

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:

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 17, 2012

A. Overview

1. The issues in this proceeding have narrowed since the application was originally commenced. The Commissioner initially sought an order (i) preventing the Toronto Real Estate Board ("TREB") from imposing any restrictions against members who wish to use information from the MLS® System to offer services over the Internet, such as through a VOW, and (ii) requiring TREB to implement resources as are deemed necessary to ensure the operation of VOWs or similar services.¹

2. On the fourth day of the hearing, Commissioner's counsel acknowledged that the relief the Commissioner was actually requesting was much narrower than that requested in the Amended Application. The Commissioner is no longer requesting relief with respect to any non-VOW Internet data-sharing vehicle.² And, the relief which is being sought in respect of TREB's VOW Policy is focused on the "Disputed Fields" (being sale price, pending sale price, WEST listings and cooperating buyer commission information), all of which is information which (i) is excluded from the TREB VOW data feed, (ii) is available to TREB members from TREB's MLS® System and/or other sources, and (iii) can be provided by TREB members to their clients when appropriate through means other than a VOW.

3. In particular, the remedy that the Commissioner seeks is an order requiring TREB to include all MLS® property information (including the "Disputed Fields") in the VOW data feed that it makes available to TREB members. Otherwise,

¹ Amended Notice of Application dated July 7, 2011, *The Commissioner of Competition v. The Toronto Real Estate Board*, CT-2011-003, para. 66.

² Hearing Transcript, volume 4 (Public), pp. 662-63.

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the Commissioner submits that TREB's VOW Policy has lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate brokerage services in the GTA.

4. Considering the refinement of the Commissioner's case and the topics on which CREA was granted leave to intervene,³ 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.⁴

5. Against this background, CREA has seven main submissions to make by way of closing argument.

6. First, there is no question that the Internet has had a significant effect on the provision of real estate brokerage services in the GTA and across Canada, most particularly in the provision of relevant property information to consumers. As is evident from its involvement in the study and development of Internet data-sharing vehicles over the years, CREA has supported and continues to support the distribution of relevant,

³ *The Commissioner of Competition v. The Toronto Real Estate Board*, 2011 Comp. Trib. 22, para. 40.

⁴ 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.

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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 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. 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 only one of the many options and it is important from CREA's perspective that the result in this proceeding not have the harmful effect of endorsing one type of innovative tool over another.⁵

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 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.

⁵ Witness Statement of Gary Simonsen (Public) dated August 3, 2012, Exhibit IC-084, para. 85 ("Simonsen Witness Statement").

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9. Fourth, the evidence in this proceeding has not established that VOWs (as opposed to other Internet data-sharing vehicles or the Internet in general) have had a significant competitive effect on the market. 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. Further, the benefits allegedly attributed by Dr. Vistnes to VOWs are, in fact, not particular to VOWs, but are the benefits associated with the use of the Internet in general or are attributable to other Internet data-sharing vehicles as well.

10. Fifth, the evidence in this proceeding has not established that VOWs displaying the Disputed Fields have a significant competitive effect on the market when compared with VOWs using TREB's current data feed. TREB's VOW policy does not prohibit consumers from obtaining the information in the Disputed Fields. Rather, consumers can obtain this information through other means. Therefore, the key question is how allowing brokers 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's evidence does not establish any of this. 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

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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 Viewpoint's market share, the popularity of REALTOR.ca in Nova Scotia, the data provided by Scott Nagal of Redfin, the evidence from the NAR 2011 Profile discussed during Dr. Vistnes' cross-examination and the evidence that VOWs with data feeds that do not include the Disputed Fields have attracted significant interest in British Columbia and in Toronto under TREB's current VOW data feed.)
- (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 conduct any analysis of potential harm, including the potential harm associated with displaying consumer's property information over the Internet.

11. Sixth, CREA has a significant and valid 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 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), as well as what CREA and/or TREB representatives' views were on privacy issues in past years in relation to issues about CMAs and other matters not involving VOWs or disclosure on the Internet generally. This evidence does

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not confirm that all appropriate informed consents have been obtained to the disclosure of the Disputed Fields on 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 be assumed or found to be appropriate for 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 or some of which can vary across the jurisdictions of boards that operate MLS® Systems.⁶

B. Introduction

14. CREA represents over 105,000 real estate brokers and agents working through approximately 100 real estate boards and associations, including provincial and territorial associations. CREA is the national voice for the Canadian real estate industry, including on competition law, as well as technological issues.⁷

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

⁶ Simonsen Witness Statement, para. 86.

