File No. CT-2016-003

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C-34 (the "**Act**");

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

BETWEEN:

CARGURUS, INC.

Applicant

\- and -

TRADER CORPORATION

Respondent

BOOK OF AUTHORITIES OF THE APPLICANT

(Application for Leave Pursuant to Section 103.1 of the *Competition Act*)

June 30, 2016

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AUTHORITIES

1. *National Capital News Canada v Milliken*, 2002 Comp Trib 41.
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4. *Apotex Inc v Eli Lilly and Company*, 2005 FCA 361.
5. *Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10.
6. *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7.
7. *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, 268 DLR (4th) 193.
8. Competition Bureau, Intellectual Property Enforcement Guidelines (Ottawa: March 31, 2016).
9. United States Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* (April 6, 1995).
10. "Competition, Innovation and Infrastructure", Remarks by John Pecman, Commissioner of Competition (Toronto: May 25, 2016) (as prepared for delivery).

Tab 1

Competition Tribunal　　Tribunal de la Concurrence

Reference: *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41
File no.: CT2002005
Registry document no.: 0004

Paras 7-14

IN THE MATTER OF an application by Mr. Robert Gilles Gauthier, carrying on business as The National Capital News Canada, pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, for leave to make an application under section 75 of the Act.

B E T W E E N:

The National Capital News Canada
(applicant)

and

The Honourable Peter Milliken, M.P.
(respondent)

Decided on the basis of the written record.
Member: Dawson J. (presiding)
Date of reasons and order: 20021213
Reasons and order signed by: Dawson J.

REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT*

I. <u>INTRODUCTION</u>

[1] This is the first application to the Competition Tribunal ("Tribunal") brought by a party other than the Commissioner of Competition ("Commissioner"). Pursuant to recent amendments to the *Competition Act*, R.S.C. 1985, c. C-34, ("Act") an application by a party other than the Commissioner can only be commenced if leave is granted by a judicial member of the Tribunal.

II. <u>RELEVANT FACTS</u>

[2] Mr. Robert Gilles Gauthier ("applicant") filed, pursuant to subsection 103.1(1) of the Act, an application for leave ("leave application") to make an application under section 75 of the Act ("application") against the Honourable Peter Milliken. Mr. Milliken is named in his capacity as Speaker of the House of Commons ("Speaker"). Sections 75 and 103.1 of the Act are attached to these reasons as Schedule A.

[3] In substance, Mr. Gauthier, as proprietor of The National Capital News Canada ("National Capital News"), seeks an order under section 75 of the Act requiring that he and his associates and employees be provided with access to the Parliamentary Press Gallery, without becoming a member of Canadian Parliamentary Press Gallery Inc., and without " . . . being required to meet unfair or arbitrarily restrictive conditions of any other person, group or government official."

[4] Contained within the leave application is a statement of grounds and material facts on which the applicant relies. The applicant also filed an affidavit sworn by him in support of the leave application. The applicant asserts that he has been substantially affected in his business, and is significantly precluded from carrying on business, due to his alleged inability to obtain full access to substantial supplies of information and to essential services (including listing on the Press Gallery journalist list) that are provided to his competitors by the Speaker. The Speaker is said to control such access on behalf of the Parliament of Canada. The affidavit describes the history of the National Capital News and its business environment, its alleged need to gain access to sources of information related to the Parliament and Government of Canada and the difficulties encountered over the years to obtain access. Exhibits attached to the affidavit consist of: (1) a copy of a March 25, 1994, letter from Mr. Brian A. Crane, Q.C., counsel for the Speaker of the House of Commons at the time; (2) a letter dated November 10, 1989, from Mr. Marcel R. Pelletier, Q.C., the House of Commons Law Clerk and Parliamentary Counsel, confirming that there has been no legislation ceding a certain power to the Parliamentary Press Gallery; (3) an order of the Ontario Court (General Division) dated January 8, 1996, prohibiting Mr. Gauthier from coming onto the premises of the Canadian Parliamentary Press Gallery; and (4) a letter dated October 16, 1995, from M.G. Cloutier, the Sergeant-at-Arms, House of Commons, confirming there is no restriction on Mr. Gauthier's access to the buildings on Parliament Hill on the same basis as other visitors, with the exception of access to the Press Gallery premises.

[5] The affidavit does not describe in any detail the facilities and services provided to the media by the Speaker, the physical location of the Parliamentary Press Gallery, or the location at which other services are provided.

[6] The Speaker did not file any material in reply to the leave application. While a respondent to a leave application is not required to make any response, the Tribunal would generally be assisted by relevant material and submissions filed by a respondent in opposition to a leave application.

III. <u>THE TEST FOR THE GRANTING OF LEAVE UNDER SECTION 103.1 OF THE ACT</u>

[7] The test for the granting of leave is contained in subsection 103.1(7) of the Act. It provides as follows:

> The Tribunal may grant leave to make an application under section 75 or 77 if it has *reason to believe* that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section. (emphasis added)

[8] In order to exercise its discretion to grant leave, the Tribunal must therefore be satisfied that it has reason to believe that: (1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in section 75 or 77 of the Act; and (2) the alleged practice could be subject to an order under that section.

IV. <u>THE REQUIREMENT OF "REASON TO BELIEVE"</u>

[9] While the phrase "reason to believe" is new to the Act, it has been judicially considered in other contexts. In *Regina* v. *Rollins*, 80 C.C.C. (3d) 385, the British Columbia Supreme Court considered the phrase as it was contained in section 756 of the *Criminal Code*, R.S.C. 1985, c. 27 (1st Supp), which generally allowed a justice to place an offender in custody for observation where there was *reason to believe that evidence might be obtained* as a result of the observation that would be relevant to dangerous offender proceedings. The Court concluded that the expression "reason to believe" requires *reasonable grounds* for the "reason to believe". McKinnon J. wrote, at page 395, that:

> I accept that s. 756 *requires reasonable grounds for the "reason to believe."* That is a precondition to the belief and in most cases will come from the medical opinion but might come from other sources as well; however, in any event, there nevertheless exists the requirement that the court's opinion must be supported by the evidence of at least one medical practitioner. There are, therefore, criteria which offer controlled direction in the exercise of the court's discretion and an ability to obtain a "settled meaning" in relation to the wording or test enunciated in s. 756 which can be used in each application.

> I find that s. 756 is a broad test that is not unduly vague and which does set forth an "intelligible" standard, albeit not a difficult one to meet. (emphasis added)

[10] I accept that the requirement that the Tribunal has "reason to believe" does not require that it be satisfied that an applicant be directly and substantially affected, but rather that there are reasonable grounds to believe the applicant's allegations that he has been so affected.

[11] As to the nature of the evidence required to establish reasonable grounds upon which to believe that an applicant has been directly and substantially affected, the Federal Court has considered the standard of proof required to show the existence of reasonable grounds for a belief.

[12] In *Canada (Attorney General)* v. *Jolly*, [1975] F.C. 216 (C.A.), the Federal Court of Appeal was asked to determine whether there were "reasonable grounds for believing" that an organization, with whom the respondent was associated, was a subversive organization. The Court concluded that, even after *prima facie* evidence had been adduced by the respondent denying the fact, it was only necessary for the Minister to show the existence of reasonable grounds for believing the fact. It was unnecessary for the Minister to go further and establish the subversive character of the organization. The Court stated at paragraph 18:

> . . . But where the fact to be ascertained on the evidence is whether there are reasonable grounds for such a belief, rather than the existence of the fact itself, it seems to me that to require proof of the fact itself and proceed to determine whether it has been established is to demand the proof of a different fact from that required to be ascertained. *It seems to me that the use by the statute of the expression "reasonable grounds for believing" implies that the fact itself need not be established and that evidence which falls short of proving the subversive character of the organization will be sufficient if it is enough to show reasonable grounds for believing* that the organization is one that advocates subversion by force, etc. In a close case the failure to observe this distinction and to resolve the precise question dictated by the statutory wording can account for a difference in the result of an inquiry or an appeal. (emphasis added)

[13] Subsequently, in *Chiau* v. *Canada (Minister of Citizenship and Immigration)* (C.A.), [2001] 2 F.C. 297, the Federal Court of Appeal, when asked to determine the proper interpretation of the term "reasonable grounds" in the context of paragraph 19(1)(c.2) of the *Immigration Act of Canada*, R.S.C. 1985, c. I-2, stated at paragraph 60:

> As for whether there were "reasonable grounds" for the officer's belief, I agree with the Trial Judge's definition of "reasonable grounds" . . . as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes "*a bona fide belief in a serious possibility based on credible evidence*." See Attorney General of Canada v. Jolly, [1975] F.C. 216 (C.A.). (emphasis added)

Leave to appeal to the Supreme Court of Canada was denied (see [2001] S.C.C.A. No. 71).

[14] Accordingly, on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

V. APPLICATION OF THE TEST TO THIS LEAVE APPLICATION

[15] I turn now to whether the evidence before the Tribunal is sufficient to satisfy it that there is reason to believe that:

> (1) the applicant is directly and substantially affected in his business by a practice referred to in section 75 of the Act; and
> (2) the alleged practice could be subject to an order under section 75 of the Act.

[16] It is the second element of the test which I consider to be dispositive of the leave application. I conclude that, for the following reasons, the applicant has failed to establish that the alleged reviewable practice could be subject to an order under section 75 of the Act.

[17] The order sought by the applicant against the Speaker is an order that:

> . . . pursuant to Section 75(1), (2) and (3) of the *Competition Act*, Restrictive Trade Practices, Refusal to Deal . . . full access to the Press Gallery facilities and services, including mailbox, listing and other benefits, be provided immediately to the applicant and his employees and associates without further delay . . . (application, paragraph 10)

[18] In the statement of grounds and material facts the applicant alleges that access to the services which he seeks is controlled by the Speaker, " . . . who controls such access on behalf of the Parliament of Canada." (application, paragraph 3) The evidence adduced by the applicant in his affidavit as it touches on this point is as follows:

> 6. I have invested 20 years of my life and more than my own financial resources into this business and have been seriously impeded by the Speaker of the House of Commons who finances and controls the facilities and services provided for the media by the House of Commons.
>
> . . .
>
> 17. The House of Commons provides substantial facilities and services made available to members of the media and which allow journalists and their employers to earn their living and realize serious commercial rewards.
>
> . . .

36. The facilities and services provided by the House of Commons fall under the direct control of the Speaker of the House of Commons who has the sole authority to determine who may have access to the Press Gallery facilities and services.

. . .

38. The power to regulate the admission of strangers to the precincts of Parliament, including the Press Gallery, resides with Parliament alone and has customarily been exercised by the Speaker. (Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 16th ed. London: Butterworths, 1976.)

39. There has been no delegation of that power by either Parliament itself nor the Speaker of the House of Commons to the privately-owned Canadian Parliamentary Press Gallery Corporation, as confirmed by the House of Commons Law Clerk and Parliamentary Counsel, in his letter 10 November 1989 to the applicant's Legal Counsel at that time, **being Exhibit "B" to this my affidavit.**

40. The applicant alleges that the Speaker is the sole person in control of the media facilities and services and therefore to the resultant commercial benefits derived by journalists and publishers who have access.

41. The Speaker has the duty to administer these publicly-funded facilities and services in a fair manner pursuant to the provisions of the *Competition Act.*

[19] The applicant is, I believe, correct that it is the Speaker who alone has the power to control access to any part of the House, including the Press Gallery. What is significant, however, is that the Speaker does so through constitutional powers and parliamentary privilege.

[20] The origin and nature of parliamentary privilege was reviewed by the Supreme Court of Canada in *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319. There, Justice McLachlin, as she then was, writing for the majority noted that Canadian legislative bodies possess those historically recognized inherent constitutional powers which are necessary to their proper functioning. Writing with respect to the historical tradition of parliamentary privilege, Justice McLachlin stated at pages 378 to 379:

> . . . It has long been accepted that in order to perform their functions, legislative bodies require certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch.
>
> The Parliamentary privilege of the British Parliament at Westminster sprang originally from the authority of Parliament as a court. Over the centuries, Parliament won for itself the right to control its own affairs, independent of the Crown and of the courts. The

courts could determine whether a parliamentary privilege existed, but once they determined that it did, the courts had no power to regulate the exercise of that power. One of those privileges, held absolutely and deemed to be constitutional, was the power to exclude strangers from the proceedings of the House.

[21] Justice McLachlin went on to confirm that Canadian legislative bodies properly claim as inherent privileges those rights which are necessary to their capacity to function as legislative bodies (page 381), and, added at page 383, that:

> . . . *If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.* (emphasis added)

[22] As to the scope of that exclusive jurisdiction, at page 384 Justice McLachlin wrote:

> . . . *The parameters of this jurisdiction are set by what is necessary to the legislative body's capacity to function.* So defined, *the principle of necessity will encompass not only certain claimed privileges, but also the power to determine, adjudicate upon and apply those privileges.* Were the courts to examine the content of particular exercises of valid privilege, and hold some of these exercises invalid, they would trump the exclusive jurisdiction of the legislative body, after having admitted that the privilege in issue falls within the exclusive jurisdiction of the legislative body. *The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function?* A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory. (emphasis added)

[23] One of the specific privileges discussed by Justice McLachlin was the parliamentary privilege to eject strangers from the House and its precincts. She observed that this ancient privilege was now reposed in the Speaker "who alone has the power, whenever he or she sees fit, to order the withdrawal of strangers from any part of the House" (page 386). This privilege is necessary because the legislative chamber is at the core of the system of representative government (page 387).

[24] J.P. Joseph Maingot, Q.C., in *Parliamentary Privilege in Canada*, 2nd Ed. (Montreal: McGill-Queen's University Press, 1997) enumerates the rights, privileges and powers of the Senate and House of Commons in Chapter 11. One such privilege is the right to regulate internal affairs free from interference. This is said to include the right to administer internal affairs both within its precincts and beyond the debating chamber.

[25] No evidence or information was provided to suggest that any of the facilities or services that the applicant seeks fall outside the scope of Parliamentary privilege. The applicant asserts that the facilities and services which he seeks are provided by the House of Commons, and are financed and controlled by the Speaker who exercises Parliament's power to regulate the admission of strangers to its precincts.

[26] Applying the principles articulated in *New Brunswick Broadcasting*, cited above, to the evidentiary record before me, I am satisfied that the Speaker's alleged refusal to grant to the applicant full access to the Parliamentary Press Gallery facilities and services is an exercise of the parliamentary privilege to control access to the House and its precincts and to regulate the internal affairs of the House. Such privilege also encompass the power to adjudicate and apply those privileges.

