

# Multiple Listing Services in Canada: How to Preserve and Expand Value

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## Executive summary

An MLS® System is a single source of rich and accurate information about a wide selection of homes for sale today, as well as those that have sold in the past. Home sellers can list their homes on an MLS® System to, effectively, advertise to a broad audience. Home buyers benefit from an MLS® System by leveraging the expertise of a REALTOR® to access listings indirectly or, alternatively, by accessing certain MLS® Systems data<sup>2</sup> directly through customized searches. Even individuals who are not yet committed to buying or selling a home may use an MLS® System to get a sense of the market. Ultimately, MLS® Systems create substantial value for Canadian home sellers as well as buyers.

This value is created, in large part, from an economic phenomenon known as “network effects.” Network effects create more value when there is more use or participation. For MLS® Systems, the intuition is clear: When more buyers consult an MLS® System, listing a home becomes more attractive for sellers. Likewise, when more sellers list their homes on an MLS® System, home buyers are more likely to find a desirable home. Those beneficial network effects can combine in a virtuous cycle: with better access to a larger set of listings, home buyers benefit from lower search costs, which increases their participation. As a result, home sellers benefit from exposure to a larger pool of buyers so their participation increases, and so on.

Cooperation among REALTORS® is the foundation for the value-creating network effects that are present on MLS® Systems. After all, an MLS® System requires multiple listings from multiple

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<sup>2</sup> This study uses the term “data” to refer to “information in digital form that can be transmitted or processed.” See Merriam Webster Dictionary <<https://www.merriam-webster.com/dictionary/data>>. Thus, all content captured by MLS® Systems constitutes “data” including descriptions of homes, digital media such as photographs and videos, and contextual information such as walk scores and demographic information. The use of the term “data” should not be construed as limiting or expanding whatever property rights owners of MLS® Systems data may possess.

REALTORS®. Cooperation among REALTORS® in Canada is governed by rules adopted by local real estate boards and associations. The real estate industry has been the subject of competition scrutiny over the years. But this study restricts its attention to the impact of network effects on MLS® Systems. Fundamentally, network effects simply reflect the intrinsic benefits to buyers and sellers transacting in “thicker” markets relative to “thinner” markets.

Because *comprehensive* MLS® Systems create the strongest network effects, we examine how the current rules could be changed to support comprehensiveness. We find that some Canadian rules permit actions by REALTORS® that serve to undermine comprehensiveness and, thus, network effects. We provide directional guidance on rule changes that would prevent such harm in three areas.

### **1. Mandatory listing requirements for members**

In Canada, most boards and associations allow REALTORS® to put some of their listings on MLS® Systems but withhold others. This “voluntary listing service” model can have unfortunate effects because it allows some REALTORS® to leave listings off the MLS® Systems, lessening network effects and diminishing the value created by MLS® Systems. REALTORS®, with their client’s permission, may use pocket listings and private listing networks that threaten to fragment MLS® Systems and decrease value created; “Coming Soon” marketing practices, if abused, operate as *de facto* pocket listings and have similar effects. While some REALTORS®, and potentially some home buyers and sellers, may *privately* benefit from those practices, these actions adversely affect other REALTORS®, as well as buyers and sellers by lessening the comprehensiveness of, and hence the value created by, MLS® Systems.

This study concludes that current listing rules are likely too lax and should be tightened. However, a perfectly strict and rigid prohibition against practices such as exclusive listings is almost certainly not the answer. Some home sellers may have legitimate privacy concerns about listing their home on an MLS® System; there may also be limited circumstances under which “Coming Soon” marketing practices may be justified. But to the extent that such exceptions are permitted, they should be tailored carefully and precisely to only allow legitimate exceptions.

### **2. Portals to MLS® Systems data**

The network effects that are present on MLS® Systems are indirect network effects: home buyers benefit from greater participation by home sellers, and home sellers benefit from greater

participation by home buyers. From this perspective, participation by *both* buyers and sellers is critical to value creation.

Portals, which we define as any technology that provides access to MLS® Systems data, are important in ensuring participation by buyers directly and sellers indirectly. Portals compete with one another for the attention of “eyeballs” through a variety of different non-price strategies such as offering innovative features and data to attract views. Home buyers benefit directly from that innovation but home buyers *and* sellers benefit indirectly through increased participation and, hence, stronger network effects. To continue to create value, MLS® Systems must continue to leverage highly effective portals.

### **3. Limitations on access to MLS® Systems listing data**

Despite the presence of network effects, increased use of MLS® Systems data need not increase value. Unfettered access may result in overly broad dissemination of information about a seller’s home (e.g., floorplans, photographs) harming consumer privacy, which may discourage sellers from listing on an MLS® System. Privacy concerns may be particularly acute if that information were maintained in perpetuity and controlled by a third party with likely quite distinct economic incentives. Separately, broad access may also lessen incentives to invest in innovations that improve portals and MLS® Systems. For these reasons, we argue that access should be restricted in some circumstances. To be clear, any entity whose access to MLS® Systems is used for the transaction of real estate would presumptively create value and should (continue to) have access. Other entities, such as PropTechs, that provide complementary services for the transaction of real estate may also add value to MLS® Systems.

This study deliberately avoids recommending specific rules that boards and associations should adopt. For example, it does not identify a specific mechanism to gauge whether entities that seek access to MLS® Systems for a use other than the transaction of real estate would contribute value. The study deliberately leaves such important details to the boards and associations that have developed and enforce their rules. Instead, the main contribution of the study is to emphasize the value created through the comprehensiveness and accessibility of the MLS® Systems data that results. Real estate boards and associations should focus on these mechanisms for value creation as they consider the rules that govern cooperation among their members.

## I. Introduction

Nearly every homeowner in Canada has used, directly or indirectly, a Multiple Listing Service® (MLS®). Most obviously, a home seller may work with a REALTOR®<sup>3</sup> to list, or advertise, a home on an accessible database called an “MLS® System.”<sup>4</sup> Alternatively, a seller may consult any number of internet portals that feature and communicate high quality listing data (e.g., REALTOR.ca<sup>5</sup>) in order to “get a sense of the market.” Home buyers can conduct a customized search—with or without the expertise of a REALTOR®—to identify candidate homes listed on an MLS® System with remarkable precision. Even individuals not yet committed to buying or selling a home may use a mobile app to gather information about homes for sale during a walk, read about a “house of the week” in a newspaper, or research financing options from their financial institution. All of those activities draw on the results of cooperation among competing REALTORS® through an agreement that this study terms an “MLS® Cooperative.” MLS® Systems are a central part of many real estate transactions in Canada and would not exist without the underlying cooperation among competing REALTORS®.

This commissioned study aims to identify how to preserve and expand the value created by MLS® Cooperatives and the MLS® Systems they create. It is explicitly focused on Canada. This study begins by discussing what residential MLS® Cooperatives and MLS® Systems are and what they produce. The fundamental conclusion of that discussion is that MLS® Cooperatives are central and valuable to the transaction of real estate because they produce a single source of accurate and comprehensive information about homes for sale today as well as those that have sold in the past. While that conclusion should not be controversial, it becomes a useful framework to answer

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<sup>3</sup> The trademarks REALTOR®, REALTORS®, and the REALTOR® logo are controlled by The Canadian Real Estate Association (CREA) and identify real estate professionals who are members of CREA.

<sup>4</sup> Real estate boards or associations in Canada typically operate a cooperative selling system in connection with the MLS® Marks. This study terms this cooperative selling system an “MLS® Cooperative”. Each MLS® Cooperative generates a database called an MLS® System, which may only be accessed by member REALTORS®. MLS® Systems include an inventory of listings from participating REALTOR® members, and ensures a certain level of accuracy of information, professionalism and co-operation amongst REALTOR® members to effect the purchase and sale of real estate on behalf of their clients.

<sup>5</sup> REALTOR.ca is an internet portal that presents data from MLS® Systems in multiple ways including a popular mobile device app and through the world wide web. [REALTOR.ca](http://REALTOR.ca) describes itself as follows:

“REALTOR.ca is Canada’s most popular and trusted real estate platform displaying both residential and commercial listings from REALTORS® across the country. Owned and operated by The Canadian Real Estate Association (CREA), REALTOR.ca gives REALTORS® across Canada great listing exposure to a national and international audience.

The property listings displayed on REALTOR.ca are provided by various MLS® Systems operated by Real Estate Boards and Associations across Canada.”

questions about how MLS® Cooperatives can preserve and, ideally, expand the value they deliver to Canadians.