⁷ Simonsen Witness Statement, paras. 3, 6.

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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.⁸

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 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 in this proceeding: 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

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Simonsen Witness Statement, paras. 8-16.

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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.

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 imposed on TREB. His analysis focused on evaluating the economic evidence on the likely competitive effects of the requested remedy. Dr. Flyer testified 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 evidence put forward by 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

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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.⁹

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

21. The Internet generally 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.¹⁰

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

23. One common benefit of these non-VOW Internet data-sharing vehicles for many consumers is that they do not require registration or sign-in in order to access detailed and relevant property and neighbourhood information. Rather, consumers can review the information available from these vehicles anonymously. Consumer preference in this regard should not be overlooked. As Mr. Pasis of Realosophy testified, "...the majority of people don't want to register."¹¹

⁹ Expert Report of Fredrick Flyer dated August 3, 2012, Exhibit IC-088 ("**Flyer Report**"); Hearing Transcript, volume 15 (Public), pp. 2387-2425; Summary and Main Conclusions from Expert Report of F. Flyer, Exhibit IC-089 ("**Flyer Summary**").

¹⁰ Simonsen Witness Statement, para. 37.

¹¹ Hearing Transcript, volume 3A (Public), p. 589.

(a) REALTOR.ca

24. REALTOR.ca is a public website operated by CREA. It contains a subset of active listing content from MLS® Systems across Canada.¹² REALTOR.ca has been consistently identified by CREA members as "one of the most important services provided by CREA".¹³ It is also a popular resource for consumers to gather information. REALTOR.ca allows consumers to privately 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.¹⁴ Unique visitors to REALTOR.ca have generally increased over time. For example, in the first six months of 2012, REALTOR.ca received, on average, approximately 5.2 million unique visitors per month, as compared to an average of 4.3 million unique visitors for the same period in 2011.¹⁵

25. The Commissioner's witnesses acknowledged the success of REALTOR.ca. Mr. Mark Enchin, a sales representative with Realty Executives Plus Ltd., acknowledged the popularity of REALTOR.ca among consumers, especially those who wish to browse the Internet anonymously.¹⁶ Mr. Pasalis expressed the same sentiment.¹⁷ Mr. Sam Prochazka, CEO of Sam & Andy Inc. ("Sam & Andy"), a real estate software company, testified that "REALTOR.ca is a great website".¹⁸

¹² Simonsen Witness Statement, para. 28.

¹³ Simonsen Witness Statement, para. 29; Hearing Transcript, volume 14 (Public), p. 2199.

¹⁴ Simonsen Witness Statement, para. 29; Hearing Transcript, volume 14 (Public), pp. 2200, 2205-2217; Example of Residential Property Search on www.realtor.ca, Exhibit IC-086.

¹⁵ Simonsen Witness Statement, para. 32.

¹⁶ Hearing Transcript, volume 5 (Public), pp. 841-44.

¹⁷ Hearing Transcript, volume 3A (Public), p. 592.

¹⁸ Hearing Transcript, volume 6A (Public), p. 926.

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26. CREA has recently initiated a number of significant improvements to REALTOR.ca that will further enhance consumers' experience with the website. For example, mobile "apps" for major mobile devices are available at no cost.¹⁹ The iPad version of the app was featured by Apple in its store.²⁰ In addition, REALTOR.ca now offers a "polygon" search tool, which is a unique tool that allows visitors to draw a geographic area that they would like to search, and will soon be adding demographic data at the neighborhood level.²¹

(b) IDX Facilities

27. 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.²²

28. IDX technology has revolutionized real estate websites, in a manner which has been beneficial to buyers, sellers and brokers.²³ 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 the website than would be available without the sharing of listings.

¹⁹ Simonsen Witness Statement, para. 30.

²⁰ Hearing Transcript, volume 14 (Public), p. 2203.

²¹ Simonsen Witness Statement, para. 31.

²² Simonsen Witness Statement, para. 41.

²³ Hearing Transcript, volume 6A (Public), pp. 897-98.

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29. Even with the advent of VOWs, IDXs have remained popular. For example, in Vancouver, 90% of brokers have opted into the board's VOW/IDX policy, with 30% using IDX solutions, compared with 23% using VOWs.²⁴ In Edmonton, interest in VOWs appears to have waned, with IDXs currently satisfying the demand.²⁵ Lastly, the London St. Thomas Association of REALTORS® currently offers an IDX facility that is highly successful, being utilized by approximately 99% of the Association's members.²⁶ Due, at least in part, to this successful IDX solution, there has been virtually no interest by either members of the Association or the public in the provision of a VOW solution in the area.²⁷

(c) CREA's Data Distribution Facility

30. 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. It 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.²⁸

31. 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

²⁴ Simonsen Witness Statement, para. 75.

