

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 :

COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

AND

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

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

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COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT May 25, 2016 CT-2011-003 Andrée Bernier for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 396

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OVERVIEW

1. The Tribunal has determined that the evidence before it warrants a remedy under section 79 of the *Competition Act*. TREB respectfully disagrees with conclusions reached by the Tribunal and the findings that underpin those conclusions. TREB is participating in the remedy portion of this hearing to make submissions on the appropriate remedy given the findings and conclusions of the Tribunal. These submissions are not to be interpreted to mean that TREB agrees with those findings or conclusions or consents to any remedy.

2. Any remedy ordered by the Tribunal pursuant to section 79(2) of the *Competition Act* must “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.”¹ In the context of this case, the Tribunal must bear in mind the rights of the members of the home-buying and home-selling public in the GTA, TREB’s Members, and TREB itself and fashion the least intrusive remedy possible. Any remedy must also, of course, be supported by the evidence before the Tribunal.

3. The Tribunal’s remedy must be consistent with *PIPEDA* and the principle of informed consent, it must be tailored to ensure that MLS® data is used and disclosed solely for the purpose of providing real estate services, it must ensure that adequate safeguards remain in place to prevent abuses of applicable law and the proprietary rights that TREB and its third-party licensors have in this data, and it must prevent redistribution of MLS® data other than for the limited purpose of providing real estate services. The Tribunal, in ordering a remedy, also cannot ignore the costs to TREB which may be involved in implementing that remedy and ought not to restrict TREB from recovering such costs.

¹ *Competition Act*, RSC 1985, c C-34 s. 79(3).

4. Finally, any remedy ordered by the Tribunal must be prospective rather than retrospective in nature. This is particularly important given *PIPEDA*'s requirement for informed consent to the use and disclosure of personal information of buyers and sellers of real estate and of Realtors®.

A. The need for informed consent²

5. The Tribunal has asked for submissions on the appropriate remedy in part because of TREB's submission that the Tribunal should exercise care in crafting a remedy to ensure that "the personal information of individuals is not widely disclosed on the Internet without their informed consent."³

6. No matter the findings the Tribunal has made regarding TREB's motivations in 2011 at the time the VOW Policy and Rules were adopted, the remedy ordered in this case must comply with and be consistent with Canadian law, including the requirements of *PIPEDA*, as amended by the *Digital Privacy Act, 2015*.

i) The Requirements of *PIPEDA*

7. The purpose of *PIPEDA* is to establish rules and principles governing the collection, use, and disclosure of personal information in a manner that recognizes the right of privacy of individuals in an era where technology increasingly facilitates the circulation and exchange of information.⁴ The principles of *PIPEDA* are squarely engaged in this case concerning the use and disclosure of personal information on VOWs and over the Internet.

² TREB also relies on its 2012 closing submissions on this point at paras. 456-480.

³ Reasons at para. 771.

⁴ *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5 ("*PIPEDA*"), s. 3.

8. *PIPEDA* has established a regime where the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information.⁵ Consent must be meaningful and informed: the individual giving consent must understand how the information will be used and disclosed.⁶ In obtaining consent, the reasonable expectations of the individual are relevant.⁷ An organization might not obtain meaningful consent if it uses an overly broad consent provision.⁸

9. The informed consent provisions of *PIPEDA* were significantly augmented in 2015 by way of Bill S-4, the *Digital Privacy Act*. Pursuant to the amendment, *PIPEDA* now provides that:

“the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization’s activities are directed would understand the nature, purpose and consequences of the collection, use, or disclosure of personal information to which they are consenting”⁹ [emphasis added]

10. *PIPEDA* also provides that an organization is prohibited from, as a condition of supplying a product or service, requiring an individual to consent to the collection, use, or disclosure of information beyond that required to fulfill the explicitly specified, and legitimate purpose(s) for which the information is being collected.¹⁰

⁵ *PIPEDA*, Principle 4.3.

⁶ *PIPEDA*, Principle 4.3.2.

⁷ *PIPEDA*, Principle 4.3.5.

⁸ *PIPEDA Case Summary #385*, [2007] C.P.C.S.F. No. 21 “Insurance broker asked to amend privacy language” at preamble and paras 2, 11; *PIPEDA Case Summary #2002-83*, “Alleged disclosure of personal information without consent for secondary marketing purposes by a bank”, online: <http://www.priv.gc.ca/cf-dc/2002/cf-dc_021016_1_e.asp> at p 2, 3.

