

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 25, 2016 CT-2011-003 | |
| Jos LaRose for / pour REGISTRAR / REGISTRAIRE | |
| OTTAWA, ONT | # 394 |

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

THE TORONTO REAL ESTATE BOARD

Respondent

- AND -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

**REMEDY SUBMISSIONS OF THE CANADIAN REAL ESTATE ASSOCIATION
May 25, 2016**

A. Introduction and Summary of Submissions

1. CREA provides these submissions in response to the Tribunal's request for further submissions on the issue of remedy, following the Tribunal's release of its decision on the merits of this proceeding. The scope of intervention granted to CREA

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by the Tribunal includes the impact of the "proposed remedies" on CREA and its members.¹

2. The scope of the "proposed remedies" requested by the Commissioner during the pendency of this proceeding has been a moving target, considering the wording of the Amended Notice of Application and the various oral and written submissions made by the Commissioner. Further, CREA has not yet had the opportunity to review the specifics of the order that the Commissioner is requesting the Tribunal to issue. As a result, these submissions are limited to the principles that CREA submits should govern the Tribunal's consideration of the appropriate remedy flowing from its decision. CREA will provide any specific submissions on the scope, wording and form of relief in its reply submissions due on May 31, after review of the Commissioner's draft order that, we understand, will be provided along with the Commissioner's initial submissions on May 25.

3. CREA submits that two key principles should guide the Tribunal's crafting of the appropriate remedy in this case. First, the approach to remedy should be one of restraint in that the Tribunal should ensure that its order is proportionate to the problem it seeks to resolve. The order should be limited to addressing the matters which were at issue in this proceeding – that is, TREB's exclusion of sold prices, pending sold prices²,

¹ *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2011 Comp. Trib. 22, at para. 40.

² A "pending sold price" refers to the price agreed to in a sale where there were no conditions or any conditions were met or waived, and the only event before the sale becomes final is the closing. (The price agreed to in a conditional sale, being a transaction where there are outstanding conditions, such as financing, in addition to the closing date, is not reported in TREB's MLS® System.)

withdrawn, expired, suspended and terminated listings ("WESTs"), and the commission offered to the cooperating buyer broker (collectively, the "Disputed Data Fields") from the data feed provided to TREB's members for the VOW portions of their websites. The order should not be overbroad such that it captures geographic areas, persons, activities, data or policies not addressed in this case. This is clear both from section 79(3) of the *Competition Act* and from the related jurisprudence.

4. Second, CREA submits that the Tribunal should ensure that its order does not prevent TREB from taking steps in the future to ensure that consumers of real estate services are able to make an informed decision, and express their informed consent, regarding the wide dissemination of their personal information over the Internet through a VOW. Measures to ensure an informed decision and informed consent may be necessary both to ensure that privacy is respected and to ensure that TREB's REALTOR® members and TREB's MLS® System continue to be associated with the standards of high quality, professionalism and integrity.

B. Governing Principles With Respect to Remedies

5. The Tribunal's discretion to grant a remedy under s. 79 of the *Act* is guided by the principle set out in s. 79(3) that the order should be proportionate to the anti-competitive acts that the Tribunal seeks to address:

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.³ (emphasis added).

³ *Competition Act*, R.S.C 1985, c. C-34 s. 79(3).

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6. This principle was described by the Tribunal in *Canada (Director of Investigation & Research) v. D&B Co. of Canada Ltd.* as "the requirement under subsection 79(3) of not going farther in our order than necessary to solve the problem".⁴

7. As the Tribunal found in its reasons on the merits in the case at bar, the Tribunal "must only go so far as its considers necessary in order to restore competition in the relevant markets (Laidlaw at p. 351). The Tribunal will therefore look for the least intrusive remedy and determine what will be necessary to restore competition on the basis of the evidence put before it as to how the Relevant Market operates and the effects the VOW Restrictions have had and are having."⁵ (emphasis added).

