



Donald S. Affleck, Q.C.
Email: dsaffleck@agmlawyers.com
Direct Line: (416) 360-1488

June 3, 2014

By E-mail: flingdepot@ct-tc.gc.ca

Joseph LaRose
Deputy Registrar
Competition Tribunal
Suite 600, 90 Sparks Street
Ottawa, ON K1P 5B4

Dear Mr. LaRose:

Re: Commissioner of Competition (“Commissioner”) v. The Toronto Real Estate Board (“TREB”) – Reply of TREB

This is a brief Reply by TREB to the Memorandum of Fact and Law of the Commissioner. Please bring this letter to the attention of Madam Justice Simpson.

1. *RJR MacDonald* is not the correct test

Contrary to the submissions of the Commissioner, the *RJR MacDonald* test is not the Tribunal’s “long-standing test for adjourning a hearing pending an appeal.” The *RJR MacDonald* test was the test that the Tribunal applied one time, twenty years ago, under a predecessor version of the *Competition Tribunal Rules*.

In *D&B*, the Respondent sought to delay proceedings before the Tribunal while a discovery-related interlocutory Order of the Tribunal was under appeal. In the instant matter, the Tribunal’s Order was a final Order dismissing the Application. If TREB succeeds in restoring the Tribunal’s Order, this matter will be at an end. The *D&B* decision has no bearing on the present motion.

Rule 139(3) of the current *Rules* expressly provides that an adjournment can be granted if compelling reasons exist to grant such relief. If a higher threshold test were intended, such would have been stated in the Rules.

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Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 271

In the alternative, TREB meets the test in *RJR MacDonald*. While not explicitly labelled as such, the tripartite factors of the *RJR MacDonald* test are canvassed in TREB's Memorandum of Fact and Law.

2. Timing of a leave decision and prospect of leave

The Commissioner relies on statistics from the Supreme Court of Canada website as a springboard for speculation about the speed with which TREB's leave Application might be decided, and TREB's chances at obtaining leave.

It is trite to say that some leave Applications take longer than the average. The legal issues raised in the leave application are complex. There is no assurance of a response on leave by the end of the summer as the Commissioner speculates.

As to the prospects of TREB obtaining leave, in overturning the Tribunal, the Federal Court of Appeal has fundamentally altered the nature of the abuse of dominance provisions. TREB has raised two questions of national and public importance in its Application for leave to appeal. It is fallacious to suggest that TREB's leave Application will fail based on general statistics from the Supreme Court of Canada's website.

3. TREB does not need to show a change in circumstances

It was expressly contemplated during the April 1, 2014 case conference that TREB may bring the instant motion seeking an adjournment of the reconsideration hearing date on account of its Application for leave to appeal to the Supreme Court. This was the very reason that the April 7, 2014 Scheduling Order was issued in advance of the more detailed April 23, 2014 Scheduling Order – to facilitate TREB putting forward its motion to seek an adjournment. As such, TREB denies that it is obligated to show that circumstances have changed since the April 7, 2014 Scheduling Order in order to justify an adjournment.

4. No prejudice

Finally, the Commissioner's submissions on prejudice are overstated and completely unsupported by the evidence before the Tribunal at the Initial Hearing.

TREB already offers a VOW datafeed to its members. The Commissioner seeks to compel TREB to include in that datafeed data on sold and pending sold prices, withdrawn, expired, suspended, and terminated listings, and the offer of cooperating brokerage commission. The Commissioner failed to present evidence at the Initial

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Barristers and Solicitors

Hearing that the incremental value of the withheld data rises to the level of a substantial lessening or prevention of competition.¹ In particular, the Commissioner led absolutely no evidence at the Initial Hearing that a “full information VOW” would result in lower commission prices for consumers than VOWs operating under TREB’s current VOW policy. The alleged cost savings stated by the Commissioner in his Memorandum of Fact and Law has no basis in the evidence. There would be no prejudice from an adjournment.

All of which is respectfully submitted.

Yours very truly,



D.S. Affleck
DSA/kra
Encl.

