

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

**IN THE MATTER OF** an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

**AND IN THE MATTER OF** certain rules, policies and agreements relating to the 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	# 399

**COMMISSIONER OF COMPETITION**

Applicant

- and -

**THE TORONTO REAL ESTATE BOARD**

Respondent

- and -

**THE CANADIAN REAL ESTATE ASSOCIATION**

Intervenor

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**REPLY REMEDY SUBMISSIONS  
OF THE COMMISSIONER OF COMPETITION**

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## **Overview**<sup>1</sup>

1. TREB's remedy submissions do not implement the Tribunal's Reasons. TREB continues to attempt to marginalize and exclude VOWS from the GTA by proposing discriminatory requirements for VOWs' use and display of the Disputed Data. Its proposal to subject VOWs to an additional consent requirement will perpetuate the information asymmetry at the heart of TREB's practice of anti-competitive acts and ensure that GTA buyers and sellers receive none of the benefits greater competition would provide.

2. Contrary to TREB's submissions, a VOW-specific consent is not required. The consents provided by home buyers and sellers permit use and display by VOWs. Only by freeing Members to use and display the Disputed Data on a VOW can the Tribunal's order ensure greater competition and innovation as contemplated in its Reasons.

## **Responses to TREB's Submissions**

### **a) Home Buyers and Sellers Have Consented to Use and Disclosure in Connection with the Listing, Marketing and Selling of Real Estate**

3. TREB argues that the consents provided by home buyers and sellers in the standard form agreements used by its Members (the "**Consents**") are insufficient to permit display of the Disputed Data on a VOW and to permit Members' use for data analysis purposes.<sup>2</sup> Thus, TREB proposes a two-tiered solution: home buyers and sellers "opt in" to password-protected VOWs on a go-forward basis with none of the Disputed Data predating the order included in the VOW Data Feed, while traditional Members carry on business as usual using and disclosing all of the Disputed Data as formerly.

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<sup>1</sup> Capitalized terms are defined in the Tribunal's Reasons for Order and Order dated April 27, 2016 ("**Reasons**").

<sup>2</sup> TREB Remedy Submissions, paras 14-16.

4. TREB has already argued that the Consents were insufficient and the Tribunal has already rejected TREB's argument. The Tribunal held that it "has not been persuaded [by TREB] that existing consents in the standard Listing Agreement that TREB recommends its Members to execute with their clients do not extend to the display of historical information such as the sold price of their home and WEST listings information, after their homes have been sold"<sup>3</sup> and that TREB "interprets its existing consents as being sufficiently broad to enable sold information to be provided to potential customers."<sup>4</sup> In view of these findings, TREB's argument must fail.<sup>5</sup>

5. The language of the Consents make clear that use and display of the Disputed Data is permitted provided it occurs in connection with the listing, marketing, and selling of real estate:

- (a) **Listing Agreement:** The Seller further acknowledges that the real estate board(s) may... make such other use of the information [in the MLS Database] as the Brokerage and/or real estate board(s) deem appropriate, in connection with the listing, marketing and selling of real estate during the term of the listing and thereafter.
- (b) **BRA and BCSA:** The Buyer agrees that the sale and related information regarding any property purchased by the Buyer through the Brokerage may be retained and disclosed by the Brokerage and/or real estate board(s) (if the property is an MLS Listing) for reporting, appraisal and statistical purposes and for such other use of the information as the Brokerage and/or board deems appropriate in connection with the listing, marketing and selling of real estate, including conducting comparative market analyses.<sup>6</sup>

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<sup>3</sup> Reasons, para 776.

<sup>4</sup> Reasons, para 406.

<sup>5</sup> TREB's argument is also inconsistent with its position on use of the Disputed Data earlier in this proceeding. At the hearing, TREB argued that Realosophy's use of the Disputed Data in its "dashboard" tool showed that the VOW Restrictions were not substantially preventing competition: Reasons, para 558. Now, TREB's position implies that Realosophy cannot use the Disputed Data in its "dashboard" tool without an additional consent from home buyers and sellers. TREB cannot have it both ways.

<sup>6</sup> This is the only consent provided to a real estate board in the BRA and BCSA, so its broad language is the only written consent from buyers on which TREB can rely for its collection, use and disclosure of the Disputed Data today, as well as its Members' use and disclosure.