With that background, this study then turns to three important policy questions that concern the governance of MLS® Cooperatives and the availability of “data.” In this study, we define data broadly to include all content captured by MLS® Systems including descriptions of homes and neighbourhoods, digital media such as photographs and videos, and other contextual information.<sup>6</sup>

*First*, we ask whether the requirements that MLS® Cooperatives impose on cooperating agents to list homes should remain lax (i.e., retain a “voluntary listing service”<sup>7</sup>) or become tighter (i.e., move towards a “mandatory listing service”). Should MLS® Cooperatives require that if a REALTOR® places one of his or her listings on an MLS® System, all his or her listings must be listed as well? That question is relevant for many real estate boards in Canada because, based on information available to us, most boards and associations in Canada impose fairly lax requirements on their members to list homes.<sup>8</sup> We first explore how a voluntary listing service can facilitate harmful practices that erode the value created by MLS® Cooperatives. We then discuss the potential benefits of a “more” mandatory listing system that expands economically beneficial cooperation. An important caveat in the present study is that exceptions to mandatory listing must be tailored carefully to preserve and expand the value created by MLS® Cooperatives. Appropriately tailored mandatory listing services benefit home buyers and home sellers by providing high quality access to valuable information about real estate. Such tailored rules would improve the quality of MLS® Systems produced by MLS® Cooperatives.

*Second*, we investigate the role of “portals” in creating value. We define “portals” to be any technology that permits access to some of the data contained in MLS® Systems. That investigation is relevant because even an MLS® System with a rich set of home listings need not create any value if it is difficult for buyers to access. Portals facilitate this access. They do so by competing for the attention of “eyeballs” by offering different features and data. To continue to create value, boards and associations across Canada should continue to support the development and

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<sup>6</sup> See footnote 2.

<sup>7</sup> The US National Association of REALTORS® (NAR) defines the terms “voluntary listing service” and “mandatory listing service,” which we adopt in this study. See “Handbook on Multiple Listing Policy – Section 1: Types of Multiple Listing Services” (1 January 2021), online: *National Association of Realtors* <<https://www.nar.realtor/handbook-on-multiple-listing-policy/section-1-types-of-multiple-listing-services>>.

<sup>8</sup> We have reviewed the rules of Lethbridge & District Association of REALTORS® (LDAR), Calgary Real Estate Board (CREB®), Chilliwack & District Real Estate Board (CADREB), Fraser Valley Real Estate Board (FVREB), and the Real Estate Board of Greater Vancouver (REBGV). These rules refer to the Three Pillars of the MLS® Mark established by CREA. One of these Pillars is that only licensed members (REALTORS®) or listing brokerages “*may* place an MLS® listing on a real estate board/association’s MLS® System,” which indicates that it is permissible for a member *not* to list on their board or association’s MLS® System.

enhancement of portals that increase the value created by MLS® Systems directly as well as indirectly through feedback effects.

*Third*, we explore who should get access to the listing data collected and maintained in MLS® Systems. While making such data available widely may, at first glance, appear to create important benefits, a more careful examination reveals risks in doing so. Due to such risks, this study concludes that a good policy should restrict access, to some extent, to MLS® System data. One practical policy option is to limit access to those that add value to MLS® Systems. Those members that use MLS® System data to trade in real property presumptively add value; others do not.<sup>9</sup>

This study deliberately avoids recommending specific rules that boards and associations should adopt. Instead, it limits itself to emphasize that cooperation among REALTORS® creates value through the comprehensiveness and accessibility of the MLS® Systems data that results. Real estate boards and associations should focus on these mechanisms for value creation as they consider and fine tune their rules.

Further, this study sets aside discussion of any broader competition matters related to MLS® Systems. Cooperation among REALTORS® in Canada is governed by rules adopted by local real estate boards and associations. The focus of this study is restricted to the impact of network effects on MLS® Systems. Network effects reflect the intrinsic benefits to buyers and sellers transacting in “thicker” markets relative to “thinner” markets.

## II. Residential MLS® Cooperatives and MLS® Systems in Canada

MLS® Cooperatives are “cooperative selling systems” operated by local real estate boards in association with the MLS® Trademark, which is owned by the Canadian Real Estate Association (CREA).<sup>10</sup> That MLS® Cooperatives are defined in this way—and not by the inventory of

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<sup>9</sup> Typically, MLS® Systems data is available in Canada only to real estate agents who are also REALTORS®. However, because barriers to becoming a member of a real estate board are fairly small, a member may plausibly access MLS® Systems data without trading in real property

<sup>10</sup> While different real estate boards have different rules that govern MLS® Systems, some rules overlap or share common elements. For instance, the Lethbridge & District Association of REALTORS® (LDAR), Calgary Real Estate Board (CREB®), Chilliwack & District Real Estate Board (CADREB), Fraser Valley Real Estate Board (FVREB), the Real Estate Board of Greater Vancouver (REBGV), and the Information Technology Systems Ontario (ITSO)—a not-for-profit corporation owned/controlled by 20 Ontario member associations that manages and supports the MLS® System on behalf of its member associations—all have rules about:

- **Accuracy of listing information.** The listing brokerage is responsible to check and verify the accuracy of its listings before a listing is submitted to a board for inclusion in an MLS® System;
- **Membership.** Only licensed members can place a listing on their board’s MLS® System and/or have access

properties that they create and maintain stored in MLS® Systems—is significant because that definition underscores that MLS® Cooperatives are agreements among competing real estate agents to cooperate by sharing listings with each other. These agreements serve to create a new product—data on real estate—that could not exist without that cooperation.

There is not a single MLS® Cooperative in Canada, but many dozens, each of which is governed by an individual real estate board or association. Those entities use rules that govern both the reporting requirements for members participating in the cooperative as well as restrictions on how the resulting data may be used. For example, rules on reporting requirements in the Calgary Real Estate Board affirm that “[a]n important part of the inherent value of the Board’s MLS® System is the transaction data accumulated for sale of MLS® Listings” and require that members report to their respective boards all unconditional sales (including the selling price). Restrictions on the use of MLS® Systems data are listed in the rules, which state that the sale or distribution to any third parties is unauthorized.

We begin this section with a brief overview of how Canadian MLS® Cooperatives create the data that are the foundation of MLS® Systems. We then conclude this opening section by discussing how the accuracy and comprehensiveness of the data created is key to the value created by the cooperatives. It is this value creation—and how it can be maintained and enhanced—that is the focus of the remainder of the study.

## II.A. How and what data MLS® Cooperatives create

MLS® Systems collect and maintain a wide variety of data. Some of that data is widely available to the public on sites such as REALTOR.ca including information about the home itself (e.g., address, rooms/bedrooms, dimensions, zoning, digital media) as well as information specific to the sale (e.g., list price, listing broker, open house date and time). MLS® Systems collect other data that are not made available widely such as sold data, price changes, the name of the seller, or agent remarks that includes information such as access instructions or showing hours.

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to it;

- **Reporting Sales.** All members of a board are responsible for reporting accurate sales data to their board;
- **Use of MLS® Systems data.** Board members cannot sell or distribute MLS® Systems data to third parties or unlicensed persons who are not authorized to receive access to the MLS® Systems data;
- **Submitting Listings.** Listing brokerages must submit their listings to their board’s MLS® System following the effective or commencement date of a listing on an MLS® System by delivering the listing directly to the board for data entry within a prescribed time period, or the listing must be brokerloaded (i.e., directly entered) into their board’s MLS® System; and
- **Minimum Listing Periods.** With the exception of the ITSO, the boards mentioned above require that all MLS® listings have a minimum duration of 60 days on their board’s MLS® System.