[27] A similar conclusion was reached by the Ontario Court (General Division) in *Gauthier* v. *Canada (Speaker of the House of Commons)*, (1994), 25 C.R.R. (2d) 286 where Madam Justice Bell found that the Court did not have jurisdiction to review the Speaker's decision to deny the plaintiff access to the precincts of Parliament.

[28] Just as a court may not examine a particular exercise of these privileges, I conclude that the Tribunal is without jurisdiction to embark upon such examination. The Tribunal is, pursuant to section 9 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), a court of record and principles of Parliamentary privilege are as important and applicable to it as they are to other courts. Therefore the practice complained of could not be the subject of any order of the Tribunal under section 75 of the Act.

[29] It follows that the Tribunal does not have, and can not have, any basis upon which to believe that the practice complained of by the applicant could be subject to an order. This requirement of subsection 103.1(7) of the Act is not met and therefore the application for leave must fail. In view of this conclusion it is unnecessary to consider whether the applicant adduced sufficient evidence to meet the first element of the test for leave.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[30] The leave application is denied.

DATED at Ottawa, this 13th day of December, 2002.

SIGNED on behalf of the Tribunal by the judicial member.

(s) Eleanor R. Dawson

[31] Schedule A: Legislative References to sections 75 and 103.1 of the Act.

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(*a*) a person is *substantially affected in his business* or is precluded from carrying on business due to his *inability to obtain adequate supplies of a product* anywhere *in a market* on *usual trade terms*,

(*b*) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of *insufficient competition among suppliers* of the product in the market,

(*c*) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(*d*) the product is in ample supply, and

(*e*) the refusal to deal is having or is likely to have *an adverse effect on competition in a market*,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada. (emphasis added)

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person’s application under section 75 or 77.

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(*a*) is the subject of an inquiry by the Commissioner; or
(*b*) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(*a*) or (*b*) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

REPRESENTATIVE

For the applicant:

Robert Gilles Gauthier, carrying on business as the National Capital News Canada

Robert Gilles Gauthier

For the respondent:

The Honourable Peter Milliken, M.P.

not represented

Tab 2

Case Name:

Barcode Systems Inc. v. Symbol Technologies Canada ULC

Paras 16-20, 24

Between
Symbol Technologies Canada ULC, appellant (respondent),
and
Barcode Systems Inc., respondent (applicant)

[2004] F.C.J. No. 1657

[2004] A.C.F. no 1657

2004 FCA 339

2004 CAF 339

[2005] 2 F.C.R. 254

[2005] 2 R.C.F. 254

327 N.R. 296

4 B.L.R. (4th) 58

34 C.P.R. (4th) 481

134 A.C.W.S. (3d) 592

Docket A-39-04

Federal Court of Appeal
Winnipeg, Manitoba

Richard C.J., Létourneau and Rothstein JJ.A.

Heard: September 28, 2004.
Judgment: October 7, 2004.

(30 paras.)

Trade regulation -- Competition tribunal -- Decisions, standard of review -- Competition -- Unfair competition.

Appeal by Symbol Technologies Canada from a decision of the Competition Tribunal granting leave to the respondent Barcode Systems to make an application to the Tribunal against Symbol. Barcode stated that Symbol was engaging in the reviewable restrictive trade practice of refusal to deal. It sought an order requiring Symbol to accept Barcode as a customer. Symbol had informed Barcode that it would not accept any purchase orders from Barcode. Symbol stated that the Tribunal erred in refusing to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market.

HELD: Appeal dismissed. The standard of review was correctness. The Tribunal erred in refusing to consider whether the alleged refusal to deal was likely to have an adverse effect on competition in a market. However, based on the evidence, there were reasonable grounds to infer that Barcode's ability to be an effective competitor in the Western Canadian market was affected by Symbol's refusal to deal, thereby having an adverse effect on competition in that market.

Statutes, Regulations and Rules Cited:

Competition Act, R.S.C. 1985, c. C-34, ss. 1.1, 75, 75(1), 77, 103.1(1), 103.1(7).

Competition Tribunal Act, R.S.C., 1985, c. 19, s. 13(1), 13(2).

Appeal from a decision of the Competition Tribunal dated January 15, 2004, [2004] C.C.T.D. No. 1.

Counsel:

Steven Field and Dave Hill, for the appellant (respondent).

Lindy Choy, for the respondent (applicant).

[Editor's note: An amendment was released by the Court on April 19, 2005. The changes were not indicated. This document contains the amended text.]

The judgment of the Court was delivered by

ROTHSTEIN J.A.:--

INTRODUCTION

1 This is an appeal by Symbol Technologies Canada ULC (Symbol) from a decision of the Competition Tribunal under subsection 103.1(7) of the Competition Act, R.S.C. 1985, c. C-34 granting leave to the respondent Barcode Systems Inc. (Barcode) to make an application to the Tribunal against Symbol. In its leave application to the Tribunal, Barcode alleged that Symbol was engaging in the reviewable restrictive trade practice of "refusal to deal" within the meaning of section 75 of the Act.

2 Barcode's application before the Tribunal is for an order under subsection 75(1) of the Competition Act requiring Symbol to accept Barcode as a customer.

3 In this appeal, Symbol says that the Tribunal member who granted leave erred in law by refusing to take into account statutory requirements and that the decision to grant leave should be quashed by this Court.

FACTS

4 The facts are taken from the affidavit of David Sokolow, the President of Barcode. There has been no cross-examination on that affidavit. Symbol is the Canadian subsidiary of Symbol Technologies Inc. (Symbol US). Symbol US is the largest single manufacturer of bar code equipment in the world. Symbol sells and distributes Symbol US products in Canada. In or about 1994, Barcode took over Symbol's distribution in Western Canada.

5 In or about January 2003, Symbol informed Barcode that it could no longer buy parts for Symbol products. In April 2003, Symbol informed Barcode that it would not accept purchase orders from Barcode. Barcode says that since May 1, 2003, Symbol has refused to deal with Barcode.

RELEVANT STATUTORY PROVISIONS

6 Until 2002, only the Commissioner of Competition could bring an application before the Competition Tribunal in respect of reviewable restrictive trade practices described in Part VIII of the Competition Act, e.g. refusal to deal (section 75) and tied selling (section 77). By amendments to the Competition Act, 2002, c. 16, ss. 11.1-11.3, private applicants were given the opportunity to bring applications to the Tribunal, subject to the Tribunal granting them leave to do so. Subsection 103.1(1) of the Competition Act provides:

> 103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

* * *

> 103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée

d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

7 The considerations the Tribunal is to take into account in determining a leave application are set out in subsection 103.1(7). To grant leave, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by a reviewable restrictive trade practice that could be the subject of a Tribunal order under sections 75 or 77 of the Competition Act. Subsection 103.1(7) provides:

> (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.
>
> * * *
>
> (7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

8 The reviewable restrictive trade practice relied on by Barcode is refusal to deal. Subsection 75(1) provides:

> 75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
> (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
> (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
> (d) the product is in ample supply, and
> (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
>
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms

unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

* * *

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
d) que le produit est disponible en quantité amplement suffisante;
e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

THE ALLEGED ERROR OF LAW

9 Symbol submits that the Competition Tribunal member who granted leave refused to take account of all the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and therefore erred in law by not taking account of statutory requirements. Symbol's main argument is that the member refused to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market as required by paragraph 75(1)(e).

10 Indeed, in his reasons, the member specifically finds that on an application for leave, the

Tribunal is not to have regard to whether the refusal to deal is likely to have an adverse effect on competition in a market. At paragraphs 8 and 10, the member states:

> 8. What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.
>
> 10. As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

STANDARD OF REVIEW

11 Subsection 13(1) of the Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.), s. 13; 2002, c. 8, s. 130, provides for a statutory right of appeal to the Federal Court of Appeal from any decision or order whether final, interlocutory or interim of the Competition Tribunal as if it were a judgment of the Federal Court. The unrestricted right of appeal (except in the case of appeals on questions of fact under subsection 13(2)) is an indication of a correctness standard of review.

12 Whether to grant leave under subsection 103.1(7) is a discretionary decision of the Tribunal. However, the question at issue here is whether, in exercising its discretion, the Tribunal is required to consider all the elements of the restrictive trade practice of refusal to deal set out in subsection 75(1). That is a question of law, a straight question of statutory interpretation. It is the task of the Court to determine whether the Tribunal has exercised its discretionary power within the constraints imposed by Parliament. See Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at paragraph 38.

13 This question of statutory interpretation does not engage any particular expertise of the Tribunal. Economic and commercial considerations are not part of the analysis of whether, on a leave application, all the elements listed in subsection 75(1) must be considered. That expertise is not engaged on the question of statutory interpretation at issue here therefore points to the correctness standard.

14 The basic purpose of the Competition Act as described in subsection 1.1 is "to maintain and encourage competition in Canada" and the purpose of section 75 is in furtherance of that objective. When economic and commercial considerations are being considered, deference may be called for. But these considerations are not at issue in the present appeal.

15 Weighing these pragmatic and functional considerations, I conclude that the standard of review in this appeal is correctness. ANALYSIS

The legal test in an application under subsection 103.1(7)

16 In National Capital News Canada v. Canada (Speaker House of Commons) (2002), 23 C.P.R. (4th) 77, Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:

> Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

17 The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

18 However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

19 The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

20 The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

21 The respondent says that the words in subsection 103.1(7) "that the applicant is directly and substantially affected in the applicant's business" are essentially the words in paragraph 75(1)(a) and because there are no words similar to those in paragraphs 75(1)(b) to (e) in subsection 103.1(7), Parliament did not intend that each element in paragraphs (b) to (e) need be taken into account on a leave application.

22 I do not think that is correct. Because subsection 103.1(1) says that "any person may apply", it is theoretically possible for someone other than a person substantially and directly affected to bring a private application. However, Parliament clearly intended to limit private applications to persons who themselves are directly and substantially affected in their businesses by the alleged reviewable practice. I think that is the reason for the use of words in subsection 103.1(7) that are substantially similar to those in paragraph 75(1)(a). However, the use of these words does not imply that the statutory elements in paragraphs 75(1)(b) to (e) need not be considered on a leave application. That is because, on a leave application, the Tribunal must consider whether the practice that is alleged could be subject to an order under subsection 75(1); and it cannot reach that conclusion without considering all the elements of refusal to deal set out in that subsection.

23 Counsel for Symbol argued that on a purposive interpretation, it should be clear that on a leave application, the Tribunal must have regard to all the statutory elements in subsection 75(1). I agree. The purpose of the Competition Act is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition. That is the obvious reason for paragraph 75(1)(e). The threshold at the leave stage is low, but there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market.

Application of the test for leave to the facts

24 Having determined the correct legal test on an application seeking leave to apply for an order under subsection 75(1), the question is whether this matter should be remitted to the Tribunal for redetermination or whether this Court should dispose of it. Barcode has pointed out that a leave application is intended to be a summary screening process. There is no right of cross examination on the affidavit filed in support of the application for leave, there is no provision for the respondent to file affidavit evidence and the time limits in section 103.1 are short, consistent with leave applications being dealt with summarily. For these reasons, I think the appropriate course of action in this case would be for this Court to resolve the matter without further delay.

25 Is there credible evidence to support a finding that there are reasonable grounds to believe that

Symbol's refusal to supply Barcode could be subject to an order under subsection 75(1)? There is evidence that Barcode is substantially affected in its business due to its inability to obtain Symbol's products. Barcode's evidence is that it cannot obtain these products either directly from Symbol or from other Symbol distributors. Barcode says it is willing and able to meet Symbol's usual trade terms and that Symbol's products are in ample supply.

26 The only real controversy is whether there is evidence that Symbol's refusal to deal is likely to have an adverse effect on competition in a market.

27 On this point, paragraph 75(1)(e) has not been interpreted by the Tribunal or this Court and a leave application is not the appropriate occasion to do so. Therefore, if there are any facts in its affidavit that might meet the requirements of paragraph 75(1)(e), the benefit of any doubt should work in favour of granting leave in order not to finally preclude Barcode from its day before the Tribunal.

28 The evidence of Barcode is that in or about 1994, it took over Symbol's distribution in Western Canada and that by 2002 its annual revenues were in excess of $20 million. Symbol US is the largest single manufacturer of bar code equipment in the world. Barcode's evidence is that if Symbol continues to refuse to supply, Barcode will be forced into receivership, and indeed, the Tribunal member found that on December 19, 2003, Barcode was petitioned into receivership.

29 From Barcode's evidence, I think it may be inferred, for leave to apply purposes, that there are reasonable grounds to believe that Barcode had somewhat of a presence in the Western Canadian market for the supply and servicing of Symbol's products. Its difficult financial situation reflected by its receivership could be likely to impede its ability to be an effective competitor in that market, thereby having an adverse effect on competition in that market. The evidence may not be strong but I think it is sufficient to constitute reasonable grounds to believe that Symbol's alleged refusal to deal could be the subject of an order under subsection 75(1).

CONCLUSION

30 For these reasons I would dismiss the appeal with costs.

ROTHSTEIN J.A.
RICHARD C.J.:-- I agree.
LÉTOURNEAU J.A.:-- I agree.

Tab 3

Competition Tribunal Tribunal de la Concurrence

Reference: *Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada*, 2015 Comp. Trib. 26
File No.: CT-2015-009
Registry Document No.: 079

Paras 30-31

IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the *Competition Act*, RSC, 1985, c C-34 as amended;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

BETWEEN:

Stargrove Entertainment Inc.
(applicant)

and

Universal Music Publishing Group Canada,
Universal Music Canada Inc.,
Sony/ATV Music Publishing Canada Co.,
Sony Music Entertainment Canada Inc.,
ABKCO Music & Records, Inc.,
Casablanca Media Publishing, and
Canadian Musical Reproduction Rights Agency Ltd.
(respondents)

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE

Decided on the basis of the written record.
Before Judicial Member: Barnes J.
Date of Reasons for Order and Order: December 14, 2015

REASONS FOR ORDER AND ORDER GRANTING AN APPLICATION FOR LEAVE UNDER SECTION 103.1 OF THE COMPETITION ACT

I. Overview

[1] The Applicant, Stargrove Entertainment Inc. ("Stargrove"), seeks leave under section 103.1 of the *Competition Act*, RSC, 1985, c C-34 as amended, to bring an application against the Respondents for the following substantive relief:

(a) an Order pursuant to subsection 75(1) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other applicants to the Canadian Musical Reproduction Rights Agency Ltd.;

(b) an Order pursuant to subsection 76(2) of the Act prohibiting the Respondents from continuing to engage in the practices that form the basis of this Application;

(c) an Order pursuant to subsection 76(2) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other applicants to CMRRA;

(d) an Order pursuant to subsection 76(8) of the Act prohibiting the Respondents from continuing to engage in the practices that form the basis of this Application;

(e) an Order pursuant to subsection 76(8) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other applicants to CMRRA;

(f) an Order pursuant to subsection 77(2) of the Act prohibiting the Respondents from continuing to engage in exclusive dealing;

(g) an Order pursuant to subsection 77(2) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other applicants to CMRRA.