6. While VOWs may make the Disputed Data more available than in the past, the Tribunal found that the Disputed Data is already widely disclosed by Members<sup>7</sup> who use and disclose it "in connection with the listing, marketing, and selling of real estate" as permitted by the Consents. Likewise, use and display by VOWs will be "in connection with the listing, marketing and selling of real estate" because VOWs are a mechanism through which Members provide real estate services. The order proposed by the Commissioner expressly limits Members' use of the MLS information in the VOW Data Feed to use that is directly related to the business of residential real estate. In this way, VOWs will only be able to use the Disputed Data within the parameters of the already-provided Consents. No additional consent is required.

**b) Use and Disclosure is Integral to the MLS and not Impermissible "Tied-Consent"**

7. TREB's argument about "tied consent" is a red-herring and was implicitly rejected by the Tribunal as a pretext for TREB's anti-competitive acts.<sup>8</sup> Requiring buyers and sellers to consent is permitted under *PIPEDA* because their consent to use and disclosure in connection with the listing, marketing, or selling of real estate is integral "to fulfil the explicitly specified, and legitimate purposes"<sup>9</sup> of selling and buying through the MLS.

8. As TREB and CREA admit,<sup>10</sup> consent to use and disclosure is integral to the MLS. The MLS contains a wealth of listing information, including the Disputed Data. Members use MLS information, especially the Disputed Data, to provide a range of real estate services to home

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<sup>7</sup> Reasons, paras 395, 398, and 584.

<sup>8</sup> Reasons, para 400. As a condition of listing their home on TREB's MLS, TREB already requires home sellers to consent to TREB and its Members using and disclosing the sales information "in connection with the listing, marketing, and selling of real estate": Exhibit R-039, Witness Statement of Donald Richardson dated July 23, 2012, Rule 340 p. 151. Use and disclosure is not limited to the sale of *the seller's home*, so if TREB's argument were accepted, TREB is already impermissibly tying the sale of the seller's home to the seller providing consent to TREB's collection, use and disclosure of the sales information for general real estate purposes in perpetuity.

<sup>9</sup> TREB's Remedy Submissions dated May 25, 2016, para 10 citing *PIPEDA*, Principle 4.3.3.

<sup>10</sup> Reasons, paras 400-401.

buyers and sellers, including CMAs.<sup>11</sup> Those services depend on a complete data set and the ability to use and disclose MLS information now and in the future. If buyers and sellers did not consent to the use and disclosure of this sales information, future MLS participants would receive inferior services than today's home buyers and sellers enjoy.

9. Use and display of information on a password-protected VOW is just the latest advancement in how Members use and disclose MLS information in the course of providing residential real estate brokerage services. No delivery mechanisms are expressly addressed in the Consents, but the evidence was that use and disclosure occurs "in connection with the listing, marketing, or selling of real estate." The change from use and disclosure using out-of-date, less efficient means (*e.g.*, by hand) to modern, more efficient means (*e.g.*, email and VOWs) is consistent with what home buyers and sellers would reasonably expect (and demand, where it is available), having shopped online for real estate for the past two decades.<sup>12</sup>

**c) A VOW-Specific Consent would Perpetuate the Effects of TREB's Anti-Competitive Conduct**

10. Permitting TREB to impose an additional consent requirement would perpetuate rather than remedy the effects of TREB's anti-competitive conduct, leaving no possibility of the innovation and competition contemplated by the Tribunal.

11. Permitting an additional consent specific to VOWs only encourages those TREB Members who are "fearful of new technology"<sup>13</sup> to eviscerate the utility of the VOW Data Feed by ensuring that their clients do not "opt in" to VOWs. This is not a speculative concern: the "opt in"/"opt out" idea was the very "solution" adopted by the EDU Task Force thirteen years ago to

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<sup>11</sup> Reasons, paras 79, 364, and 584.

<sup>12</sup> Exhibit IC-177 Updated Witness Statement of Gary Simonsen, paras 29-38.

<sup>13</sup> Reasons, para 370.

address the threat of disintermediation.<sup>14</sup> It is such an effective "solution" at preventing competition from VOWs because the less complete the data set available to VOWs, the less attractive they are, the less they will invest in innovating using the data, and the less of a competitive threat they become (if they even enter at all).

12. TREB's discriminatory proposal is the very concern motivating the Commissioner's desire to ensure a level playing field as between the information Members distribute by hand, email, and fax, and the information distributed over a VOW. Although none of the Consents expressly refers to disclosure to home buyers and sellers of sold and pending sold information, TREB has always interpreted the Consents as sufficient to permit use and distribution by hand, fax, and email,<sup>15</sup> and has enabled Members to do so through the Stratus system, such as through the ability to email 100 sold listings to *anyone*<sup>16</sup> and the Stratus CMA tool. Now, TREB proposes a two-tiered system in which (i) Members can rely on the Consents to, among other things, email up to 100 sold listings at a time from Stratus to anyone, but (ii) VOW operators would require an additional consent to display sold listings to registered VOW users who have signed in and agreed to terms of use confirming their *bona fide* interest in purchasing or selling real estate.