Accessing the data in MLS® Systems is just as important as the data recorded in MLS® Systems. In the 1800s, the first MLS® Cooperatives did not compile listings information electronically, or even on paper, but held meetings at association offices where agents could share information on their listings with other agents.<sup>11</sup> Today's digital technology permits the information generated by MLS® Cooperatives to be transferred and accessed much more quickly and efficiently. Instead of regular in-person meetings, members now access MLS® Systems through specialized software that responds to specific queries formulated by a member (e.g., return active listings of single-family detached homes with three to four bedrooms in a specific neighborhood in a specific price range). Canadian real estate boards select query software that they deem best fits the needs of its members and their clients.<sup>12</sup>

But beyond this core query functionality, the information generated by MLS® Cooperatives is now transmitted in new ways. Two data transfer protocols—Internet Data Exchange (IDX), which local boards operate, and REALTOR.ca's Data Distribution Facility (DDF®)<sup>13</sup>—allow for the transmission of data so that websites can display listing information in various ways.<sup>14</sup> Examples of third parties partnering to access listing data via the REALTOR.ca DDF® for the purposes of marketing them on their sites include Real Estate Weekly, Microsoft Bing, and Kijiji. In addition, TD Bank and ScotiaBank combine listing data from MLS® Systems with financial tools from their websites such as mortgage affordability calculators; the Globe & Mail combines MLS® Systems data with content to appeal to their readers (and, thereby, advertisers). Thousands of REALTOR® websites deliver additional functionality directly to their clients. Additionally, popular portals, such as CREA's REALTOR.ca or the independently owned point2homes.com, provide wide and convenient access to a subset of MLS® Systems data.

Because MLS® Cooperatives are local or regional in nature, a separate data transfer protocol is necessary to compile the numerous local or regional data into national data. MLS® Systems send their data to CREA via a utility called "Data Load." CREA combines this data and uses it on its REALTOR.ca portal and also makes it available to various entities like The Globe & Mail, TD Bank, or point2homes.com for marketing purposes only.

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<sup>11</sup> "Multiple Listing Service (MLS): What Is It", online: *National Association of Realtors* <<https://www.nar.realtor/nar-doj-settlement/multiple-listing-service-mls-what-is-it>>.

<sup>12</sup> Real estate boards across Canada use query software developed by Corelogic, Black Knight, Stratus, and Realty Server.

<sup>13</sup> The trademark DDF® is owned by CREA. Third-party use of REALTOR.ca's DDF® is subject to contractual limitations.

<sup>14</sup> CREA has published a short and clear description of these and other acronyms. See Patrick Pichette "5 real estate tech acronyms demystified" (9 September 2015), online (blog): *CREA Café* <<https://www.creacafe.ca/5-real-estate-tech-acronyms-demystified/>>.



## II.B. How MLS® Cooperatives create value

In an MLS® Cooperative, each participant benefits when other participants abide by the spirit of the cooperative. In particular, all MLS® Cooperative participants benefit when the information that is collected is accurate and complete. While the term “agent” refers to any professional assisting in the purchase or sale of real estate, the trademarked term REALTOR® is more specific as it is used to refer to an agent that is a member in good standing of CREA and has committed to adhering to the REALTOR® Code among other requirements.<sup>15</sup> In CREA’s view, the MLS® and REALTOR® Trademarks “are an assurance of integrity and identify a certain standard of brokerage services and professionalism.”<sup>16</sup> Importantly, only a REALTOR® can enter information into an MLS® System,<sup>17</sup> which is a key way that the accuracy of information found in MLS® Systems is assured. Clearly, the utility of an MLS® System would be lost if the underlying data were inaccurate or otherwise unreliable.

In addition to the accuracy of the underlying information, the principal way in which MLS® Cooperatives create value is through the comprehensiveness of the data collected in MLS® Systems. Ideal measures of the comprehensiveness of MLS® Systems data are not available. Nevertheless, it appears that MLS® Systems are fairly comprehensive, but not perfectly so. MLS® Systems may not include all “for-sale-by-owner” homes in which the owner is trying to sell their home without the assistance of an agent, although some such listings are posted on MLS® Systems via REALTORS® that offer “mere posting” services. Additionally, MLS® Systems typically do not include new construction.<sup>18</sup> Despite these exceptions, a substantial portion of existing homes appear to be sold through an MLS® System. While data to identify what fraction of existing homes are sold through an MLS® System are not available in Canada, a recent survey of homes sold during 2019 and 2020 in the mid-Atlantic region of the United States found that 74% of existing home sales were identified as being marketed and sold “on-MLS.”<sup>19</sup>

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<sup>15</sup> “Why a REALTOR?”, online: *CREA The Canadian Real Estate Association* <<https://www.crea.ca/buyers-or-sellers/why-a-realtor/>>.

<sup>16</sup> *The Commissioner of Competition v The Toronto Real Estate Board* (31 August 2011), CT-2011-003, online: Competition Tribunal <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463446/index.do>> (Affidavit of Gary Simonsen at ¶ 10).

<sup>17</sup> *Ibid* at ¶ 13.

<sup>18</sup> *The Commissioner of Competition v The Toronto Real Estate Board* (31 August 2011), CT-2011-003, online: Competition Tribunal <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463311/1/document.do>> (Expert Report of Gregory S Vistnes at ¶ 25).

<sup>19</sup> That study found that, among all homes studied, homes sold on an MLS sold for nearly 17% more than homes not “off-MLS.” A “performance difference” continues to exist for various subsamples of the data considered. See Meghan Devine, “On/Off MLS Study: Homes marketed through the MLS sell for 16.98% more” (28 July 2021), online: *Bright MLS* <<https://www.brightmls.com/article/on-off-mls-study>>.

Importantly, there are indications that the comprehensiveness of MLS® Systems is currently under threat. For example, in the United States, a recent survey from brokerage Redfin revealed that 43% of real estate agents believe that “pocket listings” (i.e., listings held by an agent but not listed on an MLS® System) are more common than they were two years ago while only 10% said pocket listings are less common than they were two years ago.<sup>20</sup> In Canada, the *Globe & Mail* recently reported that “[s]ometimes sellers—particularly in the upper echelons of the market—prefer to keep a sale confidential” and that “[p]roperty swaps that never make it to the MLS are increasingly common these days as sellers try to avoid having lots of visitors wandering through during the coronavirus pandemic.”<sup>21</sup> A Sotheby’s “2021 Year in Review” also noted that luxury sales in Canada “[c]ontinued to migrate away from MLS towards exclusive sales and marketing platforms as homeowners sought to protect privacy.”<sup>22</sup>

The comprehensiveness of MLS® Systems—including the potential to increase that comprehensiveness above current levels in the face of possible headwinds—is important to keep in mind given the tight link between comprehensiveness and value. In fact, the key point of this study is to carefully consider policies that, directly or indirectly, affect the comprehensiveness of MLS® Systems. But before discussing those policies, we conclude this section by discussing more explicitly the link between comprehensiveness and value. Doing so is important because careful consideration of that link allows for a more informed consideration of policies meant to improve MLS® Systems.

The term “network effects” has become prominent in business, economics, as well as the law. Harvard Business School’s “Business Insight Blog” offers this definition:

the term network effect refers to any situation in which the value of a product, service, or platform depends on the number of buyers, sellers, or users who leverage it. Typically, the greater the number of buyers, sellers, or users, the greater the network effect—and the greater the value created by the offering.<sup>23</sup>

Network effects arise in a variety of settings but have been associated most prominently with debates about “big tech.” For example, a social network is more valuable to an individual if that

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<sup>20</sup> Lily Katz & Ben Walzer, “2 in 5 Real Estate Agents Say Pocket Listings Are Becoming More Common” (8 December 2021), online: *Redfin News* <<https://www.redfin.com/news/real-estate-pocket-listings-q3-2021/>>.

<sup>21</sup> Carolyn Ireland, “Rise of the ‘private’ deal”, *The Globe and Mail* (14 October 2020), online: <<https://www.theglobeandmail.com/real-estate/toronto/article-rise-of-the-private-deal/>>.

<sup>22</sup> “Top-Tier Real Estate Report: 2021 Year in Review” (12 January 2022), online (blog): *Sotheby’s International Realty Canada* <<https://sothebysrealty.ca/insightblog/en/2022/01/12/2021-year-end-top-tier-real-estate-report/>>.

<sup>23</sup> Tim Stobierski, “What Are Network Effects?” (12 November 2020), online (blog): *Harvard Business School Online* <<https://online.hbs.edu/blog/post/what-are-network-effects/>>.

individual's friends also are active on that same social network. Users of a search engine benefit with use by others to the extent that the search engine can leverage "big data" and algorithms to improve the quality of its search results. An online shopping site becomes more valuable to consumers as more merchants sell on that site; merchants also benefit when more consumers patronize the site. Strong network effects mean that larger firms or platforms (like an MLS® System) have a natural advantage over smaller firms or platforms because their products create more value. Canada's Competition Bureau has recognized the value created by network effects while also recognizing the possibility that they constitute a barrier to entry that may limit competition.<sup>24</sup>

The reason why residential MLS® Cooperatives create value through network effects is intuitive: when more buyers consult an MLS® System, listing a property on an MLS® System becomes more attractive for sellers. Similarly, buyers are more likely to find an attractive home by consulting an MLS® System when more sellers list their homes on an MLS® System. It is the fact that MLS® Systems are fairly comprehensive that is key to their value. And unlike a physical marketplace like a supermarket or shopping mall, there is no crowding or congestion. Home buyers and sellers both benefit as MLS® Systems become "thicker."

