

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

November 12, 2015

CT-2011-003

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

357

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

THE TORONTO REAL ESTATE BOARD

Respondent

- AND -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

UPDATED CLOSING SUBMISSIONS OF THE CANADIAN REAL ESTATE ASSOCIATION
October 28, 2015

A. Overview

1. This proceeding is not about whether real estate brokers should be permitted to use the Internet to innovate and compete. They are already doing so, and doing so successfully, using a number of different Internet data-sharing vehicles. This

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proceeding is also not about whether brokers should be permitted to innovate and compete by incorporating a VOW into their websites. TREB's VOW Policy permits VOWs, and brokers in the GTA have been incorporating VOWs into their websites for many years. Lastly, this proceeding is not concerned with whether brokers should have access to the information contained in TREB's MLS® System. Brokers already have such access and share such information with their clients.

2. The issue is whether competition in the relevant market is likely to be substantially lessened or prevented if certain fields of information from TREB's MLS® System (the so-called "Disputed Fields") are not included in TREB's VOW data feed, even though they are accessible through other means. The "Disputed Fields" are: (i) sale price, (ii) pending sale price, (iii) WEST listings and (iv) cooperating buyer commission information.

3. Accordingly, the question is not whether the Disputed Fields are accessible to brokers and their clients but, rather, how they are accessible. While the Disputed Fields are excluded from the TREB VOW data feed, they are available to TREB members from TREB's MLS® System and other sources and can be provided by TREB members to their clients through means other than a VOW.

4. As was the case in 2012, CREA's closing submissions focus on the impact on CREA's members and trademarks of the remedy the Commissioner requests be imposed on TREB. The remedy's impact requires a consideration and balancing of the potential incremental benefits and harm that may result from the implementation of the remedy, and engages the third part of the section 79 test – being whether TREB's

exclusion of the Disputed Fields from its VOW data feed has had, is having or is likely to have the effect of substantially preventing or lessening competition in the relevant market.¹

5. CREA's position in this proceeding can be illustrated through seven main themes.

6. First, there is no question that the Internet has had a significant effect on the provision of real estate brokerage services, most particularly in the provision of relevant property information to consumers. CREA has supported and continues to support the distribution of relevant, appropriate and accurate information to consumers through the Internet and remains committed to providing REALTORS® with the tools they need to service consumers in the Internet age.

7. Second, innovation in brokerage services through use of the Internet is not restricted to VOWs alone. A VOW is simply a portal to certain MLS® listing information that exists on a broker's website and that website can and usually does contain additional relevant and detailed information that is valued by consumers. In this sense, VOWs are properly viewed as one part of one type of Internet data-sharing vehicle, being broker operated websites. In addition to broker operated websites incorporating VOWs, there are many other Internet data-sharing vehicles, including REALTOR.ca, IDXs, CREA's DDF® and third party websites. A VOW on a broker's website is therefore only one of the many options, and it is important from CREA's perspective that

¹ The fact that CREA will not be addressing the first two elements of the section 79 test is not an admission that the Commissioner has satisfied those two elements but simply a reflection of the issues on which CREA was permitted to intervene.

the result in this proceeding not have the harmful effect of endorsing one type of innovative tool over another.²

8. Third, VOWs do not and were never intended to replace brokers. VOWs provide a means by which a broker can partially provide one of the services a broker normally provides to a client, being the provision of relevant property information that a client needs or wants to buy or sell real estate. VOWs do not provide the entire range of information required, nor do they fully analyze that information, show houses, negotiate prices or close a transaction.

9. Fourth, the Commissioner has not established that VOWs on a broker's website (as opposed to other aspects of the broker's website, other Internet data-sharing vehicles or the Internet in general) have had a significant competitive effect. The experience of Redfin in the United States, the experience of Viewpoint in Nova Scotia and the experience with VOWs and IDXs across Canada reinforce this. In this regard, it is critical to keep in mind that the benefits allegedly attributed by the Commissioner to VOWs are, in fact, not specific to VOWs, but are benefits associated with the use of broker operated websites or are attributable to other Internet data-sharing vehicles.

10. Fifth, since TREB's VOW policy does not prohibit consumers from obtaining the information in the Disputed Fields, and consumers can obtain this information through means other than a VOW, the key question is how allowing brokers

² Updated Witness Statement of Gary Simonsen, dated June 1, 2015, Exhibit IC-177, para. 97 ("**Updated Simonsen Statement**").

to make the Disputed Fields available to consumers via a VOW versus other available means will affect competition. This depends on whether allowing the Disputed Fields to be shown through a VOW would materially change the quality of brokerage services from the consumer's perspective, which in turn requires proof that the available services to consumers would be either higher in quality or lower in cost as a result of having a VOW that displays the Disputed Fields. The Commissioner has not established these elements: In particular:

- (a) Dr. Vistnes does not provide reliable support for the assertion that brokers who use VOWs offer higher quality or less expensive brokerage services. He does not perform an empirical analysis on whether the delivery of the Disputed Fields through a VOW is competitively important to brokers who use VOWs. Further, he uniquely attributes services to brokers who use VOWs that are available through brokers who do not use VOWs (such as lower commission rates or the provision of detailed information over the Internet).
- (b) Dr. Vistnes does not appropriately address the evidence that the incremental value associated with providing the Disputed Fields on a VOW versus other means may be limited. (See, for example, the evidence of both Viewpoint's and Redfin's market share and conversion rate of website visitors into registrants and into clients, the popularity of REALTOR.ca, the evidence from the NAR 2014 Profile of Home Buyers and Sellers in the United States and the evidence that VOWs with data feeds that do not include the Disputed Fields have attracted significant interest in British Columbia and in the GTA.
- (c) In order to reliably conclude that the requested remedy provides an overall benefit to consumers, one must consider both potential benefits and potential harm. Dr. Vistnes does not appropriately analyze potential harm, including the potential harm associated with displaying consumer's property information over the Internet.

11. Sixth, CREA has a significant concern about the negative effect of the requested remedy on CREA's Trademarks. In essence, the accessibility of the Disputed Fields on a VOW may serve to diminish the credibility of an MLS® System in

the eyes of the consumer (who is concerned about their property information being disclosed on a public website), as well as the credibility of REALTORS® who placed the information on the MLS® System and provide services using that System, which in turn may negatively affect the credibility of CREA's Trademarks.

12. Considerable time was spent during the 2012 hearing dissecting the consents to the disclosure of listing information found in standard form listing agreements and buyer representation agreements and in schedules to agreements of purchase and sale (which are not standard, but vary). This evidence, and the further evidence heard in 2015, does not establish that all appropriate informed consents have been obtained to the disclosure of the Disputed Fields to the public through a VOW. There remains the risk that consumers will be upset with REALTORS® by what consumers may view as improper disclosure of their information for uses they have not consented to.

13. Seventh, any remedy that may be deemed to be appropriate for the GTA should be expressly limited to the GTA and should not extend to other jurisdictions in which MLS® Systems operate. This is because the effect of the requested remedy depends on competitive alternatives to obtaining the Disputed Fields, consumer and broker demands and preferences, the regulatory environment and the technical and financial resources of local boards and associations, all of which can vary across the jurisdictions of boards that operate MLS® Systems.³

³ Updated Simonsen Statement, para. 98.

B. Introduction and Summary of CREA's Evidence

14. CREA represents over 110,000 real estate brokers and agents working through approximately 90 real estate boards and associations. CREA is the national voice for the Canadian real estate industry, including on competition law, as well as technological issues.⁴

15. CREA owns the Multiple Listing Service® trademark, the MLS® trademark, and the associated logos (the "MLS® Trademarks"), and co-owns with the National Association of REALTORS® ("NAR") the trademarks REALTOR® and REALTORS® and the associated logos (the "REALTOR® Trademarks"). The MLS® Trademarks and REALTOR® Trademarks (together, "CREA's Trademarks") are certification marks which can only be used in Canada by members in good standing of CREA, are an assurance of integrity and identify a certain standard of brokerage services and professionalism.⁵

16. An MLS® System is a cooperative selling system operated by a local board in association with the MLS® Trademarks which are licenced to the board by CREA. In essence, the MLS® Trademarks identify professional services provided by CREA members to effect the purchase and sale of real estate as part of a cooperative selling system.

17. REALTORS® use MLS® Systems to provide valuable services to clients. The REALTOR® Trademarks certify to the public in Canada that the services are being

⁴ Updated Simonsen Statement, para. 4.

⁵ Updated Simonsen Statement, paras. 9-17.

offered by professional and licensed real estate agents who are CREA members, subject to CREA's rules and policies, and subscribe to a high standard of professional service and a strict code of ethics.

18. CREA called two witnesses at both the 2012 hearing and the 2015 reconsideration hearing; Mr. Gary Simonsen, Chief Executive Officer of CREA, and Dr. Fredrick Flyer, an economist who was qualified to give expert economic evidence.