⁹ Bill S-4, *An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act*, SC 2015 Ch 32, and in particular s 5 therein; *PIPEDA*, s 6.1

¹⁰ *PIPEDA*, Principle 4.3.3.

11. The provisions of *PIPEDA* apply despite any other Act of Parliament unless the other Act expressly declares that it operates despite the provisions of *PIPEDA*.¹¹

ii) *PIPEDA* applied to the remedy in this case

12. The Tribunal's remedy should ensure that the personal information of home buyers and sellers in the GTA is not widely disclosed on the Internet without their informed consent. Consumers must understand the nature, purpose, and consequences of such a broad public dissemination of their personal information.

13. The current consents in place for the Listing Agreement, Buyer Representation Agreement, and the Buyer Customer Service Agreement do contain language pertaining to use and distribution of transactional information.¹² These consents enumerate several specific purposes for which the buyer's or seller's personal information may be used or disclosed by the brokerage collecting such information and, where the property is an MLS® listing, by the appropriate board, including the creation of comparative market analyses, and also contain a broad general "catch-all" consent clause for the use (but not disclosure) of the data by the brokerage and/or board.

14. Signatories of the Listing Agreement, Buyer Representation Agreement, or Buyer Customer Service Agreement have not given informed consent for their personal information to be widely and permanently distributed over the Internet for any member of the general public to see after their transaction closes, because the disclosure of this information over the Internet is so far beyond the examples enumerated within the consent clause. In order for consumers to provide informed consent within the meaning of privacy legislation, consumers must understand the type of information to be disclosed, to whom it would be disclosed, and

¹¹ *PIPEDA*, s 4(3).

¹² See Appendix "A" to these submissions for the consent clauses

the purpose for which it would be disclosed. The wording of the current consents does not adequately inform consumers of the nature, purpose, or consequences of online dissemination of their personal information. Posting and broad dissemination of transactional information that is Disputed Data (or any other sensitive personal information of consumers) on the Internet is not within the reasonable expectation of buyers and sellers. None of these agreements contain a valid or meaningful consent to the distribution of such transactional information over the Internet.

15. Furthermore, some buyers sign neither a Buyer Representation Agreement nor a Buyer Customer Service Agreement.¹³ For these buyers, there is no consent.

16. In order to be compliant with *PIPEDA*, the Disputed Data should not be permitted to be displayed on a VOW unless both the buyer and the seller have expressly consented to having the information made available through a VOW. Such data should not be used for data analysis purposes (eg, creation of heat maps or neighbourhood trends) unless the buyer and seller have expressly consented to having the information used for that purpose.

17. 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 and display of their private information. These steps may include creating new policies, forms or amendments to the standard listing and buyer representation agreements as may be necessary.

18. Consumers should have a choice as to whether they want to consent to have their information a) disclosed on a VOW, or b) used by authorised users of the TREB MLS® system for data analysis purposes. Consumers should not be forced to automatically consent

¹³ Reconsideration Hearing Transcript, October 6, 2015, Examination of Don Richardson, p. 733 line 16 – p. 734 line 1.

to such use or disclosure by virtue of them buying or selling their home using TREB's MLS® system. Such use or disclosure goes beyond what is required for the purpose of buying or selling their home on the MLS® system and is a secondary purpose to buying or selling a house. As discussed above, *PIPEDA* prohibits such "tied consent."¹⁴ The notion of tied consent is particularly problematic for privacy-conscious consumers who have an interest in keeping their private information (including sold and pending sold information and other sensitive personal information) private and not made widely and readily available to the general public, and for certain consumers who may have particular safety-related concerns about their personal information.

19. Consumers must be given an express opt-in choice to consent (or not) to the Disputed Data being used or disclosed for secondary purposes (meaning disclosure on a VOW or use for data analysis purposes). This could be accomplished by including an opt-in consent box on the agreement of purchase and sale, a document signed by both the buyer and the seller.

20. Any remedy regarding the use or disclosure of any Disputed Data should only be done on a go-forward basis, since the proper consents are not in place for the historical MLS database.