8. Following this principle of proportionality and restraint, the Tribunal has in past cases refused to make orders that are overly broad or that would include matters that were not at issue or addressed by the parties. For example, in *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.*, the Tribunal refused to grant a series of remedies relating to pricing, holding:

The Tribunal has difficulty accepting that orders of this nature should be issued. The Tribunal's difficulty arises because no argument has been articulated as to why these remedies are sought and what will potentially be achieved through them.⁶

⁴ *Canada (Director of Investigation & Research) v. D&B Co. of Canada Ltd.*, 1995 CarswellNat 2684 (Comp. Trib.), at para. 203 (*D&B Co.*).

⁵ *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7, at para. 780 (*Reasons*).

⁶ *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.*, 1992 CarswellNat 1628 (Comp. Trib.) at para. 196 (*Laidlaw*).

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9. Similarly, in *D&B Co.*, the Tribunal refused to make an over-broadly worded order that could apply, not just to certain types of data that were at issue in the case, but also other types of data not at issue. The Tribunal held that:

[T]he inclusion of these data in an order cannot fairly be considered to have been in issue in this case. The original application did not refer to data other than scanner data. When the Director presented a motion to amend his application, he referred only to the need for an order to cover causal data as well as scanner data. If he was of the view that audit data and warehouse data also had to be included he should have made this clear.⁷

10. In that same case, the Tribunal also refused to prohibit the respondent from engaging in certain practices since no anti-competitive act had been alleged or proven with respect to those practices and no submissions had been made on the subject.⁸

11. In the same vein, the Tribunal should focus on the kind of order requested by the Commissioner in his application, subject to the need to maintain flexibility to modify proposed remedies to achieve an effective order⁹. As a general matter, the Tribunal's orders should be confined to terms that are relatively certain and enforceable.¹⁰

⁷ *D&B Co.*, *supra*, at para. 205.

⁸ *D&B Co.*, *supra*, at para. 206.

⁹ *Canada (Director of Investigation & Research) v. NutraSweet Co.*, 1990 CarswellNat 1368 (Comp. Trib.), at paras. 176-178 (*NutraSweet*); *D&B Co.*, *supra*, at para. 218.

¹⁰ *NutraSweet*, *supra*, at para. 177.

12. Finally, the Tribunal has the residual discretion, in rare cases, to refuse to issue an order despite a positive finding under s. 79.¹¹

C. – Applying The General Principles In This Case

(a) The Remedy Should Be Expressly Limited In Its Scope To TREB And The GTA

13. CREA submits that the scope of the remedy issued by the Tribunal should be limited to TREB and the GTA.

14. There is no dispute that the Relevant Market for the purposes of this proceeding is the GTA. The Commissioner confirmed that no remedy outside the GTA was sought during opening submissions in the re-hearing,¹² and this was again confirmed during closing submissions¹³ and recognized by the Tribunal at paragraphs 160 and 770 of its decision on the merits.

15. As CREA has submitted throughout this proceeding, limiting any remedy to the GTA is appropriate because the factors relevant to the application of section 79, including on the issue of remedy, depend on competitive alternatives to obtaining the Disputed Data Fields, consumer and broker demands and preferences, the regulatory environment and the technical and financial resources of local real estate boards and associations, all of which can vary across the jurisdictions of boards that operate MLS® Systems.¹⁴

¹¹ *D&B Co., supra*, at para. 194.

¹² 2015 Hearing Transcript, volume 1, p. 57.

¹³ 2015 Hearing Transcript, volume 7, p.1191.

¹⁴ Updated Closing Submissions of CREA, October 28, 2015, para. 13.

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16. Further, the Commissioner has agreed that he is not seeking any order against any real estate board or association, other than TREB.¹⁵ This is appropriate considering that no other local real estate board or association is before the Tribunal in this case.

