

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

AND IN THE MATTER OF certain rules, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board.

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

May 31, 2016
CT-2011-003

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

398

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

THE TORONTO REAL ESTATE BOARD

Respondent

- AND -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

**REPLY REMEDY SUBMISSIONS OF THE CANADIAN REAL ESTATE ASSOCIATION
May 31, 2016**

1. CREA provides these submissions in reply to the Commissioner's submissions on remedy, dated May 25, 2016.
2. CREA has 6 points by way of reply submissions.

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3. **First**, CREA takes issue with **paragraph 2(e) of the Commissioner's proposed order** which, in brief, would require TREB to include on its VOW data feed all "MLS® information" currently available, or in the future made available, to Members by any means, and not just the Disputed Data Fields. CREA submits that this term of the order is too broad and should not be granted for the following reasons.

4. First, the Commissioner's justification for this broad scope of order is based on two related comparisons that are repeated throughout his submissions. In particular, the Commissioner states that the following comparisons are relevant to the issue of remedy: (i) "traditional" TREB members as compared to those members who wish to compete using VOWs, and (ii) VOWs as compared to other competitive products, stating that "VOWs represent an important new way for Members to compete".¹

5. Neither comparison correctly reflects what was at issue in this case, nor what is relevant for the Tribunal to consider in fashioning a remedy.

6. The proper comparisons, which reinforce that the remedy should be restricted to the Disputed Data Fields, are (i) TREB members who have VOWs based on TREB's current VOW data feed, as compared to those who wish to compete using VOWs based on a VOW data feed that contains the Disputed Data Fields, and (ii) VOWs based on TREB's current VOW data feed, as compared to VOWs based on TREB's current VOW data feed plus the Disputed Data Fields.

¹ See, for example, paragraphs 9, 23, 24 and 25 of the Commissioner's submissions on remedy.

7. The Tribunal recognized this in its decision when it agreed with TREB and CREA that the appropriate focus was the incremental effect of the VOW Restrictions on competition², not the incremental effects of VOWs themselves.

8. Second, the order as requested by the Commissioner in paragraph 2(e) would extend beyond matters that were addressed in this proceeding. The submissions, the evidence of the lay witnesses and the evidence and analysis offered by the experts were all focused on the Disputed Data Fields, and not on any other type of "MLS® information" that is available through Stratus.

9. Third, the order as requested by the Commissioner in paragraph 2(e) is imprecise, not certain and extends to unknown and/or hypothetical matters. CREA submits that the Tribunal's order should not extend to (i) (undefined) "MLS® information" currently available, (ii) (undefined) "MLS® information" that does not even exist now but may exist in the future, and (iii) (undefined) means of disseminating MLS® information that do not exist now but may exist in the future.³

10. Accordingly, CREA submits that there is no proper basis on which the Tribunal could require the inclusion of information other than the Disputed Data Fields in TREB's VOW data feed.

11. **Second**, CREA has two submissions with respect to **paragraph 2(c) of the Commissioner's proposed order**. The Commissioner submits that the seller's

² See paragraph 503 of the Tribunal's decision.

³ For the same reason, CREA submits that **paragraph 2(f) of the Commissioner's proposed order** should be amended by removing the phrase in parentheses.

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name and home security information should be included in the TREB VOW data feed, but takes no issue if TREB wishes to implement rules that prohibit the display of this information on a VOW.

12. First, to the extent it requires the seller's name and home security information to be included in the TREB VOW data feed, the order requested by the Commissioner in paragraph 2(c) would extend beyond the matters that were addressed in this proceeding, for the same reasons expressed in paragraph 8 above.

13. Second, CREA submits that the seller's name and other personal and confidential information concerning the seller, the seller's tenant or the home for sale, and remarks intended for brokers only, should not be displayed to the public on a VOW and submits that the Tribunal's order should include such a prohibition. Examples of such information are security information, instructions for access, the seller's mortgage information, when the seller/tenant will be present or absent, and personal information about the seller (or a tenant) and his/her family, CREA submits that the last phrase of paragraph 2(c) should be amended to read as follows:

“...except that the seller's name, and remarks or instructions intended for Members only, including security information, instructions for access, when the home will be empty or occupied, the seller's mortgage information and personal information about the seller and residents of the home, shall not be displayed on a VOW.”⁴

⁴ CREA notes that, while some TREB Members include such personal and confidential information in the “brokers remarks” section, it is important that the Tribunal's order prohibiting the display of this information refer to the nature of the information, and not to a specific data field in TREB's MLS® System. Also, boards across Canada vary in terms of where on their respective MLS® System this personal and confidential information is displayed.

