

THE 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.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

**REPLY OF THE CANADIAN REAL ESTATE ASSOCIATION TO THE
COMMISSIONER'S RESPONSE TO ITS REQUEST FOR LEAVE TO INTERVENE**

Overview

1. The Canadian Real Estate Association ("CREA") provides these submissions in response to the Commissioner's argument that the national association representing the

Canadian real estate industry should have no role whatsoever in a proceeding where the Commissioner seeks a broad and imprecise remedy in respect of the provision of VOWs and other Internet data-sharing vehicles that will directly impact CREA and its members. The crux of the Commissioner's position is that the Tribunal should decide important issues relating to the use of the Internet to provide VOWs and other data-sharing vehicles in the real estate industry in the absence of the CREA's unique perspective and without regard to the ramifications of the remedy requested on CREA and its members. The Commissioner's position should be rejected.

2. The Commissioner's position is based on a test for intervention that is overly restrictive and not supported by the authorities. Further, the Commissioner's assertion that CREA and its members are not directly affected by the matters in issue is based on an unjustifiably narrow and incorrect view of the relevant factual context. In addition, the Commissioner's attempt to portray CREA's perspective as being identical to that of the Respondent is contrary to the evidence and confuses a unique and distinct perspective (which is a requirement for intervention) with the adoption of a different legal position (which is not a requirement for intervention). Lastly, the Commissioner's position on the appropriate scope of CREA's participation in this proceeding, should CREA be granted intervention status, is unreasonably restrictive, not supported by the authorities and, if implemented, would have the effect of denying CREA any meaningful participation in this proceeding.

3. The purposes of allowing an intervention in a proceeding include the protection of the interests of non-parties and to ensure that the Tribunal is fully informed of the issues

in the proceeding and the consequences of any decision that it makes.¹ Allowing CREA to intervene in the manner it has requested will fulfill all of these purposes. On the other hand, refusing CREA's request to intervene will deny CREA the ability to protect its members' interests and will leave the Tribunal in the undesirable position of having to decide important issues without regard to all of the relevant perspectives and consequences.

CREA Has Met the "Directly Affected" Test

4. ***The Commissioner's Argument That This Proceeding Is Restricted In All Relevant Respects to TREB and TREB Members is Incorrect.*** The Commissioner's main argument is that this proceeding lies wholly within the physical boundaries of the Greater Toronto Area ("GTA"). The Commissioner argues that this proceeding is limited to the Respondent and its members in all relevant respects and does not have any implications whatsoever outside of the GTA. In advancing the argument that CREA is not directly affected, the Commissioner attempts to distinguish the Tribunal's decisions in *A.C. Nielsen*² and in *Visa Canada Corp.*³ on the basis that CREA has provided no evidence of a direct effect on members outside of the GTA and that CREA has no proprietary interest in the data in TREB's MLS® System. CREA submits that the Commissioner's arguments should fail for the following reasons.

¹ Paul R. Muldoon, *Law of Intervention* (1989) at 16; and John Sopinka and Mark Gelowitz, *The Conduct of an Appeal* (2nd ed., 2000) at 253-254.

² *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*, [1994] C.C.T.D. No. 19 (QL).

³ *Canada (Commissioner of Competition) v. Visa Canada Corp.*, [2011] C.C.T.D. No. 2 (QL).

5. First, the Tribunal's decisions in *A.C. Nielsen* and in *Visa Canada Corp.* do not stand for the proposition that an industry association must point to a direct effect on a contractual or proprietary interest in order to satisfy the Tribunal that it is directly affected by the matters in issue. Rather, the Tribunal simply found that the proposed intervenors' contractual and proprietary interests were sufficient to pass this stage of the test on the particular facts of those cases. It is certainly open to CREA to point to different relationships or factors in order to establish that it is directly affected in the context of the particular facts of this proceeding.

6. Second, while TREB is the only named Respondent in this proceeding, the scope and potential effect of the remedy requested by the Commissioner in the Amended Application is extremely broad and, as worded, is not restricted to TREB. For example, after setting out the relief the Commissioner is specifically seeking against TREB, paragraph 66(d) requests "all other orders or remedies that may be required to give effect to the foregoing prohibitions, or to reflect the intent of the Tribunal and its disposition of this matter".