[2] In support of the application for leave Stargrove filed an Application Record and a Supplementary Application Record. The Respondents replied with Written Representations. Included with the responding material was an affidavit sworn on behalf of Sony Music Entertainment Canada Inc. ("Sony Canada") stating that it "does not own or control any copyright rights in musical works". This was filed in support of Sony Canada's argument that it is not a proper party to this proceeding. A similar affidavit was filed on behalf of Casablanca Media Publishing ("Casablanca"). Casablanca sought leave to file under Rule 119(3) of the *Competition Tribunal Rules*, SOR/2008-141, but Sony Canada neglected to do so. When Stargrove filed its Reply, it, too, included an affidavit without seeking permission. That affidavit attached a relevant email that was deliberately withheld from the Application Record ostensibly for privacy concerns.

[3] Subsequently the Canadian Musical Reproduction Rights Agency Ltd. ("CMRRA"), asked for leave to file a 10-paragraph sur-reply that, for the most part, repeated arguments it had made in its Written Representations. That submission drew an objection from Stargrove. It, too, took the opportunity to repeat some of its earlier arguments. The CMRRA then filed a sur-sur-sur-reply, this time without the courtesy of seeking leave.

[4] While the *Competition Tribunal Rules* contemplate a degree of informality, they do not countenance unlimited, unrestrained and unauthorized filings. Where leave is required to file affidavit evidence or to make a further submission, it must be sought.

[5] There is similarly no authority in the Rules to file Reply <u>evidence</u> as of right and the only basis to do so is under Rule 2 with leave. This also applies to the filing of arguments in sur-reply, sur-sur-reply and sur-sur-sur-reply.

[6] Notwithstanding the above-noted irregularities, I have considered the additional evidentiary materials received. I have done so on the basis that those affidavits would have been admitted had leave been properly sought.

[7] Leave is denied for the CMRRA's sur-reply and sur-sur-sur-reply and for Stargrove's response in sur-sur-reply. Nothing in those submissions adds anything of significance to the issues before me and, on that basis, I have ignored them.

II. BACKGROUND

[8] Stargrove says that, since 2014, it has carried on business as a record label manufacturing and selling competitively-priced musical compact discs ("CDs"). It characterizes the Respondent, CMRRA, as a music licensing collective representing the interests of music publishers on whose behalf it issues licenses for the reproduction of musical works on payment of appropriate fees. The remaining corporate Respondents are said to be record labels and/or music publishers who, in this case, allegedly hold or control copyright in certain musical works for which the issuance of a mechanical license is required before reproduction can take place. Stargrove is aggrieved by the refusal of the Respondents to issue mechanical licenses authorizing the reproduction by Stargrove of five recordings, namely: the Beatles "*Love Me Do*", the Beatles "C*an't Buy Me Love*", the Rolling Stones "*Little Red Rooster*", Bob Dylan "*It Ain't Me Babe*" and The Beach Boys "*Fun, Fun, Fun*". In each case, copyright in the sound recording has expired but copyright in the musical work still exists in favour of at least some of the Respondents.

[9] According to the affidavit of the sole Director and Officer of Stargrove, Mr. Terry Perusini, its business model is based on the production and sale of low-cost CDs for musical works of three types:

(a) sound recordings for which Stargrove owns the sound recording copyright;

(b) sound recordings licensed to Stargrove from various independent labels; and

(c) sound recordings that are now in the public domain and for which master recording licenses are no longer legally required but where mechanical licenses are still required from the publishers.

[10] In early 2015, Stargrove applied to the CMRRA seeking mechanical licenses to reproduce the five titles noted above. It submitted a royalty payment of $13,799.10 based on a "standard" mechanical royalty rate of $0.083 per song. The CMRRA cashed Stargrove's cheque and Stargrove proceeded to produce CDs (12,400 units) for sale through a distributor to Walmart at a retail price of $5. Sales of some of these CDs were strong.

[11] According to Mr. Perusini, from January 22, 2015 each of the Respondents took steps to refuse or to block the issuance of mechanical licenses to Stargrove or to otherwise discourage the sale of its CDs. On February 25, 2015, the CMRRA returned Stargrove's royalty payment. At the same time negative reviews began to appear on the Walmart website criticizing the quality of Stargrove's CDs. According to evidence filed on behalf of Stargrove, these supposed customer reviews were the product of an in-house campaign initiated by the Respondent, Universal Music Canada Inc. ("Universal Canada"), to convince Walmart to remove the Stargrove CDs from its shelves and to thereby protect Universal's market share.

[12] Stargrove then made efforts to negotiate with CMRRA and with some of the Respondents, (Sony/ATV Music Publishing Canada Co., Sony Canada, ABKCO Music & Records, Inc. ("ABKCO"), Casablanca), to obtain the required mechanical licenses. The CMRRA did obtain authorizations for a few of the songs in issue but not for most of them. Stargrove has been unable to pursue its intended line of business in connection with the protected song titles and Mr. Perusini estimates an immediate loss of $150,000 in wholesale sales through Walmart.

[13] Mr. Perusini characterizes the overall impact of the Respondents' conduct in the following way:

> Stargrove's business model relies heavily on producing CD compilations of sound recordings that are in the public domain. The Respondents' refusal to license Stargrove under usual licensing terms has caused losses to Stargrove and has cut off any future growth of the business.
>
> I estimate that, if Stargrove's business is able to continue and we are able to sell a mix of licensed sound recordings, our own sound recordings, and public domain sound recordings, we will achieve sales of $3 to $5 million per year in Canada.
>
> Under our current business model, without being able to obtain mechanical licences on ordinary terms through CMRRA, Stargrove will go out of business.

[14] The affidavit of Mario Bouchard filed on behalf of Stargrove describes the typical business arrangements that apply to the issuance of mechanical licenses in Canada. Mr. Bouchard is a former general counsel to the Copyright Board. He acknowledges that compulsory licensing to record a musical work ended in 1988 and "in law, a record label [eg. Stargrove] should obtain the necessary mechanical licenses before pressing a CD, let alone releasing it" (see para 29). Nevertheless, according to Mr. Bouchard – and verified by David Basskin in a 2009 affidavit sworn in an unrelated Ontario legal proceeding – in practice record producers routinely release new recordings without first obtaining the requisite mechanical licenses from copyright holders or the CMRRA. When a mechanical license is issued by the CMRRA on behalf of the holder of the copyright, the necessary royalties are paid by the licensee on generally applicable business terms. It is of some additional note that Mr. Basskin's affidavit also stated that "a given copyright owner is entitled to refuse a license request and might well do so…" (see Application Record at p 381, para 51). On the other hand, music publishers will often be motivated to obtain appropriate royalties for the reproduction of their songs.

[15] The general background to Stargrove's claim to relief is captured in the first four paragraphs of its Proposed Notice of Application:

> 1. Stargrove is a record label that manufactures CD compilations of sound recordings of The Beatles, The Rolling Stones, and other artists for sale at low prices ($5.00) at Walmart stores. It can offer such low prices because the sound recordings it uses are no longer protected by copyright; they are in the public domain. As such, Stargrove does not require a "master sound recording licence" to use the recordings.
>
> 2. Although the sound recordings are in the public domain, the musical works (songs) on the recordings continue to be copyright protected. Stargrove requires what are known as "mechanical licences" for each song it seeks to use. In Canada, there are standard industry practices and terms that govern the issuance of mechanical licences; for the songs relevant to this application, these are administered by the Canadian Musical Reproduction Rights Agency. Stargrove is willing to abide by those terms and practices. The Respondents, however, have banded together to shut Stargrove out, having CMRRA deny Stargrove <u>any</u> mechanical licences (not just for the titles in question).
>
> 3. Stargrove is being targeted for its low pricing model, but the real victims are consumers; instead of being able to buy popular titles for just $5.00 per CD, they pay much more.
>
> 4. The Respondents have campaigned to block Stargrove by pressuring Stargrove's distributor, concocting false negative reviews of Stargrove's CDs, and having CMRRA refuse to deal with Stargrove on standard terms. They have violated sections 75,

> 76, and 77 of the Competition Act, depriving consumers of competitive prices and artificially extending copyright over public domain recordings. This has negatively affected competition. Stargrove seeks to be treated fairly, in accordance with standard industry terms. Since the Respondents are unwilling to engage with Stargrove, Stargrove asks this Tribunal to order them to do so.

[16] The Respondents oppose the granting of leave on various grounds discussed below.

<u>The Test for Leave</u>

[17] Subsection 103.1(1) of the *Competition Act*, RSC, 1985, c C-34 as amended (the "Act") gives any person the right to apply to the Tribunal for leave to make an application under sections 75, 76 or 77 – the three provisions under which Stargrove seeks relief.

[18] Subsection 103.1(7) provides that leave may be granted under section 75 or section 77 if the Tribunal "has reason to believe that the applicant is directly <u>and</u> substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section".

[19] Subsection 103.1(7.1) authorizes the Tribunal to grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order. For this provision, the words "substantially affected" are not present.

[20] The general approach to the granting of leave for relief under section 75 was set out by Justice Marshall Rothstein in *Symbol Technologies Canada ULC v Barcode Systems Inc.*, 2004 FCA 339, [2005] 2 FCR 254:

> [16] In *National Capital News Canada v. Canada (Speaker House of Commons)* (2002), 23 C.P.R. (4th) 77, Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:
>
>> "Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order."
>
> I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

> [17] The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.
>
> [18] However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).
>
> [19] The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).
>
> [20] The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

[21] The above discussion also informs the granting of leave under sections 76 and 77 (see also: *Safa Enterprises Inc. v Imperial Tobacco Company Limited*, 2013 Comp. Trib. 19, at para 15).

III. Analysis

[22] I am not satisfied that Stargrove has met its burden for leave to apply for relief under either section 75 or section 77. I am, however, satisfied that it has made a case for leave to seek relief under section 76.

[23] There are two fundamental weaknesses to Stargrove's claim to pursue relief under sections 75 and 77. Standing squarely in the way of a claim to section 75 relief is a decision of the Tribunal in *Canada (Competition Act, Director of Investigation and Research) v Warner Music Canada Ltd*, [1997] CCTD No 53, 78 CPR (3d) 321 ("*Warner Music*)". I do not agree with Stargrove's assertion that this decision can be distinguished or, alternatively, that it should be ignored.

[24] In *Warner Music*, the Commissioner brought an application alleging that the Respondents' (collectively "Warner Music") refusal to grant copyright licenses to a competitor on usual trade terms allowing it to make sound recordings from master recordings contravened section 75 of the Act.

[25] Warner Music successfully moved to strike the application. In striking out the Commissioner's application, the Tribunal said the following:

> 30 Having considered the submissions discussed here and the additional points in the parties' memoranda, the Tribunal has concluded that on the facts of this case the licences are not a product as that term is used in section 75 of the Act, because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" -- there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.
>
> 31 As well, the Tribunal has accepted the respondents' submissions that, when considered in the context of sections 32 and 79(5) of the Act, the term "product" in section 75 cannot be read to include these copyright licences. These submissions are discussed above and need not be repeated here.
>
> 32 Although the Tribunal was commenting on section 79 and intellectual property (trade-marks) in *Director of Investigation and*

> *Research v. Tele-Direct (Publications) Inc.*, we are of the view that its statement is very compelling in the circumstances of the motion before us:
>
> > The respondents' refusal to licence their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.
>
> The *Copyright Act* is similar to the *Trade-marks Act*, in that it allows the trade-mark owner to refuse to license and it places no limit on the sole and exclusive right to license. [Footnotes omitted]

[26] This analysis fully applies to the section 75 relief sought by Stargrove. Relief is simply not available under this provision where the impugned conduct involves the refusal to grant a license over copyrighted material. The ratio in *Warner Music* is further strengthened by the exception found in subsection 76(3) making price maintenance relief available notwithstanding the existence of exclusive intellectual property rights. If Parliament intended that relief under sections 75 or 77 could be had in the face of such an exclusive right, presumably it would have said so just as it did in section 76.

[27] The general concerns expressed by the Tribunal in *Warner Music* also apply to the availability of relief under section 77. There is simply no reasonable interpretation of section 77 that would make it applicable to the factual allegations advanced by Stargrove. Put simply, the conduct Stargrove complains about is not a form of exclusive dealing or tied selling as those terms are defined in the Act.

[28] The second fundamental deficiency in Stargrove's application for leave under sections 75 and 77 arises from its evidence concerning the impact of the alleged conduct on its business. Subsection 103.1(7) requires evidence of a direct and substantial affect. The evidence presented by Stargrove is manifestly insufficient to meet the burden it carries to show a "substantial" affect. Despite Mr. Perusini's acknowledgement that Stargrove's business model includes the sale of musical works it controls or which are now fully within the public domain, he has provided no evidence about the size of that part of its overall business relative to the market for the disputed musical works.

[29] I have no doubt that the copyrighted CDs Stargrove seeks to produce and sell represent a potentially lucrative market but I cannot tell on this record whether access to those products is possibly existential or simply profitable in some largely unsubstantiated measure. To be substantial there must be an effect that is “important or significant”; it need not be such that the affected party will be unable to carry on: see *Nadeau Poultry Farm Limited v Group Westco Inc. et al*, 2009 Comp. Trib. 6. Mr. Perusini offers the bare conclusion that Stargrove will fail without access to these products but he provides no credible data in support of that opinion or to support his estimates of potential sales going forward. On the whole, this evidence is insufficient to give rise to a *bona fide* belief by the Tribunal that the denial of access to the musical works in issue could substantially affect Stargrove’s business and the application under sections 75 and 77 fails on that basis as well.