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14. Further, the proposed term in paragraph 2(c) assumes that TREB's Members who operate VOWs have the ability, technical or otherwise, to control what information or fields contained in the VOW data feed will be accessible to the public on the VOW. CREA has no information in this respect and leaves it to TREB to address any technical issues associated with Members being required to display less information on their VOWs than what is contained in the VOW data feed.

15. **Third**, in **paragraph 2(d) of the Commissioner's proposed order**, reference is made to AVPs. CREA assumes that the reference is to AVPs who are under contract with a TREB member to provide that member with website services, and submits that this paragraph should be more precisely worded to reflect that. The following wording is suggested:

TREB shall continue to make available the VOW Data Feed directly to Members or, at their direction, to the Members' AVPs, which shall not in any respect be inferior to the VOW Data Feed existing as of the date of this Order.

16. **Fourth**, for reasons similar to those expressed above with respect to paragraph 2(e), CREA takes issue with the scope of the order requested in **paragraph 2(h) of the Commissioner's proposed order**. Paragraph 2(h) would require TREB to provide the VOW data feed on terms and conditions and with technical characteristics that are at least as favourable as those that apply to any other platforms or services used by TREB to provide the Disputed Data Fields to Members' clients.

17. This term of the order, like paragraph 2(e), is based on an incorrect premise. It assumes that the correct analysis for determining what will restore

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competition is a comparison between VOWs and non-VOWs (i.e., "other platforms or services"). The issue for the Tribunal is not to place VOWs on the same footing as non-VOW platforms or services. The issue is to restore the competition that was found to be lessened by the exclusion of the Disputed Data Fields from TREB's VOW data feed.

18. Also, the order requested would apply to "other platforms or services" developed by TREB in the future, without any information as to what those platforms or services may be, and how the technical characteristics of those platforms or services might compare to VOWs (and therefore whether it is even possible for TREB's VOW data feed to share the same technical characteristics). It is certainly fair to assume that platforms or services developed in the future may be more technologically advanced than VOWs and may even ultimately serve as additional alternatives to VOWs. In that respect, it is important that the Tribunal's order not have the effect of stifling the development of advanced technology by effectively requiring that other platforms and services are not permitted unless it is possible to provide VOWs with the same technical characteristics.

19. **Fifth**, CREA has two points in response to the Commissioner's discussion of firm sales⁵ that do not close, found at paragraph 34-35 of his remedy submissions.

20. First, the Commissioner alleges that a firm sale failing to close is a "rare situation". No evidence is offered in support of this assertion and it should be given no weight.

⁵ "Firm sales" as referred to by the Commissioner are pending sales which do not have outstanding conditions except for closing.

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21. Second, his concession that it is appropriate that firm sale prices be removed from the VOW data feed if the sale does not close does not go far enough. The prejudice caused to the seller from the agreed sale price being publicly available for weeks or months on the VOW data feed before the deal falls through remains. Further, the removal of the sale price from the VOW data feed does not provide any comfort that the sale price has been removed from the Internet in general. Once information is made available on the Internet through a VOW, its dissemination cannot be effectively controlled.

22. Sixth, in closing, CREA asks the Tribunal to keep in mind that, while the order that is issued will be restricted to TREB, other boards and associations across Canada will look to the Tribunal's decision and order for guidance. It is important to CREA and its members across Canada that the decision in this case recognizes that many boards and associations across Canada are differently situated, including in respect of technical capabilities, the characteristics of their MLS® Systems, member and client demands and their regulatory environment, and that those individual characteristics are appropriately taken into account by a board or association in assessing what actions, if any, should flow from the Tribunal's decision in this case.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 31, 2016



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