19. Among other things, Mr. Simonsen explained that CREA has supported and continues to support the distribution of relevant, appropriate and accurate information to consumers through the Internet. His evidence detailed the various Internet data-sharing vehicles studied and developed by CREA over the years, the challenges and benefits associated with them, and the current experience with respect to their use across Canada. Mr. Simonsen explained CREA's view that the provision of property information over the Internet needs to be done in a manner which (i) respects the requirements of relevant federal and provincial legislation, including privacy legislation, (ii) protects and preserves the integrity and quality associated with CREA's Trademarks, (iii) recognizes that multiple Internet data-sharing vehicles—not just VOWs—can and do serve this purpose, and (iv) acknowledges that real estate boards and associations differ in relevant respects and therefore what may be appropriate in one jurisdiction may not be appropriate in others.⁶

20. Dr. Flyer was asked by CREA to examine the potential effects on CREA (including its members and Trademarks) of the remedy the Commissioner requests be

⁶ Updated Simonsen Statement, paras. 95-103.

imposed on TREB. Dr. Flyer's analysis focused on evaluating the economic evidence on the likely competitive effects of the requested remedy. Dr. Flyer testified in both 2012 and 2015 that: (a) in order to assess the competitive effects of the remedy requested by the Commissioner, both the relevant benefits and harms to consumers of that specific remedy must be appropriately considered; (b) the Commissioner's expert, Dr. Gregory Vistnes, failed to adequately assess and balance the potential benefits and harms of providing the information in the Disputed Fields to consumers via a VOW versus other available means; and (c) the effect of the requested remedy will depend on many factors that vary across real estate boards in Canada so that a remedy which might be appropriate for TREB cannot be presumed to be appropriate elsewhere.⁷

C. The Key Evidence – Non-VOW Internet Data-Sharing Vehicles

21. The Internet has had a significant impact on the provision of residential real estate brokerage services, including as a marketing tool for REALTORS® and as a source of information for consumers.⁸

22. This impact has resulted from a multitude of Internet data-sharing vehicles, including but not limited to VOWs. As elaborated on below, these include REALTOR.ca, Internet data exchange ("IDX") facilities, CREA's data distribution facility ("DDF®") and numerous innovative broker-owned and operated websites.

⁷ Expert Report of Fredrick Flyer dated August 3, 2012, Exhibit IC-088 ("**Flyer Report**"); 2012 Hearing Transcript, volume 15 (Public), pp. 2387-2425; Summary and Main Conclusions from Expert Report of F. Flyer, Exhibit IC-089 ("**Flyer Summary**"). Expert Report of Fredrick Flyer dated June 2, 2015, Exhibits IC-182 and CIC-183 ("**2015 Flyer Report**"). Dr. Flyer's analysis and conclusions remain the same in 2015.

⁸ Updated Simonsen Statement, para. 24; 2014 CREA Consumer Insights Report, Exhibit IC-109, p. 10 ("**CREA Insights Report**"); 2015 Hearing Transcript, volume 5 (Public), p. 773; 2012 Hearing Transcript, volume 7 (Public), p. 1114.

23. Many if not most consumers want to search properties anonymously. As a result, one important benefit to consumers of non-VOW Internet data-sharing vehicles is the absence of any registration or sign-in requirement in order to access detailed property and neighbourhood information.⁹

(a) REALTOR.ca

24. REALTOR.ca is a very popular public website operated by CREA.¹⁰ It contains a subset of active listing content from MLS® Systems across Canada¹¹ and allows consumers to search active listings and obtain detailed information and photos about properties without the need to call a broker or to provide their identity through a log-in requirement.¹² REALTOR.ca does not display any of the Disputed Fields.

25. REALTOR.ca has been consistently identified by CREA members as "number one or the most important service provided by CREA".¹³ Mr. McMullin, the principal of Viewpoint, described REALTOR.ca as "the single most valuable and utilized asset that CREA provides and manages on behalf of members".¹⁴

⁹ 2012 Hearing Transcript, volume 3A (Public), p. 589.

¹⁰ *Commissioner of Competition v. The Canadian Real Estate Association*, (2015) Comp. Trib. 3 at para. 4.

¹¹ Updated Simonsen Statement, para. 30.

¹² Updated Simonsen Statement, para. 31; 2012 Hearing Transcript, volume 14 (Public), pp. 2200, 2205-2217; Example of Residential Property Search on www.realtor.ca, Exhibit IC-086; 2015 Hearing Transcript, volume 6 (Public), pp. 1052-1054.

¹³ Updated Simonsen Statement, para. 31; 2012 Hearing Transcript, volume 14 (Public), p. 2199.

¹⁴ Email chain between McMullin and CREA, Ex.IC-107, p. 4-5.

26. In 2014 alone, REALTOR.ca provided 1 million leads to Canadian REALTORS® and is on track to provide close to 2 million leads in 2015.¹⁵ The website's success has been acknowledged by several of the Commissioner's witnesses.¹⁶

27. REALTOR.ca continues to be a popular resource for consumers to gather information. REALTOR.ca is Canada's leading source for real estate listings and is Canada's leading property listing site.¹⁷ In 2014, 58% of those "just browsing" for properties were using REALTOR.ca as their primary source of information – 37% were working with a REALTOR® and 81% planned to do so.¹⁸ For purchasers planning on making a real estate decision within 3 months, 60% of them were using REALTOR.ca as their primary source for searching properties, 70% were working with a REALTOR® and 72% planned to do so.¹⁹

28. REALTOR.ca received a range of between 4.66 and 5.67 million visitors each month from January to April of 2015.²⁰ Usage of REALTOR.ca and its associated platforms (including the mobile version of the website and the various app versions) has generally increased over time. Reductions in usage of the main website are due to the migration of users to mobile platforms.²¹

¹⁵ 2015 Hearing Transcript, volume 6 (Public), pp. 1046-1048; CREA Insights Report.

¹⁶ 2012 Hearing Transcript, volume 3A (Public), pp. 592; 2012 Hearing Transcript, volume 5 (Public), pp. 841-844; 2012 Hearing Transcript, volume 6A (Public), p. 926.

¹⁷ CREA Insights Report, pp. 1, 6.

¹⁸ CREA Insights Report, p. 3.

¹⁹ CREA Insights Report, p. 4.

²⁰ Updated Simonsen Statement, para. 37.

²¹ Updated Simonsen Statement, para. 38.

29. Since 2012, CREA has initiated a number of significant improvements to REALTOR.ca, including releasing an enhanced version with updated appearance, improved functionality and additional information.²²

30. Users of REALTOR.ca are able to keyword search or search using a map function, view listing information including up to 99 photos for each listing (with more available by link), take virtual tours, compare properties, review neighbourhood demographic information, get directions to a property, assess the property's walkability by its "walk score", email the listing to others and contact an agent.²³

31. CREA intends to introduce a consumer log-in feature in 2016, that will allow consumers to save searches across devices and platforms and also will be adding a "transit score" to allow users to assess a given property's proximity to transit.²⁴

32. CREA continues to offer mobile "apps" for major mobile devices which are available at no cost, and added an app for the Apple Watch in 2015.²⁵ The iPad version of the app was featured by Apple in its store.²⁶ Since June 2012, these apps have been downloaded an average of slightly more than 100,000 times per month, corresponding to a total rate of 1.3 to 1.4 million downloads per year.²⁷

(b) IDX Facilities

²² Updated Simonsen Statement, para. 34.

²³ 2015 Hearing Transcript, volume 6 (Public), pp. 1050-1063.

²⁴ 2015 Hearing Transcript, volume 6 (Public), pp. 1050, 1052-1053.

²⁵ Updated Simonsen Statement, para. 32.

²⁶ 2012 Hearing Transcript, volume 14 (Public), p. 2203.

²⁷ Updated Simonsen Statement, para. 32.

33. An IDX is a reciprocal system whereby consenting brokerages agree to advertise on their websites each other's active property listings, either from the MLS® System of the relevant local board/association or from REALTOR.ca, subject to the rules of the relevant local board/association and the REALTOR®'s oversight.²⁸ An IDX does not display any of the Disputed Fields.

34. IDX technology has revolutionized real estate websites in a manner which has been beneficial to buyers, sellers and brokers.²⁹ IDXs are a benefit to brokers because they allow them to advertise more than just their own listings on a website. IDXs are a benefit for sellers because they provide them with more exposure for the property they are selling. IDXs are a benefit to buyers because they can see a larger inventory of properties on a website than would be available without the sharing of listings.

35. Even with the advent of VOWs, IDXs remain popular. For example, in Vancouver, 95% of brokers have opted into the board's VOW/IDX policy, with 30% using IDX solutions and 30% using VOWs.³⁰ In Edmonton, interest in VOWs appears to have waned, with IDXs currently satisfying the demand.³¹ Lastly, the London St. Thomas Association of REALTORS® currently offers an IDX facility that is highly successful, being utilized for approximately 99% of the Association's brokers' listings.³²

²⁸ Updated Simonsen Statement, para. 48.

²⁹ 2012 Hearing Transcript, volume 6A (Public), pp. 897-98.

³⁰ Updated Simonsen Statement, para. 87.

³¹ Updated Simonsen Statement, para. 88.

³² Updated Simonsen Statement, paras. 90-91; 2012 Hearing Transcript, volume 14 (Public), pp. 2235-36.

Due, at least in part, to this successful IDX solution, there continues to be virtually no interest by either members of the Association or the public in the provision of a VOW solution in the area.³³

(c) CREA's Data Distribution Facility

36. CREA's DDF® is intended to supply reliable and accurate publicly available MLS® listing content for publication on both member and non-member (*i.e.*, third party) websites. The listing information available for publication is comparable to that found on REALTOR.ca, and therefore does not include the Disputed Fields. CREA'S DDF® is a permissions-based system that allows brokers to share their listings with other brokers, receive a feed of their own listings for display on their website, and send their listings to third parties.³⁴

37. The DDF® addresses the needs of both consumers and REALTORS®. Sellers receive the benefit of their property being accurately and consistently advertised on a wider range of websites. REALTORS® are able to provide this service to their clients without the need to invest in additional infrastructure and with confidence in the quality of the data.³⁵ The DDF® also provides members with a number of analytical tools to assess the extent to which their listings are viewed.³⁶

³³ Updated Simonsen Statement, para. 91.

³⁴ Updated Simonsen Statement, para 62; 2012 Hearing Transcript, volume 14 (Public), pp. 2223-29.

³⁵ Updated Simonsen Statement, para. 71.

³⁶ Updated Simonsen Statement, para. 74.