B. Additional Concerns about Specific Fields

i) Pending Solds

21. Pending sold prices should not be made available for display on a VOW, because this sets a reserve price to the prejudice of the seller in the event that the sale falls through. This concern is not just limited to conditional sales. Home sales do fall through after the conditions

¹⁴ *PIPEDA*, Principle 4.3.3.

have been waived (or in transactions where there were no conditions in the first place),¹⁵ and the prejudice to these home sellers is the same as would be experienced where a conditional sale falls through.

22. Pending sold prices should, if anything, only be available for internal use (data analysis) purposes by VOW brokerages and other authorised users of the TREB MLS® system, provided that buyers and sellers provide informed consent to this use.

ii) Cooperating Broker Commissions

23. The offer of cooperating brokerage commission is a Member to Member contractual issue. The Commissioner's theory of consumer harm regarding the cooperating brokerage offer of commission (buyer steering) was not made out.¹⁶

24. The Tribunal's principal concern with the cooperating brokerage offer of commission appears to be related to a savings of time regarding VOW operators calculating rebates. TREB submits that the cooperating brokerage offer of commission should be available for internal use for the purpose of calculating rebates, but that the offer of commission should not be available for display on a VOW.

iii) Expired and Terminated Listings

25. In 2005, the Privacy Commissioner expressed a concern to CREA about a practice of prospective sellers being contacted after their listing agreements became expired by those who were marketing their real estate services to such prospective sellers.¹⁷ The Privacy Commissioner observed that prospective sellers had not consented to this use of their personal

¹⁵ Exhibit CR-142, Updated Witness Statement of Donald Richardson at para. 46.

¹⁶ Reasons at paras. 634-638.

¹⁷ See Appendix B attached hereto.

information, and she mandated that express opt-in consent should be sought in order for an expired listing to be used in such a way. This directive of the Privacy Commissioner is reflected in TREB's current Listing Agreement where post-expiry and post-termination contact is optional at the choice of the home seller.¹⁸

26. TREB cannot make all expired and terminated listings available for display on a VOW. If it did so, it would be impossible to distinguish between those sellers for whom consent has been given and those for whom it had not. For those that did not consent, universal availability of expired and terminated listings on a VOW would facilitate unwanted contact from those marketing real estate services and also other services, beyond the scope of the consent the consumer has given through the listing agreement. Given the concerns of the Privacy Commissioner, specific opt-in consent is required before an expired listing can be available for display on a VOW.

C. Verification of Closed Transactions

27. TREB strives to ensure accuracy in its MLS® system database through the Rules, Policies, and systems it has in place, but it cannot completely guarantee the accuracy of that data.

28. TREB does not currently conduct any independent verification of whether a given transaction actually closes or not. In order for TREB to have the confidence that any given transaction has closed such that TREB is comfortable making a representation to the public of that closing, TREB will need to enter into an agreement (likely at significant cost) with Teranet to verify that information. In the absence of such verification, information about

¹⁸ Exhibit Y to Exhibit CR-142, Updated Witness Statement of Donald Richardson at p. 521 (immediately above clause 12).

pending sold transactions that have fallen through and not actually closed could be inadvertently disclosed through a VOW, to the prejudice of the home seller.

D. Confining the use and disclosure of MLS® data to its intended purpose

29. The Tribunal did not find that TREB has no proprietary interest in the data within its MLS® system database. Providing access to the Disputed Data is not the same as providing a copy of the data or of the entire MLS® system database, and the Tribunal must consider that providing access to the data will provide a sufficient remedy. Any remedy imposed by the Tribunal must be tailored in such a way to ensure that data from TREB's MLS® system database is used and disclosed by TREB Members solely for the purpose helping consumers buy and sell homes and cannot be recopied and redistributed on a mass scale by unscrupulous third parties.

30. TREB is concerned that certain individuals want access to the data in its MLS® system database not to trade in real estate, but to monetize that data for their own personal gain. Although TREB does not commercially exploit the data in its MLS® system database,¹⁹ the data in its MLS® system database has great commercial value.

31. A non-exhaustive list of ways that the data could be misused include: copying, redistributing, or selling data to third parties for data mining and/or predictive marketing purposes; selling information to service suppliers (roofing or window companies targeting homes that are of a certain age, pool maintenance companies targeting homes that have a pool, moving companies targeting homes that have just sold); or selling information to mortgage brokers around the time a mortgage renewal would be expected. These derivative uses of TREB's data are not at all consistent with the underlying consents given to TREB

¹⁹ Exhibit CR-142, Updated Witness Statement of Donald Richardson at para. 47.

members by consumers and upon which TREB relies when its members submit the data to TREB.

