

COMPETITION TRIBUNAL

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

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

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

B E T W E E N :

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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May 31, 2016
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Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

400

COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

AND

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

**REPLY REMEDY SUBMISSIONS OF THE TORONTO REAL ESTATE BOARD
(ORAL HEARING – JUNE 2, 2016)**

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OVERVIEW

1. TREB submits that the Commissioner has proposed a remedy that completely disregards consumer choice, is unduly broad and vague, and goes beyond the evidence and findings of the Tribunal.

2. The Tribunal in determining a remedy: (i) should respect consumer choice as far as the use and disclosure of their personal information; (ii) should impose temporal limits on access to the data within TREB's MLS® system database to ensure that such data is used solely for providing residential real estate brokerage services; (iii) should limit the scope of the remedy to the Disputed Data, which was the subject-matter of the Application; (iv) should respect the rights of home sellers in pending sold transactions; (v) should provide *access* to any Disputed Data as opposed to providing a copy of that data; (vi) should allow TREB sufficient time to implement the remedy; and (vii) generally should issue an Order that is clear in terms and tailored to the findings made in its Reasons regarding the Disputed Data.

B. Consumers should be given a choice

3. The Commissioner wants to populate VOWs with the personal information of consumers whether consumers like it or not. The Commissioner's submissions do not reference consumer consent or privacy rights whatsoever. To the contrary, the Commissioner expressly wants to prohibit TREB from giving consumers a choice about whether their personal information be made available for display on a VOW.¹

¹ Commissioner's Remedy Submissions at para. 23.

4. The Commissioner's position is inconsistent with privacy law (as explained in TREB's initial remedy submissions), as well as being bad public policy. What is wrong with letting consumers have the ability to decide how broadly their private personal information, including the purchase price of their home, be distributed? A remedy that disregards consumer choice is not in the best interests of consumers. Such a remedy would be an extreme interference with the rights of consumers and would be inconsistent with section 79(3) of the *Competition Act*.

5. Currently the home seller has a choice, through the Data Information Form, as to whether they want their listing sent to Internet portals. If the consumer says "no" then their listing does not go anywhere over the Internet, including Realtor.ca or VOWs.² Consumers who select "no" to this option (for whatever the personal reason) do not even want the fact they are selling their home to be publicized widely over the Internet at a point in time when one would expect it to be in their financial interest to have that fact made known. The privacy wishes of these consumers ought to be respected. In the face of the consumer expressly saying they do not want their listings anywhere on the Internet, it would be an absurd outcome that not only the listing, but then the historical data associated with the listing (including interior photos of the home and sold price), be available widely over the Internet through a VOW.

6. TREB's concern about consumer choice is not limited to consumers that do not want their listing sent over Internet portal. Consumers should also be able to make a decision that they want to publicize their home for sale over the Internet, but not then be stuck with the

² Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras. 40, 67, 71, Exhibit F (Data Information Form) p. 148 (three quarters of the way down the page) of witness statement.

mandatory result that their historical data, including interior photos of their home and the sold price be widely available over the Internet through a VOW.

C. Temporal Limits

7. The Commissioner concedes that it is appropriate that TREB restricts its Members' use of data "to being directly related to the business of residential real estate."³

8. When a consumer is looking to buy a house, it does not matter what the real estate market looked like 5 years ago, or even 1 year ago. Information that goes far into the past is not required to service consumers looking to buy and sell in the present day. There should be limits on the length of time that historical information be available both for display over a VOW and for internal use by VOW operators. Data should be limited going back six months (on a rolling basis), as that is more than enough to provide services to consumers related to the current marketplace. This would apply only on a go-forward basis, since the required consents are not in place for a retrospective remedy (as discussed in TREB's initial submissions on remedy).

D. Remedy restricted to the Disputed Data

9. The Commissioner seeks a remedy that goes beyond the Disputed Data.⁴ The findings of the Tribunal do not support such a remedy.

³ Commissioner's Remedy Submissions at para. 2(b).

⁴ Reasons at para. 27.

10. The Tribunal found that the VOW Restrictions are substantially preventing competition in the relevant market.⁵ This finding was based on the Tribunal's comparison of the incremental effect of the VOW Restrictions on competition.⁶ As the Tribunal noted, the VOW Restrictions (as defined) concern only a limited subset of the data in TREB's MLS system database: the Disputed Data.⁷

11. In granting a remedy the Tribunal is confined to making orders restricting the "practice" or making an order that is reasonable and necessary "to overcome the effects of the practice" that has been found to be substantially lessening or preventing competition.⁸ A remedy that goes beyond the Disputed Data would be overreaching and beyond the jurisdiction of the Tribunal.

12. Furthermore, the record before the Tribunal is inadequate to support a remedy beyond providing access by VOW operators to the Disputed Data. There was no evidence before the Tribunal of a comprehensive list of data fields "absent" from the VOW data feed, or a consideration on a one by one basis of any legal, technological, or other impediments to disclosure of data fields beyond the Disputed Data.

13. It is not appropriate for the Tribunal to order a "kitchen sink" remedy – the remedy must be based on the evidence and based on the findings of the Tribunal.

⁵ Reasons at para. 705.

⁶ Reasons at para. 503.

⁷ Reasons at para. 709.

⁸ *Competition Act*, s. 79(1) and 79(2).

E. Pending Solds

14. The Commissioner proposes that pending sold prices (where conditions have been met) should be available on a VOW, and only removed in the “rare” case where such a sale fails to close.⁹

15. There is no basis in the evidence to suggest that pending sold transactions fail to close only rarely. This is an unsubstantiated assertion.

16. If a prospective home-buyer has been tracking a property (and perhaps even put in a failed offer on the home), the “reserve price” prejudice to the seller remains even under the Commissioner’s proposal, since the sale price will not be erased from the home-buyer’s memory when it is taken down from the VOW.