7. Third, the Commissioner and the Tribunal operate under federal legislation that applies equally across Canada. Any decision about the appropriateness of the terms of TREB's VOW Policy and/or any Order requiring TREB to implement resources or facilities in relation to the provision of VOWs or other Internet data-sharing vehicles will set the boundaries for the development and implementation for such vehicles by both CREA and local boards across the country, regardless of which real estate board is a formal party to this proceeding. To suggest otherwise is to defy reality, as well as to endorse the indefensible position that the Tribunal should put "blindness" on and ignore

all consequences of its Order that extend beyond the geographic boundaries of the named Respondent.

8. The Commissioner relies on the Tribunal's decision in *Tele-Direct*⁴ to argue that the fact that the remedy requested may have national precedential effect for real estate boards is not a legitimate basis on which to intervene. In fact, the portion of this decision relied on by the Commissioner simply stands for the proposition that, in the circumstances of that case, the fact that a decision may affect how a specific industry participant (not a national industry association) conducts its business is not, by itself, sufficient to establish that the industry participant is directly affected. In any event, CREA is not relying on the precedential effect of the Tribunal's decision as the sole basis to establish that it is directly affected.⁵ Further, as stated above, the Tribunal should be extremely wary of making decisions that will have significant impact beyond the parties, without hearing from the representative of those non-parties who will be impacted.⁶

9. Fourth, the Commissioner specifically relies on evidence concerning the operation of VOWs in jurisdictions beyond the GTA. In the Amended Application, the Commissioner refers to VOWs operating in other Canadian jurisdictions and in the United States in support of the argument that the availability of VOWs leads to

⁴ *Canada (Director of Investigations and Research) v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528 (Comp. Trib.).

⁵ Rather, as explained in its Request for Leave to Intervene, CREA also relies on the fact that the matters in issue directly affect its members, including TREB and TREB's members, as well as the fact that CREA is directly affected by virtue of the potential impact of any Order on the trademarks that it owns and licences to local board and associations in conjunction with their operation of an MLS® System.

⁶ Muldoon, *supra* at 16; and Sopinka and Gelowitz, *supra* at 253-254.

competitive benefits for consumers.⁷ This is an admission by the Commissioner that the experience with VOWs in jurisdictions beyond the GTA is relevant to the matters in issue in this proceeding and it is not open for the Commissioner to attempt to withdraw that admission for the purpose of objecting to CREA's Request For Leave To Intervene.

10. Fifth, simply from a factual perspective, it is a fallacy to suggest that the issues raised by this proceeding are wholly and neatly contained within the four corners of the GTA boundaries and, therefore, will only affect members of CREA who are members of TREB. Other members of CREA will also be affected because of the arrangements that have been put in place between TREB and other local boards and associations.

11. For example, the "Connect" program is a joint venture of TREB and the local boards in Hamilton-Burlington, London-St. Thomas and Ottawa. It allows all members of all participating boards and associations (currently, 24 in Ontario) to search and view active MLS® listings and recent sales histories of all other participating boards. This means, for example, that TREB members have access to MLS® listings in Ottawa, and members of the Ottawa board have access to MLS® listings in the GTA. Also, separate from the Connect program, TREB has entered into contracts to provide MLS® listings services to the local boards in Brampton and Durham, who do not operate an MLS® System for their respective members.

12. Considering the breadth and generality of the relief requested by the Commissioner, the boards/associations participating in the Connect program and/or receiving MLS® listings services from or through TREB will be impacted by a remedy

⁷ Amended Application, paragraph 6.

imposed by the Tribunal in respect of TREB's MLS® System including, for example, any Order that may apply to non-GTA listings obtained by TREB members or to GTA listings obtained by non-TREB members.

13. Sixth, in arguing that CREA members outside of the GTA are not affected by the matters in issue in this proceeding, the Commissioner simply assumes that the appropriate market for the purposes of the section 79 analysis is Toronto (as defined in the Amended Application), and that TREB members do not compete with other CREA members. The appropriate market definition is an issue which will ultimately be determined by the Tribunal in this proceeding. It is not appropriate to assume that the issue will be decided in the Commissioner's favour for the purpose of deciding whether CREA should be permitted to intervene.

14. ***In the Alternative, A Direct Effect On TREB Members Is Sufficient.*** Even if the only members of CREA who are directly affected by the issues in this proceeding are TREB and the members of TREB (which CREA denies, for the reasons set out above), CREA still satisfies the direct affected part of the intervention test.