38. Industry interest in CREA's DDF® has been high, even with the availability of other Internet data-sharing vehicles, including VOWs. In 2012, 93% of local boards/associations expressed the intention to offer the CREA DDF® solution and 72.5% of REALTORS® across Canada indicated an intention to use it.³⁷ Since 2012, member participation in the DDF® has increased, and, in line with predictions in 2012, 73% of eligible members are currently participating.³⁸

(d) Broker Websites

39. Many brokers have sophisticated and successful websites that provide leads and allow consumers to access significant amounts of useful information and conduct detailed property searches without the consumer ever having to access the information available on a VOW. Where a broker's website includes a VOW, it is important to remember that the VOW is just one portion of a broker's website – a portal to a specific form of search by a consumer, in the midst of other relevant information and available searches which are accessible to the consumer without accessing the VOW.

40. These broker websites succeed because of the range of informative features available on them and because of their user-friendly designs.³⁹ Examples include TheRedPin, Realosophy, Viewpoint, Sage Real Estate and Redfin. As discussed below, each one of these brokers have websites designed to attract leads,

³⁷ Updated Simonsen Statement, para. 94; Witness Statement of Gary Simonsen, Dated August 12, 2012, p. 710 (Exhibit 27) ("**2012 Simonsen Statement**"); 2012 Hearing Transcript, volume 14 (Public), pp. 2226-27.

³⁸ Updated Simonsen Statement, para. 94 and pp. 371-372 (Exhibit M); 2015 Hearing Transcript, volume 6, p. 1033.

³⁹ 2012 Hearing Transcript, volume 7 (Public), pp. 1134-1136.

and which provide consumers with relevant and detailed property information over the Internet without the consumer having to access a VOW (let alone a VOW than contains the Disputed Fields).

41. **TheRedPin** Mr. Hamidi, former CEO of TheRedPin, testified in 2012 that his company's use of technology:

...is what's empowering us internally, helping our REALTORS® to be better at what they do, offer better level of service, be more efficient. It also helps our customers to just be better at what they are looking for, better searches, more information. The combination of the technology and data is what's empowering and making all these possible.⁴⁰

42. Mr. Gidamy, also of TheRedPin, testified in 2015 that the consumer's experience on TheRedPin website (as compared to other websites) and the manner in which data is displayed on the website (as opposed to the mere data itself) was what was important to distinguish TheRedPin website from other websites.⁴¹

43. Almost all of TheRedPin's leads come from its website.⁴² Like other technologically innovative brokerages in the GTA such as Zolo and Spring Realty,⁴³ lead generation from its website has been the foundation of TheRedPin's growth since 2012.⁴⁴

⁴⁰ 2012 Hearing Transcript, volume 4 (Public), p. 615.

⁴¹ 2015 Hearing Transcript, volume 2 (Public), p. 293.

⁴² Second Witness Statement of Tarik Gidamy, dated January 30, 2015, Exhibits A-113 and CA-114, paras. 6-7, ("**Second Gidamy Statement**").

⁴³ 2015 Hearing Transcript, volume 2 (Public), pp. 264-267.

⁴⁴ Second Gidamy Statement, paras 6-7.

44. Mr. Gidamy explained that TheRedPin website provides a wealth of information to users without users having to access the VOW. In particular, unregistered users can view listing information based on TREB's IDX feed as well as TheRedPin's listings and have access to third party (*i.e.* non-MLS®) information about given properties such as the applicable school district and walk scores.⁴⁵

45. Registered users of TheRedPin have access to the VOW which includes all TREB MLS® listings (based on the TREB VOW data feed) and receive additional information, including the number of days a property has been on the market, the initial listing price and tax information.⁴⁶ Users can also use TheRedPin to sign up to view properties.⁴⁷

46. **Realosophy** Ms. Desai of Realosophy explained the importance of website design (and not just its content), in appealing to consumers. She testified in 2012 that much of the information in TREB's VOW data feed:

...is to serve REALTORS® doing business with other REALTORS®, so there is a lot of jargon so to speak. So we [Realosophy] just present it in [a] way that's not crammed together, it's not overwhelming. So we have invested a lot in design. And so consumers can know where to look to get the information they are looking for.⁴⁸

47. Indeed, both Realosophy witnesses, Ms. Desai and Mr. Pasalis, acknowledged that most of the website content that makes Realosophy unique, and the

⁴⁵ 2015 Hearing Transcript, volume 2 (Public), pp. 262-263.

⁴⁶ 2015 Hearing Transcript, volume 2 (Public), pp. 262-263.

⁴⁷ 2015 Hearing Transcript, volume 2 (Public), p. 264.

⁴⁸ 2012 Hearing Transcript, volume 2 (Public), p. 363.

reason consumers come to the website, is the result of information that does not come from TREB's VOW data feed.⁴⁹ These features include geocoding, school ranking and profiles, the "Neighbourhood Match" feature, public transit information, local business information and walk scores.⁵⁰

48. In 2015, Realosophy's focus continues to be to provide useful analysis of relevant information on its website, and not simply the provision of information itself.⁵¹ Unregistered users continue to be able to access all of the website's analysis as well as the analysis set out in Realosophy's blog.⁵² Since 2012, Realosophy has further refreshed and updated its website including by updating demographic information, school profile information and by developing new neighbourhood analysis tools.⁵³

49. [REDACTED]

⁴⁹ 2012 Hearing Transcript, volume 2 (Public), p. 378.

⁵⁰ 2012 Hearing Transcript, volume 2 (Public), p. 379; 2012 Hearing Transcript, volume 3A (Public), pp. 523-24, 531-32.

⁵¹ 2015 Hearing Transcript, volume 3 (Public), p. 366.

⁵² 2015 Hearing Transcript, volume 3 (Public), pp.366-367.

⁵³ Second Witness Statement of John Pasalis, dated February 2, 2015, Exhibit A-120, para. 2, ("**Second Pasalis Statement**").

⁵⁴ 2015 Hearing Transcript, volume 3 (Confidential), pp. 16, 20.

⁵⁵ 2015 Hearing Transcript, volume 3 (Confidential), pp. 16-17.

⁵⁶ 2015 Hearing Transcript volume 3 (Confidential), pp. 16-17.

[REDACTED]

50. **Viewpoint** Viewpoint, a Nova Scotia brokerage, also continues to provide a significant amount of information to non-registered website users, including map search capabilities, property listings containing overview information, photographs including a "street view" photograph, lot boundaries, school information, current tax assessment value and zoning information.⁵⁹

51. Unregistered users also continue to have access to "Viewpoint Neighbourhoods", a tool displaying neighbourhood data for 27 areas around Nova Scotia including the number of properties in total, number for sale, average list price, highest and lowest list prices, number of properties sold, average sold price, average days on market and sold price as a percentage of list price.⁶⁰ Unregistered users also have access to "Viewpoint Market Data", which provides a range of metrics including number of listings, sales, withdrawn expired and cancelled listings year to date and aggregate dollar volumes for each of these groups.⁶¹

⁵⁷ 2015 Hearing Transcript, volume 3 (Confidential), p. 20.

⁵⁸ 2015 Hearing transcript, volume 3 (Confidential), p. 29.

⁵⁹ 2015 Hearing Transcript, volume 1 (Public), pp. 93-95, 109-114.

⁶⁰ Second Witness Statement of William McMullin, dated February 5, 2015, Exhibits CA-99 and A-100, paras. 25-27, ("**Second McMullin Statement**").

⁶¹ Second McMullin Statement, para. 28. Users who register with Viewpoint.ca can access more information and property data including historical sales information, which is sourced both from MLS® data and from government registry information. The latter is now available in bulk due to recent Nova Scotia legislation. Users may further apply for Viewpoint's "Client Advantage"

52. **Sage Real Estate** Sage Real Estate creates a unique website for each home listed by the brokerage that provides comprehensive information about the home as well as the neighborhood in which the home is located.⁶² These websites feature videos and professional photographs, floorplans and 3D tours and utilize search engine optimization techniques to help the home show up high in Google search results.⁶³ The website and associated mobile apps provide consumers with a variety of information about properties including asking price, neighbourhood information, proximity to shopping and schools.⁶⁴

53. **Redfin** The goal of the Redfin website continues to be to make as much information as possible available to the public on the website without the need to register (and therefore without having to access the VOW).⁶⁵ Redfin provides a substantial amount of information to unregistered users.⁶⁶ Consumers can access information by clicking on an interactive map or conducting a search by property criteria specified by them. This results in the display of active listing information, photographs

service, which gives them access to (among other things) additional information from the land registry, an online CMA tool, property ratings and a property report. As will be discussed further below, relatively few users of Viewpoint.ca have opted to become registered users to see historical price information or to subscribe to the "Client Advantage" service. 2015 Hearing Transcript, volume 1 (Public), pp. 94-96; 2015 Hearing Transcript, volume 2 (Public), pp. 126-128; Second McMullin Statement, paras. 12-18.

⁶² Updated Witness Statement of Evan Sage, dated May 15, 2014 Exhibits R-163 and CR-164, para. 7 ("**Updated Sage Statement**").

⁶³ Updated Sage Statement, para. 7.

⁶⁴ Sage Real Estate also provides clients with market reports containing information about sold prices in their neighbourhoods, without identifying actual addresses. Updated Sage Statement, paras 15.1-15.3; 2015 Hearing Transcript, volume 5 (Public), pp. 775-777.

⁶⁵ Second Witness Statement of Scott Nagel, dated February 5, 2015, Exhibits A-129 and CA-130, para. 3 ("**Second Nagel Statement**"); 2015 Hearing Transcript, volume 3 (Public), pp. 420-421.