32. Any remedy granted by the Tribunal should be structured to ensure that TREB's MLS® data is not misused or disclosed for an unauthorized purpose and must include safeguards to prevent such misuse or unauthorized disclosure. TREB expects to have more substantive submissions to address its "intended use" concerns in Reply to the Commissioner's submissions.

E. TREB's proprietary interest in the MLS® Database

33. TREB owns the TREB MLS® system database, which has been assembled over decades by TREB and its Members.²⁰ TREB and its Members have invested a significant amount of time, energy, and expense in creating the forms which collect the data, selecting the information to be included in the forms and on the MLS® system database as well as maintaining the accuracy and currency of the MLS® system database.²¹ The submission above on the uncontrollable nature of data is equally applicable to TREB's submissions on the negative impact and irreversible and irreparable that a remedy might have on TREB, its Members, and consumers.

34. The Tribunal should not grant a remedy that would create the possibility of another service provider creating a rival MLS® system by putting TREB's MLS® system database out in the world to be copied, redistributed, or to facilitate the creation of derivative works. Such an outcome would significantly harm TREB's interests and would result in unfair competition using TREB's own proprietary data. This would also significantly harm the interests of TREB's Members and consumers, since a splintering of real estate listings across

²⁰ In addition to owning the MLS Database, TREB maintains its position that it has copyright in the MLS Database.

²¹ Reasons at para. 78; Exhibit CR-142, Updated Witness Statement of Donald Richardson at para. 43

MLS® providers would greatly reduce the utility of TREB's MLS® system (a two-sided platform with network effects) to its remaining Members and to consumers.

35. The Tribunal should bear in mind that *access* to the Disputed Data could be provided without requiring TREB to deliver a wholesale copy of its entire MLS® system database to whomsoever should request it (as would happen if the Disputed Data were included in a VOW Data Feed). Once a copy of the database is sent to any third party, any value which TREB's MLS® system database might have is entirely destroyed. Ordering access to the Disputed Data (or some of it) interferes with TREB's rights much less than ordering TREB to provide copies of its MLS® system database, and would achieve the purpose of the order in the same way.

36. The Tribunal should also be mindful that if the remedy does not sufficiently protect the privacy interest of consumers, TREB's members may opt out of TREB and join one of the neighbouring and overlapping MLS® systems that already includes GTA listings. This would place TREB at a competitive disadvantage to other real estate boards in the geographic vicinity if TREB alone is subject to rules that erode privacy interests. This concern also applies to any potential rival GTA MLS® systems created with TREB's proprietary data as a result of the Tribunal's Order, discussed above, which would not be subject to the Tribunal's Order as would TREB, and would have an unfair competitive advantage over TREB.

37. TREB also needs to be in a position to take appropriate action against entities that scrape its MLS® system database. If the Tribunal were to order TREB to provide a complete copy of its data (as opposed to providing access to the data under licence, for example), it would become impossible for TREB to pursue data scrapers who misuse its MLS® system database.

38. The remedy in this case must be tailored in a way to minimally impair the rights of TREB and its Members and promote the ongoing viability of TREB's MLS® system.

F. Remedy should be restricted to VOWs

39. The Tribunal has noted that it will remain open to considering the inclusion of terms in its Order that go beyond VOWs.²² TREB submits that the Tribunal's Order should not go beyond VOWs.

40. During the course of the initial hearing, counsel to the Commissioner advised that the Commissioner was not seeking a remedy for Internet vehicles other than VOWs.²³ In spite of the general nature of the Commissioner's pleading regarding remedy, the Commissioner's position at the initial hearing confines the potential relief in this matter solely to VOWs.

41. In addition, the evidence and submissions before the Tribunal were focused on VOWs. In crafting a remedy the Tribunal will "determine what will be necessary to restore competition on the basis of the evidence put before it."²⁴ There is no basis in the evidence for granting a remedy that goes beyond VOWs.

G. Remedy should be limited to the Disputed Data

42. The evidence and submissions before the Tribunal were focused on the Disputed Data on a VOW. As with the above submission on limiting the remedy to VOWs, there is no basis

²² Reasons at para. 28.

