TREB does not exercise significant market power, i.e., TREB is not dominant, even if the market is assumed to be the TREB MLS® in the GTA and excludes other platforms used to match buyers and sellers of residential real estate in the GTA.

TREB's Access Terms and Proposed VOW Policy

21. TREB's Access Terms and Proposed VOW Policy must be assessed and understood within the context of the incentives of TREB to promote usage of the TREB MLS® and in particular the potential of VOWs to affect, either positively or negatively the incentives of buyers and sellers to use the TREB MLS®.
22. The Commissioner's narrow focus on price competition and service differentiation on one side of the platform is a partial and incomplete analysis of the effects of TREB's Proposed VOW Policy. If VOWs or other innovations reduce costs without negatively affecting the TREB MLS®, then TREB and its members would adopt these practices, or they would determine how these practices and innovations could be incorporated into the TREB MLS®, by incorporating rules and restrictions that allow the benefits to be realized while at the same time minimizing any negative effects on the operation of the system in its entirety.
23. Restrictions on VOWs that draw data from the TREB MLS® may be pro-competitive if they limit negative effects on the liquidity of the TREB MLS®, i.e., without the restriction the number of buyers and sellers using the MLS system would be negatively impacted.

24. The restrictions contained in TREB's Proposed VOW Policy may be pro-competitive for a number of reasons, including the following:

- VOWs may deplete the value the TREB MLS®. For example, VOWs may add information that reduces the reputation of the TREB MLS® in general for accuracy. Or VOWs may result in the addition of information that is private. Both of these effects may negatively impact the incentives of buyers and sellers to participate in the TREB MLS®, reducing its overall value.
- Unrestrained VOWs may create excessive incentives for price competition among buyers' brokers and divert the focus away from non-price competition. This may reduce the effectiveness of the TREB MLS® from the perspective of sellers, resulting in fewer listings.
- Similarly, sellers may prefer to ensure that brokers have an incentive to enlarge the pool of potential buyers. Rather than compete over price (by offering a discount) to a buyer already in the market, sellers may prefer instead to provide incentives for finding new buyers by promising a large commission.
- VOWs may result in listing brokers leaving a MLS or reducing their incentive to find listings. This will be true, for instance, if listings generate additional listings and the link between the broker and a listing is weakened by posting on VOWs. That is, if a key factor to generate new listings is a stock of existing listings associated with a broker, then to the extent a VOW reduces the ability of sellers to assess the stock of existing listings, brokers do not have the same incentive to find listings.
- Because of network effects, a VOW might become the public face of the TREB MLS®, creating market power for the VOW. If this market power is used to charge fees above costs for referral, the total costs of a transaction could be raised. Alternatively, VOWs might decrease the incentive of buyers to participate, by charging an access fee or subjecting them to other implicit costs.
- VOWs may also have little incentive or capability to recruit new sellers/buyers compared to full service brokers. An important role of brokers is to locate new sellers and buyers who might otherwise not participate in the market, expanding the market and

increasing liquidity. To the extent that VOWs result in a reduction in the number of active traditional brokers, liquidity could be harmed.

- VOWs may access TREB MLS® data at only the incremental cost of providing the data and without contributing to the database directly by adding new listings. As such, they would be free riding on the efforts of full service brokers because they do not contribute appropriately to the cost of maintaining the TREB MLS® and because they do not contribute to the number of listings.
- The success of a VOW might encourage brokers to withdraw (opt out) from the TREB MLS® and compete for listings directly. This could lead to fragmentation of the listings into different platforms, with different VOWs covering only parts of the market. This would likely reduce the value of the listings compared to a single comprehensive listing service. Since these VOW listings may be operated with different aims than the TREB MLS®, which exists as a means of facilitating the real estate market, this may reduce the efficiency of the real estate market.
- A VOW that only refers buyers might not save significant costs for the buyer's broker handling the purchase. Yet the VOW referral could become an established route for buyers to enter the market, with the buyer's broker now needing to bear an additional cost of the referral, without corresponding reductions in the broker's subsequent costs. In other words, separating out the VOW from the buyer's broker may incur some doubling of costs compared to performing all functions within a single buyer agent. If a VOW acts as an additional search mechanism this *might* improve buyer broker efficiency and cut total buyer costs. If, however, it acts as an additional front end service, and merely shifts activity between different types of buyer brokers (which might *appear* to be increased competition on the buyer side but which in fact does not reduce costs or increase the efficiency of the matching process) then it might act as an additional cost to the system.

25. The Commissioner's narrow focus on price competition in buyer brokerage appears to mischaracterize the rationale for restrictive VOW policies and rules. There is in fact no market power to preserve or enhance in the operation of the TREB MLS®. Instead an

efficient VOW policy may have certain restrictions which are aimed to reduce overall costs and to promote usage of the TREB MLS®, thereby preserving its value. That is, a restrictive VOW policy is likely efficiency enhancing. The design and control of the TREB MLS® is intended to facilitate trade, not to create or maintain market power.

26. The *Competition Act* does not exist to regulate industry practice but only to remedy the abuse of market power.

CT-2011-003

COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

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