15. The Commissioner argues that, when considering whether CREA is directly affected, the Tribunal must look beyond CREA's GTA membership. This is an incorrect statement of the test.

16. As set out in paragraph 5 of CREA's Request for Leave to Intervene, the Tribunal has concluded that an industry association is directly affected when the matters in issue directly affect the persons that association represents. CREA represents TREB and the members of TREB, amongst other boards/associations and their members. If TREB

and/or its members are directly affected, then so is CREA. It is irrelevant to the "direct affected" analysis whether or not a member itself is also a party to the proceeding.

17. ***In Any Event, CREA Is Directly Affected By Virtue Of Its Ownership of The MLS® and REALTOR® Trademarks And Its Contracts With TREB.*** As explained in its Request For Leave To Intervene, CREA owns the MLS® and REALTOR® Trademarks. Local boards/associations, including TREB, operate an MLS® System in association with the MLS® and REALTOR® Trademarks, under licence from CREA, and in accordance with rules and policies promulgated by CREA as a condition of membership. Amongst other things, those rules and policies protect the distinctiveness of the MLS® and REALTOR® Trademarks, including by requiring adherence to standards that ensure the quality of information in the MLS® System.⁸

18. TREB (as well as other local boards and associations) have also entered into contracts with CREA which specifically govern, amongst other things, the terms of the licence from CREA to use the MLS® and REALTOR® Trademarks, and the terms and conditions for the uploading of MLS® listing data to the website operated by CREA at REALTOR.ca.⁹

19. Any Order made by the Tribunal in this proceeding that affects the value of the MLS® and REALTOR® Trademarks directly affects CREA's rights and interests. In

⁸ In his Supplemental Affidavit, Mr. Simonsen has provided a copy of CREA's current By-Laws, Rules and Regulations. Articles 2.1.10, 16 and 17 deal specifically with CREA's ownership of the MLS® and REALTOR® Trademarks and its members use of those Trademarks, as well as CREA's members' responsibility to ensure that the information on a board's MLS® System is accurate and meets reasonable standards of quality.

⁹ In his Supplemental Affidavit, Mr. Simonsen has provided copies of the three relevant agreements executed by TREB and CREA; the Certification Mark License Agreement, the CREA/TREB Content Upload Agreement and the Three-Way Membership Agreement.

particular, any Order requiring TREB to do anything that changes the content, quality or age of information derived from TREB's MLS® System impacts the association of those Trademarks with assurances of integrity, services and professionalism. It is irrelevant that CREA does not itself operate an MLS® System or gather data directly from the members of local boards/associations because CREA's direct interest is derived from the Trademarks it owns and licences to TREB and other boards/associations for use in relation to their MLS® Systems.

20. The Commissioner argues that CREA has no interest in ensuring that the information sourced from an MLS® System for VOWs is subject to rules that protect standards of professionalism and accuracy because CREA has not issued binding national rules specifically in relation to VOWs. The fact that CREA has not yet issued a mandatory VOW policy completely misses the point. As explained above, CREA has implemented binding rules with respect to the operation of members' MLS® Systems and the use of the MLS® and REALTOR® Trademarks that serve to protect standards of professionalism and accuracy in relation to the data contained in the MLS® Systems – the very data that would be accessed for the purposes of operating a VOW. Local boards/associations are required to abide by these rules in their operation of an MLS® System, including when creating and implementing policies on VOWs or other Internet data-sharing vehicles.

21. TREB is contractually bound by the conditions of membership in CREA, including the rules concerning professionalism, the quality of information in its MLS® System and the terms of its licence to use the MLS® and REALTOR® Trademarks. Any Order by the Tribunal that affects the content or use of the information in TREB's MLS® System

would not only impact the value of CREA's Trademarks as explained above, but would also interfere with the requirements for membership in CREA.

22. It is not an answer to maintain (as the Commissioner does) that TREB is better positioned to address concerns about standards because those standards are only relevant to the extent they apply to TREB's MLS® System, TREB has the responsibility to enforce those standards amongst its members and TREB is intending to address this issue. CREA has a distinct interest in any proceeding that has the potential to impact the terms and conditions on which it grants membership and the obligations owed to it.