²³ Hearing Transcript, September 13, 2012 p. 662 line 19 – p. 663 line 4: "[T]he intervention that my friend's entitled to ask questions about is the appropriate terms of use, conditions, requirements to be included in a policy rule that implements Internet data-sharing vehicles other than VOWs, other than VOWs. There are no rules, terms of use or any other requirements being requested in this application by the Commissioner with respect to Realtor.ca, with respect to Internet data exchanges, or IDXs for short, or any other Internet vehicle that is used or utilized in the real estate industry."

²⁴ Reasons at para. 780.

in the evidence to evaluate the necessity or appropriateness of a remedy that goes beyond the Disputed Data.

43. Apart from the general submission that a remedy beyond the Disputed Data would not be appropriate in this case, there are two types of data in the MLS® system database that would be particularly inappropriate for broad dissemination on the Internet or otherwise: sensitive data, and licensed third party data.

i) Sensitive data

44. Among the personal information in TREB's MLS® system database are some data points which are particularly sensitive. This sensitive data include the name of the seller, their contact information, and the "remarks for brokerages." Remarks for brokerages are showing remarks which often contain information that is particularly private or sensitive in nature such as when the owner will be absent from the property, who might be present in the house at certain times, details about lockbox access, and so on.²⁵

45. Sensitive data is not shared by "traditional brokers" with members of the public, and there is no evidence to suggest the contrary. The Tribunal should make no order requiring the dissemination to the general public of this sensitive data.

ii) Third Party Data

46. Some of the data contained in the TREB MLS® system database comes from third party licensors of such data including: Teranet, MPAC, Realnet, Altus, and Microsoft. TREB's use of this data is restricted to the terms of its agreement with third party providers,

²⁵ Exhibit CR-142, Updated Witness Statement of Donald Richardson at para. 39.

including restrictions on distribution.²⁶ The remedy granted by the Tribunal should not require TREB to breach the agreements it has with its third party data suppliers.

H. TREB's Liability Concerns

47. The improper use and disclosure of personal information and the limitations of TREB's licenses to third-party data within its system are issues which, if not properly addressed by the Tribunal in ordering its remedy, could make TREB subject to complaints and possible claims from members of the public, from TREB Members, and from TREB's suppliers.

48. TREB is concerned that it not be subject to legal liability as a result of complying with whatever remedy the Tribunal orders. The Tribunal should be mindful of this risk when formulating a remedy.

I. TREB should be able to pass on any additional costs

49. In the event that the Tribunal's Order increases TREB's costs in any way, TREB should be permitted to pass along these additional costs as a service fee. Such a result would be consistent with the Tribunal's remedy decision in the *D&B* case, where the Respondent was made to share its historical scanner data with a competitor, but the competitor was required to pay 50% of the costs the Respondent had incurred in "cleaning up" that data.²⁷

²⁶ See, for example, Exhibit CR-142, Updated Witness Statement of Donald Richardson at para. 189, and MPAC Contract, Exhibit O to Exhibit CR-142, Updated Witness Statement of Donald Richardson at clause 5.2.

²⁷ *Canada (Competition Act, Director of Investigations and Research) v. The D&B Companies of Canada Ltd.*, [1995] C.C.T.D. No. 20 at p.51 (of QL); Joint Book of Authorities Tab 25.

Summary

50. TREB will be able to provide more detail in its submissions in reply to those of the Commissioner in terms of logistics and specific modes of implementation.

51. In considering a remedy, however, TREB submits that the Tribunal must bear in mind the principles that

(a) The remedy must respect and comply with existing laws, including privacy legislation. Personal information—which includes sale price—must not be ordered disclosed if doing so would violate the consents from buyers and sellers. This means that the remedy must be prospective and cannot be in respect of historical data.

(b) The remedy must bear in mind the potential safety concerns of certain sensitive data fields as well as the potential additional costs to TREB of complying with the order and TREB's ability to recover such additional costs from end users.

(c) Section 79(2) requires the Tribunal to limit interference with the rights of any person to whom the order is directed only to the extent necessary to achieve the purpose of the order. This includes ensuring that TREB's proprietary rights in the data are protected (and that access to the Disputed Data can be provided without requiring TREB to deliver a wholesale copy of its MLS® system database to whomever requests it), that TREB is not exposed to complaints and claims as a result of complying with the order, and that TREB is not compelled to breach any other commercial agreements in order to comply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2016.