MLS® Systems have another important property that is key to the value that they create: their contents can be copied and shared by authorized users, essentially, without limit or cost. Economists call such goods "non-rivalrous goods." Non-rivalrous goods differ quite starkly from physical goods (e.g., homes, automobiles) where one person's use precludes another person's use. In fact, due to the presence of network effects, one person's use of an MLS® System actually makes another person's use of that MLS® System even more valuable; the non-rivalrous nature of MLS® Systems mean that there are no costs to tapping into that value.

In short, comprehensive and accurate MLS® System data adds value in several ways. First, and most directly, it enlarges the pool of potential buyers for sellers as well as the pool of potential sellers for buyers. Larger pools of participants on each side of a transaction improves how sellers (and their homes) are matched with buyers. Second, the accuracy of the MLS® Systems data provides buyers and sellers with a common set of good information on current list prices as well as historical selling prices for residential properties, ensuring that informational transparency helps facilitate the functioning of markets. Third, comprehensive data provides buyers and sellers with

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<sup>24</sup> Competition Bureau Canada, "Big data and innovation: key themes for competition policy in Canada" (19 February 2018), online (pdf): *Government of Canada* <[https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/\\$file/CB-Report-BigData-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/$file/CB-Report-BigData-Eng.pdf)> ("The most important implication of network effects for competition law is that they can be both an efficiency that benefits consumers but also a barrier to entry that may limit competition." at 7).

*more* information to better understand the value of the residential properties they are buying or selling.

The comprehensiveness of MLS® Systems should not be measured by the mere volume of listings it contains. The quality and accuracy of the information provided on those listings is just as important. As discussed above, residential MLS® Systems contain a rich set of information useful to transact real estate including detailed information on the home and neighborhood. For example, the usefulness of an MLS® System to home buyers (and, hence, to home sellers) would decrease substantially if an MLS® System contained essentially all homes for sale but did not provide information on a home's location.

The implications of this discussion are that MLS® Systems always create more value as they grow and also as they are shared more widely. It turns out, however, that a more complete understanding of Canadian residential MLS® Systems identifies considerations that may place limitations on how comprehensive MLS® Systems should be and how widely they should be shared. We address these limitations in the remainder of this study.

### **III. Mandatory listing requirements for members**

The cooperation that is enabled by MLS® Cooperatives is vital for creating value for buyers, sellers, members, and the economy in general. Currently, listing requirements are largely voluntary in the sense that a REALTOR® is free to place only a subset of his or her listings on the MLS® System.<sup>25</sup> In light of the added value from listing to an MLS® System, we ask whether it should be mandatory for cooperating members to list residential properties on MLS® Systems.

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<sup>25</sup> To be clear, there are currently MLS® Cooperative rules in place that mandate certain requirements for REALTORS®. For example:

- The Lethbridge & District Association of REALTORS® (LDAR), Calgary Real Estate Board (CREB®), Chilliwack & District Real Estate Board (CADREB), Fraser Valley Real Estate Board (FVREB), and the Real Estate Board of Greater Vancouver (REBGV) each require that all MLS® listings have a minimum duration of 60 days on a board's MLS® System;
- LDAR and CREB® require MLS® listings be submitted to their respective boards within two business days of the commencement date of the MLS® System listing or that MLS® System listings be brokerloaded;
- Chilliwack & District Real Estate Board (CADREB), Fraser Valley Real Estate Board (FVREB), and the Real Estate Board of Greater Vancouver (REBGV) require that listings for data entry be delivered to the board within three calendar days (excluding statutory holidays) after the effective date of the listings or that listing brokerage loaded listings be entered within three calendar days (excluding statutory holidays) after the effective date of the listings;
- The Information Technology Systems Ontario (ITSO) rules require listing brokerages to submit listings into its MLS® System not later than 11:59 p.m. on the business day following the commencement date of the MLS® listing by delivering the MLS® listing directly to the member association for data entry or enter the

Under a mandatory listing service, properties for sale would need to be listed on the MLS® System shortly after the property is first “marketed to the public.”<sup>26</sup> The precise definition of “marketing to the public” would need to be defined by the boards and associations that create and enforce such rules. But an obligation to list may be triggered by any of a broad list of activities including flyers, yard signs, digital marketing, social media posts, email blasts, and other activities.

The primary benefit of a *mandatory listing service* is that it enhances comprehensiveness and, hence, adds value. But there may be reasonable objections to absolute mandates. Moreover, value can be enhanced relative to the status quo even if the mandates are not absolute. We therefore conclude that there are good reasons to think that a mandatory listing service would enhance the value of MLS® Systems, while recognizing that appropriate exceptions should be considered in order to maximize the gains from cooperation. Of course, exceptions to mandatory rules would likely be open for abuse if the exceptions are not carefully written or if monitoring of the exception is not feasible.

To better understand the value of a mandatory listing service, we first explore some of the harms that are facilitated by a voluntary listing service. We then explore reasons why sellers may wish not to have their property listed on an MLS® System. An important conclusion of this study is that industry experts must assess the legitimacy of any potential exceptions to a mandatory listing service.

### **III.A. A voluntary listing service permits conduct that decreases the economic value created by MLS® Cooperatives**

A *voluntary listing service* permits members to withhold vital information from an MLS® System. It allows members to engage in conduct that can harm buyers, sellers, other members, and the economy as a whole. We discuss three such practices where listing information is kept off an

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MLS® listing by direct data entry;

- The ITSO rules do not permit advertising private trades on multi-media URLs and webpages linked directly from the MLS® System through multi-media URLs shall not indicate where private trade information can be otherwise located; and
- The ITSO rules require that within five business days of marketing a property as “Coming soon” in association with the MLS® trademarks or REALTOR.ca, the listing brokerage must list the property on the MLS® System. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites and/or social media, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public.

<sup>26</sup> MLS Clear Cooperation Policy”, online: *National Association of Realtors* <<https://www.nar.realtor/about-nar/policies/mls-clear-cooperation-policy>>.

MLS® System, thereby lessening the value created by the cooperation enabled by the MLS® Cooperative.

### **Pocket listings**

“Pocket” or “exclusive” listings are not marketed through MLS® Systems but exclusively through the listing agent or their brokerage. They may be beneficial for an individual agent, particularly in a sellers’ market as opposed to a balanced or buyers’ market when “the best guarantee of achieving market value for a seller is to get the widest possible exposure through an MLS listing on REALTOR.ca.”<sup>27</sup> Pocket listings may allow the agent to attract a larger commission, since they may not have to share any commission with another agent. From a broader perspective of ensuring that value is created through cooperation, however, this practice is concerning.

Pocket listings are likely detrimental for most sellers.<sup>28</sup> They inhibit competition among buyers by limiting the pool of potential buyers to those who work with the listing agent or the agent’s connections. It seems plausible to expect that this reduced exposure results in poorer quality and fewer purchase offers on the home as well as increase in time on market. In contrast to sellers who do not clearly benefit from pocket listing, the buyers who are fortunate enough to be connected in some way with the seller’s agent may get preferential treatment and face less competition. Other buyers, who are not connected to the seller’s agent, are unambiguously harmed by pocket listings.

Pocket listings are detrimental for this latter set of less-connected potential buyers because they increase buyer search costs. Clearly, potential buyers as a whole find it more difficult to locate properties for sale that are not openly advertised through a mechanism like an MLS® System. Even well-connected buyers may face additional informational hurdles in comparing properties without the standardized data maintained and shared in MLS® Systems.

More broadly, pocket listings diminish the value created by MLS® Cooperatives to other buyers and other sellers. By keeping properties off an MLS® System, the breadth

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<sup>27</sup> Gord McCormick, “Are exclusive listings gaining traction in sellers’ markets?” (4 September 2020), online: *REM Real Estate Magazine* <<https://www.realestatemagazine.ca/are-exclusive-listings-gaining-traction-in-sellers-markets/>>.