²⁵ Simonsen Witness Statement, para. 76.

²⁶ Simonsen Witness Statement, paras. 78-79; Hearing Transcript, volume 14 (Public), pp. 2235-36.

²⁷ Simonsen Witness Statement, para. 79.

²⁸ Simonsen Witness Statement, paras. 55-60; Hearing Transcript, volume 14 (Public), pp. 2223-29.

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clients without the need to invest in additional infrastructure and with confidence in the quality of the data.

32. Industry interest in CREA's DDF has been high, even with the availability of VOWs. 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. Ontario is the most likely region to use the DDF, at 79.2%.²⁹

(d) Broker Websites

33. Many brokers have sophisticated websites which allow consumers to access significant amounts of useful information and conduct detailed property searches without ever accessing a VOW. The websites discussed in the evidence are successful in providing consumers with the information they seek on the Internet, even though they do not display the Disputed Fields on a VOW.

34. These broker websites succeed because of the range of informative features available on them and because of their user-friendly designs.³⁰

35. For example, Mr. Shayan Hamidi, CEO of TheRedPin, testified 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,

²⁹ Simonsen Witness Statement, para. 79 and p. 710 (Exhibit 27); Hearing Transcript, volume 14 (Public), pp. 2226-27.

³⁰ Hearing Transcript, volume 7 (Public), pp. 1134-1136.

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more information. The combination of the technology and data is what's empowering and making all these possible.³¹

36. TheRedPin, even before it had access to TREB's current VOW data feed,³² received accolades for its innovation, including being recognized by the MaRS Institute as one of Canada's most innovative companies and being nominated as one of the world's most innovative brokerages.³³

37. Ms. Desai of Realosophy stressed the importance of website design (and not just its content), in appealing to consumers. She said 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.³⁴

38. 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. These websites feature videos and professional photographs, and utilize search engine optimization techniques to help the home show up high in Google search results.³⁵

³¹ Hearing Transcript, volume 4 (Public), p. 615.

³² Hearing Transcript, volume 4 (Public), p. 648.

³³ Hearing Transcript, volume 4 (Public), pp. 645-46.

³⁴ Hearing Transcript, volume 2 (Public), p. 363.

³⁵ Witness Statement of Evan Sage dated July 27, 2012, Exhibit R-064, para. 7.

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39. In addition to the map search capabilities on Viewpoint.ca, a real estate website based in Nova Scotia, property listings containing overview information, photographs, a "street view" photograph, and school information are available to unregistered users. Access to tax information and sold information requires registration.³⁶

40. Realosophy is known for its unique property searches by neighborhood boundaries.³⁷ More generally, both Realosophy witnesses, Ms. Desai and Mr. Pasalis, acknowledged that the majority of the unique content that makes Realosophy special and the reason users come to the website is the result of information that does not come from TREB's VOW data feed.³⁸ These features include geocoding, school ranking and profiles, the "Neighbourhood Match" feature, public transit information, local business information and Walk Scores.³⁹

41. Similarly, the Redfin website provides a substantial amount of information without the requirement to register.⁴⁰ 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 and property details, tax information, school and community information, market analytics, home value estimates, comparable properties and sold information obtained from public records.

³⁶ Hearing Transcript, volume 2 (Public), pp. 280-81.

³⁷ Hearing Transcript, volume 2 (Public), p. 362.

³⁸ Hearing Transcript, volume 2 (Public), p. 378.

³⁹ Hearing Transcript, volume 2 (Public), p. 379; Hearing Transcript, volume 3A (Public), pp. 523-24, 531-32.

⁴⁰ Hearing Transcript, volume 3A (Public), p. 474; Witness Statement of Scott Nagel dated June 20, 2012, Exhibit A-008, paras. 11-15 ("**Nagel Witness Statement**").

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Registration entitles the consumer to additional property history details, including sold information usually obtained by Redfin from MLS⁴¹ sources.

D. Key Evidence – Impact of VOWs

42. A VOW is just one tool that can be used to provide some relevant real estate information to consumers over the Internet – but, as described above, it is not the only information providing tool and does not provide the entire gamut of information sought by consumers. The evidence reveals that VOWs have not and, even with the inclusion of the Disputed Fields, would not have a significant competitive impact.