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The Toronto Real Estate Board

Appendix A

TREB - Consent Clauses

Listing Agreement (CR-142, Exhibit Y)

11. USE AND DISTRIBUTION OF INFORMATION: The Seller consents to the collection, use and disclosure of personal information by the Brokerage for the purpose of listing and marketing the Property including, but not limited to: listing and advertising the Property using any medium including the Internet; disclosing Property information to prospective buyers, brokerages, salespersons and others who may assist in the sale of the Property; such other use of the Seller's personal information as is consistent with listing and marketing of the Property. The Seller consents, if this is an MLS(R) listing, to placement of the listing information and sales information by the Brokerage into the database(s) of the MLS(R) System of the appropriate board, and to the posting of any documents and other information (including, without limitation, photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions) provided by or on behalf of the Seller into the database(s) of the MLS(R) System of the appropriate Board. The Seller hereby indemnifies and saves harmless, the Brokerage and/or any of its employees, servants, brokers or sales representatives from any and all claims, liabilities, suits, actions, losses, costs and legal fees caused by, or arising out of, or resulting from the posting of any documents or other information (including, without limitation, photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions) as aforesaid. The Seller acknowledges that the database, within the board's MLS(R) System is the property of the real estate board(s) and can be licensed, resold or otherwise dealt with by the board(s). The Seller further acknowledges that the real estate board(s) may: during the term of the listing and thereafter, distribute the information in the database, within the board's MLS(R) System to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others; market the Property, at its option, in any medium, including electronic media; during the term of the listing and thereafter, compile, retain and publish any statistics including historical data within the board's MLS(R) System and retain, reproduce and display photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions which may be used by board members to conduct comparative analyses; and make such other use of the information 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. The Seller acknowledges that the information, personal or otherwise ("information"), provided to the real estate board or association may be stored on databases located outside of Canada, in which case the information would be subject to the laws of the jurisdiction in which the information is located.

Buyer Representation Agreement (CR-142, Exhibit Y)

8. USE AND DISTRIBUTION OF INFORMATION: The Buyer consents to the collection, use and disclosure of personal information by the Brokerage for such purposes that relate to the real estate services provided by the Brokerage to the Buyer including, but not limited to: locating, assessing and qualifying properties for the Buyer; advertising on behalf of the Buyer; providing information as needed to third parties retained by the Buyer to assist in a transaction (e.g. financial institutions, building inspectors, etc...); and such other use of the Buyer's information as is consistent with the services provided by the Brokerage in connection with the purchase or prospective purchase of the property.

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.

The Buyer acknowledges that the information, personal or otherwise ("information"), provided to the real estate board or association may be stored on databases located outside of Canada, in which case the information would be subject to the laws of the jurisdiction in which the information is located.

Buyer Customer Service Agreement (A-161)

7. USE AND DISTRIBUTION OF INFORMATION: The Buyer consents to the collection, use and disclosure of personal information by the Brokerage for such purposes that relate to the real estate services provided by the Brokerage to the Buyer including, but not limited to: locating, assessing and qualifying properties for the Buyer; advertising on behalf of the Buyer; providing information as needed to third parties retained by the Buyer to assist in a transaction (e.g., financial institutions, building inspectors, etc...); and such other use of the Buyer's information as is consistent with the services provided by the Brokerage in connection with the purchase or prospective purchase of the property. 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. The Buyer acknowledges that the information, personal or otherwise ("information"), provided to the real estate board or association may be stored on databases located outside of Canada, in which case the information would be subject to the laws of the jurisdiction in which the information is located.

Appendix "B"

Dispatch 2006-01

This document contains information of interest to your members.
We thank you in advance for your collaboration in passing this information along to your membership.

To: Presidents and Executive Officers of all
Real Estate Boards and Provincial/Territorial Associations
Date: January 25, 2006

Re: Decision of Privacy Commissioner on Issue of Calling Expired Listings

On December 23, 2003, CREA released Dispatch 2003-17 dealing with (amongst other things) the use of expired listing information on MLS® systems by REALTORS® to contact sellers and market their services. A copy of this Dispatch is attached.