<sup>28</sup> On fragmentation of markets generally, see R. Bartlett, “Property Rights and the Pricing of Real Estate Brokerage” (1981) 30:1 *J Ind Econ* 79 (“The probability that the broker with whom a seller lists will simultaneously have readily available the “best” buyer is likely . . . fairly low. The result will be unnecessary delays in finding an acceptable buyer, or the consummation of sales at less than the best terms, or both.”)

of “comparables” data is negatively impacted, which reduces the ability of buyers and sellers to accurately understand the value of similar properties.

Finally, the use of pocket listings may favour larger brokerages or agents with well-established connections at the expense of smaller brokerages or agents who are new to the business. A comprehensive MLS® System helps level the playing field by ensuring that *all* members—small and large as well as those that are well established and less well established—have exposure and access to information about properties for sale.

### **Private networks of listings**

A private network of listings is similar to pocket listings. These are networks of listings created by a small number of agents who cooperate with each other, but not with other agents. These smaller networks have similar effects to the pocket listing: fragmentation of listing data harms sellers and the less well-connected pool of potential buyers. Disparate private networks would give home buyers reduced access to properties and, as a result, sellers would have less competition for their homes.<sup>29</sup> Further, by reducing the number and quality of comparables on MLS® Systems, private listing networks make it more difficult for buyers and sellers to accurately assess the true market value of residential property.

In this light, the value of CREA’s cooperation with local boards in Canada is clear: that cooperation serves to create a unique resource for property listings that is fairly comprehensive nationally. As explained in section II, CREA assembles data from many dozens of MLS® Systems with its Data Load Utility and promulgates the resulting compiled data through its REALTOR.ca DDF® and REALTOR.ca.

### **“Coming Soon” or delay in posting listings**

Over the past decade, there has been increased use of “Coming Soon” strategies that entail delays in posting listings to an MLS® System, and by extension to REALTOR.ca and its DDF® partners.<sup>30</sup> Indeed, in some markets, the use of Coming Soon strategies

<sup>29</sup> See e.g., *Top Agent Network, Inc v National Association of Realtors*, 2021 U.S. Dist. LEXIS 80723 (ND Cal) where Justice Chhabria pointed out that the plaintiff, a private listing service, did not plausibly allege that having a number of separate, smaller listing services, each offering its own set of exclusive listings and commanding their own subscription fees, would benefit the ultimate consumers in the market for homes.

<sup>30</sup> See e.g., John Owen, “Coming Soon real estate signs – who do they benefit?” (20 August 2014), online (blog): *RE/MAX* <<https://johnowen.realtor/blog.html/coming-soon-real-estate-signs---who-do-they-benefit-3357754>>; Jenny Yuen, “‘Coming Soon’ – an increasingly common tactic in T.O.’s booming housing market” (17 October 2016), online: *Toronto Sun* <<https://torontosun.com/2016/10/16/coming-soon---a--new-tactic-in-tos-booming-housing-market>>; Gord McCormick, “Are exclusive listings gaining traction in sellers’ markets?” (4 September

is now referred to as a “common practice.”<sup>31</sup> In “hot” markets, a Coming Soon strategy may be used with the objective of generating interest and sparking bidding wars; there may be no intent to ultimately list the home on an MLS® System. With Coming Soon marketing practices, an agent indicates that a residential property will “soon” be on the market. While we do not question that specific marketing strategies, like Coming Soon, can be useful in certain circumstances, they do raise concerns where the practice creates a *de facto* pocket listing.

In addition to the direct lessening of value that results from a Coming Soon strategy that is, effectively, a pocket listing, there is potential for indirect harm. Potential buyers may infer that the implicit promise of a Coming Soon strategy is that the property is indeed “coming soon” to an MLS® System, and to REALTOR.ca and DDF® partners. When that property does not make it to an MLS® System, that promise is broken. Thus, the practice may not only result in the undesirable effects discussed in relation to pocket listings, but the broken promise may undermine the expectation of buyers, sellers, and agents that MLS® System data will be comprehensive and accurate. Undermined expectations can have far-reaching and undesirable consequences.

Each of these practices diminishes the value created by MLS® Cooperatives. A mandatory listing service would, at least in theory, better protect the integrity of MLS® Systems by preventing the harmful fragmentation caused by this conduct. Even a less than perfectly strict mandatory listing service would reduce their negative impacts.

### **III.B. Exceptions to mandatory listing requirements**

While a mandatory listing service adds value by ensuring comprehensiveness, legitimate reasons why certain sellers may wish not to list their home on an MLS® System certainly exist. An effective mandatory listings policy would be improved if it were to recognize legitimate exceptions, without letting those exceptions be abused.

The most frequently claimed reason to avoid listing on an MLS® System is seller privacy. This is a particularly salient concern for luxury housing where high-wealth individuals and celebrities have concerns over their privacy and, potentially, safety if their property is listed publicly. The concern

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2020), online: *REM Real Estate Magazine* <<https://www.realestatemagazine.ca/are-exclusive-listings-gaining-traction-in-sellers-markets/>>.

<sup>31</sup> See e.g., Ron Neal, “Pros & Cons of the ‘Coming Soon’ Marketing Strategy” (8 June 2017), online (blog): The Neal Estate Group <<https://www.ron Neal.com/blog/coming-soon-how-can-this-marketing-strategy-benefit-you.html>>.



is not restricted to luxury properties, however. For any number of personal reasons, a seller may simply not want their friends and family to know that they are selling their home; they may prefer that photographs of each room in their house are not widely distributed and easily available.

Ultimately, sellers who covet privacy should be prepared to accept a lower price than they might otherwise get if the property were listed on an MLS® System. But from a broader perspective, leaving these properties off an MLS® System impacts other buyers and sellers as described above by reducing comprehensiveness; that concern may be particularly serious in certain segments of real estate markets, such as thinner luxury segments.

Another example of an exception concerns marketing strategies like Coming Soon listings. As discussed above, such practices reduce value created by MLS® Cooperatives by lessening comprehensiveness. But it is also possible that a listing agent's expertise suggests that a Coming Soon strategy could be appropriate and effective in a particular circumstance. For example, a house may need work or repairs before it can be shown, and sellers and their agents may deem it preferable not to have the home viewable until these repairs are complete. During the time repairs or improvements are made, a Coming Soon strategy might actually increase the home's exposure.<sup>32</sup>

It is important to stress that, independent of the putative benefits that strategies such as Coming Soon may promise, creating a broad exception for such strategies would present clear opportunities for abuse that would lessen the value created by MLS® Cooperatives. On the other hand, we recognize that a strict mandatory listing policy would likely encroach upon the legitimate privacy concerns of sellers. This study therefore recognizes the presence of such tradeoffs without pretending to weigh the specific benefits and costs and offer a specific rule. Doing so requires detailed knowledge and facts that are not available to us. Nevertheless, such tradeoffs are unavoidable and must be considered in the specific formulation of more rigorous listing requirements.

### **III.C. Mandatory listing and cooperation: conclusion**

Because the distribution of listing data on an MLS® System creates value, it is important to consider policies that proscribe practices that circumvent, subvert, or negate cooperation—pocket listings, private networks of listings, and certain Coming Soon marketing practices. A mandatory listing service no doubt achieves these aims.

A strict mandatory listing service with no exceptions may, however, be overly rigid. Home sellers may have legitimate concerns about their property being listed on an MLS® System, particularly

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<sup>32</sup> The articles previously cited described such reasoning as well as other motivations.

when it comes to privacy. To the extent that exceptions are permitted, these exceptions should be tailored clearly and correctly to only allow legitimate exceptions—it is imperative to avoid abuse. It is easy to conceive how unintended consequences could result from overly broad exceptions. An exception for “office listings,” for example, could, in theory, result in large brokerages creating private networks of listings, thereby leading to fragmentation and a diminished value of the cooperative.

This study does not propose specific exceptions to a mandatory listing requirement because doing so requires assessing the costs and benefits of those exceptions. Such an analysis requires detailed knowledge and facts that are not available to us. For this reason, we take no position on the specific crafting of the rules here beyond highlighting the tradeoffs inherent in encouraging comprehensiveness and allowing for legitimate exceptions.

We also wish to emphasize that a more rigorous listing requirement rule need not be “perfect” to expand the value created by the MLS® Cooperatives. A rule that enhances cooperation to any extent—and thereby increases value over that created without the rule—is better than no rule. A rule need not identify and curb all abuse to be valuable. In fact, a policy may be highly effective by simply stopping the most egregious or common infringements.