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

44. The Commissioner's witnesses acknowledged that VOWs are not intended to replace the services of a REALTOR® and that there are limitations on the value that a VOW can provide to consumers. Mr. Pasalis's witness statement states 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."⁴² Similarly, Mr. Hamidi testified that TheRedPin definitely believes that consumers need professional advice to complete a real estate transaction.⁴³ He also agreed that the straight provision of information to consumers (like a VOW provides) is

⁴¹ MLS is not a trademark in the United States.

⁴² Witness Statement of John Pasalis dated June 20, 2012, Exhibit A-010, para. 39.

⁴³ Hearing Transcript, volume 4 (Public), p. 632.

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on the lower end of importance of the various services that a REALTOR® would provide in a real estate transaction.⁴⁴

45. Data from the United States published in NAR's 2011 Profile of Home Buyers and Sellers also illustrates the importance of REALTORS®, even in the age of VOWs, and the fact that the Internet is having a relatively small impact on REALTORS®' lead generation. Real estate agents (as opposed to the Internet) remain the most useful information resource for home buyers.⁴⁵ Nine in ten buyers of real estate who used the Internet to search for a home used a REALTOR® compared to seven in ten buyers of real estate who did not use the Internet.⁴⁶ Also, just one in ten home buyers⁴⁷ and only 3% of sellers⁴⁸ found their REALTOR® through a website.

46. Additionally, numerous witnesses testified that a REALTOR® is necessary in order to prepare a comprehensive comparative market analysis, or "CMA", and that an algorithm on a VOW is insufficient.⁴⁹ For example, Mr. Pasalis testified that when a REALTOR® is preparing a CMA he or she must consider factors that are not evident from just looking at the MLS® data.⁵⁰ Mr. McMullin testified that there are typically "more things than just doing mathematical calculations" when assessing the value of a

⁴⁴ Hearing Transcript, volume 4 (Public), p. 650.

⁴⁵ 2011 Profile of Home Buyers and Sellers, Exhibit IC-035, p. 44 ("**2011 NAR Profile**").

⁴⁶ 2011 NAR Profile, p. 45.

⁴⁷ 2011 NAR Profile, p. 60.

⁴⁸ 2011 NAR Profile, p. 100.

⁴⁹ A CMA "is a market analysis 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. Nagel Witness Statement, para. 21.

⁵⁰ Hearing Transcript, volume 3A (Public), p. 544.

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property.⁵¹ Finally, the witness statement of 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.

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 renovations to the home.

Also, numbers alone do not reveal information about general market trends, or market trends within a specific neighborhood taking into consideration things like volume of sales, and levels of inventory.⁵²

47. Second, VOWs do not exist as a stand-alone website. A VOW is 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 customer without accessing the VOW. The evidence does not establish that the success of broker websites is attributable to them containing a VOW. Many broker websites are considered to be successful without (or before) adding a VOW, and actual VOW registrations have proved to be a low percentage of the visits to a broker's website.

⁵¹ Hearing Transcript, volume 2 (Public), p. 242.

⁵² Witness Statement of Pamela Prescott dated July 27, 2012, Exhibit R-062, paras. 19-21.

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48. While 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,⁵³ the evidence is clear that only a fraction of consumers who visit a broker's website containing a VOW are willing to register to access the information available on a VOW, and an even smaller number of consumers will actually use the services offered by the brokerage running the website to purchase or sell a property.

49. Mr. Pasalis testified that, even though the Realosophy website clearly explains what information will be made available to consumers after registering and that consumers will not receive "spam" emails following registration, "statistically the percentage of people who sign up is still very low".⁵⁴

50. Mr. McMullin testified that, between January 1, 2012, and May 31, 2012, only approximately 7% of visitors to the Viewpoint website (approximately 28,000 of 380,000 unique visitors) actually registered to access the VOW.⁵⁵ Mr. McMullin also testified that, even though Viewpoint offers lower commissions than many of its competitors, its market share in Nova Scotia is only approximately 1%.⁵⁶

51. Similarly, Mr. Nagel provided data to the Tribunal in response to the Panel's questions indicating that between January 1, 2012 and May 31, 2012, the Redfin website received ■ new visitors but that only ■, or approximately ■ of those

⁵³ Hearing Transcript, volume 2 (Public), pp. 276, 365-66 and 369; Hearing Transcript, volume 3A (Public), pp. 398, 473 and 510; Hearing Transcript, volume 4 (Public), p. 674.