The bottom-line recommendation was that seller information on an MLS® system cannot be used by REALTORS® to contact sellers whose listings have expired to market their services. The rationale was that this was "personal information" within the meaning of PIPEDA, and no consent had been given by sellers for this particular use. This was an extremely controversial recommendation and has been the subject of heated debate for the last two years.

Some time ago, a privacy complaint was filed by a real estate professional with the federal Privacy Commissioner, arguing that another salesperson had contacted a seller whose listing had expired, using the information on the MLS® system. CREA has been monitoring the progress of this complaint.

While the decision of the privacy commissioner has not at the time of this writing been published, CREA received a letter from the Commissioner on December 21, 2005 setting out the case and her decision. The Federal Privacy Commissioner has come to the same conclusion as CREA and has determined that this use of information on the MLS® system for this purposes offends PIPEDA. A copy of the letter from the Privacy Commissioner is attached.

Please note: This is a decision of the Federal Privacy Commissioner interpreting PIPEDA, and may not necessarily apply in the same manner to those jurisdictions which are governed by provincial privacy legislation, namely British Columbia, Alberta and Quebec. Boards/Associations in those provinces are encouraged to consult their own counsel in this regard.

THE FACTS OF THE CASE

The Respondent (the person against whom the complaint was made) phoned a seller after the listing had expired. The seller had, in fact, relisted with the original listing agent, but this was apparently unknown to the Respondent. The Respondent argued that he did not use MLS® information to call the seller, but rather heard from some other source that this person wanted to sell, and then got the number from the phone book. As telephone directory information can be used without consent, he argued that this exception applied. The Privacy Commissioner found that scenario to be "improbable". What she found to be "probable" was that all of the information, including the contact information, was taken from the MLS® system.

Using the same rationale as is set out in CREA's Dispatch 2003-17, she determined that this use of the MLS® information was contrary to PIPEDA.

A very interesting aspect of the decision was that the Privacy Commissioner found that even if the Respondent did use the telephone directory to get the phone number, the initial information about the expired listing (in her interpretation of the facts) came from the MLS® system and this "linking" resulted in more information being used than mere contact information. Therefore all of the information that came into play was not "publicly available" even if the phone number itself was exempt. This is significant in that it clarifies an often asked question -can a salesperson call an expired listing if the only information taken from the MLS® system is the fact that the listing has expired and the actual contact information is taken from the phone book? The answer now appears to be no.

The Application of Consent Clauses

The letter from the Privacy Commissioner then asks that CREA assist in recommending that expired listing consent clauses be included in all listing agreements. CREA provided sample wording for a consent clause in Dispatch 2003-17.

There does, however, appear to be a difference in emphasis between the advice CREA has given and the recommendation in the letter from the Privacy Commissioner. CREA's approach was to affirm the need for education of members so that they were aware of the limitations in the use of the information. We did not insist that a consent clause be incorporated into the agreements. In fact, we cautioned that the consent itself might not be valid as PIPEDA imposes a 2-pronged test. We stated: *"Not only must the consent of the individual be obtained, the use itself must be "reasonable" in terms of the purpose for which the information was collected. It is not clear whether obtaining the consent of the seller to be contacted by other REALTORS® on the expiry of the listing would meet this test - at least in the context of a listing agreement."*

CREA has spoken to representatives of the Privacy Commissioner's Office who have confirmed that in their view, the option should be given to the seller, and in that context, **an opt-in consent clause should be incorporated into the listing agreement.**



This decision serves to emphasize the need for this type of consent clause in listing agreements. We would therefore recommend that all provincial associations review their listing agreements with a view to adding expired listing consents. **It is extremely important to ensure that the consents are worded in such a way that the seller is required to actively "opt-in"** in order to provide consent. In our view, the sample clause in Dispatch 2003-17 contains adequate opt-in wording.

Yours very truly,

Gerry Thiessen,
President

GT/as
Attachments

**Privacy Commissioner
of Canada**

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CREA / ACI



Mr. William D. Harrington, B.A., LL.B.
Legal Counsel and Privacy Compliance Officer
The Canadian Real Estate Association
1600-344 Slater Street
Ottawa, ON K1R 7Y3

DEC 20 2005

Dear Mr. Harrington:

I would like to take this opportunity to bring to your attention our Office's concerns regarding the practice of using expired MLS listings to contact sellers. As you are aware, our Office has been considering the implications of this practice within the context of a complaint filed with us under the **Personal Information Protection and Electronic Documents Act**. We are now in a position to provide our comments on the practice, and would appreciate your organization's assistance in addressing our concerns.

