

CT-2011-003

## COMPETITION TRIBUNAL

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

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

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

**B E T W E E N :**

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

**RECEIVED / REÇU**

CT-2011-003

May 15, 2015

Jos LaRose for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

# 308

**COMMISSIONER OF COMPETITION**

**Applicant**

**AND**

**THE TORONTO REAL ESTATE BOARD**

**Respondent**

**AND**

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

**Intervenors**

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**UPDATED WITNESS STATEMENT OF PAMELA PRESCOTT  
CENTURY 21 HERITAGE GROUP LTD**

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I, Pamela Prescott, of the City of Thornhill, in the Province of Ontario, state as follows:

1. I am the owner and ~~Broker of Record of~~ a broker at Century 21 Heritage Group Ltd., an independently-owned real estate brokerage with offices in Thornhill, Richmond Hill,

Newmarket, and Bradford. My brokerage has 4 offices, 2 satellite offices, and in excess of 400 475 sales representatives.

2. I have been involved in the real estate industry in the Greater Toronto Area for approximately 35 38 years. I was a real estate salesperson for 8 years, and I have been a real estate broker for the past 27 30 years. During my career, I have been involved in approximately 700 real estate transactions as a salesperson, and approximately 40,000 45,000 as a broker.
3. I served as a Director of The Toronto Real Estate Board (“TREB”) for a period of three years during the early 2000s. I have also served as the Vice-Chair of TREB’s Ethics Committee, and as a member of TREB’s Arbitration Committee.
4. I have owned my brokerage for the past 25 28 years. Originally, my brokerage operated under the HomeLife banner. For the past 15 18 years, it has operated under the Century 21 banner.
5. Century 21 does not itself operate any “corporate-owned” real estate brokerages. All Century 21-affiliated brokerages are independently-owned franchisees.
6. My brokerage competes for business with other Century 21 brokerages. Some of my biggest competitors are other Century 21 brokerages, including ~~Century 21 Land Stars Realty Inc,~~ Century 21 Leading Edge Realty Inc, and Century 21 Atria Realty Inc.

#### **Operating as a Century 21 Franchisee**

7. Generally speaking, Century 21 takes a very hands-off approach to how its franchisees run their brokerages.

8. Century 21 does not have any restrictions on the type of business model that its franchisees operate. Franchisees have complete freedom to pick whatever business model they like, and they have complete freedom to change business models if they so desire.
9. From the perspective of the brokerage, there is freedom to determine the compensation between the brokerage and sales representative. Some Century 21 offices charge desk fees, some charge transaction fees, some charge a percentage of the commission on a transaction, and some use a combination of these methods. Some Century 21 offices have a maximum annual commission, and once sales representatives reach that amount the sales representative retains 100% of their commissions for the rest of the year.
10. From the perspective of the sales representative, there also is flexibility to use different business models. Some sales representatives do flat rate commission and some charge a percentage of the purchase price (and this rate varies widely among sales representatives at my brokerage).
11. There are a suite of Century 21 tools that are available to its franchisees (including training materials, technical support, and so on), and it is up to the franchisee how, if at all, those tools will be used.
12. Century 21 operates a website that lists homes that are for sale across the Century 21 franchise network, and also some of the homes that have sold within the Century 21 franchise network. **At the time of the initial hearing before the Competition Tribunal,** Century 21 Heritage Group sales representatives obtained the consent of clients for this sold information to be posted on the Century 21 website by way of schedule "B" to the agreement of purchase and sale. **As I testified at the initial hearing, only about 5-10% of**

our brokerage's clients were giving consent to post sold price information on the Century 21 website.

12.1 Since the initial hearing, Century 21 Heritage Group made a decision as a brokerage to stop sending sold price information to the Century 21 website, and so we no longer ask for consent to send the information for display on the Century 21 website as part of the home buying/selling process. Century 21 Heritage Group now has a stand-alone "Permission to Advertise the Sale of the Property" document that our sales representatives ask the parties to the transaction to sign. This is a consent to advertise that is for marketing materials such as distributing "just sold" cards.<sup>1</sup> Less than 5% of our clients sign our "Permission to Advertise the Sale of the Property" form. Century 21 Heritage Group's "Permission to Advertise the Sale of the Property" form is attached to my witness statement as Exhibit A.