⁶⁶ 2012 Hearing Transcript, volume 3A (Public), p. 474; Witness Statement of Scott Nagel, dated June 20, 2012, Exhibit A-008, paras. 11-15 ("**2012 Nagel Statement**").

and property details, tax information, school and community information, market analytics, home value estimates, comparable properties and sold information obtained from public records.⁶⁷

D. Key Evidence – Impact of VOWs

54. A VOW is just one tool that can be used to provide some relevant real estate information to consumers over the Internet. It is not the only such tool and does not provide the entire gamut of information or services sought by consumers. The evidence continues to show that VOWs have not and, even with the inclusion of the Disputed Fields, would not have a significant competitive impact in the relevant market.

(a) VOWs are not a substitute for a REALTOR®

55. VOWs are not a substitute for brokers, nor a substitute for the specific service of providing property information to a consumer.

56. The Commissioner's witnesses have acknowledged that VOWs are not intended to replace the services of a REALTOR® and that there are limitations on the value that a VOW (whatever information it displays) can provide to consumers.

57. In his 2012 witness statement, Mr. Pasalis stated that "The data analytics available on our website [Realosophy] or our blog will not replace the expertise of an agent because there is both art and science in giving advice to clients".⁶⁸

⁶⁷ 2012 Nagel Statement, paras. 11-15. Registration entitles the consumer to additional property history details, including sold information usually obtained by Redfin from MLS sources. MLS is not a trademark in the U.S. Redfin does not display pending sold prices, expired or withdrawn listings or cooperating buyer's commissions on its website, whether to registered or unregistered users. Second Nagel Statement, para 19; 2015 Hearing Transcript, volume 3 (Public), pp. 398-399, 414.

⁶⁸ Witness Statement of John Pasalis dated June 20, 2012, Exhibit A-010, para. 39.

58. Similarly, Mr. Hamidi testified that TheRedPin believes that consumers need professional advice to complete a real estate transaction,⁶⁹ and that the straight provision of information to consumers (like a VOW provides) is on the lower end of importance of the various services that a REALTOR® would provide in a real estate transaction.⁷⁰

59. Dr. Vistnes agreed that there is little question that consumers value the services they receive from brokers, that brokers offer "a lot of value" – including through face-to-face meetings, and that brokers are likely to remain integral and important in the buying and selling of real estate. He acknowledged that consumers would not likely rely on a VOW alone to close a transaction and that many of the services that brokers can offer, such as scheduling or providing information and advice, can be provided by them over the Internet (as well as by other means) without the need for a consumer to access a VOW. Importantly, he concedes that VOWs are a complement to the services that brokers provide, not a substitute.⁷¹

60. Numerous witnesses also testified that a REALTOR®'s expertise is necessary in order to prepare a comprehensive comparative market analysis, or "CMA", and that an algorithm on a VOW is insufficient.⁷² For example, Mr. Pasalis testified that

⁶⁹ 2012 Hearing Transcript, volume 4 (Public), p. 632.

⁷⁰ 2012 Hearing Transcript, volume 4 (Public), p. 650.

⁷¹ Expert Report of Dr. Gregory Vistnes, dated August 4, 2015, pp. 14-15 ("**Vistnes 2015 Reply Report**"); 2015 Hearing Transcript, volume 4 (Public), pp. 485-487; 2012 Hearing Transcript, volume 7 (Public), pp. 1136-1138.

⁷² A CMA "is an evaluation of similar, recently sold homes (called comparables) that are near a home that you want to buy or sell." CMAs are performed in order to establish a fair price for a home under consideration. 2012 Nagel Statement, para. 21.

a REALTOR® preparing a CMA must consider factors that are not evident from just looking at MLS® data.⁷³ Mr. McMullin testified in 2012 that there are typically "more things than just doing mathematical calculations" when assessing the value of a property.⁷⁴ In 2015, he testified that an agent performing a CMA would have to scan the market to determine what their price recommendation would be, which would, most of the time, include a personal visit.⁷⁵ He also testified that agents, and not the website, educate and guide consumers through the information they see online.⁷⁶ Finally, in her updated witness statement, Pamela Prescott, broker of record of Century 21 Heritage Group Ltd., notes that simply knowing what apparently "comparable" homes have recently sold for does not tell the whole picture, either to the home buyer or the home seller. Those numbers need to be interpreted by a professional in order to truly be able to compare a home being sold to other recently sold homes.⁷⁷

61. Data from the United States published in NAR's 2014 Profile of Home Buyers and Sellers further illustrates the continuing importance of REALTORS®, even in the age of VOWs. This data also shows the relatively small impact that the Internet in general (*i.e.*, including but not limited to VOWs) is having on REALTORS®' lead generation. The number of buyers using a REALTOR® has increased over time: 88% of buyers in 2014 purchased their home through a real estate agent or broker, up from 69% in 2001.⁷⁸ While the vast majority of buyers use the Internet while searching for a

⁷³ 2012 Hearing Transcript, volume 3A (Public), p. 544.

⁷⁴ 2012 Hearing Transcript, volume 2 (Public), p. 242.

⁷⁵ 2015 Hearing Transcript, volume 2 (Public), pp. 167-168.

⁷⁶ 2015 Hearing Transcript, volume 2 (Public), p. 241.

⁷⁷ Updated Witness Statement of Pamela Prescott, dated May 15, 2015, Exhibits R-132 and CR-133, paras. 19-21.

home, 90% of those who used the Internet in their search still purchased a home through an agent and were more likely to do so than those who did not use the Internet.⁷⁹ However, only one in ten buyers and just 4% of sellers found their real estate agent through a website.⁸⁰

62. As discussed above, 70% of those people using REALTOR.ca to search for a home in 2014 were working with a REALTOR, with 72% intending to work with one (where they intended to make a real estate decision within 3 months).

(b) Innovative Brokerages Succeed Without a VOW Feed that includes the Disputed Fields

63. Tech-savvy brokerages have continued to successfully innovate and grow their businesses using their websites, without a VOW feed that includes the Disputed Fields.

64. TheRedPin TheRedPin has continued to innovate and grow since 2012, and continues to provide rebates to clients. The number of TheRedPin agents increased from 5 in 2012, to 55 at the time of Mr. Gidamy's Second Witness Statement, to 65 at the time of the hearing.⁸¹ TheRedPin sold approximately \$325 million worth of real estate in the past year alone and is involved in an average of ■ deals per month – ■ 2013 average.⁸² Buyers are still offered a rebate, though this has been reduced from 25% to 15%.⁸³

⁷⁸ NAR 2014 Profile of Home Buyers and Sellers, Exhibit IC-140, p. 57 ("**2014 NAR Profile**").

⁷⁹ 2014 NAR Profile, p. 45.

⁸⁰ 2014 NAR Profile, pp. 59, 101.

⁸¹ Witness Statement of Shayan Hamidi, dated June 22, 2012, Exhibit A-13, para. 30; Second Gidamy Statement, para. 5; 2015 Hearing Transcript, volume 2 (Public), p. 267.

65. TheRedPin also recently introduced a new package for clients willing to retain the company to both sell and buy a home, which includes returning to the client the seller's portion of the commission (1.75%).⁸⁴ This new program has resulted in a 20-25% increase in the number of listings secured by TheRedPin.⁸⁵

66. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁸⁶ Dr. Vistnes' suggestion that what Mr. Prochazka called the "almighty conversion rate"⁸⁷ is somehow not informative,⁸⁸ contradicts the Commissioner's fact witnesses who have attested to the significance of these rates in demonstrating their ability to obtain clients.⁸⁹ In fact, conversion rates are one of the few pieces of empirical evidence that the Commissioner has offered to the Tribunal.

67. **Realosophy** Like TheRedPin, Realosophy's business has grown since 2012. The number of agents has doubled due to the customers that the website and the VOW have generated.⁹⁰ Realosophy continues to offer a 1.5% listing commission

⁸² 2015 Hearing Transcript, volume 2 (Public), p. 268; Exhibit R-115; Second Gidamy Statement, para. 5.

⁸³ Second Gidamy Statement, para. 9.

⁸⁴ 2015 Hearing Transcript, volume 2 (Public), pp. 245-246.

⁸⁵ 2015 Hearing Transcript volume 2 (Public), pp. 248-249.

⁸⁶ 2015 Hearing Transcript, volume 4 (Confidential), pp. 91-95.

⁸⁷ 2015 Hearing Transcript volume 2 (Public), p. 310.

⁸⁸ 2015 Hearing Transcript, volume 4 (Public), pp. 561-565.

⁸⁹ 2015 Hearing Transcript volume 2 (Public), pp. 255-256, 310.

⁹⁰ Second Pasalis Statement, para. 3; 2015 Hearing Transcript, volume 3 (Public), p. 366.

rate⁹¹ and, as discussed above, has continued to innovate by adopting new online tools such as Realosophy Pro.

68. **Sage Real Estate** Sage Real Estate continues to innovate, without a VOW data feed at all, let alone one that contains the Disputed Fields. Since the initial hearing, Sage Real Estate has adopted new tactics to promote listings through social media and is developing a new property search function to compete with REALTOR.ca.⁹² It's website uses CREA's IDX and DDF® feeds, not TREB's VOW data feed.⁹³

69. **Re/Max Ultimate** Re/Max Ultimate Realty Inc. also successfully innovates using the Internet without access to a VOW data feed that includes the Disputed Fields. As Mr. Syrianos explained, Re/Max Ultimate currently operates four websites that use data from the IDX feed and that are tailored to different consumer markets.⁹⁴ Re/Max Ultimate also uses two mobile apps. which use data from TREB's VOW data feed. The mobile apps have been downloaded some 40,000 times.⁹⁵ Re/Max Ultimate's websites and apps generate between 75 to 125 leads per month.⁹⁶ Re/Max Ultimate continues to invest heavily in innovation.⁹⁷ It now has live chat

⁹¹ 2015 Hearing Transcript, volume 3 (Public), pp. 361-362.

⁹² Updated Sage Statement, paras. 9.1, 11.1-11.5; 2015 Hearing Transcript, volume 5 (Public), pp. 774-775.