In 2004, we received a complaint alleging that a broker improperly used the personal information of another broker's client (contained on an apparently expired MLS listing) when it contacted the client to market its services to her. The following is a summary of our analysis of the facts within the framework of the **Act**.

When the seller signed the listing agreement, she authorized the listing broker to use and disclose all information she provided for the purpose of listing, marketing, and selling the property. She also consented to the real estate board distributing the information to authorized users of the MLS, which may include other brokers, for the purpose of dealing with her listing broker in order to sell her home. The seller did not, however, consent to her personal information being used by other agents to market their services to her.

The respondent (the other broker), however, believed that paragraph 7(2)(c.1)¹ should apply, contending that the agent used publicly available personal information to contact the seller. The respondent argued that its agent noticed the expired listing, or somehow knew that the individual wanted to sell, and then searched a telephone directory to obtain the seller's name and phone in order to contact her.

¹ An exception to consent for the use of personal information is provided under paragraph 7(2)(c.1), which states that an organization may without the knowledge or consent of the individual, use personal information only if it is publicly available and is specified by the regulations. Among other things, the regulations specify that certain personal information consisting of the name, address and telephone number of a subscriber that appears in a telephone directory that is available to the public, where the subscriber can refuse to have the personal information appear in the directory, is publicly available information.



We found such a scenario improbable. The more likely sequence of events, in our view, was that the agent noticed in the MLS system that the listing had expired or was about to expire and contacted the seller using the information contained on the listing. While in some cases that contact information may also be found in a publicly available directory, this may not be true in every case. For example, some sellers may provide their unlisted telephone number or a cell phone number to their broker for a listing.

However, even if the broker did use a publicly available directory to obtain contact information, there was the matter of the link between the intention to sell, which the agent knew from the MLS system, and the contact information. As a result of this linking, there was more information being used in this instance than mere contact information, and all of it was contained in a database available only to board members and not available to the public. Thus, in our view, the information used was not publicly available personal information as defined in the Regulations, and the respondent could not rely on paragraph 7(2)(c.1) to use the personal information in the listing without consent.

In this case, the seller had signed a new listing agreement with her original broker prior to the other broker's agent contacting her, and thus it was clear that she had not consented to being contacted by anyone other than her own agent. We then considered whether our analysis would be different if the listing had expired and there had not been a new one in effect when the other agent called.

In reviewing the wording of the listing agreement, I did not think that sellers would infer that other agents could contact them after the listing has expired, nor did I have the impression that listing agents routinely inform them of such a possibility. In light of this, I would conclude that sellers do not consent to their personal information being used by other agents to contact them to market their services after the listing has expired.

During the investigation, the respondent argued that the **Act** was not written to restrict competition or trade. I would agree. The **Act** does not stop businesses from competing but rather says that businesses need consent from individuals to use their personal information for legitimate business purposes. Thus, when it comes to using expired listings to contact sellers, the **Act** requires sellers to be informed of the practice when they list their property and given the choice of having their personal information used in such a manner. Their choice should be recorded on the listing so that other agents know. Some sellers may want to be approached; others may not. As it is their personal information that is being used, it is ultimately their choice.

I have therefore written to you to recommend that CREA and/or the provincial real estate associations insert adequate consent clauses into listing agreements to ensure that sellers are informed of the practice (of other agents using expired listings to market their



services) when they list their property, and to be given the opportunity to opt in to such a use and have that choice recorded on the MLS listing. I would be pleased to receive CREA's comments on this recommendation.

In the meantime, I have recommended that the respondent organization in this complaint advise its agents to cease using expired MLS listing information to market themselves to expired listing sellers until such time as the listing agreement language can be amended.

If you have any questions or concerns regarding the results of this investigation, please do not hesitate to contact Garth Cookshaw, Senior Privacy Investigator, at 995-1506. I trust that the foregoing information proves useful to you, and I would like to thank you for your assistance in this matter.

Yours sincerely,

A handwritten signature in cursive script that reads "Jennifer Stoddart".

Jennifer Stoddart
Privacy Commissioner of Canada

CT-2011-003

COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

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

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