12.2 One of the main reasons that our brokerage stopped sending sold prices to the Century 21 website is that we found that clients do not want their private information, including the sold price of their home, to be widely available on the internet. Since the initial hearing I have discussed the issue of internet-available sold home prices with several of my sales representatives (who I directed to discuss the issue with their own clients), and I also discussed the issue directly with numerous clients. Of all the feedback I received, no one was comfortable with having the sold price of their home widely available on the internet (whether as a buyer or a seller).

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<sup>1</sup> A "just sold" card is typically a postcard sized mail-out that features branding from our brokerage with a picture of the exterior of the sold property with the address, and will sometimes include either the sold price or state that the property sold for 105% (for example) of the listing price. These cards are mailed out to the neighbourhood in which the house is sold shortly after the transaction closes.

12.3 My sales representatives and I received feedback that clients were comfortable with sold prices being available on TREB's MLS for use by other realtors because, after all, they themselves had the benefit of a sales representative with access to TREB's MLS (which includes historical sold data) when they were buying or selling their home. While some clients did not mind something like a sold card being distributed one time in locally in the neighbourhood, they did not want their private sold price to be out there widely available over an extended period of time for everyone to see on the internet. Other clients were not even comfortable with the notion of a sold card showing the price, and simply wanted the sold price to stay private.

12.4 My consultations with Century 21 Heritage Group's sales representatives and clients played a big role in the decision to stop sending sold prices to the Century 21 website. Based on the comments that I received, I wondered whether the 5-10% of people who had agreed to our posting the sold prices in the past actually understood that they were consenting to having their sold price sent to the Century 21 website.

12.5 From my review of the Century 21 website, it appears that currently across the franchise about 95% of Century 21's transactions do *not* list the sold price for sold listings. In other words, the website shows all of the homes that are sold across the Century 21 franchise network, and the sold price is only stated for 5% of those listings.

### Competition in the Greater Toronto Area Real Estate Market

13. There is a tremendous amount of competition within the real estate industry in the Greater Toronto Area, with a high amount of turn-over. Within the past year, my brokerage has hired 100 107 new sales representatives, and 50 96 sales representatives have left the brokerage.

14. One of the main ways that sales representatives generate new business is by having a presence in the local community. Sales representatives within the same community are competing for the same business.

**14.1 A trend I have noticed since the initial hearing is that realtors are increasingly competing for business across the entire city, as opposed to staying put within a neighbourhood or part of the city. There are also more realtors in the GTA now than there were during the time of the initial hearing. Both of these factors have led to even more competition for listings and clients since the initial hearing.**

15. Sales representatives within my brokerage are in competition with each other for business because they operate in the same community. My sales representatives are all independent contractors.

16. Sales representatives within my brokerage do not have a salary. Their compensation is completely determined by the amount they earn in commissions. As discussed below, sales representatives within my brokerage have complete autonomy to set commission rates with their clients.

**Comparative Market Analyses**

17. Buying a home and selling a home are incredibly emotional experiences. A real estate sales representative provides services that help their clients make informed decisions during what will be one of the biggest transactions in their lives.
18. One of the services that a real estate sales representative typically provides, both to sellers and buyers of real estate, is a Comparative Market Analysis. A Comparative Market Analysis compares the home being sold against other recently sold homes to determine a rough market value for the home being sold.
19. 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.
20. In my practice, I would do an in-person visual inspection of the relevant properties before providing a Comparative Market Analysis to a client. Many factors have an effect on market value, and these factors have to be considered and interpreted before making any definitive comparisons between homes. By way of a few examples, there might be structural issues with a home that might be visible in person but might not be apparent in pictures; the home might back out onto train tracks; the home might be near a stop sign on a busy street; or there might be recent renovations to the home.
21. Also, numbers alone do not reveal information about general market trends, or market trends within a specific neighbourhood taking into consideration things like volume of sales, and

levels of inventory. Market trends make a tremendous difference in determining market value.