[30] I am satisfied that Stargrove has, however, met the threshold for leave under section 76 of the Act. As noted above, subsection 103.1(7.1) only requires that a party has been “directly affected” by the alleged reviewable conduct. For purposes of leave, that requirement is clearly met.

[31] In light of the limited scope of *Warner Music* it remains an open question whether a copyright is, for some statutory purposes, a “product”. In *Warner Music* at para 30 the Tribunal recognized that possibility: also see *Cinemas Guzzo Inc. v Canada*, 2005 FC 691 at para 56 aff’d, 2006 FCA 160.

[32] Perhaps of more significance is the recognition in subparagraph 76(1)(*a*)(ii) that reviewable price maintenance includes direct or indirect discriminatory conduct motivated by the low-pricing policy of another person.

[33] If Stargrove is able to establish that some or all of the Respondents, singularly or in concert, discriminated against it by refusing to issue mechanical licenses motivated by Stargrove’s low-pricing practices, an argument for section 76 relief could be available. The case for relief could be enhanced by credible evidence that mechanical licenses are routinely granted by music publishers to record labels on standard business terms and that Stargrove was treated differently.

[34] In *The Queen v Royal LePage Real Estate Services Ltd*, [1994] AJ No 823, 27 WCB (2d) 428, the Alberta Court of Queen’s Bench held that discrimination under the earlier equivalent criminal provision meant “treating a person differently than another without proper justification” (see para 25). Similarly, in the text *Competition Law of Canada* (Huntington, New York: Juris Publishing, 2003) (loose-leaf revision 22-2009) (Davies, Ward and Beck), the authors state:

> The Background Papers also note with regard to the prohibition on refusing to supply “or otherwise discriminating” in now repealed paragraph 61(1)(b) (currently paragraph 76(1)(a)(ii)) that discrimination may “encompass certain unfair pressures that do not amount to a direct refusal to supply but that have the effect of disturbing the retailer’s suppliers, e.g., line breaking, lost or delayed orders.” [Footnotes omitted]

[35] By virtue of paragraph 76(3)(*c*), the fact that the impugned conduct is carried out by a party with an exclusive intellectual property right is not a bar to relief. Presumably, by enacting this provision, Parliament recognized that some forms of anti-competitive conduct should be the subject of relief notwithstanding the existence of intellectual property rights. In the face of this provision, I do not agree that it is clear the authority to order a compulsory license resides only in section 32 of the Act. It also strikes me that discriminatory conduct falling under section 76 may not be "the mere exercise of an intellectual property right" as described in *Apotex Inc v Eli Lilly and Company*, 2005 FCA 361 at paras 28 and 34.

[36] I also agree with Stargrove that it is still an open question whether, in every instance, section 76 requires product resale or that a product input could never be the subject of relief. These are issues worthy of further consideration.

[37] There is also an argument to be made that relief for reviewable conduct under section 76 is not effectively the equivalent of a compulsory licensing regime. If, in a particular case, a breach of section 76 is proven, it is arguably open to the Tribunal to order an appropriate remedy under that provision. This presumably would not open the door to anyone to obtain a copyright license regardless of the basis for its refusal. Where the owner of an exclusive intellectual property right lawfully refuses a license, no compulsory remedy would be available to the party affected.

[38] I am also satisfied that sufficient credible evidence has been produced to support a *bona fide* belief that holding Stargrove out of the market could have an adverse effect on competition in a market. In an email exhibited to the affidavit of Ms. Anna Kusmider, a representative from Universal Canada noted one-week CD sales of Universal content through Walmart of 4,172 units. The author expressed concern about maintaining market share. Other evidence presented by Mr. Perusini speaks to Stargrove's initial success in the retail market and to Walmart's continuing interest in Stargrove's CDs. The Respondents' alleged denials of meaningful access to the market could also be an indication of their concern about damage to the existing higher-priced market for this music.

[39] I acknowledge that the evidence bearing on each Respondent's motives is not particularly strong. This is, however, evidence that lies exclusively within the knowledge of the Respondents and they have not produced any evidence in rebuttal. In the face of the unanswered evidence submitted by Stargrove, I am satisfied that it has met the relatively low evidentiary threshold on this point.

[40] Sony Canada argues that Stargrove's application for leave should be dismissed against it because it is not a music publisher and holds no copyright interests in any of the musical works in issue. Casablanca makes a similar argument. It says that Stargrove has mistakenly attributed to Casablanca copyright over three songs that, until September 30, 2015, was owned or controlled by a third party (Red Brick songs).

[41] In an affidavit sworn by Ms. Jennifer Mitchell – who is the President of both Red Brick Songs and Casablanca – it is asserted that "the Three Songs were never administered by Casablanca". She also stated that Casablanca "does not have the ability to grant licenses to Red Brick songs".

[42] This evidence is seemingly contradicted by an email from the CMRRA to Stargrove stating that Casablanca represents the three songs in issue and had instructed CMRRA not to issue any licenses to Stargrove. This apparent contradiction cannot be resolved on the record before me and, until it is, there is no basis for dismissing this application against Casablanca.

[43] I am similarly not persuaded that it is appropriate at this early stage to dismiss the application for leave against Sony Canada. It may well be correct that Sony Canada does not own or control copyright in any musical works. But that fact may not be sufficient on its own to exempt it from any form of section 76 relief. There is evidence in the record that some of the Respondents may have acted in concert to exclude Stargrove. That is an issue deserving of further evidentiary exploration. The same concern arises in connection with the involvement of the CMRRA. It was presumably acting throughout as an agent but its joinder as a Respondent may be necessary to give practical effect to any order that might ultimately be made in favour of Stargrove.

[44] ABKCO argues that this application should be dismissed against it because the Tribunal lacks jurisdiction where service was carried out *ex juris*. Most of ABKCO's arguments, however, go directly to the merits of the application. I agree with Stargrove that the appropriate approach to this issue required a separate motion challenging the Tribunal's jurisdiction. By challenging this application on the merits, ABKCO has consented to the Tribunal's jurisdiction; see *Van Damme v Gelber*, 2013 ONCA 388 at para 22, 363 DLR (4th) 250.

[45] For the foregoing reasons, this application is allowed in part with costs payable to Stargrove at the mid-point of Column IV.

NOW THEREFORE THE TRIBUNAL ORDERS THAT:

[46] The application for leave seeking relief under section 76 of the Act is allowed;

[47] The application for leave seeking leave for relief under sections 75 and 77 of the Act is dismissed; and

[48] The Applicant is awarded costs against the Respondents, jointly and severally, at the mid-point of Column IV.

DATED at Ottawa, this 14th day of December, 2015.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) R.L. Barnes

COUNSEL:

For the applicant:

Stargrove Entertainment Inc.

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Scott McGrath
Bronwyn Roe
Sangeetha Punniyamoorthy
Thomas Kurys

For the respondents:

Universal Music Publishing Group Canada
Universal Music Canada Inc.

Donald B. Houston

Sony/ATV Music Publishing Canada Co.
Sony Music Entertainment Canada Inc.

Mahmud Jamal
Peter Franklyn

ABKCO Music & Records, Inc.
Casablanca Media Publishing

Michael Osborne

Canadian Musical Reproduction Rights Agency Ltd.

Christopher M. Hersh
Casey M. Chisick
Eric Mayzel

Tab 4

Case Name:

Eli Lilly and Co. v. Apotex Inc.

Paras 21, 27-28

Between
Apotex Inc., appellant (plaintiff by counterclaim), and
Eli Lilly and Company and Eli Lilly Canada Inc., respondents (defendants by counterclaim), and
Shionogi & Co. Ltd., respondent (defendant by counterclaim), and
Commissioner of Competition, intervener

[2005] F.C.J. No. 1818

[2005] A.C.F. no 1818

2005 FCA 361

2005 CAF 361

[2006] 2 F.C.R. 477

[2006] 2 R.C.F. 477

260 D.L.R. (4th) 202

341 N.R. 114

44 C.P.R. (4th) 1

143 A.C.W.S. (3d) 673

Docket A-579-04

Federal Court of Appeal
Toronto (Ontario)

Desjardins, Evans and Sharlow JJ.A.

Heard: September 27, 2005.
Judgment: November 2, 2005.

(60 paras.)

Commercial law -- Trade regulation -- Competition -- Unfair competition and restrictive trade practices -- Monopolies -- Appeal from orders, reported at [2004] F.C.J. No. 1753, striking claims alleging assignment of patent unduly restricted competition allowed, where assignment created monopoly -- Competition Act, s. 45.

Intellectual property law -- Patents -- Ownership -- Assignment -- Appeal from orders striking claims alleging assignment of patent unduly restricted competition allowed, where assignment created monopoly -- Competition Act, s. 45.

Appeal by Apotex from decisions granting summary judgment to Lilly and Shionogi, and striking paragraphs from Apotex's 2001 defence and 2002 counterclaim in Lilly's action for patent infringement. Apotex's pleadings alleged the 1995 assignment of a patent to Lilly by Shionogi unduly lessened competition, by creating in the assignee market power greater than that inherent in the patent assigned. Such power was allegedly created because Lilly, the assignee, already held related patents, thereby creating a monopoly. Apotex's counterclaim added Shionogi to the action. Lilly was awarded summary judgment to strike these portions of Apotex's pleadings. Shionogi was granted summary judgment dismissing Apotex's claim. The judge held that because patent holders were permitted to assign their patents, doing so could not be considered to unduly lessen competition in the absence of other circumstances creating anti-competitive effects. The judge did consider the assignment from Shionogi to Lilly to have had a competition-lessening effect.

HELD: Appeal allowed. The assignment of a patent could, as a matter of law, unduly lessen competition. No other agreement between the assignee and assignor needed to exist. Lilly could not assert its patent rights in breach of competition law. Gaining the exclusive rights to market a particular thing by way of an assignment was different than gaining a monopoly by obtaining an exclusive patent. The public interest in maintaining competition weighed in favour of restricting a patent holder's right to assign its patent in a way that unduly lessened competition. In this case, the assignment did lessen competition. Apotex's claims were not statute-barred by a two-year limitation period, because the competition-lessening effect of the assignment continued beyond the date of the assignment.

Statute, Regulations and Rules Cited:

Competition Act, R.S.C. 1985, c. C-34, ss. 1.1, 32, 36, 36(1), 36(4), 45, 45(1), 45(3), 45(7), 45(7.1), 79, 79(1), 79(5)

Patent Act, R.S.C. 1985, c. P-4, s. 50

Appeal From:

Appeal from the Order of Mr. Justice Hugessen, dated October 20, 2004, No. T-1321-97, [2004] F.C.J. No. 1753.

Counsel:

Harry B. Radomski and David Scrimger, for the appellant.

Anthony Creber and Patrick Smith, for the respondent - Eli Lilly.

A. David Morrow and Colin B. Ingram, for the respondent - Shionogi.

Randall Hofley, for the intervener.

The judgment of the Court was delivered by

EVANS J.A.:--

A. INTRODUCTION

1 This is an appeal by Apotex Inc. from a decision of the Federal Court granting motions brought by the respondents, Eli Lilly and Company, Elli Lilly Canada Inc. ("Lilly") and Shionogi & Co. Ltd.. The Judge granted motions for summary judgment by Lilly and Shionogi, and struck paragraphs from Apotex' defence and counterclaim to an action by Lilly for patent infringement. The Judge's decision is reported as Eli Lilly and Company v. Apotex Inc., [2005] 2 F.C.R. 225, 2004 FC 1445.

2 The appeal raises an important question of law arising at the intersection of patent law and competition law. It is this. As a matter of law, can an assignment of a patent constitute an agreement or arrangement to lessen competition unduly, contrary to section 45 of the Competition Act, if it results in an increase to the assignee's market power greater than that inherent in the patents assigned?

3 Lilly and Shionogi say that it cannot. They rely on section 50 of the Patent Act, which authorizes a patentee to assign a patent. They argue that, by their nature, patents create monopolies. Since the right to assign is one of the rights conferred on patentees by Parliament, any lessening of competition following the exercise of the right to assign cannot be undue. Lilly and Shionogi say that there is binding authority to this effect, Molnlycke AB v. Kimberly-Clark of Canada Ltd.

(1991), 36 C.P.R. (3d) 493 (F.C.A.). However, they concede that it is different if, in addition to the assignment, the assignor and assignee enter into some other competition-restricting arrangement.

4 Apotex, on the other hand, submits that section 50 of the Patent Act and section 45 of the Competition Act can be read harmoniously: section 50 enables patents to be assigned, but does not purport to exempt assignments from the need to comply with other laws, including section 45 of the Competition Act. Hence, it is argued, when the effect of an assignment is to increase the assignee's market power by more than that inherent in the rights assigned, section 50 does not preclude the possibility, as a matter of law, that the assignment unduly lessened competition.

5 Apotex says that Molnlycke is distinguishable on the ground that the Court in that case was not considering a situation in which the assignment created in the assignee market power greater than that inherent in the patents assigned. In contrast, such power was conferred in the present case because of the assignee's existing ownership of related patents.

6 The Commissioner of Competition was given leave to intervene to assist the Court on whether section 50 of the Patent Act precludes the application of section 45 of the Competition Act from the assignment of patents, and whether the Judge erred in concluding that his view on this issue was consistent with the Intellectual Property Enforcement Guidelines, 2000 (Hull: Industry Canada) issued by the Commissioner.

B. BACKGROUND AND JUDICIAL HISTORY

7 The essential background to this appeal has already been described by Rothstein J.A. in the previous round of the present litigation, reported as Apotex Inc. v. Eli Lilly and Company, [2004] F.C.J. No. 1049, 2004 FCA 232:

> [2] On June 18, 1997, Eli Lilly and Company and Eli Lilly Canada Inc. ("Lilly") commenced an action against Apotex Inc. ("Apotex") for infringement of seven patents which relate to processes that can be used in the making of the antibiotic cefaclor, to intermediates that can be formed using those processes, and to a compound used in the processes. On January 11, 2001, Lilly amended its statement of claim to add an eighth patent which it claimed had been infringed.
>
> [3] By amendments to its Statement of Defence and by Counterclaim made in 2001, Apotex alleged that certain conduct of Lilly violated section 45 of the Competition Act, R.S.C. 1985, c. C-34, thereby entitling Apotex to damages under section 36 of that Act. In 2002, Apotex further amended its Statement of Defence and Counterclaim to add Shionogi & Co. Ltd. ("Shionogi") as a defendant by counterclaim in the proceedings as part of its claim for damages under the Competition Act.