¹ Excerpt from the Closing Argument of The Toronto Real Estate Board, enclosed

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 :

COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

AND

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

Intervenors

CLOSING ARGUMENT OF THE TORONTO REAL ESTATE BOARD

AFFLECK GREENE McMURTRY LLP
365 Bay Street, Suite 200
Toronto, Ontario M5H 2V1

Donald S. Affleck, Q.C. LSUC # 10420B
David N. Vaillancourt LSUC # 56969I
Fiona Campbell LSUC # 60383V
Tel: (416) 360-2800
Fax: (416) 360-5960

Counsel for The Toronto Real Estate Board

downstream market. As indicated in the Bureau's enforcement guidelines, this is not the type of conduct intended to be caught by the abuse of dominance provisions: "in enforcing section 79, the Bureau is concerned with the creation, enhancement, or preservation of market power resulting from a practice of anti-competitive acts." The facts of this case simply do not fit the abuse of dominance framework.

Competition Bureau of Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions*, September 20, 2012, p. 6, TREB's Brief of Authorities at Tab 5.

320. As conceded by the Commissioner's expert and counsel, there is no creation, enhancement, or maintenance of market power on the facts of this case. As a result, there is no lessening or prevention of competition within the meaning of section 79(1)(c), and the Commissioner's application must fail.

(iii) The Relevant Markets Would Not Be More Competitive in the Absence of TREB's VOW Policy

321. In the alternative, TREB's VOW policy does not substantially lessen or prevent competition in the markets for real estate brokerages services in the GTA.

(a) The Relevant "But For" World

322. TREB approved its VOW Policy and Rules on August 25, 2011, and TREB's VOW datafeed became active on November 15, 2011.

Exhibit R 39, Witness Statement of Donald Richardson, at p. 30, paras. 156-157.

323. TREB's VOW datafeed does not include information about listings that are sold, pending sold, withdrawn, expired, suspended, or terminated. The datafeed also does not include the cooperating broker's initial offer of commission.

Exhibit R 39, Witness Statement of Donald Richardson, at p. 29, para. 148, p. 36 para. 186.

324. As counsel to the Commissioner stated to the Tribunal on the argument of the intervention motions in this matter:

The narrow issue before the Tribunal is simple: Are these ongoing restrictions appropriate or do they contravene, as the Commissioner alleges, section 79 of the Competition Act? That is the issue.

Commissioner of Competition v. Toronto Real Estate Board, 2011 Comp. Trib. 22 at para. 22, TREB's Brief of Authorities at Tab 16.

325. In evaluating whether TREB's VOW policy, as enacted, substantially lessens or prevents competition, the appropriate analysis compares a but-for world in which the information withheld from the VOW datafeed is available to a world in which that information is not available.

Exhibit A 32, Reply Expert Report of Gregory S. Vistnes at para. 15.

326. In considering whether TREB's conduct with respect to VOWs substantially lessens or prevents competition, the relevant "but for" comparison is between TREB's current VOW policies, and the "full information VOWs" advocated for by the Commissioner. In other words, **the Tribunal must consider the incremental value of the withheld data being available for search and display on a VOW.**

327. The incremental benefit of the withheld data is directly tied to the usefulness of that data:

MR. VAILLANCOURT: Right. So if these excluded pieces of data were not useful, there would be no incremental benefits to including the data in the VOW feed, correct, as a general proposition?

DR. VISTNES: If nobody finds them to be of value, then including them in the VOW feed wouldn't -- I'm not sure how that would provide any value.

MR. VAILLANCOURT: Okay. And if the excluded data fields were only marginally useful, then they would only provide a marginal incremental benefit, by definition?

DR. VISTNES: That is true. You need to be careful about the magnitude of marginal, but, true.

Cross-Examination of Dr. Gregory Vistnes, September 19, 2012, pp. 1070-1071.

328. The Commissioner claims that a "full information VOW" would result in significant cost savings to the brokerage, and these cost savings may be passed on to the clients of these brokerages. In evaluating this claim, it is important to remember that the vast majority of consumers want to access the full suite of brokerage services when they buy or sell a home.