22. In my experience, sold price information on its own does not provide a complete picture, and this information needs to be analysed by a professional in preparing a Comparative Market Analysis.

### **Commissions**

23. Sales representatives at my brokerage have complete discretion to negotiate their commissions with their clients, both as listing sales representatives and cooperating sales representatives. There is no such thing as a normal or standard commission charged by my sales representatives.
24. Commissions are addressed in both the listing agreement (the agreement between the listing sales representative and the home seller), and in the buyer representation agreement (the agreement between the cooperating sales representative and the home buyer). These are standard forms that are provided by the Ontario Real Estate Association.
25. The listing agreement sets out the amount of commission that the listing sales representative will receive if the home sells, and it also sets out the amount of the offer of commission to the cooperating broker. These commission figures are discussed and negotiated between the home seller and the listing sales representative.
26. Generally speaking, the cooperating sales representative receives his/her commission out of the listing sales representative's commission. For example, if the listing sales representative received commission of 3.75%, a portion of that 3.75% would be provided to the cooperating sales representative as his/her commission.



27. In my experience, the initial offer of the cooperating sales representative's commission in the listing agreement is something that can be, and is, negotiated between the listing sales representative and the cooperating sales representative. In other words, the initial offer in the listing agreement is not necessary the commission that the cooperating sales representative ends up receiving.
28. The standard buyer representation agreement contains a clause that guarantees a floor for the cooperating sales representative's commission. If the cooperating sales representative receives less than the stipulated percentage/dollar amount from the listing sales representative, the home buyer agrees to cover the shortfall. This is a negotiable amount between the home buyer and the cooperating sales representative. In my experience, the cooperating sales representative's commission will always be guaranteed in the buyer representation agreement, although the amount will vary and is often negotiated at the time of an offer.

28.1 As I testified during the initial hearing, it is a very common practice for my sales representatives to rebate a portion of the cooperating (buying side) commission to the buyer. This rebating practice has become even more common since the initial hearing.

[start confidential level A]

[end confidential level A]

In addition, since the initial hearing, my sales representatives are also frequently rebating part of their commission to the sellers.

29. Both the listing sales representative's commission and the cooperating sales representative's commission are negotiable. In my experience, there is a lot of competition on commission rates in the Greater Toronto Area among sales representatives, and among brokerages, as sales representatives and brokerages compete for clients. In my experience, the listing commission in residential real estate transactions can range from 2.5 – 5.5%, and the cooperating commission can range from 0 – 2.5% (which would be paid out of the listing sales representative's commission).

29.1 During the initial hearing I prepared a chart showing the commissions charged by my sales representatives for all transactions covering March 2010 through February 2012 for both the listing side and for the cooperating side. For the purposes of the chart, the "listing commission" figure is net of the amount of commission paid to the cooperating sales representative. The commission chart was marked as an exhibit at the hearing, and for ease of reference is attached to my witness statement as Exhibit B.

29.2 For the reconsideration hearing I have prepared an updated chart showing the commissions charged by my sales representatives for all transactions covering March 2012 through February 2015 for both the listing side and for the cooperating side. My updated commission chart is attached to my witness statement as Exhibit C.

29.3 As I testified at the initial hearing, the "selling" (cooperating) commission rate listed in my charts overstates the actual amount of commission flowing to the sales representative, because any rebates to the home buyer are taken out of the recorded number. For example, if a cooperating sales representative received 2% commission from the listing agent on a transaction and rebated half of that amount back to the client, the

cooperating sales representative would only receive 1% commission, although the attached charts would record such a transaction as being an instance of a 2% selling side commission. Because my agents are now frequently giving rebates to home sellers as well as home buyers, the same comment now also applies to the “listing” commissions in my chart – these numbers overstate the amount of commission being received. Our brokerage does not track the commission received by our salespeople net of rebates.