⁹³ Updated Sage Statement, paras. 11.2-11.3; 2015 Hearing Transcript, volume 5 (Public), pp. 774-775.

⁹⁴ 2015 Hearing Transcript, volume 5 (Public), pp. 814-816.

⁹⁵ 2015 Hearing Transcript, volume 5 (Public), p. 815.

⁹⁶ 2015 Hearing Transcript, volume 5 (Public), p. 816.

⁹⁷ 2015 Hearing Transcript, volume 5 (Public), pp. 817-818.

functionality, a third party service to fluidly complete listing agreements from a mobile device and has become 80 to 85% paperless in its operations.⁹⁸

70. **Redfin** The inability to obtain sold data from an MLS in certain areas of the United States has not prevented Redfin from operating in those areas. In 2012, Redfin operated VOWs in areas where sold data was not available from the MLS.⁹⁹ Since 2012, Redfin has expanded across the United States while continuing to operate in areas where sold data cannot be obtained from the MLS.¹⁰⁰

(c) Evidence of Low Value Placed on Accessing Information (including the Disputed Fields) on a VOW

71. The Commissioner's witnesses consistently testified that their websites (and not their VOWs, in particular) were their principal source of lead generation or means of attracting customers.¹⁰¹ While having a good website has driven growth for innovative brokerages, the evidence remains clear that only a fraction of consumers who visit a broker's website containing a VOW actually register to access the further information contained in the VOW. An even smaller number of consumers will actually use the services offered by the brokerage operating the website to purchase or sell a property.

⁹⁸ 2015 Hearing Transcript, volume 5 (Public), pp. 817-819.

⁹⁹ 2012 Hearing Transcript, volume 3A (Public), pp. 420, 501.

¹⁰⁰ Second Nagel Statement, para. 22; 2015 Hearing Transcript, volume 3 (Public), pp. 404-405.

¹⁰¹ 2012 Hearing Transcript, volume 2 (Public), pp. 276, 365-66 and 369; 2012 Hearing Transcript, volume 3A (Public), pp. 398, 473 and 510; 2012 Hearing Transcript, volume 4 (Public), p. 674, 2015 Hearing Transcript, volume 2, pp. 264-265, 2015 Hearing Transcript, volume 3 (Public), pp. 420-421.

72. **Viewpoint** Between January 1, 2012, and May 31, 2012, approximately 7% of the visitors to Viewpoint.ca registered to access the Viewpoint VOW.¹⁰² Mr. McMullin also testified in 2012 that, even though Viewpoint offered lower commissions than many of its competitors, its market share in Nova Scotia was approximately 1%.¹⁰³

73. Even though Mr. McMullin regularly tracked website statistics and testified at the 2015 hearing that "the greatest evidence of acceptance and popularity is the usage of the website by consumers"¹⁰⁴, he purported to be unable to provide an updated figure for 2015 for the percentage of website visitors who register for the Viewpoint VOW.¹⁰⁵ He eventually agreed that one could calculate updated figures based on the business metrics information and Google Analytics¹⁰⁶ reports that he provided as evidence to the Tribunal.¹⁰⁷ Based on the information provided by Mr. McMullin¹⁰⁸, in 2013, [REDACTED] of website users registered for the Viewpoint VOW and, in 2014, [REDACTED] of website users registered for the Viewpoint VOW.

74. Further, a very small proportion of those who do register for the Viewpoint VOW actually become clients of Viewpoint. In 2014, for example, Viewpoint had [REDACTED]

¹⁰² 2012 Hearing Transcript, volume 2 (Public), pp. 335-36.

¹⁰³ 2012 Hearing Transcript, volume 2 (Public), pp. 250, 338.

¹⁰⁴ 2015 Hearing Transcript, volume 2 (Public), pp. 172-173.

¹⁰⁵ 2015 Hearing Transcript, volume 2 (Public), pp. 182-185.

¹⁰⁶ As was discussed in Mr. McMullin's testimony, Google analytics is a service that allows a website owner/operator to obtain information about traffic on a website and which estimates the number of persons who visit the website, represented by the number of "Users" in the Google Analytics report. "Sessions" is Google's calculation of the actual visits by users on the website. The majority of websites use this tool. 2015 Hearing Transcript, volume 2 (Confidential), pp. 4-7.

¹⁰⁷ 2015 Hearing Transcript, volume 2 (Public), pp. 236-240.

¹⁰⁸ Second McMullin Statement, Exhibit D (also Exhibit CA-103), Exhibit E, pp. 26-28.

new registered users and was involved in [REDACTED] brokered transactions – therefore, only approximately [REDACTED] of new registrations led to a real-estate transaction brokered by Viewpoint in that year.¹⁰⁹

75. Enrollment is also low in Viewpoint's "Client Advantage" program, offered since February 2014. This program provides consumers who qualify with even more information about properties than normal registered users, including access to an online CMA tool. In 2014, a year that saw approximately [REDACTED] users of Viewpoint.ca,¹¹⁰ the Client Advantage Program received [REDACTED] applications of which [REDACTED] were granted.¹¹¹

76. **Redfin** Similarly, between January 1, 2012 and May 31, 2012, the Redfin website received [REDACTED] new visitors, with [REDACTED] [REDACTED] [REDACTED] [REDACTED] registering for the VOW.¹¹² Further, Redfin was involved in approximately [REDACTED] transactions in 2011,¹¹³ which represent a similarly small percentage of Redfin's registered users.

77. Redfin's website remains the critical part of the delivery of Redfin's services to its customers and its principal means of attracting business.¹¹⁴ While overall traffic to Redfin has increased since 2012, Redfin's conversion rate is slightly lower than

¹⁰⁹ Exhibit CA-103.

¹¹⁰ Second McMullin Statement, Exhibit E, p. 28.

¹¹¹ Second McMullin Statement, para.16; 2015 Hearing Transcript. volume 2, pp. 177-178.

¹¹² Letter from Scott Nagel to Madame Justice Simpson dated September 18, 2012, Exhibit CA-038.

¹¹³ 2012 Nagel Statement, para. 48.

¹¹⁴ Second Nagel Statement, paras. 2, 5.

it was in 2012, with [REDACTED] of unique website visitors registering with RedFin between 2012 and 2014.¹¹⁵

78. Finally, NAR's 2014 Profile of Home Buyers and Sellers indicates that, even in the United States where sold data is displayed on VOWs, sold data ranks relatively low amongst website features considered to be "very useful" by consumers. In particular, detailed information about recently sold properties ranked eighth out of eleven, while pending sales ranked sixth.¹¹⁶ Photos, detailed information about properties for sale, interactive maps, virtual tools and neighbourhood information were all considered to be more useful by consumers,¹¹⁷ and only 8% of consumers wanted their real estate agent to determine what comparable homes were selling for.¹¹⁸

(d) Other Internet Data Sharing Vehicles Remain Popular

79. Even with the availability of VOWs, including VOWs like Viewpoint's that display some of the Disputed Fields, other Internet data-sharing vehicles remain

¹¹⁵ Second Nagel Statement, para. 18; 2015 Hearing Transcript, volume 3 (Confidential), pp. 48-49, 55-56. See also the NAR real estate website traffic statistics for January – June 2015 (Ex. IC-184), which compare the traffic to Redfin's website with traffic to other real estate websites, including REALTOR.com and third party non-VOW websites.

¹¹⁶ 2014 NAR Profile, p. 57.

¹¹⁷ 2014 NAR Profile, p. 55 (Ex. 3-18).

¹¹⁸ 2014 NAR Profile, p. 55 (Ex. 3-18), Exhibit IC-140, p. 62 at Ex. 4-9. The Commissioner relies on recent NAR rule changes that require the provision of sold data over the past three years and the apparent recent display of sold information on REALTOR.com as evidence that consumers value and want the display of this information via the Internet. This evidence should be treated with caution. First, the recent NAR rule change requiring the display of three years of sold data applies to IDXs, not VOWs. See 2015 Hearing Transcript, volume 3 (Public), p. 418-419. Second, in the United States, MLS is not a trademark and there is no federal privacy legislation comparable to PIPEDA. Lastly, REALTOR.com is owned and operated by a private entity, not NAR, and, in that respect, is not comparable to REALTOR.ca, which is owned and operated by CREA.

popular. The popularity of REALTOR.ca, the continued interest in IDXs and the interest in and success of CREA's DDF® discussed above are examples.

80. In particular, REALTOR.ca, which does not display any of the Disputed Fields, remains just as popular as Viewpoint.ca in Nova Scotia. Even excluding the users of REALTOR.ca's mobile apps (to remove any risk of double-counting), 1,114,227 users in Nova Scotia visited REALTOR.ca in 2013 (compared to [REDACTED] users visiting Viewpoint.ca in 2013) and 1,281,893 users in Nova Scotia visited REALTOR.ca in 2014 (compared to [REDACTED] users visiting Viewpoint.ca in 2014).¹¹⁹ These comparisons aside, as will be discussed below, there is no reliable evidence that

¹¹⁹ Realtor.ca Nova Scotia Web and Mobile Traffic Analysis: 2012, 2013, 2014, Exhibit IC-179, cover page; Second McMullin Statement, Exhibit E, pp. 26-28. In his cross-examination of Mr. Simonsen, Commissioner's counsel suggested that the REALTOR.ca web analytics for Nova Scotia are not an appropriate comparison to Viewpoint.ca. This suggestion should be rejected for a number of reasons. First, Mr. McMullin has consistently relied on the REALTOR.ca web statistics for Nova Scotia produced by Google Analytics. He actually regularly tracked REALTOR.ca's web traffic statistics in Nova Scotia in order to assess how Viewpoint.ca was doing relative to REALTOR.ca. He consistently obtained Google Analytic reports on REALTOR.ca web visits for Nova Scotia on a monthly basis from CREA. Those reports are conservative in that they do not capture IP addresses outside of Nova Scotia who are searching for Nova Scotia properties on REALTOR.ca. And, at least in 2012, one of the services he provided to clients was a weekly report showing the number of clicks on their property on both Viewpoint.ca and REALTOR.ca. Second, Mr. McMullin uses and relies on Google Analytics to track web traffic to Viewpoint.ca and any limitations in the results provided by Google Analytic reports equally apply to the reports he has filed and relies on. Third, unlike CREA, Mr. McMullin had access to both the relevant REALTOR.ca (from CREA) and Viewpoint.ca web statistics over a number of years, and yet offered no comparative analysis for the benefit of the Tribunal. The Tribunal should draw the inference that such comparative analysis would have confirmed CREA's evidence that Viewpoint.ca and REALTOR.ca are, currently, equally popular in Nova Scotia. See 2015 Hearing Transcript, volume 2 (Public), p. 188-194 and 203; Second McMullin Statement, para. 41; Witness Statement of William McMullin, dated June 18, 2012, para. 62 ("**2012 McMullin Statement**"); Exhibit IC-107 and IC-108.