(b) The remedy should be confined to TREB's Members' VOWs

17. Despite the focus on VOWs and the VOW data feed throughout this proceeding, the Commissioner's requested relief, found at paragraph 208 and following of his closing submissions, appears to extend beyond the VOW data feed, something the Tribunal recognized in its questions to Commissioner's counsel during closing arguments.¹⁶ The Commissioner asks that:

the Tribunal prohibit TREB from directly or indirectly enacting, interpreting or enforcing any restrictions that exclude, prevent or discriminate against TREB members who wish to use the information in the TREB MLS system to offers [sic] services over the Internet, including through a VOW.¹⁷

18. It is important to recall that the scope of this case was narrowed to focus on VOWs close to the outset of the initial 2012 hearing. While the Commissioner's Amended Notice of Application requested an order preventing TREB from imposing any restrictions against members who wish to use information from the MLS® System to

¹⁵ This position of the Commissioner was acknowledged and accepted by the Tribunal at para. 770 of its Reasons.

¹⁶ 2015 Hearing Transcript, volume 7, pp. 1187-1190.

¹⁷ Further Closing Submissions of the Commissioner of Competition, October 28, 2015, at para. 208.

offer services over the Internet,¹⁸ the Commissioner confirmed on day four of the first hearing that the Commissioner only sought a remedy with respect to VOWs.¹⁹

19. Restricting any remedy to VOWs is consistent with the position taken by the parties for the duration of this proceeding. The "VOW Restrictions"²⁰ are the sole anti-competitive acts alleged against TREB.²¹ The provision of data by means of the VOW data feed and the competitive effects of TREB's rules with respect to that data feed formed the main thrust of the Commissioner's submissions and of the evidence of the Commissioner's witnesses. This is reflected in the Tribunal's decision on the merits, where the Tribunal confirmed that the conduct at issue in this particular case:

would primarily be [TREB's] withholding of the Disputed Data from its VOW Data Feed, its prohibition of the display of the Disputed Data from its VOW Data Feed, its prohibition of the display of the Disputed Data on a VOW, and its imposition of restrictions on an agent's ability to use the data in its VOW feed for the purposes other than mere display to the public.²²

20. The Tribunal should be cautious not to issue an order unrelated to VOWs or the VOW data feed where, as here, the rationale for doing so has not been addressed or articulated. As in the *Laidlaw* and *D&B Co.* decisions cited above, matters unrelated to VOWs cannot fairly be said to have been at issue in this case, nor has the

¹⁸ Amended Notice of Application dated July 7, 2011, *The Commissioner of Competition v. The Toronto Real Estate Board*, CT-2011-003, at para. 66.

¹⁹ 2012 Hearing Transcript, volume 4 (public), pp. 662-663.

²⁰ As defined by the Tribunal at para. 14 of its Reasons.

²¹ The anti-competitive acts are broken down into three specific acts by the Commissioner being, in brief, (i) the exclusion of the Disputed Data from TREB's VOW data feed; (ii) the prohibition on TREB's members using the information in TREB's VOW data feed for any purpose other than display, and (iii) the prohibition on displaying the Disputed Fields on a VOW. See Reasons, *supra*, at para. 320.

²² *Reasons, supra*, at para. 200.

Commissioner articulated any compelling argument as to why the order should have broader application.

21. Further, an order beyond VOWs would lead to a remedy that extended beyond the acts that the Tribunal found to be anticompetitive, and therefore would be inconsistent with the principle of restraint articulated in s. 79(3) of the Act. There is no finding that anything aside from the VOW Restrictions, as defined in the Tribunal's reasons, has led to an anticompetitive result requiring a remedy in this case.

22. Lastly, confining the remedy to VOWs is consistent with the Tribunal's agreement with CREA's submission that VOWS are simply one part of one type of Internet-based data-sharing vehicle, being broker operated websites, and the remedy should not have the harmful effect of endorsing one type of innovative tool over another.

In this respect, the Tribunal stated:

The remedy to be imposed in this case will therefore not endorse one type of innovative tool over another. It will simply address the restrictions applicable to VOWs, and participants in the Relevant Market will remain free to compete by offering whatever innovative services they deem appropriate, without any bias in favour or against full-information VOWs.²³

23. In order to achieve this important goal of not endorsing one type of innovative tool over another, it is important that the remedy ordered by the Tribunal in respect of TREB and its VOW data feed recognize that different types of innovative Internet data-sharing tools, other than VOWs, may be appropriate in different jurisdictions across Canada, depending on the particular characteristics of those jurisdictions, and make clear that the Tribunal is not suggesting that the provision of

²³ Reasons, *supra*, at para. 778.