## **IV. Portals to MLS® Systems data**

The network effects that are present on MLS® Systems are indirect network effects: home buyers benefit from greater participation by home sellers, and home sellers benefit from greater participation by home buyers. From this perspective, participation by both buyers and sellers is critical to value creation. Thus, while the previous section focused on the “seller side” of the market, this section focuses on the “buyer side” by considering how home buyers can access MLS® Systems data.

Accurate, comprehensive and easily accessible MLS® Systems data benefits potential home buyers in two ways. First, it provides a direct benefit by allowing potential buyers to get a better sense of the prices and characteristics of properties in various geographic areas; making such information available to potential buyers can lower search costs. Home buyers also benefit indirectly because easily accessible data on homes for sale may also attract a wider audience for homes listed on MLS® Systems so that a virtuous cycle results: more participation by potential home buyers increases the benefits to placing listings on the MLS® System, which leads to the placement of more listings, which attracts more home buyers and so on. This positive “feedback effect” ultimately leads to more comprehensive MLS® Systems and, hence, more valuable MLS® Systems.

Potential home buyers can access MLS® Systems through different channels. First, they can access the data through REALTORS® who use specialized software and their expertise to assemble information of relevance to their clients. Second, potential home buyers can also access the data directly through different types of portals. We define “portals” broadly as any technology that provides access to MLS® Systems data. Typically, portals provide access to some, but not all, of the information collected by MLS® Systems. For example, most portals make available a home’s address, room dimensions, and listing photos. However, due to restrictions imposed by provincial privacy regulations, most portals do not provide comprehensive information about past home sales.

There are a very large number of public-facing portals in Canada. Prominent Canadian examples include REALTOR.ca, centris.ca, and point2homes.com.<sup>33</sup> But the largest number of portals are those maintained by individual REALTORS® or franchises (e.g., remax.ca, royallepage.ca). In addition to these portals, potential buyers can access MLS Systems data from “virtual office websites” or “VOWs.”<sup>34</sup> VOWs are a password-protected area of a brokerage’s website that provide listing information to clients alongside brokerage services. Because VOWs function as an online extension of brokerage services, provincial regulations that restrict the use of sold data on homes for the purposes of advertising do not apply to them.<sup>35</sup> For example, HouseSigma, through its VOW, provides sold data on homes in Ontario to users who register with a name and an email address and agree to certain terms and conditions.<sup>36</sup>

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<sup>33</sup> Portals in the United States differ from those in Canada. For example, Zillow.com is a popular portal in the United States that has a presence in Canada but does not currently offer the breadth of listings that other portals offer.

<sup>34</sup> The Competition Tribunal defined VOWs as follows: “The term ‘virtual office website’ is somewhat incongruous, as it refers neither to a website nor to a virtual office. Rather, the term is used to describe an area of a brokerage’s website where MLS information is made available to potential home sellers and buyers in a particular searchable format... The Tribunal will use the term VOW simply to describe a password-protected area of a brokerage’s website where consumers can access and search a database containing MLS information.” *The Commissioner of Competition v The Toronto Real Estate Board* (31 August 2011), CT-2011-003, online: Competition Tribunal <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463446/index.do>> (Reasons for Order and Order ¶¶ 93-94).

<sup>35</sup> Sold data are publicly and easily available in some jurisdictions but not others.

For example, in British Columbia, the British Columbia Financial Services Administration (BCFSA) publishes “Real Estate Service Rules” that do not appear to restrict the use of sold prices in advertising. See “Real Estate Service Rules” (1 August 2021) at Part 4, Division 3 – Advertising, online: *BC Financial Services Authority* <<https://www.bcfesa.ca/about-us/legislation/real-estate-services-rules#division-3-advertising>>.

However, in Québec, L’Organisme d’autoréglementation du courtage immobilier du Québec (OACIQ) requires the written authorization from buyer and seller before sold prices are used in advertisements. OACIQ “Advertising Guide” (10 February 2020), online (pdf): <<https://www.oaciq.com/uploads/ckeditor/attachments/912/oaciq-advertising-guide.pdf>> (“Under no circumstances may a price be advertised: neither the listing price nor the selling price unless authorized in writing by the parties to the transaction (i.e., the buyer and the seller)” at 51)

In Ontario, the Real Estate Council of Ontario (RECO) makes similar requirements and threatens disciplinary action against agents deemed to have advertised without authorization or consent. “Advertising sold properties” (17 April 2015), online: *RECO* <<https://www.reco.on.ca/registrar-bulletin/advertising-sold-properties/>>.

<sup>36</sup> Although it is a brokerage with a number of affiliated agents (see <https://team.housesigma.com/directory/>),

Portals compete to attract the attention of potential home buyers by offering an array of features and information meant to appeal to potential home buyers, which are typically provided at no charge. For potential home buyers, switching between portals and assessing the performance of multiple portals is easy. Thus, potential home buyers move to portals that provide access to features and information most relevant to them. That dynamic spurs many portals to offer a rich set of features and information to attract “eyeballs” such as the following:

- **Multimedia functionality.** Nearly all portals now provide not only photographs but also videos and interactive 3D virtual tours. Home buyers have come to expect this functionality in portals, which has made it essentially ubiquitous. Nevertheless, new features continue to appear. For example, in response to the COVID-19 pandemic, REALTOR.ca implemented functionality to host virtual open houses.<sup>37</sup>
- **Geographic and neighbourhood information.** Portals may include important context for a home including neighborhood and city information like walk scores, schools, and demographics. As with multimedia capability, potential home buyers have come to expect such contextual information from portals, which has resulted in its widespread adoption.
- **Mobile and desktop access.** Mobile access is a particularly useful feature in real estate where home buyers can access the site while visiting a neighborhood. To meet this demand, portals may provide a native mobile application (instead of relying on a mobile web browser interface) to provide users with a premium experience that can be better customized to the user’s preferences.
- **Notifications.** Potential home buyers can use portals to notify them when homes that meet certain criteria (e.g., postal code, number of bedrooms) are listed for sale or are sold. For example, REALTOR.ca provides (near) real-time notifications that can be delivered to mobile devices via a push notification or an email.<sup>38</sup>
- **Identification of conditionally sold homes.** When a seller accepts an offer that is subject to conditions (e.g., a home inspection), a home is “conditionally sold.” Because a great majority of homes that are conditionally sold are, in fact, ultimately sold, this identification benefits home buyers who can focus their efforts on available homes. Up until recently, information

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HouseSigma describes itself as a “technology platform”: “HouseSigma is a leading technology platform that utilizes artificial intelligence technology to correctly estimate Canadian home values in real time. With one click, home buyers can obtain an accurate automated home valuation for every listing within seconds. The HouseSigma algorithm also correctly identifies similar nearby sold properties to help buyers determine their final offer price!” See “About us”, online: *HouseSigma* <<https://housesigma.com/blog-en/about-us/>>.

<sup>37</sup> See <<https://www.crea.ca/what-realtors-should-know-about-covid-19/highlight-live-stream-open-houses-on-realtor-ca-listings/>>

<sup>38</sup> Notifications on REALTOR.ca are made with an eight-hour delay for homes listed in the Toronto region.

on conditionally sold homes was only provided by some VOWs. However, REALTOR.ca has recently begun the process of adding this functionality to its portal.

To be clear, while there is substantial pressure for portals to incorporate valuable features, there exists meaningful differentiation among some portals driven by differences in business model. For example, consider the role of advertising on portals. At one extreme, REALTOR.ca contains no advertising of any kind as CREA views providing users with a “clean” and “uncluttered” experience as key to retaining those users and best serving its REALTOR® members. But other portals do feature some form of advertising. For example, with a focus on Alberta and British Columbia, Bode features a form of advertising by supporting a “marketplace” for services such as home inspections, legal services, mortgage broking, photography, and staging.<sup>39</sup> Other portals may raise the prominence of listings in exchange for payment—an arrangement that is akin to advertising.<sup>40</sup>

But regardless of differences in business model, portals continue to incorporate new features and offer new information in attempts to capture the attention of potential home buyers. For example, CREA is piloting real-time bidding functionality by integrating software developed by PropTech company Openn Negotiation.<sup>41</sup> Specifically, if a home transaction is managed by REALTORS® through this software, then REALTOR.ca will be able to display offer details in near real-time to REALTORS® and their clients involved in the bidding process.