CREA also provided reports prepared by ComScore which compare the website traffic for Viewpoint.ca and REALTOR.ca in Atlantic Canada. See Ex. IC 110 and 111. Even if you cut the REALTOR.ca stats in half to account for the fact that Viewpoint.ca only does business in roughly half of Atlantic Canada, REALTOR.ca is still generally as popular as Viewpoint.ca.

2015 Hearing Transcript, volume 2 (Public), pp. 191-194 and Exhibits I-107 and CI-108.; 2012 McMullin Statement, para. 62.

Viewpoint.ca's popularity has anything to do with the display of some of the Disputed Fields on its VOW.

(e) No Empirical Evidence Quantifying Competitive Effects

81. Despite agreeing that a comparison of "full information" VOWs (*i.e.*, containing the Disputed Fields) versus "partial information" VOWs (*i.e.*, based on the TREB VOW data feed) is necessary in order to assess competitive effects,¹²⁰ Dr. Vistnes does not offer any quantitative analysis that assesses the incremental competitive benefit, if any, of having a full-information VOW instead of a partial-information VOW.

82. Dr. Vistnes offers no empirical analysis as to the competitive impact of full-information VOWs in the United States, no analysis of the competitiveness of technologically advanced brokerages in the GTA market, no analysis of the relative effectiveness of a VOW with sold data in converting website users to clients compared to VOWs that do not, and no analysis of relative effectiveness of agents whose websites have a full-information VOW versus those whose do not.¹²¹ This is despite (i) an additional 3 years of experience in the United States and Nova Scotia with VOWs containing some of the Disputed Fields, (ii) Redfin's operation both in jurisdictions where sold data is available from the MLS and those where it is not, and (iii) an additional 3 years of experience in the GTA with brokers who operate websites with VOWs that do not contain the Disputed Fields.

¹²⁰ 2012 Hearing Transcript, volume 7 (Public), p. 1145.

¹²¹ 2015 Hearing Transcript, volume 4 (Public), pp. 514-516, 531-533; 2015 Hearing Transcript, volume 4 (Confidential), pp. 94-95.

83. In particular, Dr. Vistnes has not analyzed the impact on price of displaying the Disputed Fields in a VOW, as opposed to providing the information through other means. He concedes that Viewpoint, which displays some of the Disputed Fields on its VOW, is now charging market rates for listing commissions and has discontinued buyer rebates.¹²² He further concedes that brokers who offer VOWs using TREB's VOW data feed have and continue to offer discounted commissions as well as rebates.¹²³ He is not able to provide an explanation as to why commission rates in areas with full information VOWs are not coming down and concedes it is not clear whether full information VOWs cause a decrease in prices.¹²⁴

84. Dr. Vistnes offered two reasons why it would not be helpful to undertake a comparative quantitative analysis, using the experience in the United States or Nova Scotia.

85. First, Dr. Vistnes argued that because of the differences between the GTA on the one hand, and Nova Scotia and the United States on the other hand, any conclusions he reached from the comparative analysis would be open to criticism.¹²⁵ The Tribunal should not accept this explanation. Dr. Vistnes himself relies on the United States experience in several respects to support his opinions.¹²⁶ Indeed, in his evidence in 2012 (which he affirmed in 2015)¹²⁷ Dr. Vistnes confirmed that the American

¹²² 2015 Hearing Transcript, volume 4 (Public), pp. 522, 525.

¹²³ 2015 Hearing Transcript, volume 4 (Public), pp. 525.

¹²⁴ 2015 Hearing Transcript, volume 4 (Public), pp. 596.

¹²⁵ 2015 Hearing Transcript, volume 4 (Public). pp. 514-515, 556-558.

¹²⁶ 2012 Hearing Transcript, volume 6A (Public), pp. 1007-1008, 2015 Hearing Transcript, volume 4 (Public), pp. 606-608. See also the Report of Dr. Gregory Vistnes, dated February 6, 2015, footnote 47 and Vistnes 2015 Reply Report at page 25.

experience with full information VOWs would be instructive so long as possible differences were accounted for.¹²⁸ And, as explained by Dr. Flyer in response to questions from the Tribunal on this issue, a market comparison is possible and appropriate, given the similarities between the relevant markets and given the Commissioner's argument that providing the Disputed Fields through a VOW will have a substantial effect on competition.¹²⁹

86. Second, Dr. Vistnes suggested that he did not have access to the necessary data to do the quantitative analysis because the Commissioner is not able to subpoena MLS information from the United States. This explanation should not be accepted by the Tribunal. After further questioning, Dr. Vistnes clarified that he was not "unable" to access the necessary MLS data; rather, it appears that the Commissioner simply decided not to seek the relevant MLS information from the U.S.,¹³⁰ at least some of which Dr. Vistnes acknowledged he had access to as a result of his involvement as an expert in the 2008 NAR proceedings concerning VOWs.¹³¹

87. Without any quantitative evidence, Dr. Vistnes is forced to rely on the general assertion that residential real estate brokerage services would be of better quality if the Disputed Fields were available in the TREB VOW feed. Dr. Vistnes concedes that quality is difficult to measure¹³² and he has made no attempt to undertake such measurement.

¹²⁷ 2015 Hearing Transcript, volume 4 (Public), p. 615.

¹²⁸ 2012 Hearing Transcript, volume 7 (Public), pp. 1117-1118.

¹²⁹ 2015 Hearing Transcript, volume 6 (Public), pp. 1171-1172.

¹³⁰ 2015 Hearing Transcript, volume 4 (Public), pp. 556-557.

¹³¹ 2015 Hearing Transcript, volume 4 (Public) p. 605.

88. There is no evidence before this Tribunal that the quality of services is suffering because TREB does not provide a VOW data feed that contains the Disputed Fields. The evidence, summarized above, is to the contrary; brokers in the GTA continue to innovate and improve their service offerings, using VOWs based on the TREB VOW data feed, as well as other Internet data-sharing vehicles.

(f) The Commissioner's "Indirect Evidence" of Alleged Benefits of VOWs with the Disputed Fields Is Not Probative and Should be Rejected

90. The "indirect evidence" from the Commissioner's fact witnesses regarding the competitive advantage of a VOW data feed containing the Disputed Fields is, at best, speculative, non-specific and without a reliable foundation. What little specific evidence these witnesses do provide tends to undermine their assertions regarding the competitive importance of the Disputed Fields on a VOW.

91. **TheRedPin** Mr. Gidamy claims he would develop more sophisticated CMA tools if sold data were included in the VOW data feed and that using these tools would save his agents time.¹³³ However, the only specific evidence he offers is that his agents, as a group, conduct 200 CMAs per month, with each taking between 10 and 60 minutes to complete.¹³⁴ Mr. Gidamy acknowledged that for each of these CMAs the agent would have to do some analysis.¹³⁵ At the time of his Second Witness Statement, TheRedPin had 55 agents. Taking the worst-case scenario of 60 minutes per CMA, the

¹³² 2015 Hearing Transcript, volume 4 (Public), pp. 592-594.

¹³³ Second Gidamy Statement, para. 14.

¹³⁴ 2015 Hearing Transcript, volume 2 (Public), pp. 273-275.

¹³⁵ 2015 Hearing Transcript, volume 2 (Public), p. 277.

maximum savings per agent would be a mere 3.6 hours per month. Dr. Vistnes stated that such a time savings "wouldn't strike me as particularly substantial".¹³⁶

92. Mr. Gidamy asserts that TheRedPin would have developed a seller's listing package "long before April 2014" if sold data had been offered in the VOW data feed.¹³⁷ The suggestion that TheRedPin required sold data in a VOW data feed before it could offer a seller's listing package is not credible. Realosophy, using the same TREB VOW data feed used by TheRedPin, was able to offer a seller's listing package on essentially the same or better terms as TheRedPin (*i.e.*, a 1.5% listing commission) as far back as 2012.¹³⁸ In a similar vein, while Mr. Gidamy asserts that access to historical sales data would allow him to develop neighbourhood "heat maps" and other neighbourhood specific tools and analysis, Realosophy is already providing these very tools using the current TREB VOW data feed.¹³⁹

93. **Realosophy** Mr. Pasalis argues that he would develop additional tools that his agents would use if he received the Disputed Fields through TREB's VOW data feed. No specifics are provided and Mr. Pasalis's discussion of these tools is simply an assertion that access to sold data would save his agents time and make them more efficient.

¹³⁶ 2015 Hearing Transcript, volume 4 (Public), p. 530.

¹³⁷ Second Gidamy Statement, para. 15; 2015 Hearing Transcript, volume 2 (Public), pp. 284-286.