13. TREB's remedy proposal would ensure that nothing will change following the Tribunal's order. The Tribunal relied on Mr. McMullin's evidence that ViewPoint was unlikely to enter the GTA without the ability to provide *the same MLS information* through its website as traditional brokerages can by hand, email, or fax.<sup>17</sup> By perpetuating the information asymmetry between

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<sup>14</sup> Reasons, para 329-330.

<sup>15</sup> Reasons, para 406.

<sup>16</sup> Reasons, para 398.

<sup>17</sup> Reasons, para 512.

traditional brokerages and VOWs, TREB's two-tiered proposal will keep ViewPoint out of the GTA and thus defeat the new entry the Tribunal's order should enable.

14. TREB's proposal similarly ensures that the higher quality and broader range of services the Tribunal described will not emerge. Many of these products require access to historical information to identify trends and make other useful analytical tools. Taking CMA tools as just one example, TREB's prospective remedy proposal would mean VOWs could not develop CMA tools until enough sold listings became available through the VOW Data Feed to provide a sufficiently robust data set from which to draw a useful sample. And even that set would be at a disadvantage to the full set in Stratus if some home buyers and sellers did not "opt in". That would mean continued manual checking through Stratus, as Mr. Pasalis testified he has to do today,<sup>18</sup> and less accurate tools overall, especially where homes have materially different characteristics.<sup>19</sup>

**d) Buyers who Have not Signed BRAs or BCSAs**

15. It is remarkable that TREB argues that some buyers have not signed BRAs or BCSAs and thus have not consented at all. If TREB believes that some buyers have not consented, then TREB is already violating *PIPEDA* by collecting, using, and disclosing their information today via Stratus and otherwise. That TREB has for years collected, used and disclosed the information of MLS buyers suggests that TREB must believe all buyers have consented (explicitly or implicitly), or their consent is not required. If consent is required and has not been obtained, then TREB should already have deleted the information of these buyers from Stratus.

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<sup>18</sup> Reasons, paras 239, 450, and 558.

<sup>19</sup> Reasons, para 222.

**e) VOWs Require Access to the Disputed Data through the VOW Data Feed**

16. TREB proposes that some form of "access" to the Disputed Data short of putting the Disputed Data in the VOW Data Feed may restore competition. This proposal is woefully unspecific, unsubstantiated by evidence, and not supported by the Tribunal's findings. The Tribunal relied on Mr. McMullin's evidence that ViewPoint requires the data through a RETS data feed,<sup>20</sup> not some unspecified access. It relied on Mr. Hamidi's evidence that "TREB's refusal [in 2009] to make resale home listing data available in a feed led [TheRedPin] to focus [its] efforts on new condominiums."<sup>21</sup> Without access to the Disputed Data through the VOW Data Feed, the implication is that VOWs will not enter (*e.g.*, ViewPoint) or focus their innovation on other markets (*e.g.*, TheRedPin). As a result, the innovation and greater competition described by the Tribunal in its Reasons will not emerge.

17. Although TREB could have proposed "access" solutions in its evidence, it failed to do so, leaving no opportunity for those proposals to be tested or met with responding evidence. TREB did not cross-examine any of the Commissioner's witnesses to test whether some other form of "access" to the information would suffice. "Access" as contemplated by TREB may look very much like "access" through Stratus today, leaving no possibility of innovation and preserving the effects of TREB's conduct.

18. To support its position on access, TREB speculates that some Members may use the Disputed Data for other purposes. This concern is addressed by the language of the Commissioner's proposed order that limits use to that directly for the business of real estate.

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<sup>20</sup> Reasons, para 239.

<sup>21</sup> Reasons, para 614.



19. Similarly, TREB's concern about data scraping by third parties is addressed through the current VOW terms and conditions which require VOW operators to take steps to prevent scraping.<sup>22</sup> If such safeguards were insufficient, TREB could have led evidence of any mischief arising from third-party scraping outside the GTA. TREB did not cross-examine Mr. McMullin or Mr. Nagel about their practices to prevent scraping, how effective they are, or what problems (if any) have arisen. Having failed to even cross-examine the Commissioner's witnesses about the issue, TREB cannot rely now on the unsubstantiated spectre of such scraping from VOWs.