> [4] Of the eight patents Lilly claimed were infringed by Apotex, four had been assigned to Lilly by Shionogi in 1995. Apotex says that these assignments constituted an agreement that resulted in an undue lessening of competition contrary to section 45 of the Competition Act.

> [5] Subsection 45(1) of the Competition Act makes it unlawful for parties to enter into agreements which lessen competition unduly:

8 I would only add that the patent for cefaclor expired in 1994 and the last Shionogi process patent expired in 2000, shortly before the last of Lilly's process patents. Finally, contemporaneously with the assignment, Lilly granted a non-exclusive licence to Shionogi with respect to the patents which Shionogi assigned to Lilly.

9 In the first round of these proceedings, the Judge granted three motions. In the first, Lilly was awarded summary judgment striking the paragraphs of Apotex' defence and counterclaim that rested on section 45, and dismissing the counterclaim. In the second, Shionogi was awarded summary judgment on the counterclaim and, in the third, the Judge allowed Shionogi's appeal from a decision of a Prothonotary refusing to strike Apotex' counterclaim against it.

10 The Judge held that, since any lessening of competition arose from Shionogi's assignment of the patents to Lilly, it could not be undue because it was authorized by section 50 of the Patent Act. He regarded Molnlycke as binding authority to this effect. The Judge's decision is reported as Apotex Inc. v. Eli Lilly and Company, (2003), 28 C.P.R. (4th) 37, 2003 FC 1171.

11 Apotex appealed to this Court, which allowed the appeal and remitted the matter to the Judge, on the ground that Molnlycke only applied when the lessening of competition resulted from the assignment alone. If there was "evidence of something more than the mere exercise of patent rights" (at para. 15), the Competition Act was not necessarily excluded. Accordingly, the Court referred the matter back to the Judge, requesting him (at para. 22) to address the following questions "at a minimum":

> ... (1) whether subsection 45(1) can ever apply to an agreement involving the exercise of patent rights; and (2) if it can, whether the facts of this case are sufficient to prove that Lilly and/or Shionogi engaged in conduct that was contrary to section 45. Finally, even if Apotex can establish that section 45 applies and that Lilly and/or Shionogi's conduct was contrary to section 45, the motions judge will still have to determine if any of the other arguments raised by Lilly and Shionogi, which he did not originally consider, prevent Apotex from recovering damages under section 36 of the Competition Act.

The citation for the Court of Appeal's decision was set out at paragraph 7 of these reasons.

12 When the matter went back to the Judge, he asked himself whether there was some agreement or term, in addition to the assignment of the patents, which could constitute the "something more" to which the Court of Appeal had alluded. Finding that there was not, he again granted the motions. He said (at para. 9):

> [W]here an agreement deals only with patent rights and is itself specifically authorized by the Patent Act, any lessening of competition resulting therefrom, being authorized by Parliament, is not "undue" and is not an offence contrary to section 45.

In the Judge's view, therefore, since any lessening of competition resulted from the assignments alone, Molnlycke applied.

13 Accordingly, the Judge (at para. 26) answered Yes to the first question, but No to the second, because

> [t]he agreement which constitutes the conspiracy alleged by Apotex, however, is solely and exclusively the assignment of the Shionogi patents and there is no other agreement alleged or shown by the evidence which could be the basis of a section 45 offence.

As for the third question, the Judge said that, while it did not arise, "it too would receive a negative answer".

14 For the reasons which follow, I have concluded that the assignment of a patent may, as a matter of law, unduly lessen competition. I would allow Apotex' appeal from the Judge's decision, dismiss the motions, restore the paragraphs struck from the defence and counterclaim, and allow the matter to proceed to trial on all other issues, except whether there was a lessening of competition as a result of the assignment.

C. STATUTORY FRAMEWORK

Patent Act, R.S.C. 1985, c. P-4

> 50. (1) Every patent issued for an invention is assignable in law, either as to the whole interest or as to any part thereof, by an instrument in writing.
>
> ...

Competition Act, R.S.C. 1985, c. C-34

> 32. (1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more trade-marks, by a

copyright or by a registered integrated circuit topography, so as to

(a) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,
(b) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,
(c) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or
(d) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,

the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.

36. (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the

person bringing the action is evidence thereof in the action.

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

45. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

...

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

(3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

(a) the exchange of statistics;
(b) the defining of product standards;
(c) the exchange of credit information;
(d) the definition of terminology used in a trade, industry or profession;
(e) cooperation in research and development;
(f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;
(g) the sizes or shapes of the containers in which an article is packaged;
(h) the adoption of the metric system of weights and measures; or
(i) measures to protect the environment.

(7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

(a) in the practice of a trade or profession relating to the service; or
(b) in the collection and dissemination of information relating to the service.

(7.1) Subsection (1) does not apply in respect of an agreement or arrangement between federal financial institutions that is described in subsection 49(1).

79. (1) Where, on application by the Commissioner, the Tribunal finds that

...

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

...

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial

Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

* * *

50. (1) Tout brevet délivré pour une invention est cessible en droit, soit pour la totalité, soit pour une partie de l'intérêt, au moyen d'un acte par écrit.

[...]

32. (1) Chaque fois qu'il a été fait usage des droits et privilèges exclusifs conférés par un ou plusieurs brevets d'invention, par une ou plusieurs marques de commerce, par un droit d'auteur ou par une topographie de circuit intégré enregistrée pour :

a) soit limiter indûment les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un article ou d'une denrée pouvant faire l'objet d'un échange ou d'un commerce,
b) soit restreindre indûment l'échange ou le commerce à l'égard d'un tel article ou d'une telle denrée ou lui causer un préjudice indu,
c) soit empêcher, limiter ou réduire indûment la fabrication ou la production d'un tel article ou d'une telle denrée, ou en augmenter déraisonnablement le prix,
d) soit empêcher ou réduire indûment la concurrence dans la production, la fabrication, l'achat, l'échange, la vente, le transport ou la fourniture d'un tel article ou d'une telle denrée,

la Cour fédérale peut rendre une ou plusieurs des ordonnances visées au paragraphe (2) dans les circonstances qui y sont décrites.

36. (1) Toute personne qui a subi une perte ou des dommages par suite :

a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

(2) Dans toute action intentée contre une personne en vertu du paragraphe (1), les procès-verbaux relatifs aux procédures engagées devant tout tribunal qui a déclaré cette personne coupable d'une infraction visée à la partie VI ou l'a déclarée coupable du défaut d'obtempérer à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, ou qui l'a punie pour ce défaut, constituent, sauf preuve contraire, la preuve que la personne contre laquelle l'action est intentée a eu un comportement allant à l'encontre d'une disposition de la partie VI ou n'a pas obtempéré à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, selon le cas, et toute preuve fournie lors de ces procédures quant à l'effet de ces actes ou omissions sur la personne qui intente l'action constitue une preuve de cet effet dans l'action.

(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).

(4) Les actions visées au paragraphe (1) se prescrivent :

a) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date du comportement en question,
(ii) soit la date où il est statué de façon définitive sur la poursuite;

b) dans le cas de celles qui sont fondées sur le défaut d'une personne d'obtempérer à une ordonnance du Tribunal ou d'un autre tribunal, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date où a eu lieu la contravention à l'ordonnance du Tribunal ou de l'autre tribunal,
(ii) soit la date où il est statué de façon définitive sur la poursuite.

45. (1) Commet un acte criminel et encourt un emprisonnement maximal de cinq ans

et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :

a) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;

[...]

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

(3) Sous réserve du paragraphe (4), dans des poursuites intentées en vertu du paragraphe (1), le tribunal ne peut déclarer l'accusé coupable si le complot, l'association d'intérêts, l'accord ou l'arrangement se rattache exclusivement à l'un ou plusieurs des actes suivants :

a) l'échange de données statistiques;
b) la définition de normes de produits;
c) l'échange de renseignements sur le crédit;
d) la définition de termes utilisés dans un commerce, une industrie ou une profession;
e) la collaboration en matière de recherches et de mise en valeur;
f) la restriction de la réclame ou de la promotion, à l'exclusion d'une restriction discriminatoire visant un représentant des médias;
g) la taille ou la forme des emballages d'un article;
h) l'adoption du système métrique pour les poids et mesures;
i) les mesures visant à protéger l'environnement.

(7) Dans les poursuites intentées en vertu du paragraphe (1), le tribunal ne peut déclarer l'accusé coupable s'il conclut que le complot, l'association d'intérêts, l'accord ou l'arrangement se rattache exclusivement à un service et à des normes de compétence et des critères d'intégrité raisonnablement nécessaires à la protection du public :

a) soit dans l'exercice d'un métier ou d'une profession rattachés à ce service;
b) soit dans la collecte et la diffusion de l'information se rapportant à ce service.

(7.1) Le paragraphe (1) ne s'applique pas à un accord ou à un arrangement visé au paragraphe 49(1) lorsque cet accord ou arrangement a lieu entre des institutions financières fédérales.

79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

[...]

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

[...]

(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la Loi sur les brevets, de la Loi sur les dessins industriels, de la Loi sur le droit d'auteur, de la Loi sur les marques de commerce, de la Loi sur les topographies de circuits intégrés ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

D. ISSUES AND ANALYSIS

Issue 1: As a matter of law, may an assignment of a patent unduly lessen competition by virtue of the assignee's ownership of related patents?

(i) Molnlycke AB v. Novopharm Kimberly-Clarke of Canada Ltd.

15 Lilly and Shionogi rely heavily on the decision in Molnlycke. They argue that, in the first round of this litigation (see paragraph 7 of these reasons), this Court held that Molnlycke is good law and should be followed. Consequently, they submit, as far as the present parties are concerned, the soundness of Molnlycke is res judicata. For present purposes, I accept this. However, the more important question is to define the scope of the proposition for which this Court affirmed Molnlycke.

16 In my view, this Court's opinion of the scope of Molnlycke is clear from the reasons it gave when allowing the appeal from the first decision of the Judge. If, as Lilly and Shionogi argue, Apotex is bound by the Court's conclusion that Molnlycke should be followed, Lilly and Shionogi, in my opinion, are equally bound by the Court's view of the ratio of Molnlycke. This is what Rothstein J.A. said about Molnlycke:

> [14] In the case of Molnlycke, there was a single supplier lawfully entitled to sell the subject of the patent prior to the patent being assigned. The assignment merely transferred the patent to another company. The only effect of the assignment was that a different company could sue the defendant for infringement. There was no change in the number of patent-holders before and after the assignment. The defendant appears to have claimed that an agreement to assign a patent and thereby allow the assignee to enforce the patent monopoly, with nothing more, could itself be an agreement that unduly lessened competition under subsection 45(1).
>
> [15] Molnlycke held that, in order to provide scope for the statutory monopolies granted by the Patent Act to operate, Parliament must have intended that "undue impairment of competition cannot be inferred from evidence of the exercise of [patent] rights alone" [emphasis added]. Where, however, there is evidence of something more than the mere exercise of patent rights that may affect competition in the relevant market, Molnlycke does not purport to completely preclude application of the Competition Act.
>
> [Emphasis added]

17 Distinguishing Molnlycke, the Court said:

> [17] In the present case, Apotex does not allege that it is the mere assignment of patent rights or the enforcement of those patent rights by Lilly that gave it a cause of action. Rather, Apotex says that the assignment in this case resulted in one company, Lilly, acquiring patent rights that allow it to control all of the commercially viable processes for making cefaclor where, before the agreement, those processes were controlled by two companies, Shionogi and Lilly. Apotex argues that this consolidation was something more than the mere exercise of patent rights. Therefore, it says, the assignment agreement gave rise to an undue lessening of competition which engaged subsection 45(1) of the Competition Act.

18 Since the Court did not refer to any other basis on which Apotex sought to distinguish Molnlycke, the Court's reference to "something more" must mean, in this case, the anti-competitive effects of the assignment, namely, the increased power of Lilly in the market for bulk cefaclor, as a result of its existing ownership of the patents for the other known, commercially-viable processes for manufacturing the medicine.

19 Hence, Molnlycke must be distinguished on the basis that it was dealing with a situation where the only market power created by the assignment was that inherent in the patent assigned. To the extent that there is broader language in Molnlycke, it must be understood to have been read down.

20 In my respectful opinion, therefore, the Judge erred in confining his consideration to whether the parties entered into some agreement or other arrangement, in addition to the assignment itself.

(ii) Interpreting sections 45 and 50

21 My conclusion that, in the previous round of this litigation, this Court held that Molnlyke was not determinative of this case would be sufficient to allow the appeal. Nonetheless, because the merits were fully argued, and in case the matter should go further, I shall explain why I agree with the interpretation of the relevant legislation implicit in the conclusion of this Court in the previous round of this litigation: namely, section 50 of the Patent Act does not immunize an agreement to assign a patent from section 45 of the Competition Act when the assignment increases the assignees's market power in excess of that inherent in the patent rights assigned.

22 First, this interpretation of section 50 of the Patent Act enables it and section 45 of the Competition Act to operate harmoniously in accordance with the ordinary meaning of the statutory language of the provisions. It avoids the need to imply limiting words into section 45 exempting the assignment of patents from its scope. Nor does it render section 50 otiose, because the provision clarified what otherwise would have been, at best, uncertain: namely, that a patentee's rights include the right to assign the statutory rights conferred under the Patent Act on the grantee of a patent.

23 Since section 50 neither compels nor expressly authorizes what section 45 forbids, there is no true conflict between these two provisions of statutes which have different purposes: see Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th edn. (Markham, Ontario: Butterworths, 2002), 262-66; see also R. v. Smith, [1960] S.C.R. 776 at 800; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161 at 191.

24 Further, it is possible that an assignment pursuant to section 50 of the Patent Act which unduly lessens competition, and thereby potentially gives rise to criminal proceedings under section 45 and a claim for damages under section 36, may still be valid as between the assignor and assignee, even though section 45 may prevent the assignee from enforcing the rights assigned against certain third parties. However, this is not an issue that falls for decision here.

25 To subject the right to assign patents to section 45 in the circumstances under consideration in this case is also consistent with the scheme of the Competition Act.