More generally, however, subject to provincial regulation, portals face a choice between pursuing a “listing-centric” model, where a home is removed from the portal once it is no longer an active listing, and a “property-centric” model, where a home remains on the portal but its status changes depending on whether it is active, conditionally sold, or has sold in the past. Thus, a property-centric model provides richer information than a listing-centric model. For example, in the United States, Zillow’s property-centric portal provides home value estimates as well as data on previous sales for, essentially, all homes—not just those actively for sale. In Canada, some VOWs such as HouseSigma or Bode, follow a similar model.

Regulation limits, somewhat, the extent to which some portals may pursue a property-centric model when it comes to displaying sold data. As noted above, province-specific regulation may restrict whether sold data can be used in “advertisements.” As a result, portals do not feature sold

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<sup>39</sup> See <<https://bode.ca/pro-marketplace>>. We take no position on whether this form of advertising is relevant to any provincial regulation that restricts the use of sold data in advertising.

<sup>40</sup> Again, we take no position on whether this form of advertising is relevant to any provincial regulation that restricts the use of sold data in advertising.

<sup>41</sup> “CREA set to bring transparency to the Canadian real estate consumer” (6 April 2022), online: *CREA The Canadian Real Estate Association* <<https://www.crea.ca/news/transparency/>>.

data where it is prohibited. For example, REALTOR.ca features sold data only in Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island, and in British Columbia (outside of Vancouver and the Fraser Valley). VOWs, on the other hand, typically feature sold data in provinces where sold data is not permitted to be used for purposes of advertising without consent of the homeowner.

In conclusion, home buyers can access information about homes through a large number of portals, which may offer different content and innovative features. Some differences arise organically – through differentiated business models. Other differences arise because of external forces, such as regulation. Boards and associations in Canada should continue to encourage the development and enhancement of a diverse set of portals. Doing so provides potential home buyers with access to a rich set of information and useful features, which increases the value created by MLS® Systems directly as well as indirectly through feedback effects.

## V. Limitations on access to MLS® Systems listing data

MLS® Systems provide a mechanism for the creation and dissemination of economically valuable information. It might, therefore, appear that mandating unrestricted access to—and unrestricted use of—MLS® Systems listing data would be unambiguously beneficial. But this view would be short sighted. There are additional considerations about *who* should have access to MLS® Systems data and, in particular, who should be permitted to disseminate that data. Ultimately, this study concludes that access should be restricted to those entities that add to the value created by MLS® Cooperatives.

Before discussing that conclusion further, it is important to note that MLS® Systems data is not freely available in Canada. Board rules that govern MLS® Cooperatives in Canada that we have reviewed are explicit: only board members may access MLS® Systems data for purposes of transacting in real estate.<sup>42</sup> Moreover, board membership is subject to certain ethical and

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<sup>42</sup> We reviewed the rules of the following association/boards: Lethbridge & District Association of REALTORS® (LDAR), Calgary Real Estate Board (CREB®), Chilliwack & District Real Estate Board (CADREB), Fraser Valley Real Estate Board (FVREB), the Real Estate Board of Greater Vancouver (REBGV), and Technology Systems Ontario (ITSO), which is controlled by 20 Ontario member associations such as Mississauga Real Estate Board, Barrie and District Association of REALTORS®, North Bay Real Estate Board, and London and St. Thomas Association of REALTORS®.

The language used in the rules of CADREB, FVREB, and REBGV specify at section 3.22 that “[a]ccess to listings on the MLS® System shall be made available to all” board members subject to rules about when a listing cannot be shown. Section 11.02 states that except as provided in the rules, no members shall make available to any unlicensed person, firm or corporation information distributed by the MLS® System.

Similarly, LDAR and CREB® specify at subsection 8.02(a) in their respective rules that “all members in good standing shall have access” to their board’s MLS® System which, pursuant to paragraph 8.05(b)(i), is authorized to

educational requirements as well as the payment of dues and fees.<sup>43</sup> Additionally, as noted above, CREA makes certain data feeds available to entities that do not transact in real estate. Moreover, CREA's REALTOR.ca, which is freely available, reflects only a portion of the content of MLS® Systems.

## **V.A. Access to MLS® Systems listing data should be restricted to those that add to the value created by MLS® Cooperatives**

Who adds to the value created by MLS® Cooperatives? First and foremost, members that assist clients in transacting real estate. Those that contribute listings (i.e., data) to MLS® Systems *clearly* add value. By contributing information about properties for sale, listing agents help realize the benefits described above. But agents who work exclusively with buyers—and who do not directly list properties for sale on MLS® Systems—*also* add value. By bringing in potential buyers, which widens the audience for properties for sale, the value of MLS® Systems is enhanced. In fact, because every real estate transaction requires a buyer and a seller, the participation of both parties is integral to the value created by MLS® Cooperatives—an MLS® System used only by buyers or only by sellers would create no value.

But not all parties that access or disseminate MLS® Systems data add value to the cooperative. In this section, we outline examples of how access to and dissemination of MLS® Systems data by third parties may not only fail to add value but may *diminish* value. The concerns we spell out involve situations where access to MLS® Systems data is provided today, but a negative impact may follow tomorrow.

Potential negative impacts include lessened value created by MLS® Cooperatives and diminished incentives of members, regional boards, and the national association to contribute to the development of MLS® Systems. It is important to stress, however, that we do not pretend to identify all the ways that these negative impacts may manifest. In fact, we recognize that seemingly anodyne access can plausibly reduce value in subtle and non-obvious ways. Thus, we believe a

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be used by members in good standing “to assist them in representing” their clients “in the trade of real property”.

The ITSO rules state in article 10.07 that the MLS® Systems are “licensed products for the exclusive access to and use” of association members, members belonging to other real estate associations that are members of ITSO, and authorized users (any person other than a member that has been authorized access and use by a member association). As noted in article 10.15, members and authorized users are “authorized to access the MLS® System data” to represent clients or in a trade/transaction.

<sup>43</sup> Annual board dues in Canada vary by board but typically range between about \$1,000 and about \$2,000. Those amounts may include payments to provincial real estate associations as well as CREA. Boards may impose additional one-time fees on new members. Other fees such as service fees, business development fees, and real estate licensing fees may be assessed as well.

prudent policy should err on the side of limiting access to those that clearly and obviously add to the value created by MLS® Cooperatives.

The question of access has gained renewed focus given the rapid evolution of certain large, well-funded “PropTech” companies. The term PropTech captures an enormous variety of business models. On the one hand, some PropTech business models clearly add economic value. These business models provide innovative modes of providing real estate services without undermining the spirit of cooperation that enables MLS® Systems. But some PropTech companies will register as brokerages and join local real estate boards with the sole purpose of gaining access to listing data, for example through IDX and/or VOW feeds, and may operate in ways that erode or threaten the value created by MLS® Cooperatives. These so-called “brokerages in name only” companies may use MLS® Systems data without respecting the spirit of cooperation on which those systems rely.

The key question, thus, becomes: do these entities with access to and use of MLS® Systems data add to the value created by MLS® Cooperatives? The discussion that follows explores how third-party disseminators of MLS® Systems data can undermine the comprehensiveness, and hence value, of MLS® Systems.

## **V.B. Third-party disseminators of MLS® Systems listing data can undermine comprehensiveness**

Listing data maintained by MLS® Systems may be accessed and used by third parties in ways that are contrary to the principles of cooperation that an MLS® Cooperative embodies. That access may be used for purposes other than for the transaction of real estate, may directly result in a diminution of the value created, or may amplify some of the potential costs for sellers with properties listed on MLS® Systems. We offer two examples of how this may play out.

### **PropTech conduct may discourage listing on MLS® Systems**

Unrestricted access and use of listing data by PropTech companies may discourage sellers from listing their property on an MLS® System by increasing the private costs of listing a property. That access may result from authorized access to MLS® Systems data or from unauthorized access such as “data scraping.” In that sense, access acts as a deterrent to listing a property on an MLS® System, thereby reducing comprehensiveness and value. To take a simple example, suppose a seller has mild privacy concerns. Ordinarily, these privacy concerns would not be so great as to prevent listing their property on an MLS® System. But these privacy concerns may grow sufficiently large if the information about



their home (e.g., photographs of each room, floorplans of the house, sales and tax history, or other home details like presence of an alarm system) are distributed, displayed, and disseminated across a large number of PropTech apps and websites to a very wide audience and, potentially, used for purposes other than the provision of residential real estate brokerage services. The amplification of these costs may diminish listings on MLS® Systems.