⁵⁴ Hearing Transcript, volume 3A (Public), pp. 595-96.

⁵⁵ Hearing Transcript, volume 2 (Public), pp. 335-36.

⁵⁶ Hearing Transcript, volume 2 (Public), pp. 250, 338.

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visitors registered.⁵⁷ Further, Mr. Nagel's witness statement indicates that Redfin was involved in approximately 4,400 transactions in 2011,⁵⁸ which would represent a similarly small percentage of Redfin's registered users.

52. Third, other Internet data-sharing vehicles remain popular, even with the availability of VOWs. The popularity of REALTOR.ca, the continued interest in IDXs and the interest in CREA's DDF discussed above are examples. In particular, REALTOR.ca is still getting more traffic in Nova Scotia than Viewpoint.ca. Mr. McMullin agreed that, based on Google Analytics data, between January 1, 2012, and May 31, 2012, Viewpoint (which lists properties across Nova Scotia) received approximately 381,000 unique visitors, while REALTOR.ca received approximately 496,000 unique visitors from computers in Nova Scotia.⁵⁹

53. Further, Mr. Prochazka testified that of his approximately 1500 clients⁶⁰ only "around 50 or so" use the VOW feed capable website package that his company offers, with the rest relying on more basic website packages that display the broker's active listings.⁶¹

54. Fourth, the evidence does not support the assertion that VOWs with the Disputed Fields have or will have a significant competitive effect as compared to

⁵⁷ Letter from Scott Nagel to Madame Justice Simpson dated September 18, 2012, Exhibit CA-038.

⁵⁸ Nagel Witness Statement, para. 48.

⁵⁹ Hearing Transcript, volume 2 (Public), pp. 321, 323, 327.

⁶⁰ Hearing Transcript, volume 6A (Public), p. 894.

⁶¹ Hearing Transcript, volume 6A (Public), p. 901.

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TREB's current VOW data feed. In addition to the evidence noted above in relation to VOWs in general, the following evidence is relevant:

- (a) Dr. Vistnes does not provide an empirical analysis that supports such a competitive effect.
- (b) The issue is not whether, but how, the information in the Disputed Fields is provided to consumers. Information relating to past sales is available from non-MLS® sources and, along with the other information in the Disputed Fields, is also available directly from a broker to a client when relevant and appropriate. For example, TREB publishes, on a monthly basis, its Market Watch report, which includes sold data segmented by property type and district.⁶² Additionally, Mr. Tarik Gidamy, broker of record for TheRedPin testified that TREB's Stratus system allows the results of any search conducted by a TREB member to be emailed to clients.⁶³
- (c) The absence of sold data and pending sold data does not prevent the successful operation of a website that contains a VOW. Redfin still operates VOWs in jurisdictions (like Marin County) where sold data is not available from the MLS and, where sold data is provided by the MLS, it is only displayed when the transaction has closed.⁶⁴ Also, VOWs without the Disputed Fields are being provided by brokers in both British Columbia and Toronto.
- (d) 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.⁶⁵ 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 business.
- (e) Even with the display of sold data and some WEST listings information, Viewpoint retains a small market share and Viewpoint.ca remains less popular in Nova Scotia than REALTOR.ca.⁶⁶ There is no credible evidence that the display of either sold data or WEST listings on the VOW creates any incremental competitive benefit in terms of services offered or fees charged.

⁶² Hearing Transcript, volume 3A (Public), pp. 529-30.

⁶³ Hearing Transcript, volume 4 (Public), pp. 685-86.

⁶⁴ Hearing Transcript, volume 3A (Public), pp. 420, 501.

⁶⁵ Hearing Transcript, volume 3A (Public), pp. 467-468.

⁶⁶ Hearing Transcript, volume 2 (Public), pp. 321, 323, 327

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- (f) In the U.S., where there are VOWs that display some of the Disputed Fields, REALTORS® remain the primary source of information for home buyers, a small percentage of consumers find their broker through a website⁶⁷ and (using Redfin as an example) having Disputed Fields displayed on the VOW does not make any significant difference in the percentage of website visitors who register, or in the percentage of those that register who retain Redfin to provide brokerage services.

E. Argument

(i) Test under Section 79

55. In order to find a violation of section 79 of the *Competition Act*, as the Commissioner has alleged here, it must be shown that

- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.⁶⁸

56. Each of the elements in section 79 must remain conceptually distinct, and each element gives rise to a distinct legal test.⁶⁹ 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 a market.