26 For example, subsections 45(3), (7) and (7.1) provide specific exceptions and defences to the offences created by subsection 45(1). None deals with intellectual property rights. Moreover, it is clear that Parliament considered the interface of the Competition Act and intellectual property rights. For example, while subsection 79(1) prohibits the abuse of market dominance, subsection 79(5) provides that, for the purpose of section 79, "an act engaged in pursuant only to the exercise of any right ... derived under the ... Patent Act ... is not an anti-competitive act." Section 45 contains no analogous exemption for the exercise of rights under the Patent Act, including assignments pursuant to section 50.

27 In light of the above, the presumption of statutory interpretation, expressio unius est exclusio alterius, supports an interpretation of section 45 that does not impliedly exclude an assignment of patents which lessens competition by increasing the market power of the assignee beyond that inherent in the rights assigned.

28 Further, section 32 provides that the Federal Court may make certain orders where use is made of the exclusive rights conferred by a patent so as to unduly restrain trade or lessen competition in an article. It is clear from this that Parliament did not intend to exclude the exercise of patent rights from the reach of the Competition Act altogether. In order to achieve consistency with section 32, section 45 should be interpreted as applicable to an assignment of a patent which unduly lessens competition.

29 Lilly and Shionogi argue that, if a person had applied for and been granted patents for all the known processes for making a product, the person would have a monopoly over the manufacture of that product. This would not be contrary to the Competition Act, unless the patentee abused its market power in breach of section 79. Why should it make a difference if the patentee acquired some or all of the patents as a result of an assignment?

30 In my view, the answer is that the right to exclude others is an essential part of the bargain: the monopoly granted to the patentee is the recompense for ingenuity and the public disclosure of the invention. Moreover, as a unilateral act, the issue of a patent cannot be a conspiracy or agreement for the purpose of section 45.

31 The right to assign a patent is also valuable, and Parliament has authorized patent holders to assign their patents. No doubt, a patent holder may expect to obtain a higher price from a purchaser who already owns patents that would give the assignee a monopoly in a relevant market. However, to deter a patentee from obtaining the full potential value of the patent in these circumstances in order to maintain competition in a market is not incompatible with the essential bargain between the patentee and the state.

32 Second, an interpretation of section 50 which does not immunize the assignment of patents from section 45 when it lessens competition is consistent with the purpose of the Competition Act, which is stated in section 1.1 to be "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy". The importance of the Act and, within it, of section 45, was emphasized in R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at 648, where Gonthier J. described the Act as being "central to Canadian public policy in the economic sector" and said that "s. 32 [now section 45] is itself one of the pillars of the Act." It would be inconsistent with this view of the Competition Act, and of the place of section 45 within it, to reduce the scope of section 45 by reading in words that exclude an assignment of patents which lessens competition in the relevant market.

33 Third, this interpretation is consistent with the Competition Bureau's Intellectual Property Enforcement Guidelines. Like other administrative interpretations, the Guidelines are not, and do not purport to be, legally binding nor determinative of the meaning of the Competition Act: Canada (Commissioner of Competition) v. Superior Propane Inc., [2001] 3 F.C. 185, 2001 FCA 104 at para. 124 (C.A.). Nonetheless, they may be considered by the Court as an aid to the Act's interpretation (R. v. Nowegijick, [1983] 1 S.C.R. 29 at 37 (Revenue Canada Interpretation Bulletin)), especially since the Guidelines are promulgated after an extensive consultative process.

34 The following paragraph of the Guidelines is particularly relevant.

4.2.1 General Provisions

> The mere exercise of an IP right is not cause for concern under the general provisions of the Competition Act. The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP. The Bureau views an IP owner's use or non-use of the IP also as being the mere exercise of an IP right.
>
> The unilateral exercise of the IP right to exclude does not violate the general provisions of the Competition Act no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural, social and educational benefits created by them and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary.
>
> The Bureau applies the general provisions of the Competition Act when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights, and when the alleged competitive harm stems from such an arrangement and not just from the mere exercise of the IP right and nothing else.

Applying the Competition Act in this way may limit to whom and how the IP owner may license, transfer or sell the IP, but it does not challenge the fundamental right of the IP holder to do so. If an IP owner licenses, transfers or sells the IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the Bureau may seek to challenge the arrangement under the appropriate section of the Competition Act. Part 7 of this document provides a series of hypothetical examples to illustrate how the Bureau would examine the licensing, transfer or sale of IP under the Competition Act.

* * *

4.2.1

Dispositions générales

Selon les dispositions générales de la Loi sur la concurrence, le simple exercice d'un droit de PI ne constitue pas un motif de préoccupation. Le Bureau définit le simple exercice d'un droit de PI comme l'exercice du droit du titulaire d'empêcher unilatéralement d'autres personnes d'utiliser la PI. Le Bureau considère également l'utilisation ou la non-utilisation d'une PI par un titulaire comme le simple exercice d'un droit de PI.

L'exercice restrictif du droit d'exclusion de la PI ne contrevient pas aux dispositions générales de la Loi sur la concurrence, peu importe jusqu'à quel point la concurrence est affectée. Soutenir le contraire pourrait en fait annuler les droits de PI et faire perdre ou compromettre les avantages économiques, culturels, sociaux et éducatifs qu'ils ont produits ainsi qu'entrer en contradiction avec l'opinion fondamentale du Bureau, qui veut que les lois sur la PI et sur la concurrence soient généralement complémentaires.

Le Bureau applique les dispositions générales de la Loi sur la concurrence lorsque les droits de PI constituent le fondement des arrangements conclus entre des entités indépendantes, que ce soit sous forme de transfert, d'accord de licence ou d'entente visant l'utilisation ou l'application des droits de PI, et quand le prétendu préjudice est le résultat de tels arrangements plutôt que du simple exercice du droit de PI, sans plus.

Appliquer la Loi sur la concurrence de cette façon peut imposer des limites au

> propriétaire d'une PI quant à la manière dont il peut octroyer une licence, transférer ou vendre la PI et à qui il peut le faire, mais cela ne remet pas en question les droits fondamentaux d'un propriétaire de PI de le faire. Si un titulaire de PI octroie une licence, transfère ou vend la PI à une entreprise ou à un groupe d'entreprises qui, n'eût été de cette entente, aurait représenté un concurrent réel ou potentiel, et si cet accord crée, maintient ou renforce la puissance commerciale, le Bureau peut tenter de contester cet arrangement en vertu de l'article applicable de la Loi sur la concurrence. La partie 7 du présent document contient une série de cas hypothétiques qui illustrent la manière dont le Bureau examine l'octroi de licences, le transfert ou la vente de PI en vertu de la Loi sur la concurrence.

35 It should be noted, however, that none of the hypothetical examples provided in Part 7 of the Guidelines deals with the facts of the present case.

36 To conclude, in my respectful opinion, the Judge erred in law by holding that the assignment of patents is exempt from section 45 when, by reason of the assignee's existing ownership of other patents, the assignment transfers more market power than that inherent in the patents assigned. He also erred in regarding Molnlycke as authority for the proposition that, in these circumstances, any lessening of competition could not be undue for the purpose of section 45.

Issue 2: Did the assignment of the patents by Shionogi to Lilly lessen competition?

37 The alternative argument of Lilly and Shionogi is that the evidence does not establish that the assignment of Shionogi's patents to Lilly in 1995 lessened competition. Lilly says that this is because, as a result of the 1995 assignment and Lilly's grant of a non-exclusive licence back to Shionogi of the assigned patents, there were two sources, namely, Shionogi and Lilly, from which a competitor could purchase, or seek a licence to manufacture, cefaclor. Previously, only Lilly could utilize the Shionogi cefaclor patents in Canada because, in 1975, Shionogi had granted Lilly an exclusive licence with respect to these patents.

38 Whether there was a lessening of competition after the 1995 assignment is a question of fact, on which the Judge made an express finding. After quoting a passage from the Court of Appeal's decision in the previous round of this litigation, the Judge said:

> [13] To avoid any possible doubt, what was stated by the Court of Appeal in the quoted passage to be an allegation of Apotex is a fact amply demonstrated by the evidence and not seriously contested by either Lilly or Shionogi.

> [14] So, there is and never has been any doubt that the result of the assignment of

> Shionogi's patents to Lilly was to increase the latter's monopoly power. Where [page232] formerly it had held four process patents useful in the production of cefaclor, it now held eight and no one else held any. In a word, it had a monopoly of the known production processes. It may well have been in a position of market dominance.
>
> [emphasis added]

To put his view beyond any doubt, he added (at para. 22) that the agreement between Lilly and Shionogi "had the effect of lessening competition".

39 In the absence of a palpable and overriding error, this Court cannot disturb the Judge's conclusion that the effect of the assignment was a lessening of competition because of Lilly's existing ownership of other patents. The question for trial is whether the lessening of competition resulting from the assignment is sufficiently significant as to be undue: see R. v. Nova Scotia Pharmaceutical Society, supra at 646 and following.

40 Lilly argues that, since Shionogi was not in the Canadian market for cefaclor and, in 1975, had granted an exclusive licence to Lilly, Lilly held a monopoly in Canada prior to the assignment. After 1995, as a result of both the assignment, and Lilly's grant to Shionogi of a non-exclusive licence with respect to cefaclor, there were two potential sources from which Apotex could have sought either to purchase, or to obtain a licence to manufacture, bulk cefaclor. Thus, it was argued, the assignment merely enabled Lilly, rather than Shionogi, to sue for infringement of the assigned patents, and actually increased competition.

41 Moreover, Lilly and Shionogi say, since Apotex had not sought a licence from Lilly or Shionogi, before or after the assignment, it was in no position to say that the effect of the assignment was to shut it out of the cefaclor market. Indeed, Apotex had obtained bulk cefaclor from another source which, Apotex alleged, was manufactured by a process that did not infringe the Shionogi or Lilly patents.

42 Although the Judge made his finding of fact on the lessening of competition without referring to the grant of the licence back to Shionogi in 1995, he based his decision on the same arguments and record as were before us, including those relating to the grant of the licence back to Shionogi. The fact that Lilly granted a non-exclusive licence to Shionogi at the time of the 1995 assignment does not mean that it thereby lost control of the patents. For example, the licence prevented Shionogi from granting a sub-licence "without the written prior approval of, and at the sole discretion of, Lilly."

43 Affidavits filed by Apotex from experts in various fields, including competition policy, provided significant evidence of a lessening of competition in the market for bulk cefaclor. In contrast, Lilly served only one, relatively short, affidavit, by an employee, in support of its position.

Shionogi filed none.

44 As for the assertion that Shionogi had licensed its cefaclor process patents to Lilly in 1975, the evidence before the Judge about the pre-1995 relationship between Shionogi and Lilly with respect to those patents does not establish that the Judge's finding that the 1995 assignment lessened competition was vitiated by palpable and overriding error.

45 Nor do I regard the Judge's reference in paragraph 14 of his reasons to the possibility that the assignment may have put Lilly in a position of "market dominance" as an indication that, in making a finding respecting a lessening of competition, he had in mind section 79, not section 45.

46 On the basis of the evidence in the record, I would not disturb the Judge's finding that the assignment lessened competition.

Issue 3: Are Apotex' counterclaims statute-barred?

47 Apotex' counterclaims against Lilly and Shionogi under section 36 of the Competition Act are for damages for loss or damage sustained as a result of conduct proscribed in section 45. As applied to this case, subsection 36(4) provides that no claim for damages may be made after two years from "a day on which the conduct was engaged in".

48 In response to Lilly's infringement action, Apotex issued a counterclaim against Lilly in March 2001 and against Shionogi in November 2002. In order to maintain these claims, they had to have been made within two years of the start of the limitation period. The question, therefore, is to determine when the limitation period commenced.

49 The Judge concluded as follows (at para. 25) with respect to the issues of prescription, and the research and development:

> there is sufficient conflict and lack of clarity in the evidence on the questions of foreseeability and the reach of the 1975 research and development agreement between Lilly and Shionogi that those questions are not suitable for summary judgment and should only be resolved after a full trial.

50 Lilly and Shionogi say that, on the basis of the evidence before him, the Judge's conclusion on the issue of prescription was vitiated by palpable and overriding error.

51 First, they argue that the assignment of Shionogi's patents was the conspiracy ("the conduct ... engaged in" for the purpose of subsection 36(4)) and this occurred in 1995, six and seven years respectively before the counterclaims were issued against Shionogi and Lilly. Moreover, the assignment was registered with the Commissioner of Patents in 1995, a copy of the registration was given to Apotex' counsel in 1999, and Apotex had knowledge of the assignment in 1997 when Lilly issued its statement of claim for infringement. Each of these possible starting dates for the running of time under subsection 36(4) is more than two years before Apotex issued its counterclaim against Shionogi. Only Apotex' receipt of a copy of the registration occurred less than two years before Apotex issued its counterclaim against Lilly.

52 In my view, the problem with this argument is that it assumes that, for the purpose of subsection 36(4), the conspiracy is the assignment, considered in the abstract as a single act. However, Apotex' case is that the assignment must be seen in its context: its enhancement of Lilly's market power, that is, Lilly's additional ability to act independently of the market by virtue of its ownership of the patents for all known, commercially-viable processes for manufacturing cefaclor. On this view, the conspiracy continued as long as the assignment had competition-lessening effect. Because of the evidential questions to be resolved, this is not the kind of issue on which it would be appropriate to grant summary judgment.

53 Second, Shionogi argues that the last of the process patents that it assigned to Lilly expired in April 2000, two years and seven months before Apotex issued its statement of claim against Shionogi. The argument here is that, if Apotex' counterclaim is based on the assignment and its anti-competitive effects, these effects must have ended on the expiry of the last of the assigned Shionogi patents.

54 I do not find this argument compelling either. The expiry of the last of Shionogi's process patents in 2000, more than two years before Apotex issued its counterclaim against Shionogi, is only relevant if it is not arguable that, after that date, there could be no competition-lessening effects as a result of the assignment.

55 However, the expiry of the Shionogi patents will not necessarily mark the start of the limitation. On the assumption that the discoverability principle applies to claims under section 36, if Apotex did not discover, and could not reasonably have been expected to discover, details of the 1975 and 1995 agreements between Lilly and Shionogi, more than two years before it issued its counterclaim, the counterclaim was not time-barred. Apotex says that it did not discover important details about the agreements until November 2001.