Evidence of John Pasalis, September 12, 2012 at p. 539, lines 9-25 and 540, lines 1-11; p. 551, lines 24-25, and p.552, lines 1-16.

329. In other words, brokers and salespeople need to spend time completing tasks such as producing CMAs, taking prospective buyers from property to property, staging a home for sale, drafting agreements of purchase and sale, and negotiating offers.

330. The overall universe of tasks performed by a broker or salesperson is great, and it is not clear how full information VOWs would "substantially" increase the efficiency of a VOW-based brokerage. This is particularly so when considering the issue from an

incremental point of view: **having a “full information VOW” would not result in a substantial benefit to a VOW-based broker as compared with VOWs in their present form.**

331. The Commissioner’s expert did not conduct any quantitative or statistical analysis that directly examined the incremental value of the withheld data fields, comparing a VOW under TREB’s current rules to a “full information VOW.”

Examination of Dr. Gregory Vistnes, September 19, 2012, p. 1084

332. TREB’s VOW datafeed in its current form has been popular amongst its members. Mark Enchin, who is not a member of TREB, has received expressions of interest from brokerages representing approximately 5,000 TREB members. In addition, 124 TREB members are currently signed up for the VOW datafeed, and other members are considering offering a VOW.

Exhibit A 20, Witness Statement of Mark Enchin, p. 14, para. 41.

Exhibit R 42, Updated list of VOWs and AVPs.

Examination of Timoleon Syrianos, September 28, 2012, p. 1900, lines 19-25.

Examination of Pamela Prescott, September 28, 2012, p. 1824, lines 16-19.

333. The evidence of Sam Prochazka is particularly illuminating on the issue of the incremental value of the withheld data. Mr. Prochazka testified that the real estate boards of Greater Vancouver, Fraser Valley, Chilliwack & District, and Edmonton used to offer sold data in their VOW feeds. Mr. Prochazka’s company does business in all of these regions. In about 2009, sold data was taken out of the VOW feed of those regions. As an immediate

response to this change, Mr. Prochazka's company lost less than 5 of its clients. However, once brokerages realized that Mr. Prochazka's competitors also did not have this data, there were no long term effects on his business.

Evidence of Sam Prochazka, September 18, 2012, p. 936, lines 1-25; p. 937, lines 1-12; p. 938, lines 12-18 and page 939, lines 11-19.

334. Realosophy and The Red Pin both offer commission discounts with the current VOW datafeed. **There was no evidence led that either of these brokerages would reduce their commissions further if they were able to operate a "full information VOW."**

Exhibit A 7, Witness Statement of Urmi Desai, p.4, para. 12 and Exhibit H (1.5% Home Selling Blitz) at p.76.

Exhibit A 10, Witness Statement of John Pasalis, p.6, para. 17.

Exhibit A 13, Witness Statement of Shayan Hamidi, p. 8, para. 32.

335. TREB's VOW policy does not substantially lessen or prevent competition in the markets for residential real estate brokerage services in the GTA. The data that is withheld from the VOW datafeed would not provide a significant incremental benefit to VOW-based brokerages. The Commissioner has not provided evidence to prove that the withheld data would result in lower costs for VOW-based brokerages, whether that be at the lead generation phase, the incubation phase, or the offer phase.

(b) There is virtually no evidence that VOWs result in lower costs or sustained lower commissions

336. In different parts of his report, the Commissioner's expert theorizes that VOWs have lower costs, and as a consequence can pass on those cost savings to clients by way of lower commissions as compared with a brokerage without a VOW. In one part of his initial report, he notes that VOW operators "often" offer significant financial discounts to clients, in his

reply report he states that VOW operators would “likely” offer lower commissions, and in another part of his reply report he states that VOW operators would “possibly” offer lower commissions.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 6 para. 11.

Exhibit A 32, Reply Report of Dr. Gregory Vistnes, pp. 17, 18 paras. 29, 32.