Privacy concerns may also be relevant to potential buyers, who may be concerned that these data (e.g., floorplans or 3D models, photographs of each room, alarm systems) will continue to be freely accessible on the Internet after they have purchased the property. If such data are widely accessible in perpetuity, privacy-conscious potential buyers may be dissuaded from purchasing listed properties.

Another example is that sellers with properties listed on an MLS® System may be targeted by advertising from “leads” generated by PropTech companies, including not only potential buyers, but providers of various services frequently used when a house is put up for sale (e.g., staging services, painters, mortgage brokers). Here, the concern is that this access is not used to advertise the property to potential home buyers, but is, rather, used to advertise products to home sellers. Such use of data may discourage sellers from listing their properties on an MLS® System.

### **The development of proprietary listing services**

Conceivably, a PropTech firm could use the data in an MLS® System to create their own proprietary listing service but does not share its listings with other MLS® Systems. While admittedly more speculative, any proprietary listing service would, by definition, withhold listings from the MLS® System and thereby diminish value created and run contrary to the principle of cooperation. A proprietary listing service that takes data from MLS® Systems only to ignore the principle of cooperation that creates that data in the first place would appropriate an “undue share of the fruits of the collaboration” inherent in MLS® Systems.<sup>44</sup>

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<sup>44</sup> See e.g., *Top Agent Network, Inc v National Association of Realtors*, 2020 U.S. Dist. LEXIS 125623 (ND Cal) where Justice Chhabria raised how it is unfair for real estate agents who are members of an MLS board to benefit from the contributions of their fellow members who share listings for cooperation while withholding listings of their own; Federal Trade Commission & U.S. Department of Justice, “Antitrust Guidelines for Collaborations Among Competitors” (April 2000) at § 3.36(b).

## V.C. Third-party access to MLS® Systems listing data can reduce incentives to enhance MLS® Systems

A distinct concern is that access by third parties who use and benefit from the listing data contributed by others—but do not contribute any data themselves—may lessen the incentives of members, regional boards, and CREA to invest in MLS® Systems.

MLS® Systems and associated technologies like portals are regularly improved through real innovations that substantially enhance functionality and require substantial expenditures. Examples of some specific enhancements to portals were provided in section IV. More generally, CREA spent just under \$18 million in 2021 and is budgeted to spend just under \$20 million in 2022 in enhancing and maintaining its portal, REALTOR.ca, as well as its DDF® that transmits data on national listings to REALTORS® and third parties. Among other things, those expenditures have supported a full rebuild of the REALTOR.ca app aimed at consumers and the launch of a new app aimed at REALTOR® members. Additionally, the DDF® software (front end as well as back end) was rebuilt, and CREA is currently fully rewriting the Data Load platform that gathers listing and member data from boards and associations to respect RESO open standards.<sup>45</sup> Ongoing and operational costs for MLS® Systems are also significant. The Toronto Regional Real Estate Board (TRREB) estimates that, exclusive of legal or compliance matters, it spends roughly \$40 million annually to deliver its MLS® System.

It is easy to imagine a circumstance where third party actions diminish the benefits REALTORS®, boards, or CREA perceive, which leads to reduced investment. In fact, the link between incentives to invest and the benefits from that investment is widely recognized and central to modern economic thinking about innovation.<sup>46</sup> Moreover, the variety of CREA’s investments in an ecosystem of services that are complementary to MLS® Systems demonstrates that the intensity of investment decisions can vary substantially. Thus, CREA could respond to a change in incentives by choosing not to undertake any of a large number of enhancements or simply delay their implementation.

The risk of decreased investments to enhance MLS® Systems and associated technologies is a key reason to be cautious about overly broad access to MLS® Systems data. An effective and likely

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<sup>45</sup> “Real Estate Standards Organization” (2022), online: *RESO* <<https://www.reso.org/>>.

<sup>46</sup> See e.g., Competition Bureau Canada, “Intellectual Property Enforcement Guidelines” (13 March 2019), online: *Government of Canada* <<https://www.ic.gc.ca/eic/site/cb-bc.nsf/eng/04421.html>> (“Adequate protection of IP plays an important role in stimulating new technology development, artistic expression and knowledge dissemination, all of which are vital to the knowledge-based economy.” at para 1).

implementable policy would be to limit access to those who respect the spirit of an MLS® Cooperative and thereby affirmatively contribute value to the cooperative.

## V.D. Access and use of listing data: conclusion

Access to—and use of—MLS® Systems listing data should be determined by whether such access and use adds to the value created by the MLS® Cooperative. Contributing more data in the form of listings or increasing the pool of potential buyers of those listings clearly adds value. But merely disseminating MLS® Systems data need not add to the value created by the cooperative. Indeed, third parties who do not contribute to MLS® Systems can *diminish* the value created.

For those reasons, this study concludes that a prudent policy would presumptively restrict access to MLS® Systems by entities that do not add value. That presumption to restrict access could be rebutted by showing that such access will not reduce the value created by MLS® Cooperatives. Members who cooperate by contributing listings or bringing buyers—that is, their principal activity is to facilitate the trade of real estate—make MLS® Systems more comprehensive and thereby add value, and so would be unaffected by such a presumption. But for those who simply *take* data without adding value, the bar would be harder to clear. Again, it is important to emphasize that this study does not propose a specific rule or policy to achieve this goal. The specifics of such a policy must leverage industry expertise held by individual boards and associations in Canada to ensure that access to MLS® Systems data is not overly broad so as to reduce the value created.

## VI. Conclusion

MLS® Cooperatives are central and valuable to the transaction of real estate. They produce a single source of accurate and fairly comprehensive information about homes for sale today as well as those that have sold in the past. In this commissioned study, we have described how MLS® Systems create value by tapping into the benefits of network effects. As more buyers use an MLS® System, the value to sellers increases and so on: the result is a virtuous cycle. The comprehensiveness of the MLS® Systems data is key.

Despite the clear benefits of the cooperation among REALTORS® that underpins MLS® Systems, there are indications that it is under threat. In this study, we discuss three ways in which Canadian real estate boards and associations can preserve and enhance cooperation and, thereby, preserve and enhance the value created by MLS® Systems.

### **Tightening rules on when properties must be listed on MLS® Systems**

Listing requirements imposed on REALTORS® in Canada are mostly lax in the sense that if a REALTOR® chooses to place one listing on an MLS® System, there is no requirement to place other listings. This “voluntary listing service” model allows some REALTORS® to lessen network effects and, hence, the value created by MLS® Systems. Pocket listings, private listing networks, and Coming Soon practices may threaten to fragment MLS® Systems and decrease value created. The current rules are likely too lax and should be tightened to strengthen the requirements of cooperation. Very strict mandatory listing requirements are likely inappropriate however. Some sellers may have legitimate privacy concerns and “Coming Soon” marketing practices may be justified under limited circumstances. But to the extent that such exceptions are permitted, they should be tailored carefully and precisely to only allow legitimate exceptions.

### **Maintaining high quality portals to access MLS® Systems data**

Even an MLS® System that contains data on all home listings cannot generate value without the participation of home buyers. Portals, defined as any technology that provides access to MLS® Systems data, allow for that participation. Competition among a diverse set of portals benefits home buyers directly by providing them with useful features and data. It also benefits home buyers and home sellers indirectly through enhanced network effects. To continue to create value, MLS® Systems must continue to leverage highly effective portals.

### **Access to – and use of – MLS® Systems listing data should presumptively be restricted to those parties that add value created by MLS® Cooperatives**

Despite the obvious benefits of wide dissemination of MLS® Systems data, certain uses of listing data can actually *reduce* value. Overly broad dissemination of information about a seller’s home may compound certain individuals’ privacy concerns to the point of discouraging listings. Separately, overly broad access may also lessen incentives to improve MLS® Systems as well as related technologies. We conclude that access to—and use of—listing data should be presumptively restricted to those who add to the value created by MLS® Cooperatives. This would include REALTORS® who list properties on an MLS® System as well as those who work with buyers in the transaction of real estate. Other entities that seek access to MLS® Systems data for purposes other than the transaction of real estate should demonstrate to boards and associations that their use contributes to the overall value of MLS® Systems.