56 I am not persuaded that the evidence pertaining to both how much Apotex knew about the relevant facts (including details of the agreements), and when it acquired its knowledge, is so clear as to warrant this Court's interfering with the Judge's conclusion that this issue should be resolved on the basis of a trial. It will generally be inappropriate to decide by summary judgment a matter in which the application of the discoverability rule is likely to be important: Aguonie v. Galion Solid Waste Material Inc. (1998), 156 D.L.R. (4th) 222 at para. 36 (Ont. C.A.).

57 Apotex also says that Lilly's pursuit of the infringement action against it is a continuing competition-lessening effect. I would not be prepared to decide the correctness of this submission on a summary motion.

Issue 4: Did Apotex sustain any damage as a result of the conspiracy?

58 In order to claim damages under section 36(1), a claimant must prove that the proscribed conduct caused it loss or damage. Lilly and Shionogi argued before us, as they had done before the Judge, that Apotex had suffered no loss or damage as a result of the assignment of the patents because there was no evidence that the assignment had delayed Apotex' entry into the cefaclor market. Apotex' reply is that any amount that it may be required to pay to Lilly by way of damages as a result of Lilly's infringement action constitutes "loss or damage" for the purpose of subsection 36(1).

59 I can do no better than adopt the Judge's conclusion on this issue (at para. 24):

> While that appears to me to be a rather strange proposition in law, it is not clear that it cannot succeed and if Apotex were otherwise successful on its section 36 claim, I would not be prepared to dismiss it on that basis at the summary judgment stage.

E. CONCLUSIONS

60 For these reasons, I would allow the appeal with costs here and below, set aside the order of the Judge, and dismiss the motions for summary judgment and for striking Apotex' counterclaims and certain paragraphs from its defence to Lilly's action for infringement.

EVANS J.A.
DESJARDINS J.A.:-- I concur.
SHARLOW J.A.:-- I agree.

Tab 5

Reference: *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10
File No.: CT-2011-06
Registry Document No.: 29

Paras 32-35, 38

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

AND IN THE MATTER of an Application by the Used Car Dealers Association of Ontario for an Order pursuant to section 103.1 granting leave to make application under sections 75 and 76 of the *Competition Act*.

B E T W E E N:

Used Car Dealers Association of Ontario
(applicant)

and

Insurance Bureau of Canada
(respondent)

Decided on the basis of the written record
Before Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: September 9, 2011
Reasons and Order signed by: Madam Justice Sandra J. Simpson

REASONS FOR ORDER AND ORDER GRANTING THE APPLICANT LEAVE TO FILE AN APPLICATION PURSUANT TO SECTION 75 OF THE COMPETITION ACT

THE APPLICATION

[1] The Used Car Dealers Association of Ontario (the "UCDA") seeks leave from the Competition Tribunal (the "Tribunal") to commence an application pursuant to section 75 and subparagraph 76(1)(a)(ii) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). The proposed application names the Insurance Bureau of Canada as the respondent.

THE DECISION

[2] For the following reasons leave has been granted to commence an application under section 75 of the Act. However, leave to proceed under section 76 has been denied.

THE APPLICANT

[3] The UCDA was founded in 1984. It is a not-for-profit trade association which represents more than 4500 motor vehicle dealers in Ontario. The UCDA provides a variety of services to its members including one called Auto Check™ ("Auto Check"). It provides dealers who are selling used cars with information about the accident history of the vehicles they intend to sell. Using a vehicle's VIN number, a dealer who is a member of the UCDA pays a fee of $7.00 (before taxes) to conduct an Auto Check vehicle accident history search.

[4] The UCDA's evidence for this application is found in an affidavit sworn by Robert G. Beattie on June 29, 2011 (the "Beattie Affidavit"). Mr. Beattie is the UCDA's Executive Director.

THE RESPONDENT AND ITS DATABASES

[5] The Insurance Bureau of Canada (the "IBC") is a national not-for-profit industry association which represents home, vehicle and business insurers. The IBC is, according to the UCDA, the only source of integrated industry wide data collected from all insurers who sell auto insurance as well as from independent adjusters and investigators. The data are located on a database which IBC describes as its Web Claims Search Application. However, that database does not include information about the dollar value of claims made when vehicles are in accidents. Those values are found in information provided to IBC by its members and collected in a second IBC database called the Automotive Statistical Plan ("ASP Database").

THE BACKGROUND

[6] In 1998, the UCDA became an Associate Member of the IBC primarily to gain access to the information in IBC's Web Claims Search Application. That information is a critical input into UCDA's Auto Check business.

OTHER PROVIDERS OF VEHICLE ACCIDENT SEARCHES

[7] 3823202 Canada Inc., carrying on business as CarProof ("CarProof"), began to provide vehicle accident searches in 2005. It is now the market leader and its searches cost $34.95 (Cdn) before taxes.

[8] In 2008, CARFAX, Inc. ("Carfax"), an American based provider of vehicle accident histories, began to sell them in Ontario. It charges $34.99 (U.S.) before taxes.

[9] Both CarProof and Carfax purchase IBC's data for their accident history searches and, according to the Beattie Affidavit, they are both able to provide the dollar value of claims as part of their search results.

[10] The relationship between Auto Check and CarProof has, from the UCDA's perspective, been troubled. The UCDA took CarProof to court to prevent it from misrepresenting the services offered by Auto Check. In the end, a settlement achieved Auto Check's objective. CarProof has also twice (in 2009 & 2010) tried to persuade the UCDA to enter into a partnership in which the Auto Check service would be terminated and CarProof would supply vehicle accident histories to UCDA's members. The UCDA refused to entertain these proposals because it believes that its members place a high value on their ability to purchase inexpensive vehicle accident histories through Auto Check.

REGULATORY CHANGES

[11] On January 1, 2010, changes to the regulations under the Ontario *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, Schedule B, required motor vehicle dealers to disclose to potential purchasers whether a used vehicle had ever suffered damage which cost more than $3000.00 to repair.

[12] To assist its members to meet this new obligation, the UCDA decided to try to obtain additional information from IBC about the dollar value of insurance claims. IBC has that information on its ASP Database. The Beattie Affidavit describes the UCDA's early efforts to secure this information in paragraphs 21 and 25-28:

> In early June 2009, in anticipation of these [Regulatory] changes, Robert Pierce, the UCDA's Director of Member Services, contacted Marti Pehar, Manager, Business Partnerships, of IBC by telephone and <u>requested that IBC expand the scope of the information it provided to Auto Check™ to include dollar value claims information</u>.
>
> I understand from Mr. Pierce that he met with Ms. Pehar on June 16, 2009 to discuss Auto Check™'s request for dollar value claims information. Although UCDA had indicated its willingness to compensate IBC for the provision of this additional information, on June 24, 2009, <u>Ms. Pehar informed Mr. Pierce that IBC had refused UCDA's request</u>. I understand and believe that at that time IBC

> provided, and presently continues to provide, similar information directly or indirectly to CarProof.
>
> On May 17, 2010 Warren Barnard, UCDA's Legal Services Director, and I met with Ralph Palumbo, IBC Vice-President - Ontario, and Randall Bundus, IBC Vice-President -Operations and General Counsel, and renewed Auto Check™'s request for dollar value claims information. Mr. Palumbo stated that he did not see any reason why IBC would not provide this information to UCDA. <u>Mr. Bundus indicated that IBC would need to obtain authorization from its member insurers</u> in order to provide the ASP information to UCDA.
>
> The requirement to obtain insurer consents in respect of dollar claims data came as a surprise to UCDA because this has never been an issue with the Web Claims Search application. Nevertheless, on May 20, 2010, <u>I wrote to Mr. Palumbo and formally requested that IBC seek the requisite authorization from its member insurers</u> to provide the ASP dollar value claims information to Auto Check™.
>
> In a letter dated May 26, 2010, Mr. Bundus wrote to me to state that IBC would not seek the authorization UCDA had requested to supply dollar claims data from its insurer members. Instead, <u>Mr. Bundus indicated that UCDA should contact each insurer member of IBC in order to obtain individual consents</u> for provision of dollar claims information.
>
> [The emphasis is mine]

THE TERMINATION OF THE UCDA’S ACCESS TO IBC’s WEB CLAIMS SEARCH APPLICATION

[13] The Beattie Affidavit deals with this subject and the UDCA’s ongoing efforts to secure consents in paragraphs 28-37. There he says:

> <u>[In a letter dated May 26, 2010] …, without any prior warning, Mr. Bundus informed me that IBC was terminating UCDA's Associate Membership</u>, thereby ending the 12-year relationship between the parties and Auto Check™'s ability to continue to obtain the claims data from the Web Claims Search application.
>
> <u>On June 2, 2010, my colleague Warren Barnard wrote to Mr. Bundus expressing the UCDA's shock over the unexplained and unforeseen termination of its Associate Membership</u>, and requesting that the IBC reconsider its decision. In the alternative, Mr. Barnard requested an extension of the termination notice period to six months (i.e., to November 26,2010) in order to (i) allow the UCDA a reasonable opportunity to contact the individual insurers whose authorization would be required for UCDA to obtain ASP information from IBC, and (ii) continue using the Web Claims Search application.

In the absence of a reply to Mr. Barnard's letter, on June 9, 2010, McMillan LLP, external counsel to UCDA, wrote to Mr. Bundus expressing UCDA's concerns that IBC's conduct raised issues under the *Competition Act* and reiterating UCDA's request that IBC reconsider the termination of UCDA's membership and its ability to source vehicle claims data (or, alternatively, extend the notice period to six months).

On June 23, 2010, McMillan LLP again wrote to Mr. Bundus, requesting that IBC grant the six-month extension and, in the meantime, provide UCDA with further particulars as to the form and content of the insurer authorizations required by IBC in order to supply the ASP information to Auto Check™. Mr. Bundus replied on June 28, 2010 providing information about the form of authorization required, but refusing to reconsider IBC's termination of UCDA's membership and provision of the Web Claims Search application, or UCDA's request for an extension of the notice period.

After further discussions and emails, IBC reinstated UCDA's Associate Membership and ability to use the Web Claims Search application until November 26, 2010. UCDA also began a process of contacting numerous insurers to obtain consent for IBC to provide ASP information to UCDA, something that has never been required to use the Web Claims Search application.

Between July 2010 and May 2011, UCDA obtained consents from insurers in respect of ASP information, and was also dealing with IBC on a range of contractual, technical and logistical issues related to ASP information. UCDA's Associate Membership has continued on a month to month basis as did its ability to use the Web Claims Search application.

On April 18, 2011, UCDA signed a Service Provider Agreement with IBC for the provision of ASP information from consenting insurers. UCDA was then in a position to seek consent from three insurers who had apparently withdrawn their earlier consents. However, UCDA was not made aware until May 30, in an email from James Fordham, Director of Customer Service at IBC, to Neil Elgar, UCDA's Manager of Administrative Services, that several other insurers had withdrawn their consents in the period from January to March, 2011. Mr. Fordham did not explain how the withdrawals occurred or why UCDA was not informed about them many months earlier when the withdrawals took place.

On June 7, 2011, Mr. Fordham informed Mr. Elgar by email that IBC would be terminating use of the Web Claims Search application. IBC gave notice that termination would take place on June 10, 2011, although after subsequent correspondence between Messrs. Elgar and Fordham, the date was extended to June 17, 2011. Mr. Fordham did not give a reason for the termination or for the briefness of the notice period.

> On June 9, 2011, Mr. Barnard communicated with Mr. Bundus and requested continuing provision of the Web Claims Search application, for which insurer consents had never been required, while UCDA pursued consents from insurers for supply of the ASP information. On June 16, 2011, McMillan LLP reiterated Mr. Barnard's request in voicemail and email messages to Mr. Bundus.
>
> On June 16, 2011, UCDA advised its members that the Auto Check™ searches would be suspended effective June 17, 2011 until further notice due to the inability to obtain supply of sufficient data to provide vehicle accident history searches. On June 17, 2011 at 5:00 pm IBC terminated supply of the Web Claims Search application to UCDA.
>
> [The emphasis is mine]

THE EFFECT OF THE TERMINATION

[14] The termination on June 17, 2011 (the "Termination") ended a 13 year arrangement which had cost the UCDA $65,000.00 in annual dues plus $16,000.00 which the UCDA provided to IBC in June of 2007 to help finance upgrades to IBC's database. As well, in 2010, IBC added a fee for the information supplied to the UCDA from the Web Claims Search Application. The UCDA has always paid IBC as required.

[15] The Termination also caused the UCDA to suspend its Auto Check business.

THE FUTURE OF AUTO CHECK

[16] The UCDA takes the position that its Auto Check service would again be viable if it had the data from the Web Claims Search Application. In other words, although it would have been helpful, the UCDA's members do not need the dollar value claims information from the ASP Database because, according to the Beattie Affidavit, approximately 2/3 of the searches show that vehicles have not been in accidents. Further, where accidents have occurred, the UCDA's member dealers are free to exercise judgment about whether the damage would have cost below or above $3000.00 to repair. In other words, dealers don't usually need the dollar value of the claims. However, the Beattie Affidavit concedes that, in the small number of situations in which a precise dollar value is needed, dealers can purchase the more costly searches from CarProof or Carfax which include the dollar amounts.

PART I – SECTION 75 – REFUSAL TO SUPPLY

[17] Subsection 103.1(7) sets out the test for granting leave under section 75 of the Act. It reads:

103.1 (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the	103.1 (7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la

applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[18] The law is clear that there must be sufficient credible evidence to give rise to a *bona fide* belief (i) that an applicant is directly and substantially affected by the refusal to supply and (ii) that an order could be made under subsection 75(1)(a-e) of the Act (*Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339, at paragraph 16, and *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, at paragraphs 14-15).

THE PRODUCT

[19] The UCDA says that the product is IBC's Web Claims Search Application and notes that it has the following distinguishing features:

- The data are available to the UCDA without the need to secure consents from the parties who provide the data.
- It includes integrated industry wide claims data.
- It is offered through IBC's web portal.
- It does not include information about the dollar value of claims.

[20] The UCDA says that the Web Claims Search Application is the product that has been refused, and that, for the reasons described above in paragraph 16, it is a viable product which meets the needs of the UCDA's members in almost all situations.

[21] The IBC takes a different view and says that the product at issue is the right to access IBC's Web Claims Search Application and that the product is therefore properly characterized as a license. IBC says that, because the Tribunal held in *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd*., 78 C.P.R. (3d) 321, that licenses are not products for the purpose of section 75 of the Act, an order could not be made.