337. Of course, for the purposes of the current proceeding, the appropriate question is not “do VOWs result in lower prices than no VOWs?”, but rather “do ‘full information VOWs’ result in lower prices than VOWs operating under TREB’s current VOW policy?” The Commissioner has presented limited evidence that VOWs result in sustained lower prices as a general concept (VOWs vs. no VOWs), **and has presented no evidence that “full information VOWs” result in lower prices than VOWs operating under TREB’s current VOW policy.**

338. The notion that VOWs will lead to lower prices is a relative concept. In order to evaluate the claim, one needs to know what pricing levels are in the current marketplace.

339. In his report, the Commissioner’s expert conducts an analysis as to current commission levels in the GTA. His methodology was to take offers of commission to the cooperating brokerage, assume that the cooperating broker actually received the amount of commission that was offered, and make a further assumption that the listing brokerage received an equal amount of commission to the cooperating brokerage.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 19, para. 45

340. Based on the foregoing methodology, the Commissioner's expert concluded that "the overall commission rate for the vast majority of properties in the GTA is 5%." According to one of the exhibits in his report, the number of transactions with a commission rate of 5% is in excess of 80%.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 19, para. 45

Exhibit A 30, Report of Dr. Gregory Vistnes, Exhibit 2b, p. 102.

341. As demonstrated by the industry witnesses called by TREB, both of Dr. Vistnes' assumptions are incorrect.

342. The offer of commission to the cooperating broker is just that; an offer. This figure can be, and is, negotiated.

Exhibit R 61, Witness Statement of Tung-Chee Chan, p.2, para. 6.

Exhibit R 62, Witness Statement of Pamela Prescott, p.6, paras. 23, 25, 27-29.

Exhibit R 64, Witness Statement of Evan Sage, p.4-5, paras. 16 -17.

343. Evidence from industry participants demonstrates [REDACTED]

[REDACTED]

[REDACTED]

Exhibit CA 34, Percentage Component of Buy-Side Offered Commissions, Summary

Exhibit CR 72, ReMax Ultimate; Exhibit CA 75, ReMax Ultimate Realty – Commission Report (June 1- June 30, 2011); Exhibit CA 77 Ultimate Realty – Commission Report (June 1- June 30, 2012)

Exhibit CR 65, Sage Real Estate Commission Table

Exhibit CR 63, C21 Heritage Group Actual Commission

Exhibit CR 60, T-C Chan Commission Tables

344. The amount of commission paid to the cooperating brokerage from the listing brokerage is not necessarily the commission actually retained by the cooperating brokerage as revenue. [REDACTED]

[REDACTED]

[REDACTED]

345. Furthermore, two of the industry participant witnesses provided data for not only the amount of commission received by the cooperating brokerage, but also the amount of commission received by their brokerage when they acted as the listing brokerage. [REDACTED]

[REDACTED]

[REDACTED]

346. The foregoing evidence demonstrates that both of Dr. Vistnes' assumptions about commission rates were incorrect. The amount of commission offered to the cooperating brokerage is not the same as the amount of commission actually retained by the brokerage, and the amount of commission retained by the listing brokerage is not the same as the amount

of commission paid to the cooperating brokerage. The foregoing evidence also demonstrates

347. Consequently, Dr. Vistnes' conclusions about commission rates, and amount of commission paid, in the GTA should be disregarded.

348. Dr. Vistnes points to the American experience as evidence of commission rebating programs by VOW-based brokerages. However, his report only discusses 3 such brokerages: ZipRealty, eRealty, and RedFin.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 67 para. 216.

349. Although ZipRealty and eRealty used to offer commission rebates/discounts, both brokerages have ceased the practice.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 26, footnote 69.

Examination of Dr. Gregory Vistnes, September 18, 2012, p. 1043-1044.

350. The other brokerage, RedFin, has reduced the amount of its rebate/discount twice within since 2007. In 2007, Redfin offered rebates of 66%; it then reduced that amount to 50% percent in 2009-2010, and then again by 16% in 2012.

Exhibit A 8, Witness Statement of Scott Nagel, p.14, para. 52.

Evidence of Scott Nagel, September 12, 2012, p. 445, lines 22-25; p. 446, lines 1-25 and p. 447, lines 1-10.