57. The Federal Court of Appeal has held that in order to assess whether there is an substantial prevention or lessening of competition, the question that must be

⁶⁷ 2011 NAR Profile, pp. 60, 100.

⁶⁸ *Competition Act*, R.S.C. 1985, c. C-34, s. 79.

⁶⁹ *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, paras. 26-28 ("Canada Pipe").

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assessed is: would the relevant market be substantially more competitive but for the impugned practice of anti-competitive acts?⁷⁰

58. For example, the Federal Court of Appeal has stated that a proper examination of this question might 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.⁷¹

59. Accordingly, in this proceeding, the relevant question is whether the alleged markets for the provision of residential real estate brokerage services 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?

60. The key evidence adduced in this matter, 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.

61. In particular, the evidence from the fact witnesses 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

⁷⁰ Canada Pipe, para. 38.

⁷¹ Canada Pipe, para. 58.

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the Internet, the role of VOWs as merely one part of a lead generating website, the high value consumers place on REALTORS® (that cannot be replicated by automation over the Internet) and the absence of any positive change to consumer services resulting from a VOW displaying the Disputed Fields as compared to one that does not. In other words, the evidence shows the lack of effect on entry/expansion, prices and product quality that would occur if the Disputed Fields were displayed on a VOW.

62. Not only does Dr. Vistnes not address this evidence, he does not offer a reliable basis or analysis from which to evaluate the alleged likely competitive effects associated with the requested remedy.⁷²

63. Specifically, and consistent with the Federal Court of Appeal's guidance, Dr. Flyer notes that to reliably demonstrate the procompetitive benefits of the requested remedy, one 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, one 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.⁷³

64. Dr. Flyer concludes that 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: Dr. Vistnes fails to perform an empirical analysis on whether the delivery of the Disputed Fields through a VOW is important to the

⁷² Flyer Report, para. 5.

⁷³ Flyer Summary, p. 5.

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competitive positioning of brokers who use VOWs; and Dr. Vistnes 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).⁷⁴

65. Further, Dr. Flyer notes that Dr. Vistnes fails to conduct an analysis of whether the display of the Disputed Fields on a VOW would result in any consumer harm. Such harm should be taken into account in assessing the competitive impact of the current TREB VOW Policy.⁷⁵ In this regard, Dr. Flyer points to the concern raised by CREA that the 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.⁷⁶

66. 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. 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

⁷⁴ Flyer Summary, p. 5.

⁷⁵ Flyer Summary, p. 7.

⁷⁶ Flyer Report, pp. 7-8.

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significantly harm CREA's Trademarks.⁷⁷ 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.⁷⁸

67. Commissioner's counsel spent considerable time 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. 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.⁷⁹ Informed consent for the specific use of information for display on a VOW is not sought or obtained through these agreements.
- (b) 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.
- (c) Schedule B's 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 does not include consent to display sold information.⁸⁰

⁷⁷ Simonsen Witness Statement, paras. 87-90.

⁷⁸ See para. 51 above, which notes 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.

⁷⁹ 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.

⁸⁰ 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.

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- (d) 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 issues and security.⁸¹
- (e) 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.⁸² Further, uncertainty remains as a result of the 2009 decision from the Privacy Commissioner⁸³ that it is not enough that sold information is available on the public record for it to be disclosed without consent.

68. 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.

G. Conclusion

69. 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 preventing or lessening of competition in a relevant market. Further, the Commissioner

⁸¹ Hearing Transcript, volume 11A (Public), pp. 1787-88.

⁸² Simonsen Witness Statement, Exhibit 23 (pp. 619-67); Hearing Transcript, volume 14 (Public), pp. 2230-33.

⁸³ Simonsen Witness Statement, Exhibit 9 (pp. 351-55).

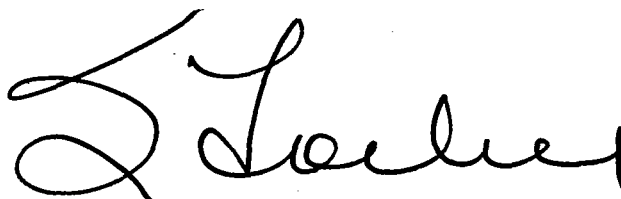
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has not established that the requested remedy is appropriate, considering the evidence provided in this proceeding and all the relevant circumstances.

70. For these reasons, CREA respectfully submits that this application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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File No. CT-2011-003

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
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