29.4 The services rendered by Century 21 Heritage Group continue to increase, while the commissions decline (mostly by way of rebates).

### Dual Agency

30. Dual agency situations occur when the same brokerage acts for the buyer and the seller in the same transaction.

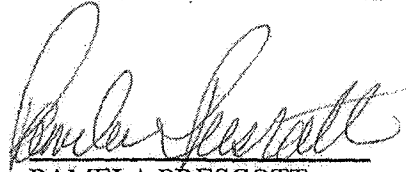
31. The most common reason for dual agency transactions in my brokerage is where the buyer and seller are represented by different sales representatives within the brokerage; sometimes across different offices. Dual agency transactions where the same sales representative acts for both buyer and seller are not the norm.

### Use of a VOW

32. During the initial hearing I testified that a VOW was likely on the horizon for Century 21 Heritage Group Ltd. Since the initial hearing, we decided to move forward with the VOW concept, and we are currently in the programming stage.

33. I expect that we will roll our VOW out in 4 phases, with the first phase being launched within the next few months. The VOW will be used primarily as a lead generation tool for our sales representatives, and will be similar in concept to other VOWs that currently exist in the marketplace such as Zolo and Zoocasa.

SIGNED THIS, this 15<sup>th</sup> day of May, 2015.



PAMELA PRESCOTT  
OWNER/BROKER,  
CENTURY 21 HERITAGE GROUP LTD.

<b>CT-2011-003</b>	
<b>COMPETITION TRIBUNAL</b>	
<b>THE COMMISSIONER OF COMPETITION</b> - and - <b>THE TORONTO REAL ESTATE BOARD</b> - and - <b>THE CANADIAN REAL ESTATE ASSOCIATION AND REALTYSELMERS REAL ESTATE INC.</b>	<b>Applicant</b>   <b>Respondent</b>   <b>Intervenors</b>
<b><u>UPDATED</u> WITNESS STATEMENT OF PAMELA PRESCOTT CENTURY 21 HERITAGE GROUP LTD.</b>	
<b>AFFLECK GREENE McMURTRY LLP</b> 365 Bay Street, Suite 200 Toronto, Ontario M5H 2V1  <b>Donald S. Affleck, Q.C.</b> LSUC#: 10420B <b>David N. Vaillancourt</b> LSUC#: 56969I <b>Fiona Campbell</b> LSUC#: 60383V Tel: (416) 360-2800 Fax: (416) 360-5960  Counsel for The Toronto Real Estate Board	

**EXHIBIT**

**A**

**PERMISSION TO ADVERTISE  
THE  
SALE OF THE PROPERTY**

The parties to the Agreement of Purchase and Sale for the property known as:

Address: \_\_\_\_\_

I/We: \_\_\_\_\_ (Buyers)

I/We: \_\_\_\_\_ (Sellers)

hereby give our consent to allow the respective real estate brokerages named herein to publicize the sale of the abovementioned property as follows:

- To disclose the sale price to other realtors and interested members of the public during the course of doing business.
- To distribute Just Sold cards or flyers, which may include the sale price, the address or general location of the property, a photo of the property, number of days on the market, list price to sale price ratio. (The Co-operating Brokerage will indicate that they have introduced the Buyer to the property.)
- To not disclose any personal information related to the parties, such as names, motivation for buying or selling, or specific information contained in the Sale Agreement.