351. There is also no consideration in Dr. Vistnes' reports about the prevalence of commission rebating by brokerages that do not operate a VOW, which would be a relevant consideration in evaluating the claim that VOWs offer commission savings in comparison to the existing marketplace.

352. Although Dr. Vistnes speaks about how VOW-based brokerages are able to operate with lower costs (by way of an increase in broker/salesperson productivity), his report does not take into account the actual expenses required to operate either a VOW-based brokerage, or a brokerage that does not operate a VOW, including the ongoing increased technology costs that may be incurred by a brokerage that operates a VOW.

Examination of Dr. Gregory Vistnes, September 18, 2012, p. 1054-1055.

353. The actual expenses of running a brokerage would be another important consideration in comparing the ability of a VOW-based brokerage to offer lower commissions than a brokerage that does not operate a VOW.

354. Finally, Dr. Vistnes admits that in evaluating the incremental value of the Confidential Data on a VOW, one relevant consideration would be to consider the proportion of time saved by the inclusion of that data in a VOW. However, his report he does not consider the amount of time that a real estate agent spends providing brokerage services to clients, and does not consider the proportionate amount of time that would be saved if the withheld data were included in the VOW feed.

Examination of Dr. Gregory Vistnes, September 18, 2012, p. 1071-1073

355. There is little evidence to support the argument that, in the long-term, a VOW-based brokerage has lower costs, or provides lower commission rates, than a brokerage that does not operate a VOW. More importantly, there is no evidence before the Tribunal that a “full information VOW” would have lower costs, or would provide lower commission rates, than would a brokerage offering a VOW under TREB’s current VOW policy. The incremental value of the Confidential Data has not been proven in this respect.

(c) **No evidence of a significant benefit to lead generation**

356. In conducting the “but for” analysis in this matter, it is critical to bear in mind the markets at issue in the proceeding: the markets for residential real estate brokerage services. Accordingly, it is not sufficient that a VOW-based brokerages might receive significantly more traffic to their websites if the VOW datafeed included the withheld data. Rather, the appropriate inquiry is to ask whether a VOW-based brokerage would be hired by significantly more clients as a real estate brokerage as a result of being able to display the withheld data on their VOWs.

357. As the Commissioner’s expert testified:

MR. VAILLANCOURT: Okay. But ultimately the goal of a brokerage is to get clients, correct?

DR. VISTNES: I would agree with that.

MR. VAILLANCOURT: And so if the excluded data fields that we’re talking about, if they increase the volume of traffic to the website, but they don’t increase the amount of people that retain the VOW-based broker to be their Realtor®, then that wouldn’t be a significant economic event for competition purposes?

DR. VISTNES: If that type of pattern were true in both the short run and likely to continue into the long run, then it would suggest that that type of competition won’t remain and it won’t be effective.

And so ultimately it would not be competitively significant.

Examination of Dr. Gregory Vistnes, September 19, 2012, pp. 1077-1078

358. VOWs are permitted to exist, and do exist, under TREB's current VOW policy. These VOWs can display not only MLS® data, but also third party data that the brokerage has aggregated from various sources.

Exhibit R 39, Witness Statement of Donald Richardson, VOW Rules and Policies, pp. 594-614.

359. A website with a VOW does more than just display MLS® data. It brings together a wealth of third party information and analysis. A VOW-operator's website provides value beyond just the display of MLS® data, and **it is this additional value that drives traffic to their website.**

Exhibit A 7 Witness Statement of Urmi Desai at paras. 2, 5, 6, 7, 10, 11, 14, 16, 17 and 19-24, and Exhibit G (Defensive Home Buying publication) at page 45.

Desai Evidence, Hearing Transcript, September 11, 2012 at page 374, lines 3-8,; page 375, lines 23-25; page 376, lines 1-25; page 378, lines 1-16; page 382, lines 5-25; page 383, lines 1-25; page 384, lines 1-25; page 388, lines 2-13 and 21-25; page 389, lines 1-25; and page 390, lines 1-2. -

Exhibit A 10, Witness Statement of John Pasalais at paras. 2, 14, 15, 16, 19 and 20.