F. A remedy ought to provide *access to the Disputed Data* and not transmit the data through a feed

17. Any order must permit TREB to implement technological methods to protect the data within TREB’s MLS® system database from misuse, copying, redistribution, resale or data mining beyond its “intended use” of being directly related to the business of residential real estate. TREB will be unable to safeguard against misuse if the Disputed Data is transmitted through the VOW data feed.

18. The Tribunal’s order ought to be focused on achieving end-use by the VOW operator, as opposed to the method of delivery of data to the VOW operator. The key should be to ensure that all TREB Members have the same access to the same data without regard to

⁹ Commissioner’s Remedy Submissions at para. 34.

business model. The appropriate remedy should be to ensure *access* rather than delivery in a particular method.

19. TREB would be able to develop a technological solution (such as an Application Programming Interface (API)) which could be used by any TREB Member to integrate the data within TREB's MLS® system database into web pages, mobile apps, or other applications, with the MLS® data remaining resident on TREB's servers. It would take approximately 6 months for TREB to develop this technological solution.

20. By focussing on the rules rather than any particular technical means of delivering the data, the Tribunal can ensure that the remedy outlasts any one ephemeral technology and also prevent against misuse of the data.

G. Time to implement

21. The Tribunal's order will require the amendment of TREB's MLS® Rules as well as certain standard forms used by TREB's Members, which are promulgated by OREA. TREB's Bylaw sets out an approval process for amending its MLS® Rules, and any remedy must take into account the time required to complete the amendment process.¹⁰ Similarly, any remedy must take into account the time required for OREA to amend its forms. As noted above, time will also be required to implement a technological solution.

¹⁰ Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit LL "MLS Rule Change Policy"

G. Specific comments on the Commissioner's proposed terms

- e. "TREB shall include in the VOW Data Feed all MLS information that is or becomes available to Members through Stratus (or any other means used to provide MLS information to Members)."**

22. Any remedy should be limited to the Disputed Data and not go beyond the Disputed Data. Disputed Data should be made available through an *access* mechanism as opposed to a download mechanism. Disputed Data should only be included with express consumer choice, and on a go-forward basis. As indicated in TREB's initial submission, consent could be achieved through an "opt-in" option in the Agreement of Purchase and Sale. Access should be limited to 6 months of historical data (on a rolling basis) and only on a go-forward basis.

- a. "TREB shall not exclude the Disputed Data from the VOW Data Feed"**

23. See comments immediately above.

- b. "TREB shall not preclude or restrict its Members' use of the information in the VOW Data Feed, but TREB may limit Members' use to being directly related to the business of residential real estate."**

24. Disputed Data should be made available through an *access* mechanism as opposed to a download mechanism. Access should be limited to 6 months of historical data (on a rolling basis) and only on a go-forward basis.

- c. **“TREB shall not preclude or restrict its Members' display on their VOWs of the information in the VOW Data Feed, including the Disputed Data, except for the seller's name and any lock-box codes or similar home security information.”**

25. The remedy should be limited to the Disputed Data (and not include things like seller's name and remarks to brokers). So long as appropriate consents are in place, the Disputed Data should be available to be displayed over a VOW.

- d. **“TREB shall continue to make available the VOW Data Feed to Members and AVPs which shall not in any respect be inferior to the VOW Data Feed existing as of the date of this Order.”**

26. The notion of “inferiority” is subjective and not appropriate for an Order of the Tribunal. The Commissioner's proposed clause “i” would give the Commissioner notice of any changes to the VOW feed, and in the event that the Commissioner found any such changes to be objectionable, he would have recourse under s. 106(1)(a) of the *Competition Act* to challenge the proposed change and seek additional terms prohibiting such change.

27. The notion of AVP access should be restricted to “AVPs of a Member”.

- f. **“TREB shall make available MLS information in the VOW Data Feed no less frequently than TREB makes MLS information available to Members through Stratus (or any other means used to provide MLS information to Members).”**

28. TREB has no comments on this item.

- g. **“TREB shall provide the VOW Data Feed on terms and conditions that are consistent with this Order and are no more onerous or restrictive in any respect than those that apply or are in force as of the date of this Order.”**

29. The first part of this clause is redundant (The Tribunal does not need to make an Order requiring TREB to follow its Order). The second part of this clause is subjective and vague as to “onerous” and “restrictive”. The comments above regarding the Commissioner’s potential recourse under s. 106(1)(a) of the *Competition Act* apply with equal force to this proposed clause.

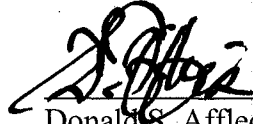
- h. “TREB shall provide the VOW Data Feed on terms and conditions and with technical characteristics that are as least as favourable as those that apply to other platforms or services developed, operated or supported by TREB that provide the Disputed Data to Members’ clients or customers.”**

30. This clause restricts innovation by TREB and TREB’s Members by restricting TREB’s ability to adopt new and superior technology in providing technology tools to its Members and consumers. The order needs to be flexible enough to account for changing technology. This clause is also subjective and vague (evaluation of whether terms and conditions are at least as favourable and whether technical characteristics are at least as favourable). If there are any concerns about TREB’s other platforms or services as compared with VOWs, the Commissioner can move under s. 106(1)(a) of the *Competition Act*.

- i. “TREB shall provide the Commissioner 60 days’ written notice of any proposed change to its MLS Rules and Policies, agreements, or practices concerning VOWs.”**

31. The structure of this sentence should be changed to make it clear that the notice requirement only applies to changes concerning VOWs (eg, the notice requirement does not apply to all changes to the MLS Rules or Policies).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of May, 2016.



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