VOW data feeds is mandatory across all local boards and associations in Canada who operate an MLS® System.

(c) The Remedy Should Be Confined to the Disputed Data Fields

24. As Chief Justice Crampton recognized in a question to Commissioner's counsel during closing submissions, "the focus of the submissions have all been on the [D]isputed [D]ata [F]ields".²⁴

25. However, TREB's MLS® System contains information beyond the Disputed Data Fields that was intended to be member to member only, and never intended for public consumption, such as the names and contact information of the sellers and instructions or broker's remarks. Instructions or broker's remarks often advise when the owner will be absent from the property, and contain details about lockbox access and other personal information or information with security implications.²⁵

26. CREA submits that, for the same reasons the remedy should not extend beyond VOWs, it also should not extend to information or data beyond the Disputed Data Fields. There has been no argument, evidence or finding that would justify including information aside from the Disputed Data Fields in the VOW data feed. Put plainly, the issue at the heart of this proceeding was whether competition in the GTA has been or is likely to be substantially lessened or prevented if the Disputed Data

²⁴ 2015 Hearing Transcript, volume 7, p. 1190.

²⁵ Updated Witness Statement of Donald Richardson, at paras. 39, 66.

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Fields are not included in TREB's VOW data feed. In addition, it is clear that the additional information in TREB's MLS® System of the type noted above raises serious concerns about personal privacy and security.

27. While not entirely clear, it appears from comments made by Commissioner's counsel during closing submissions in the re-hearing that the Commissioner is not seeking all information from TREB's MLS® System for inclusion in the VOW data feed:

MR. VAILLANCOURT: I had a one second sur-reply, but if you would prefer to ...The only observation is that if --included in the MLS database are the names of the sellers. So if the remedy is put everything in the MLS database on VOW feed, obviously there is issues with that. Just for the --

MR. ROOK: And we don't seek that and I think that's -- he's right about -- we have never sought that.

MR. VAILLANCOURT: So just as far as the need to tailor the -- the resolution to...

MR. ROOK: There's no suggestion of that.²⁶

(d) The Order Granting the Remedy Should Not Prevent TREB From Providing For Buyer and Seller Consent

28. There is no doubt that the decision of the Tribunal in this matter will result in information contained on TREB's MLS® System being disseminated much more widely to the general public than was previously the case. Given this reality, CREA submits that it is important to ensure that consumers understand precisely what use

²⁶ 2015 Hearing Transcript, volume 7, pp. 1380-1381.

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their personal information is being put to and how accessible that information will be when they consent to provide it.

29. As a result, it is important that the Tribunal's order granting the remedy in this case does not prevent TREB from taking appropriate steps to ensure that buyers and sellers are providing informed consent to the use of their private information in the VOW data feed. These steps may include creating new policies, forms or amendments to the standard listing and buyer representation agreements as may be necessary.

30. To provide an example, there remains a concern about the effect on consumers of including the agreed upon sale price in a "pending" sale prior to the transaction closing. The concern remains that including such information on a VOW would prejudice the seller by showing the agreed price to a significant number of potential buyers, should the deal ultimately collapse. While a pending sale is one that does not have conditions remaining to be satisfied, other than final closing, it remains possible that the buyer will not be able to close and the seller may decide it is not in its best interests to pursue specific enforcement of that agreement of purchase and sale.

31. The order granted should not preclude TREB from, for example, requiring REALTORS® to ensure that their clients understand that this type of information may be displayed online to interested members of the public. Similarly, the order should not preclude taking action to ensure that sellers have the opportunity to express their informed consent to the display of a pending sold price through, for example, modification of the standard listing agreement or by introducing new forms as required.

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32. Ensuring that such steps can be taken where appropriate will serve to protect the interests of consumers and will assist them in making informed decisions about the disclosure of their private information. It will also serve to preserve the integrity of CREA's REALTOR® and MLS® Trademarks by ensuring that they are not associated with what consumers view as improper disclosure of their personal information.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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