¹³⁸ Witness Statement of Urmi Desai, dated June 20 2012, Exhibit A-007, para. 29 and Exhibit H; 2015 Hearing Transcript, volume 2, pp. 284-286.

¹³⁹ Second Gidamy Statement, paras. 21-22.

94. **Viewpoint** While Viewpoint has grown its business since 2012, its market share remains relatively low.¹⁴⁰ At the time of Mr. McMullin's Second Witness Statement, Viewpoint had only 250 (or 1.8%) out of a total of 13,800 active listings in Nova Scotia.¹⁴¹

95. More importantly, there is no reliable evidence that any of Viewpoint's growth or popularity is attributable to its display of some of the Disputed Fields on a VOW. The evidence is directly to the contrary. While Mr. McMullin alleges that his users tell him that the most important feature on his website is sales history,¹⁴² the evidence tells us otherwise. As discussed above, despite the relative ease of access to some of the Disputed Fields through registration on Viewpoint.ca, only a small fraction of consumers register to access the information and an even smaller number retain Viewpoint on a transaction. Further, despite offering an online CMA tool and additional property information, very few Viewpoint.ca visitors have shown an interest in the Client Advantage program.

96. There is no evidence to support the assertion that the provision of some of the Disputed Fields on a VOW (as opposed to, for example, the Viewpoint.ca website in general or the services offered by Viewpoint REALTORS®) has given Viewpoint any kind of competitive advantage in Nova Scotia. Mr. McMullin has not done a formal survey of market activity by his competitors.¹⁴³ Further, even though there are other

¹⁴⁰ Second McMullin Statement, paras. 31-33.

¹⁴¹ Second McMullin Statement, para. 34. [REDACTED] 2015 Transcript, volume 2 (Confidential), pp. 3-4.

¹⁴² 2015 Hearing Transcript, volume 2 (Public), p. 135.

brokerages in Nova Scotia that are receiving some of the Disputed Fields in a data feed and displaying them on their websites,¹⁴⁴ no evidence as to the relative competitive success of these firms was proffered by the Commissioner. As Dr. Flyer testified, if full information VOWs did provide the substantial benefits that the Commissioner and Dr. Vistnes are alleging,

you would expect their growth would be explosive and to be, you know, robust. And it wouldn't just be one, it wouldn't just be Viewpoint because we don't know how much of this growth is attributable to their management. We would want to see multiple examples of this type of growth.¹⁴⁵

97. Mr. McMullin claimed (for the first time) during his examination in chief in September 2015 that Viewpoint agents complete 20 to 22 transactions per year, compared to the 10 to 12 done by non-VOW operators.¹⁴⁶ This comparison is, at best, misleading and unsupported by any reliable data. Mr. McMullin eventually confirmed on cross-examination that he was comparing Viewpoint to every other broker in Nova Scotia, including those who have rudimentary websites, complicated websites or, indeed, no website at all.¹⁴⁷ Further, Mr. McMullin did not provide any factual support for these figures. In any event, even if these figures were reliable, there is no evidence to suggest that Viewpoint's ability to close more transactions per agent per year has any relationship to the fact that Viewpoint.ca displays sold data on its VOW.

¹⁴³ 2015 Hearing Transcript, volume 2 (Public), p. 169.

¹⁴⁴ Second McMullin Statement, para. 7; 2015 Hearing Transcript, volume 2 (Public), pp. 206-207.

¹⁴⁵ 2015 Hearing Transcript, volume 6 (Public), pp. 1163-1164.

¹⁴⁶ 2015 Hearing Transcript, volume 1 (Public), p. 89.

¹⁴⁷ 2015 Hearing Transcript, volume 2 (Public), pp. 215-218.

98. It appears that there is no general agreement, in any event, as to the relevance of the number of deals per agent. Mr. Sage did not put much stock in such analysis, preferring instead to focus on the quality of the agent, while [REDACTED]

[REDACTED]

[REDACTED]¹⁴⁸

99. Notably, Viewpoint's provision of some of the Disputed Fields on its VOW has not lowered costs. Buyer rebates have been abandoned and commission rates have not come down; the seller still pays a commission of 4 to 5% and the current policy is to offer a commission of 2% or more to the buyer's agent.¹⁴⁹ Additionally, Viewpoint's full service commission listing is now more expensive than it was in 2012.¹⁵⁰

100. **Redfin** Redfin generally charges 1.5% listing commission and recommends that sellers offer cooperating broker commission in the 2-3% range, similar to certain brokerages using the TREB VOW data feed. Even though VOWs containing sold data have been operating in the United States for some time, Mr. Nagel was unable to provide any evidence of lower commissions in the United States.¹⁵¹

101. Mr. Nagel's suggestion that Redfin would expand into Canada if the Tribunal ordered the remedy requested by the Commissioner is deserving of very little weight. [REDACTED]

¹⁴⁸ Second Nagel Statement, para. 27; 2015 Hearing Transcript, volume 5 (Public), pp.780-781; 2015 Hearing Transcript, volume 5 (Confidential), pp. 121-122.

¹⁴⁹ Second McMullin Statement, para. 43.

¹⁵⁰ Second McMullin Statement, para. 44.

¹⁵¹ 2015 Hearing Transcript, volume 3 (Public), p. 380 and 410-11 and volume 3 (Confidential), pp. 53-54.

[REDACTED]

[REDACTED]¹⁵³ The suggestion that Redfin's expansion into Canada hinges on the outcome of this proceeding rings hollow in the face of this evidence, as well as the fact that Redfin had no difficulty expanding its business to areas in the United States where sold data was not available through the MLS.

102. **Sam and Andy** Mr. Prochazka testified that he might have opened a web-based brokerage [REDACTED] but did not for essentially two reasons. First, because he didn't have access to sold prices which he says he needed to distinguish himself from his competitors and, second, because his business model depended on recruiting high quality agents willing to work on a salary and he was concerned about being able to do so.¹⁵⁴ Neither explanation rings true. First, if the sold prices were available through a data feed, they would be available to every web-based brokerage and, therefore, would not be a point of differentiation. Further, web-based brokerages have entered the market and been successful in the GTA without access to sold prices through a VOW data feed. Second, Mr. Prochazka's ability to recruit salaried agents has nothing to do with a VOW data feed including sold prices and, in

¹⁵² 2015 Hearing Transcript, volume 3 (Confidential), pp. 42-43.

¹⁵³ Second Nagel Statement, para. 27; 2015 Hearing Transcript, volume 3 (Public), pp. 403-404; 2015 Hearing Transcript, volume 3 (Confidential), pp. 42-43.

¹⁵⁴ Second Witness Statement of Sam Prochazka, dated February 3, 2012, Exhibits A-117 and CA-118, paras. 14-19.

any event, TheRedPin has had no trouble recruiting salaried agents to a web-based brokerage that relies on TREB's VOW data feed.

(g) Certain Disputed Fields Never Displayed on VOWS

103. No evidence was presented by the Commissioner of a VOW that operates anywhere which includes buyer broker commission information. Redfin does not include commission information on a VOW, nor does Viewpoint.¹⁵⁵ There is no credible evidence that consumers want this information on a VOW or that the absence of it has had any impact on Redfin's or Viewpoint's business.

104. Further, Redfin does not display pending sold prices. Sold data is only displayed once the transaction has closed. In addition, Redfin does not display expired or withdrawn listings.¹⁵⁶ There is no evidence that the failure to display these fields on the VOW has negatively affected Redfin's business in any way.

E. The Legal Test and Summary of Argument

105. Each of the section 79 elements is conceptually distinct and gives rise to a distinct legal test.¹⁵⁷ As noted above, this closing argument focuses on the third requirement—whether the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in the relevant market.

¹⁵⁵ 2012 Hearing Transcript, volume 3A (Public), pp. 467-468; 2015 Hearing Transcript, volume 2 (Public), p. 179; 2015 Hearing Transcript, volume 3 (Public), p. 414.

¹⁵⁶ 2012 Hearing Transcript, volume 3A (Public), pp. 471-473; Second Nagel Statement, para 19; 2015 Hearing Transcript, volume 3 (Public), pp. 398-399, 414.

¹⁵⁷ *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, paras. 26-28 ("**Canada Pipe**").

106. Whether the third part of the section 79 test has been met depends on whether the relevant market would be substantially more competitive but for the impugned practice of anti-competitive acts.¹⁵⁸ Answering this question should include consideration of whether, in the absence of the impugned practice, entry or expansion might be substantially faster, more frequent or more significant, whether prices might be substantially lower, or whether the quality of products might be substantially greater.¹⁵⁹

107. Applying the test to this proceeding, the relevant question is whether the relevant market would be substantially more competitive but for the absence of the Disputed Fields from the TREB VOW data feed. Put another way, would there be a substantial incremental competitive benefit to requiring the Disputed Fields to be included in the TREB VOW data feed?

108. The Tribunal should not speculate as to the likelihood of a substantial prevention or lessening of competition.¹⁶⁰ Rather, as the Supreme Court of Canada recently held regarding the equivalent test under s.92 of the *Act*, the Tribunal's findings regarding such likelihood "must be based on evidence".¹⁶¹ "Mere possibilities" do not suffice to discharge the Commissioner's burden of proof.¹⁶²

109. The Commissioner has the burden to quantify all competitive effects that are capable of being quantified. Effects should only be considered qualitatively if they

¹⁵⁸ *Canada Pipe*, para. 38.

¹⁵⁹ *Canada Pipe*, para. 58.

¹⁶⁰ *Tervita v. Canada*, [2015] 1 S.C.R. 161, at para. 65 ("*Tervita*").

¹⁶¹ *Tervita*, para. 65.