23. Finally, in order to establish that it is directly affected, CREA is not required to prove a definite or certain impact. At this stage of the proceeding, the Tribunal has recognized that "it is not reasonable to require a proposed intervenor to be completely certain about the ways in which it might be affected by the relief sought by the Commissioner. Some speculation is acceptable".¹⁰ CREA submits that this is even more true in a proceeding such as this one, where the remedy requested by the Commissioner is extremely broad and imprecise.

CREA Brings A Useful and Distinct Perspective To This Proceeding

24. The Commissioner argues that CREA's perspective is identical to TREB's, that CREA plans to take the same position as TREB, that all topics CREA proposes to address are better and only appropriately addressed by TREB, and that any submissions that CREA may make will be redundant and will unnecessarily delay and complicate this proceeding. All of these arguments should be rejected.

¹⁰ *Visa Canada Corp.*, *supra* at para. 30.

25. **CREA and TREB Have Different Perspectives.** While they are both real estate industry associations operating in Canada, CREA and TREB have different roles, serve different mandates and have different interests. To suggest, as the Commissioner does, that they are one and the same for the purposes of this proceeding is without merit.

26. In advancing this argument, the Commissioner relies on the Tribunal's decision in *Southam Inc.* where the Tribunal denied intervention because the interests of the proposed intervenor and of Southam were "entirely the same".¹¹ This is not surprising considering that the proposed intervenor and Southam were the two parties to the transaction at issue. They were seeking to advance the same arguments in order to reach the same outcome, namely an order allowing Southam to sell an asset to the proposed intervenor. The situation in *Southam Inc.* is in direct contrast with the facts in this proceeding.

27. TREB and CREA are industry associations that operate in different spheres and with different mandates and interests. TREB is a local board for the GTA whose primary functions are to operate an MLS® System for its members, deal with TREB membership issues, implement CREA's national policies and conditions of membership and lobby local or municipal governments on real estate issues. On the other hand, CREA's mandate includes the national representation of the industry at the federal level (including with respect to federal legislation such as the *Competition Act*), the maintenance and protection of and the setting of standards for the MLS® and

¹¹ *Southam Inc. v. Canada (Director of Investigation and Research)*, [1997] C.C.T.D. No. 47 (QL) at para. 12-13.

REALTOR® Trademarks, and the development of national standards and policies, including in relation to data collection and technology issues.¹²

28. CREA speaks for the industry as a whole, and not from the perspective of any one of its particular members. Accordingly, while CREA intends to generally support TREB's position, this does not mean that CREA's and TREB's views and perspectives will be the same. In contrast to TREB, CREA represents a broad constituency of individual and board/association members who face different regimes and have different experiences with VOWs and other Internet data-sharing vehicles. This composition, combined with CREA's unique experience with VOWs and other Internet data-sharing vehicles in Canada generally will provide a distinct and useful perspective that will provide additional insight on the issues and supplement the submissions of the parties.¹³

29. The Commissioner attempts to downplay CREA's knowledge and experience by making the bald assertion that CREA does not have greater expertise than TREB in dealing with Internet and data issues. The fact that TREB representatives sat for a certain time on certain committees established by CREA does not detract from the uncontested fact that CREA has been and is at the forefront of the Canadian real estate industry's response to the challenges and opportunities created by the Internet, including with respect to VOWs and other Internet data-sharing vehicles. In any event,

¹² Supplemental Affidavit of Gary Simonsen, Exhibit "A".

¹³ *United Grain Growers Ltd. v. Canada (Commissioner of Competition)*, [2005] C.C.T.D. No. 33 (QL) at para. 19 ("UGG"); *Tele-Direct, supra* at 530; *Washington v. Canada (Director of Investigation and Research)*, [1998] C.C.T.D. No. 4 (QL) at para. 19-22; *Southam, supra* at para. 13; and *Canada (Director of Investigation and Research) v. Canadian Pacific Ltd.*, [1997] C.C.T.D. No. 14 (QL) at para. 20 ("Canadian Pacific").

whether CREA and TREB have shared some experiences concerning VOWs is irrelevant. What is relevant is that CREA has a useful and relevant perspective which is distinct from TREB's.