20. TREB also failed to lead any evidence to support its argument that Members may leave TREB for competing boards. TREB's argument boils down to a submission that TREB's Members may vote with their feet to continue TREB's anti-competitive practices at a different board. The Tribunal should not accede to such an argument.

**f) Other Issues**

21. **Pending Solds:** There is no basis for discriminatory treatment of pending solds as TREB proposes. Members have access to this information via Stratus. TREB's witnesses testified that they provide it to home buyers and sellers.<sup>23</sup> The Tribunal held that it is of enormous value to home buyers and sellers, and thus to VOWs.<sup>24</sup> Any potential prejudice to a seller can be addressed as described in the Commissioner's May 25, 2016 Remedy Submissions.

22. **Expired and Terminated Listings:** TREB relies on a document at Appendix B to its submission that was not in evidence before the Tribunal. For this reason alone, its submission on

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<sup>22</sup> Exhibit R-039 Witness Statement of Donald Richardson dated July 27, 2012, p. 597. Rule 813.

<sup>23</sup> October 6, 2015 Hearing Transcript pp. 824-830.

<sup>24</sup> Reasons, paras 679-680.

this issue should be disregarded.<sup>25</sup> In any event, this argument is a strawman. VOW users would not have the seller's name or telephone number to contact them. But if that proved insufficient, given that sellers today indicate whether they want to be contacted after expiry, a VOW could indicate that the seller is not to be contacted.

23. **Verification of Closed Transactions:** This is a non-issue. MLS Rule 616 requires Members to report a status change if a firm sale does not close. Because information uploaded by Members may be inaccurate, TREB already requires VOWs to publish a disclaimer that the information is deemed reliable but is not guaranteed accurate by TREB.<sup>26</sup>

24. **Cooperating Broker Commissions:** Limiting display as TREB proposes is inconsistent with paragraphs 689-690 of the Tribunal's Reasons.

25. **Sensitive Data:** The Commissioner's proposed order expressly permits restriction on the display of sensitive data on a VOW. But given that the information is already available to Members' through Stratus, there is no reason to withhold it from the VOW Data Feed.

26. **Third Party Data:** The Commissioner is not requesting that this be included in the VOW Data Feed (see footnote 41 of the Commissioner's May 25, 2016 Remedy Submissions).

27. **Liability:** TREB has the consent to use and disclose the Disputed Data and the Commissioner is not asking for an order that TREB violate its contracts with third parties.

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<sup>25</sup> Appendix B demonstrates that it was another agent who had improperly relied on the fact that the listing had expired to fish for business. Appendix B confirms that it is not VOW users who are likely to contact sellers whose listing agreements have expired, but TREB Members wishing to offer their services! And Members already have access to expired listings via Stratus.

<sup>26</sup> Exhibit R-039, Witness Statement of Donald Richardson dated July 27, 2012, Rule 825 p. 600 and VOW Data Feed Agreement, s. 6.3(i) p. 624.

28. **Costs:** There is no evidence about how high such incremental costs might be, or on whom such costs might be imposed. In such circumstances, the Commissioner submits that the Tribunal should not make an order permitting TREB to pass on unspecified and potentially exclusionary costs.

**Responses to CREA's Submissions**

29. **That the Order should be Limited to TREB and the GTA:** The Commissioner's proposed order is limited to TREB. An express provision limiting its scope to the GTA is unnecessary because the order applies only to TREB. Expressly limiting the order to the GTA may also create inconsistencies if some non-GTA properties are listed on the TREB MLS.

30. **That the remedy should be confined to VOWs:** The Commissioner's proposed order is related only to VOWs and TREB's VOW Data Feed as CREA admits is appropriate.<sup>27</sup>

31. **That the remedy should be confined to the "Disputed Data Fields":** The Commissioner's proposed order uses the Tribunal's defined term "Disputed Data," which the Tribunal defined with reference to the entire listing, not specific fields.<sup>28</sup> Divorcing the sold price of a home from all of the other fields in the listing would render the information useless.

32. **That TREB should not be prohibited from obtaining additional consent unique to VOWs:** As described above, no additional consent is required and a consent regime unique to VOWs will perpetuate the *status quo* and must be rejected.

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<sup>27</sup> CREA's Remedy Submissions dated May 25, 2016, para 23.

<sup>28</sup> Reasons, para 14.


**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

May 31, 2016

**BENNETT JONES LLP**

  
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John F. Rook, Andrew D. Little, and Emrys Davis

**DEPARTMENT OF JUSTICE CANADA**

  
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