¹⁶² *Tervita*, paras. 65-66.

cannot be quantitatively estimated.¹⁶³ The fact that a potential competitor is likely to enter the market is not sufficient – that entry must be likely to have a substantial effect on the market.¹⁶⁴

110. The key evidence, as summarized above, does not support the existence of a competitive benefit resulting from requiring TREB to include the Disputed Fields in its VOW data feed, let alone a substantial one. The evidence shows the lack of effect on entry/expansion, prices and product service that would occur if the Disputed Fields were displayed on a VOW.

111. In particular, the evidence discussed above illustrates the current success of innovative brokerage models and forms of Internet data-sharing vehicles that have nothing to do with VOWs, the lack of relative popularity of and impact of VOWs, the low value placed on sold information being provided over the Internet, the role of VOWs as merely one part of a lead generating website, the high value consumers place on services provided by REALTORS® (that cannot be replicated by automation over the Internet) and the absence of any positive change to consumer services or costs resulting from a VOW displaying the Disputed Fields as compared to one that does not. Further, no credible evidence exists that requiring TREB to include the Disputed Fields in its VOW data feed will result in entry that is likely to have a substantial effect on the market.

¹⁶³ *Tervita*, paras. 137-138.

¹⁶⁴ *Tervita*, para. 78.

112. To reliably demonstrate the procompetitive benefits of the requested remedy, the Commissioner must provide evidence that the available services to consumers would be either higher in quality or lower in cost as a result of the remedy. To do this, the Commissioner must show that: (a) there exists no close substitute for brokers who use VOWs for delivering the Disputed Fields; and (b) brokers who use VOWs provide unique services that aren't readily available elsewhere.¹⁶⁵

113. As Dr. Flyer explains, Dr. Vistnes provides no reliable support that brokers who use VOWs offer higher quality or less expensive brokerage services than brokers who don't use VOWs.¹⁶⁶ As discussed above, Dr. Vistnes (i) fails to perform any empirical analysis on whether the delivery of the Disputed Fields through a VOW is important to the competitive positioning of brokers who use VOWs; (ii) fails to quantify any competitive effects on either price or quality of service; and (iii) uniquely attributes services to brokers who use VOWs that are available through brokers who do not use VOWs (such as lower commission rates and the provision of detailed property information through the Internet).¹⁶⁷

114. Further, Dr. Vistnes fails to conduct an analysis of whether the display of the Disputed Fields on a VOW would result in any consumer harm.¹⁶⁸ Such harm should be taken into account in assessing the competitive impact of the current TREB VOW Policy.¹⁶⁹ In this regard, Dr. Flyer points to the concern raised by CREA that the

¹⁶⁵ Flyer Summary, p. 5; 2015 Flyer report paras. 21-22.

¹⁶⁶ 2015 Flyer Report, paras. 6-7.

¹⁶⁷ Flyer Summary, p. 5.

¹⁶⁸ 2015 Flyer Report, paras. 23-25.

¹⁶⁹ Flyer Summary, p. 7.

requested remedy could result in consumers being harmed by the accessibility of their property information on a VOW, which may diminish the credibility of REALTORS® and the MLS® System, and negatively affect CREA's Trademarks.¹⁷⁰

115. CREA, together with local boards/associations, has consistently and diligently ensured that CREA's Trademarks are used only by members in association with a high standard of professionalism and service.¹⁷¹

116. Any misuse (including use for a purpose not consented to) on the Internet of information sourced from an MLS® System could cause serious harm to the MLS® Trademarks. For example, if a VOW is required to contain all property information available on a board's MLS® System, including the data contained in the Disputed Fields, consumers could lose faith in the credibility of MLS® Systems, REALTOR.ca and the services of REALTORS® which, in turn, could significantly harm CREA's Trademarks.¹⁷²

117. This is especially true given that this information would be available to any member of the public and not just those with a legitimate interest in buying or selling real estate in the GTA.¹⁷³ As Dr. Flyer observed in his 2015 report, the evidence indicates that the vast majority of visitors to a VOW are not real estate customers;

¹⁷⁰ Flyer Report, pp. 7-8, 2015 Flyer Report, para. 25.

¹⁷¹ CREA has recently amended its trademarks policy in order to strengthen the marks by making their usage easier to understand by members. See Exhibit IC-178. 2015 Hearing Transcript, volume 6 (Public), pp. 1028-1083.

¹⁷² Updated Simonsen Statement, paras. 99-100.

¹⁷³ See paras. 77-78 above, which note that only a small fraction of the registrants on Redfin's VOW (and therefore only a small fraction of those with access to the information on the VOW) actually engage Redfin for the purchase or sale of a home. The same is true of viewpoint (see para. 75 above).

displaying disputed field information to these "real estate voyeurs" may exacerbate privacy concerns.¹⁷⁴

118. Commissioner's counsel spent considerable time in 2012 examining consent provisions of standard form agreements to attempt to establish that any privacy concerns, including CREA's concern described above, are of no moment because buyers and sellers have all consented to the display of their transaction information on a VOW. The evidence does not establish this.¹⁷⁵ In particular:

- (a) The only clauses in the listing agreements and buyer representation agreements that could possibly be interpreted to provide consent to display transaction information on a VOW is the "catch-all" clause that purports to provide consent to the use of MLS® listing information as the board or brokerage deems appropriate.¹⁷⁶ Informed consent for the specific use of information for display on a VOW is not sought or obtained through these agreements.
- (c) In any event, listing agreements only provide for consent by the seller to the selling broker. Buyer representation agreements only provide for consent by the buyer to the buyer's broker.
- (d) Schedule B to agreements of purchase and sale can include consents by both buyer and seller to both brokers to disclose information about the transaction. The Schedules provided in evidence are not uniform and the consents requested vary. For example, the schedule used by Mr. Syrianos for his Remax brokerage in 2012 did not include consent to display sold information.¹⁷⁷ He testified that keeping a consent separate allows for more scrutiny.¹⁷⁸

¹⁷⁴ 2015 Flyer report, paras. 24-45.

¹⁷⁵ The relevant clauses in the various agreements have not changed in any significant way since the hearing in 2012.

¹⁷⁶ Witness Statement of Donald Richardson (Confidential) dated July 27, 2012, Exhibit CR-040, Exhibit Y (pp. 434-440); Exhibit A-004, Document 660; Exhibit A-004, Document 1204.

¹⁷⁷ Schedule B to the Agreement of Purchase and Sale, Exhibit A-074. See also, Century 21 – Schedule B – SALE 2011, Exhibit R-068 and SAGE – SCHED B FOR SALE – LAST UPDATED JANUARY 2012, Exhibit R-069.

¹⁷⁸ 2015 Hearing Transcript, volume 5 (Public), pp. 833-834.

- (e) Ms. Prescott's evidence confirmed the concern that executing standard form agreements or Schedule B's may not be sufficient for obtaining informed consent to display transaction information on a public website. No one can force a buyer or seller to consent. When specifically asked whether they consented to their property information being displayed on a public website, 90-95% of Ms. Prescott's brokerage clients said no, for privacy reasons and security.¹⁷⁹ Similarly, 50% of Mr. Syrianos's clients do not give consent to have their transaction information published even for the limited purpose of local neighbourhood advertising.¹⁸⁰
- (f) The regulatory landscape remains unclear. Whether VOWs are advertising (and subject to the RECO Guidelines) or brokerage services or a combination of both is unsettled. Jurisdictions such as Vancouver consider VOWs to be a form of advertising.¹⁸¹ Further, uncertainty remains as a result of the 2009 decision from the Privacy Commissioner¹⁸² that it is not enough that sold information is available on the public record for it to be disclosed without consent.

119. Against this landscape, one can fairly conclude that whether consumers have or are giving informed consents for the display of the Disputed Fields on a VOW is, at best, unclear. CREA's concern about the potential effect of the remedy has merit and should not be unfairly discounted. This concern, coupled with the absence of evidence proving an incremental competitive benefit arising from displaying the Disputed Fields to consumers on a VOW, renders the remedy requested by the Commissioner both unnecessary and inappropriate.

F. Conclusion

120. The Commissioner has not met the burden of establishing that the exclusion of the Disputed Fields from TREB's VOW data feed results in a substantial

¹⁷⁹ 2012 Hearing Transcript, volume 11A (Public), pp. 1787-88.

¹⁸⁰ 2015 Hearing Transcript, volume 5 (Public), pp. 820-821

¹⁸¹ 2012 Simonsen Statement, Exhibit 23 (pp. 619-67); 2012 Hearing Transcript, volume 14 (Public), pp. 2230-33.

¹⁸² 2012 Simonsen Statement, Exhibit 9 (pp. 351-55).

preventing or lessening of competition in a relevant market. Further, the Commissioner has not established that the requested remedy is appropriate, considering the evidence provided in this proceeding and all the relevant circumstances.

121. In the alternative, if the Tribunal determines that a remedy should be imposed, CREA submits that such remedy should be expressly limited to the GTA and not found or inferred to be appropriate for other jurisdictions in which MLS® Systems operate for a number of reasons. First, the effect of the remedy depends on a number of factors that vary across the jurisdictions of boards that operate MLS® Systems. Those factors include the competitive alternatives to obtaining the information in the Disputed Fields, consumer and broker demands and preferences, the regulatory environment and the financial and technological resources of the board. Second, the Commissioner is not seeking a remedy that extends beyond the TREB VOW Policy. Third, Dr. Vistnes confirmed that the relevant market is a local one and that any opinions that he provides are limited to the GTA market.¹⁸³

122. CREA respectfully submits that the Commissioner's application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

¹⁸³ 2012 Hearing Transcript, volume 7, p. 1152-1153.

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October 28, 2015

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THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

THE TORONTO REAL ESTATE BOARD

Respondent

- AND -

**THE CANADIAN REAL ESTATE ASSOCIATION AND
REALTYSELLERS
REAL ESTATE INC.**

Intervenors

**CLOSING SUBMISSIONS OF THE CANADIAN REAL
ESTATE ASSOCIATION
October 28, 2015**

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