30. The Commissioner also relies on the *A.C. Nielsen* decision to argue that CREA's experience in competition issues that affect the Canadian real estate industry does not support granting CREA's request to intervene. The Tribunal in *A.C. Nielsen* actually found that "a particular interest in the competition area... is not in and of itself a ground for granting leave to intervene".¹⁴ The Tribunal did not conclude that a proposed intervenor's experience and direct involvement with the competition issues at the heart of the proceeding should have no bearing whatsoever on a decision to grant intervenor status. CREA submits that its unique experience dealing with competition issues in relation to VOWs and other Internet data-sharing vehicles reinforces the distinct perspective that it can offer in this proceeding.

31. **CREA's Position Is Not Identical to TREB's.** The Commissioner alleges that CREA intends to take the same position as TREB, presumably in reliance on the statement made by CREA that it intends to support TREB's position in this proceeding.

32. Supporting the position of a party cannot be grounds for refusing an intervention request since Rule 43(2)(e) of the *Competition Tribunal Rules* requires a proposed intervenor to set out the name of the party, if any, who's position that person intends to support. Supporting the position taken by TREB does not disqualify CREA from

¹⁴ *A.C. Nielsen, supra* at para. 2.

intervening, provided CREA brings a distinct perspective that will assist the Tribunal, which it does.

33. Further, CREA should not be restricted to relying on TREB to present the perspective and to protect the interests of CREA and its members. As a matter of basic fairness, a proposed intervenor who will be directly affected and has a distinct perspective to contribute should be entitled to participate to protect its own interests and present its own perspective.¹⁵

34. **The Matters CREA Wishes to Address Are Not Better and Only Appropriately Addressed by TREB.** The Commissioner's argument that CREA should not be permitted to intervene because each of the issues proposed to be addressed by CREA are better addressed, and only appropriately addressed, by TREB should also be rejected.

35. An intervenor is not restricted from making submissions on an issue simply because a party intends to address that issue. If it were otherwise, interventions would never be granted. Since an intervenor is limited to addressing the issues raised by the Commissioner, it will be addressing the same issues as the parties will be addressing. What is important is whether the intervenor can offer a unique and relevant perspective on the issue in dispute, not whether a party intends to address the issue or who, in the Commissioner's opinion, is "better" able to address the issue.

¹⁵ *American Airlines, Inc. v. Canada (Competition Tribunal)*, [1988] F.C.J. No. 1049 (CA) (QL) at 7 ("American Airlines").

36. CREA's reply to the Commissioner's assertions in paragraph 44 of the Response that CREA's submissions on the specific topics CREA wishes to address will have no useful purpose, is as follows:

- (a) **Appropriate Definitions of Product and Geographic Market:** The Commissioner's position is that TREB can better address these issues because it is only TREB members who carry on business in the relevant market. Whether TREB can "better" address an issue is irrelevant. CREA should be allowed to address relevant issues as long as it does so from a unique and helpful perspective. Further, as noted above, the issue of the relevant market is an issue to be resolved in this proceeding and it is inappropriate to assume that the Commissioner will be successful on this issue for the purpose of determining CREA's request to intervene.

- (b) **Use and Likely Competitive Effects of VOWs and Other Data-Sharing Vehicles:** The Commissioner argues that TREB intends to address this issue and therefore CREA should not be permitted to. The fact that TREB intends to deal with an issue is not a bar to CREA providing its unique and helpful perspective on the same issue. Further, the Commissioner's discussion of the alleged benefits of VOWs in the Amended Application is in no way restricted or limited to the GTA, TREB or TREB's members and, as noted above, the Commissioner intends to rely on evidence from other Canadian jurisdictions and the United States in support of her position on this issue. CREA is uniquely positioned to effectively address these

issues, for the reasons set out in Mr. Simonsen's affidavit filed in support of CREA's Request For Leave To Intervene.

- (c) **Suitability/Effectiveness of Proposed Remedies:** In arguing that CREA has nothing useful to say on this issue, the Commissioner repeats the argument already made - that this case is strictly limited to TREB, TREB members and the GTA and therefore CREA has no reason to address these issues. For the reasons already explained in detail in paragraphs 4 to 13 above, the Commissioner's argument should be rejected.