Pasalis Evidence, Hearing Transcript, September 12 at page 523, lines 16-25 and page 534, lines 1-2; page 531, lines 1-25.

Exhibit A 13, Witness Statement of Shayan Hamidi at paras. 3, 6, and 16,

Hamidi Evidence, Hearing Transcript, September 13, 2012 at page 627, lines 3-14 and lines 17-25; page 628, lines 1-25; and page 631, lines 8-12.

360. Realosophy and TheRedPin both enjoy a significant media presence operating their VOWs under TREB's existing VOW policy.

Exhibit A-013, Witness Statement of Shayan Hamidi at para. 3.

Exhibit A-007, Witness Statement of Urmi Desai at paras. 7 and 17.

Exhibit A-010, Witness Statement of John Pasalais at para. 16

361. With access to the current VOW datafeed, The Red Pin was nominated as one of the most innovative brokerages in the world by Inman, the “Oscars of the Industry.” Many nominees for this award were brokerages from the United States.

Evidence of Shayan Hamidi, September 13, 2012, p. 646, lines 18-25; p. 647, lines 1-25; and p. 648, lines 1-18.

Exhibit R 14, RedPin News Release.

362. The Commissioner has failed to meet the burden to prove that the Confidential Data’s inclusion on a VOW would assist a brokerage in generating leads.

363. There is extremely limited evidence before the Tribunal of a VOW’s ability to convert website users into clients. There is some evidence regarding the ability of RedFin and ViewPoint to convert website visitors into registered users, however, certainly not all registered users of a VOW ultimately retain a brokerage. There is no evidence of RedFin’s ability to generate website users into clients, and the evidence from Mr. McMullin suggests that ViewPoint only converts 0.03% of its website visitors into clients, and only 0.4% of its registered users into clients.

Exhibit CA 38 Confidential Letter from Scott Nagel [Redfin] to Madam Justice Simpson providing responses to questions from the Tribunal of September 12, 2012.

Exhibit CA 1, McMullin Witness Statement at para. 27, and Exhibit A (Google Analytics report for Jan1 – May 31, 2012) at page 33.

McMullin Evidence, Hearing Transcript, September 11, 2012, page 335, lines 13-25; page 336, lines 1-25; page 337, lines 1-7.

See para 125 herein re: the mathematics for ViewPoint.

364. On this point, the Commissioner’s expert gave the following evidence:

MR. VAILLANCOURT: You would agree with me that not everyone that visits a VOW-based website becomes a registered user?

DR. VISTNES: So visits the website, but doesn't click the agreement part? They don't follow through?

MR. VAILLANCOURT: Correct.

DR. VISTNES: That's correct.

MR. VAILLANCOURT: You would agree with me that not everyone that registers for a VOW ultimately hires that VOW's brokerage as their Realtor®?

DR. VISTNES: That's true.

[...]

MR. VAILLANCOURT: Your report doesn't contain any analysis on the ability of a VOW-based brokerage to convert website users into clients, does it?

DR. VISTNES: No, it does not.

Examination of Dr. Gregory Vistnes, September 19, 2012, p. 1080-1081.

365. There is also no evidence to suggest that VOWs that display sold information would increase the number of visitors to a brokerage's website.

366. Mr. McMullin gave evidence that from January 1, 2012 – May 31, 2012, Viewoint.ca (which displays sold information) had a total of 1,306,713 visits. During the same time period, Realtor.ca (which does not display sold information) had 1,659,482 visitors from Nova Scotia (i.e. visitors whose IP address identified them as being located in Nova Scotia).

Exhibit CA 1, Witness Statement of William McMullin, Exhibit A (Google Analytics, Jan 2012 – May 2012), p.33.

Exhibit IC-005, Nova Scotia visits January – May 2012.

Evidence of William McMullin, September 11, 2012, p. 325, lines 8-25; p. 326, lines 1-25; p. 327, lines 1-2; and 328, lines 1-9

367. It was also the evidence of William McMullin that he is aware that some visitors to his website are using his information without the intention of becoming a client of ViewPoint; Mr. McMullin gave evidence that some brokerages in Nova Scotia recommend to their clients that they use ViewPoint Realty's website as a resource during the home search process.