SIGNED:

\_\_\_\_\_  
(Seller's Signature) (Date)

\_\_\_\_\_  
(Seller's Signature) (Date)

\_\_\_\_\_  
(Buyer's Signature) (Date)

\_\_\_\_\_  
(Buyer's Signature) (Date)

\_\_\_\_\_  
(Listing Brokerage) (Date)

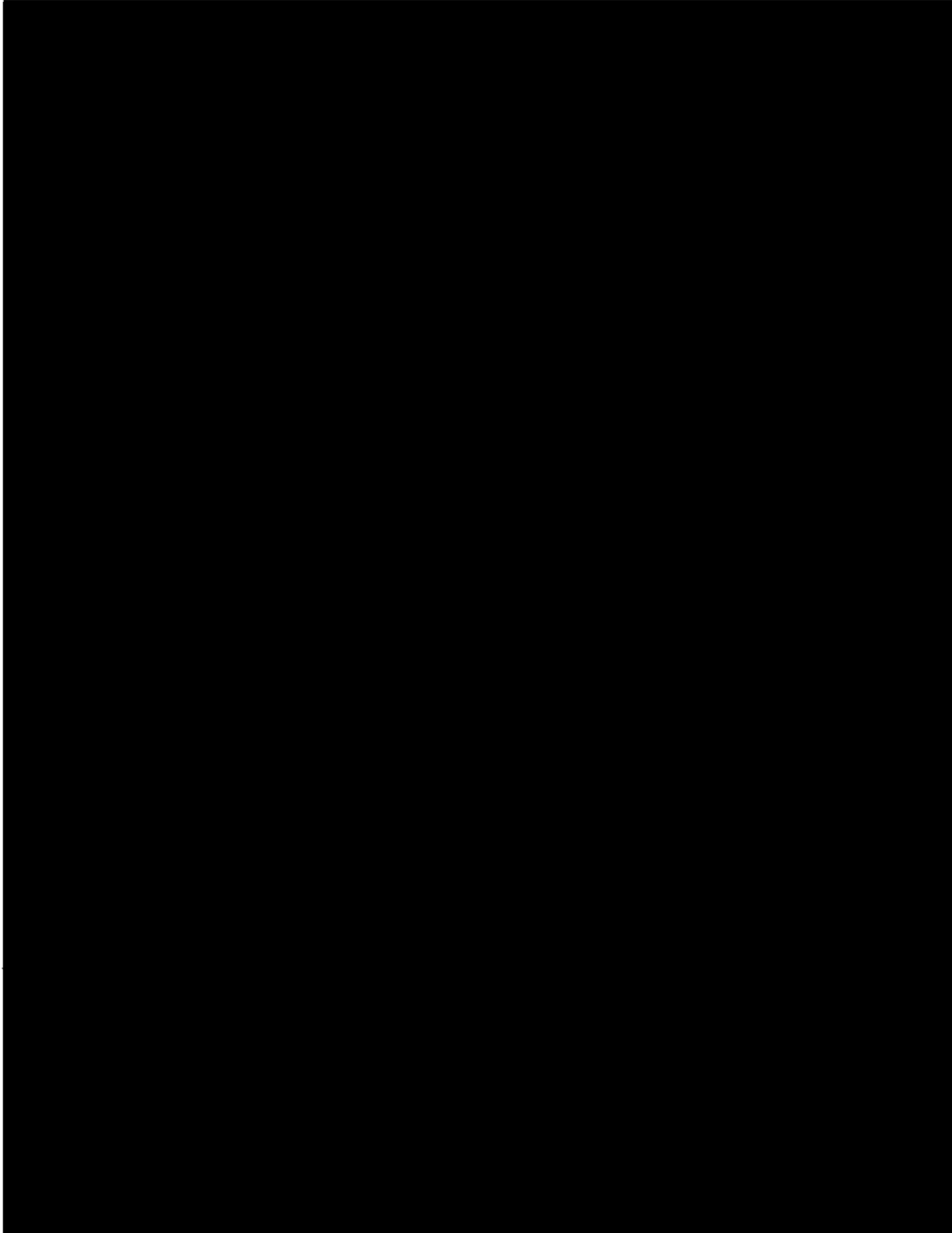
\_\_\_\_\_  
(Co-operating Brokerage) (Date)

# **EXHIBIT**

## **B**



**C21 Heritage Group Actual Commission**



# **EXHIBIT**

# **C**

Century 21 Heritage Group Actual Commission