- (d) **Relationship Between VOWs/"Bricks and Mortar" Services:** The Commissioner argues that CREA has nothing to add on this issue because TREB can adequately represent its members and TREB has developed its own VOW Policy while CREA continues to study the issue. For the reasons set out above, the fact the TREB can adequately represent its members' interests has no bearing whatsoever on whether CREA has a unique and helpful perspective to offer on this issue and, further, the Commissioner's response again incorrectly assumes that the only interests in this proceeding that need to be protected are those of TREB and its members, which is not the case.

- (e) **Whether Order Will Lead to Innovative Services/Reduced Fees:** The Commissioner argues that CREA should not be permitted to address this issue because TREB is competent to deal with it, intends to deal with it and a national perspective is not relevant. The fact that TREB is

competent to deal with an issue and intends to deal with an issue has no bearing on whether CREA has a unique and helpful perspective to offer in relation to this issue. In addition, for the reasons already expressed, the Commissioner should not be permitted to "pigeon-hole" this proceeding within the geographic boundaries of the GTA when the underlying facts, the issues and the consequences of the remedy requested by the Commissioner extend far beyond those boundaries and into the national arena.

- (f) **Effect of Availability of Internet Data-Sharing Vehicles on Competition:** The Commissioner argues that what CREA has to say is not relevant because the market is restricted to Toronto and the state of competition outside Toronto is not relevant – the same submission that the Commissioner makes in relation to issue (a) above. CREA response to issue (a) equally applies here. The issue of the relevant market is an unresolved issue and it is inappropriate to assume that the Commissioner will be successful on this issue for the purpose of determining CREA's request to intervene. CREA's submissions on this issue will be relevant and useful because it is able to provide information and expertise beyond the boundaries of the GTA.

37. **Effect on the Proceeding.** The Commissioner also suggests in paragraphs 11 and 12 of the Response that even if CREA satisfies the test for intervention, the Tribunal should deny CREA's request on the basis that its intervention may prolong or

complicate the proceeding. In making this submission, the Commissioner relies on the Tribunal's decision in the *Air Canada (1992)* case.¹⁶ CREA submits that *Air Canada (1992)* simply stands for the proposition that, depending on the circumstances of the case (which in *Air Canada (1992)* included a serious timing issue), the Tribunal may have to consider to what extent an intervenor should be permitted to lengthen or complicate the process. Allowing an intervention request will always add some time or complexity to the proceeding. The requirement in section 9(2) of the *Competition Tribunal Act* to deal with proceedings expeditiously has to be balanced against the considerations of fairness also mandated by section 9(2) and the right of any intervenor provided in section 9(3) to make representations relevant to the proceedings in respect of any matter that affects it.

38. Accordingly, CREA submits that the additional time or complication that results from the existence of an intervenor is not a legitimate reason to deny intervenor status to a person who satisfies the elements of the test. Rather, the additional time and complication are consequences which are necessary in order to protect the interests of fairness, as required under section 9(2) of the *Competition Tribunal Act*.¹⁷

The Commissioner Is Attempting To Unreasonably Limit The Scope of CREA's Intervention

39. The Commissioner argues that CREA's ability to present and test evidence in the proceeding should be severely restricted. In particular, the Commissioner proposes that CREA be permitted to adduce the evidence of only one witness (and by witness

¹⁶ *Canada (Director of Investigation and Research) v. Air Canada*, [1992] C.C.T.D. No. 24 (QL).

¹⁷ *American Airlines*, *supra* at 7-8 and subsection 9(2) of the *Competition Tribunal Act*.

statement only), that CREA not be permitted to cross-examine any witnesses at all, and that CREA not be permitted to lead expert evidence.

40. If granted intervenor status, CREA is entitled to an effective and meaningful intervention, subject to the discretion and supervision of the Tribunal. An effective and meaningful intervention requires that CREA be permitted to make non-repetitive submissions and adduce non-repetitive evidence on all issues before the Tribunal that directly affect it and its members.¹⁸ The imposition of the restrictions advocated by the Commissioner should be rejected because they would effectively deny CREA the ability to participate in a meaningful way in this proceeding.

41. CREA's request regarding its permitted scope of intervention as set out in paragraphs 15 to 19 of its Request For Leave To Intervene is fair, reasonable and consistent with the rights of intervention granted by the Tribunal in other cases.¹⁹ With respect to an intervenor's roles in the evidence stage of the proceeding, in particular:

- (a) the Tribunal has routinely allowed intervenors to tender non-repetitive fact evidence within the scope of their intervention,²⁰

¹⁸ *American Airlines*, *supra* at 7.