Evidence of William McMullin, September 11, 2012, p. 194, lines 16-25.

368. It takes seconds to sign up for a VOW, and signing up for a VOW creates no obligation on the consumer to ultimately hire the VOW operator as their broker/salesperson. Just as people use Realtor.ca to browse information about homes, it stands to reason that there will be many instances where members of the public will use a VOW as a tool in their home buying or selling experience, yet not hire the brokerage behind the VOW as their broker or agent. Website traffic statistics, and even registered user statistics, are not particularly helpful in evaluating the ability of a VOW to convert website users into clients.

369. The Commissioner has presented no evidence of the incremental effect of the Confidential Data in increasing a VOW's ability to generate clients, let alone website traffic.

370. It was the evidence of Scott Nagel that in the United States, certain States prohibit the display of a home's sold price in any format. One of these States is Texas. Mr. Nagel's brokerage, RedFin, operates in Texas, as well as in other States where the disclosure of sold prices is permitted. In Texas, RedFin's VOW does not display sold home prices, while in other jurisdictions, sold home prices are displayed. The exclusion of sold prices from

RedFin's Texas VOW apparently has no impact on the rate of commission charged by RedFin in Texas versus other markets.

Evidence of Scott Nagel, September 12, 2012, p. 460, lines 21-24, and page 461, line 1-10.

371. The Commissioner's expert acknowledges that because of the prevalence of VOWs in the United States, the American market provides an "actual experiment" to test theoretical arguments that are raised with respect to the potential impact of VOWs in the GTA.

Examination in Chief of Dr. Vistnes, September 18, 2012, p. 1008.

372. In spite of the possibility of looking at the American experience, the Commissioner's expert failed to consider whether RedFin, or any other VOW brokerage, is any less successful at generating leads in Texas than in States where the disclosure of sold prices is permitted:

MR. VAILLANCOURT: Well, it was Mr. Nagel's evidence that Texas does not permit the disclosure of sold prices, and it was also his evidence that Redfin operates in Texas.

Your report does not compare Redfin's ability to generate leads in Texas compared with other jurisdictions in which it operates, true?

DR. VISTNES: That's correct. I didn't have that information available.

MR. VAILLANCOURT: And, in fact, your report doesn't take -- doesn't undertake such a comparison with any American VOW operating in a state like Texas versus other states where sold price information is available?

DR. VISTNES: The information wasn't available, so I didn't conduct the comparison.

Cross-Examination of Dr. Vistnes, September 19, 2012, pp. 1081-1082.

373. The Commissioner has not proven that the inclusion of the Confidential Data in the VOW datafeed would have any incremental impact on a VOWs ability to generate more clients, let alone a significant incremental impact.

(d) No evidence of significant benefit in the search phase or the offer phase

374. VOWs containing the Confidential Data would not provide a significant benefit over VOWs under TREB's current VOW policy at either the incubation/search stage, or the valuation/offer stage.

375. The value of the Confidential Data in the incubation/search phase would be much less in this stage than in the subsequent valuation/offer stage, because buyers at this stage are just generally trying to learn about the home buying market during this stage.

Exhibit R 82, Summary of Expert Report – Jeffrey Church p. 35.

376. Sold home data is not self-interpreting. Valuing a home is a subjective exercise. In order to complete a proper comparative market analysis, a real estate professional will visit the subject home, as well as the homes that are being compared to the subject home. None of the Commissioner's witnesses suggested that consumers would be able to determine the market value of a home if consumers were provided with sold home information.

Exhibit R 62, Witness Statement of Pamela Prescott, p. 5, paras. 19, 21-22.

Prescott Evidence, Hearing Transcript, September 28, 2012 at p. 1791, lines 24-25; p. 1792, lines 1-25; p. 1793, lines 1-7.

Pasalis Evidence, Hearing Transcript, September 12, 2012 at p. 546, lines 9-25, and p. 547, lines 1-25.

Exhibit A 10, Witness Statement of John Pasalis, p. 11-12, paras. 36 and 39.