¹⁹ *Tele-Direct*, *supra* at 535-536; *Canada (Commissioner of Competition) v. Air Canada*, [2001] C.C.T.D. No. 5 at para. 15, 17 ("*Air Canada (2001)*").

²⁰ *American Airlines*, *supra* at 7; *Air Canada (2001)*, *supra* at para. 17; *Tele-Direct*, *supra* at 535-536; *Canada Pacific*, *supra* at para. 27; *UGG*, *supra* at para 23; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.*, [2006] C.C.T.D. No. 6 (QL) at para. 6 ("*Wheat Pool 1*"); *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.*, [2006] C.C.T.D. No. 7 (QL) at para. 6 ("*Wheat Pool 2*"); *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.*, [2006] C.C.T.D. No. 8 (QL) at para. 6 ("*Wheat Pool 3*"); and *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.*, [2006] C.C.T.D. No. 12 (QL) at para. 7 ("*Wheat Pool 4*").

- (b) the Tribunal regularly permits intervenors to cross-examine witnesses within the scope of their intervention, as long as the examination is not repetitive,²¹ and
- (c) the Tribunal also routinely permits intervenors to file expert evidence within the scope of their intervention.²²

42. The Commissioner does not cite any Tribunal decision which supports the restricted rights of participation that it seeks to impose on CREA and offers no valid explanation as to why CREA should be denied the usual rights of participation with respect to the evidence. Consistent with the Tribunal decisions noted above, CREA should be granted those rights of participation.

43. The Commissioner also argues that CREA is seeking the rights of a party but is not prepared to assume any of the corresponding obligations, such as being subject to oral and documentary discovery. CREA has not in any way sought the rights of a "party" to this proceeding. CREA has not attempted to raise "new issues" that could result in the Commissioner being "ambushed". As noted above, the scope of participation requested by CREA is consistent with that allowed by the Tribunal to intervenors in other proceedings and is limited to the issues raised by the Commissioner in the Amended Application.

²¹ *American Airlines*, supra at 7; *Air Canada (2001)*, supra at para. 17; *Tele-Direct*, supra at 535-536; *Canada Pacific*, supra at para. 27; *UGG*, supra at para.23; *Wheat Pool 1*, supra at para. 6; *Wheat Pool 2*, supra at para. 6; *Wheat Pool 3*, supra at para. 6; and *Wheat Pool 4*, supra at para. 7.

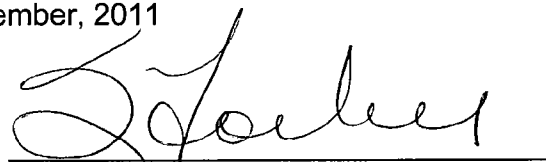
²² *Air Canada (2001)*, supra at para. 17; *Tele-Direct*, supra at 535-536; *Canada Pacific*, supra at para. 27; *UGG*, supra at para. 23; *Wheat Pool 1*, supra at para. 6; *Wheat Pool 2*, supra at para. 6; *Wheat Pool 3*, supra at para. 6; and *Wheat Pool 4*, supra at para. 7.

44. It is surprising that the Commissioner seeks discovery of CREA, considering the Commissioner's position that CREA has nothing of value to offer in this proceeding and because of the fact that the Commissioner has already received the vast majority of documents in existence (up to 2007) that are relevant to this proceeding, by virtue of a Section 11 Order issued on March 15, 2007.²³ In any event, CREA has no objection to providing an affidavit of documents in accordance with Rule 60(2) of the *Competition Tribunal Rules* with respect to documents within the scope of its intervention. CREA respectfully submits that any other discovery obligations that the Tribunal may deem to be appropriate should be reciprocal.

CREA Requests An Oral Hearing

45. Since the Commissioner has objected to CREA's Request For Leave to Intervene, CREA respectfully requests an oral hearing.

DATED at Toronto, Ontario this 21 day of September, 2011



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²³ See Exhibit G to the Supplementary Affidavit of Gary Simonsen, sworn September 20, 2011.

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**THE COMPETITION TRIBUNAL
THE COMMISSIONER OF COMPETITION**

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

**CREA's Reply to the Commissioner's Response
To CREA's Request for Leave To Intervene**

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