[22] However, I have not been persuaded by this submission. There is no evidence to suggest that IBC ever characterized its arrangements with the UCDA as a license. The evidence is that access to the Web Claims Search Application data was incidental to the UCDA's Associate Membership in IBC.

[23] In the alternative, IBC submits that the proper product market is "vehicle insurance claims data" and that data of that kind is available in both IBC's Web Claims Search Application and in its ASP Database.

[24] Evidence about the contents and attributes of the ASP Database is sparse but it does appear that the UCDA could use the ASP data to operate Auto Check if it were available. In this regard, the Beattie Affidavit says at paragraph 40:

> The Web Claims Search application will remain critical to the Auto Check™ business unless and until UCDA is able to obtain consents from individual insurers to access sufficient ASP information to offer a viable vehicle accident history search service.

[25] As noted above, the Beattie Affidavit shows that the UCDA initially approached IBC asking only for the dollar values of claims on the ASP Database and IBC refused. However, UCDA's request appears to have changed over time into one for access to all the ASP data. This change may have been motivated by IBC's first decision to terminate UCDA's access to the Web Claims Search Application in May 2010. In any event, IBC subsequently agreed to give the UDCA access to the ASP Database but said that consents were required from the insurance companies whose data are found therein (the "Consent(s)"). IBC initially offered to secure the Consents from its members.

[26] However, IBC changed its mind and, instead of providing the Consents itself, required the UCDA to approach each insurance company for its Consent. The UCDA undertook this exercise and, over a period of almost one year, from July 2010 to May 2011 it secured many Consents. On April 18, 2011, the UCDA signed a Service Provider Agreement with IBC for the provision of ASP information from consenting insurers. When the agreement was signed, the UCDA knew that three insurers who had consented had withdrawn their earlier Consents. However, it was not until the end of May 2011 that IBC told the UCDA that several other Consents had also been withdrawn earlier in the year. No reasons were provided. Without those Consents, the UCDA does not have access to sufficient ASP data to make the ASP Database a viable alternative for the data on IBC's Web Claims Search Application.

[27] Given these facts, I find that the Tribunal could conclude that the fact that access to the ASP Database requires Consents, which are not readily available, means that it is not in the same product market as the Web Claims Search Application data for which no Consents are required.

[28] For this reason, I have decided that the Tribunal could conclude that the vehicle insurance claims data from IBC's Web Claims Search Application is the product at issue in this application.

[29] IBC also says that, even if the data on the Web Claims Search Application is the product, leave should be denied because the UCDA fails to consistently describe the product it says is at issue. IBC notes that the data the UCDA received before the Termination is variously described as:

- Web Search claims data.
- Vehicle Insurance claims data
- Supply from the IBC Web Claims Search Application
- Vehicle Insurance Claims data

[30] In my view, there is no lack of clarity. In spite of the various descriptions provided, it is clear that the UCDA is speaking of the data it has received since 1998 using IBC's Web Claims Search Application.

DIRECTLY AND SUBSTANTIALLY AFFECTED – SUBSECTION 103.1(7)

[31] The Beattie Affidavit shows that Auto Check's business accounted for more than 50% of the UCDA's net income in the year ended December 31, 2010. As well, Mr. Beattie says that Auto Check is a service which the UCDA's members consider to be "critical" and that it has been suspended as a consequence of the Termination. In my view, this evidence is sufficient to show that, as a result of the Termination, the UCDA is directly and substantially affected in its business. While it may be useful to consider earnings over time as the Tribunal suggested in *Nadeau Poultry Farm Ltd v. Groupe Westco Inc.*, 2009 Comp. Trib. 6, aff'd 2011 FCA 188, I do not accept IBC's submission that such data is required. Further, it is noteworthy that subsection 103.1(7) reads in the present tense and that the UCDA has provided current information.

THE MEANING OF "COULD"

[32] I now turn to the question of whether an order could be made under section 75 and I think it useful at this juncture to reflect on the meaning of the word "could". The context is important. The question of whether an order "could" be made is being considered in an application for leave which is not supported by a full evidentiary record. Parliament decreed that an applicant would file an affidavit and a respondent would file representations. This means that there will inevitably be incomplete information on some topics. As well, the process is to be expeditious and the burden of proof is lower than the ordinary civil burden which is "a balance of probabilities".

[33] In my view, the lower threshold means that the question is whether an order is "possible" and "could" is used in that sense.

[34] In deciding whether an order is possible the Tribunal must assess whether there is sufficient credible evidence to give rise to a *bona fide* belief that an order is possible. However, given the context described above, it is not reasonable to conclude that hard and fast evidence is required on every point. In my view, reasonable inferences may be drawn where the supporting grounds are given and circumstantial evidence may be considered.

THE UCDA'S INABILITY TO OBTAIN ADEQUATE SUPPLIES OF A PRODUCT ANYWHERE IN A MARKET ON USUAL TRADE TERMS 75(1)(a)

[35] The UCDA says that IBC is the only supplier of integrated insurance claims data. IBC disputes this saying that the UCDA could acquire the information it needs for its Auto Check business from CarProof and Carfax. However, in my view, the Tribunal could not conclude that the phrase "anywhere in a market" is intended to require the UCDA to purchase the data it needs from Auto Check's competitors.

[36] IBC also says that the UCDA has failed to define the geographic market. However, since the UCDA's members are in Ontario and, since the used vehicle accident histories are sought for their use, it is reasonable to conclude Ontario is the geographic market and that an order could therefore be made.

[37] Finally, with respect to usual trade terms, the evidence shows that the UCDA is willing to continue to pay IBC and since the Web Claims Search Application data is only available from IBC, this aspect of the test is met and an order could be made.

INSUFFICIENT COMPETITION AMONG SUPPLIERS – 75(1)(b)

[38] In my view, because IBC is the sole supplier, the Tribunal could conclude that the UCDA's inability to secure the data on IBC's Web Claims Search Application is due to insufficient competition.

THE PERSON REFERRED TO IN PARAGRAPH (A) IS WILLING AND ABLE TO MEET THE USUAL TRADE TERMS OF THE SUPPLIER OR SUPPLIERS OF THE PRODUCT – 75(1)(c)

[39] There is no question that the UCDA is prepared to continue to pay for the Web Claims Search Application data. In these circumstances, I find that the Tribunal could conclude that this test has been met.

THE PRODUCT IS IN AMPLE SUPPLY – 75(1)(d)

[40] The Beattie Affidavit shows that IBC was able to reinstate the UCDA's associate membership and its access to the Web Claims Search Application after the initial termination of the UCDA's membership on May 26, 2010. Thereafter, it continued supplying the data on a month to month basis until the Termination. Based on this evidence, the Tribunal could conclude that the product is in ample supply.

THE REFUSAL TO DEAL IS HAVING OR IS LIKE TO HAVE AN ADVERSE EFFECT ON COMPETITION IN A MARKET – 75(1)(e)

[41] In my view, the Tribunal could find that IBC's refusal to supply the Web Claims Search Application has caused Auto Check's exit from the market. Since Auto Check was the low cost provider of accident claims searches to approximately 4500 used car dealers and, since it is reasonable to conclude that these dealers will now be forced to purchase more expensive searches from CarProof or Carfax, the Tribunal could find that the test is met.

PART II – PRICE MAINTENANCE – 76(1)(a)(ii)

[42] The test for leave to bring applications under section 76 of the Act is found in subsection 103.1(7.1). It says that the Tribunal must have reason to believe that an applicant is directly affected by any conduct that could be the subject of an order.

[43] For the reasons given in paragraph 31 above, I have concluded that the UCDA is directly affected by the closure of its Auto Check business.

[44] The more difficult question is whether I can conclude that an order "could" be made under subparagraph 76(1)(a)(ii) in the absence of any direct evidence in the Beattie Affidavit showing that IBC's refusal to supply its Web Claims Search Application data to the UCDA is a result of Auto Check's low pricing. The only evidence before the Tribunal is circumstantial.

[45] Some of the circumstantial evidence described below relates to the actions and affiliations of two companies called CGI Group Inc. ("CGI") and i2iQ Inc. ("i2iQ")

[46] In its submissions the UCDA says at paragraph 25:

> UCDA is unable to establish definitively, without discovery pursuant to the Tribunal's rules, whether IBC's refusal to supply occurred because of concerns about Auto Check™'s low pricing policy. However, there is significant circumstantial evidence related to the large difference between Auto Check™ and CarProof prices, the actions of CarProof, connections between CarProof and i2iQ and communications between i2iQ and IBC, that provides reason to believe that IBC's refusal to supply occurred because of Auto Check™'s low pricing policy.

[47] Further in its reply submissions the UCDA said at paragraph 39:

> In this situation, the circumstantial evidence that IBC was acting to benefit CGI, with whom it has a preferred business relationship, and which in turn has a close business relationship with i2iQ and CarProof, is the only evidence on the record related to the reasons for IBC's refusal to supply. It is noteworthy that, as Mr. Beattie indicated in his affidavit, IBC did not provide reasons when it terminated supply to UCDA, and again in its Representations IBC has remained silent about any other reasons for the termination. UCDA submits that in such a situation an adverse inference should be drawn from IBC's silence and/or the "sufficient credible evidence" test should be applied in a manner which allows potentially viable claims to proceed and be tested on the merits rather than be frustrated by the Applicant's inability to access relevant evidence in the possession of the Respondent during the leave stage.

[48] While I accept that circumstantial evidence and reasonable inferences may be relied on, the question is whether the circumstantial evidence in this case meets the requirement that there be sufficient credible evidence to give rise to a *bona fide* belief that the conduct could be subject to an order.

[49] The UCDA relies on four pieces of circumstantial evidence to show that the Termination was because of UCDA's $7.00 price contrasted with CarProof's price of $34.95. I will deal with each in turn.

(i) The Price Difference

[50] The evidence shows that CarProof has twice approached the UCDA with a view to acquiring its dealers as its customers. These approaches failed because the UCDA believes that its members prefer Auto Check's low priced searches. Accordingly, CarProof's searches will only be attractive to the UCDA's members if Auto Check's low cost searches are no longer available.

[51] The evidence, which is said to suggest that the Termination was due to Auto Check's low price, is as follows:

- CarProof doesn't deal directly with IBC to obtain its ASP data. It deals through an intermediate company. Mr. Beattie speculates that that company is either i2iQ or CGI or perhaps both. CGI is contractually linked to IBC because CGI operates the ASP Database for IBC and provides other data services to IBC members. One service is called Auto Plus and it provides information to assist insurers when making decisions about coverages and premiums. Another service is Enhanced Auto Plus. It includes vehicle claim histories from CarProof.
- I2iQ's website also offers CarProof's vehicle claim history searches and says that i2iQ has a partnership or strategic alliances with CarProof and with a division of CGI called CGI Insurance Information Services. However, there is no evidence about whether i2iQ has a contractual relationship with IBC.

[52] If CGI is the intermediary between CarProof and IBC, the Tribunal is asked to speculate that, because CGI provides important data services to IBC, IBC will be inclined to do a favour for CGI by helping its customer, CarProof. This would be accomplished by refusing to supply data to its low cost competitor Auto Check.

[53] Regarding i2iQ, the evidence shows (i) that i2iQ's CEO is able to say to IBC that UCDA's dealers could purchase data from CarProof, (ii) that i2iQ and IBC were in prompt telephone contact about the UCDA's request for dollar claims information and (iii) that i2iQ has a partnership or strategic alliance with a division of CGI. This information suggests to me that i2iQ has a degree of control over CarProof and that i2iQ has a close relationship with IBC and may be the intermediary selling IBC's data to CarProof. If those facts were true, I must infer that IBC would be inclined to do a favour for i2iQ by, in turn, helping its customer CarProof. Again, this would involve refusing to supply the Web Claims Application Search data to Auto Check.

(ii) CarProof's Actions

[54] These are described in the following paragraphs taken from paragraphs 13-15 of the Beattie Affidavit:

> CarProof has grown substantially and is the market leader in the supply of vehicle accident history searches in Ontario. In 2004, CarProof began distributing false and misleading promotional materials to motor vehicle dealers in Canada, which misrepresented the nature and scope of UCDA's lien search and other services. Following written warnings from UCDA's legal counsel, CarProof abandoned this negative campaign. It again began distributing false and misleading promotional material in 2007 in connection with UCDA's services including its Auto Check™ service. I believe that this may have been motivated in whole or in

> part by UCDA’s position as the low-price supplier in the market. UCDA’s efforts to resolve the situation out of court were unsuccessful, leading it to commence litigation against CarProof. That litigation was ultimately settled in 2009, with CarProof and UCDA issuing a joint statement in which CarProof acknowledged that UCDA provides accident claim information through its Auto Check™ service and undertook not to make misleading statements in the future.
>
> In early 2009, representatives of CarProof approached UCDA and proposed that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members rather than doing so directly through the Auto Check™ business. Such a proposal, if adopted, would have meant the end of the Auto Check™ business. Bearing in mind CarProof’s aggressive business tactics and the significantly higher prices at which it provides vehicle accident history searches, UCDA concluded that a relationship with CarProof was not in the best interests of its members and declined the CarProof proposal.
>
> In early 2010, representatives of CarProof again approached UCDA and requested that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members, rather than doing so directly through the Auto Check™ business. UCDA’s views on such a relationship had not changed, and we again rejected CarProof’s overtures.

[55] In sum, the evidence indicates that CarProof appears to have misrepresented Auto Check’s business and has suggested closing it down. However, these efforts have failed because of Auto Check’s low price.

(iii) Connections Between CarProof and i2iQ

[56] This topic is dealt with above in paragraphs 51 and 53.

(iv) Communications Between i2iQ and IBC

[57] In June 2009, the UCDA contacted Ms. Pehar of IBC to ask for access to the dollar value claims information in the ASP Database. Shortly thereafter, the CEO of i2iQ spoke to Ms. Pehar and advised her that UCDA could purchase CarProof vehicle history reports and confirmed that he could be contacted if the UCDA wanted to pursue the idea. In the alternative, he suggested that the UCDA could speak directly to CarProof.

[58] The Beattie Affidavit speculates that IBC must have told i2iQ or CarProof of UCDA’s request and that the only reason IBC, CarProof and i2iQ were in contact, after the UCDA asked for access to the dollar value claims information, was because they were concerned that, with this information, Auto Check would be a more effective low cost competitor.

CONCLUSIONS

[59] Against this background, it is clear that IBC has a close direct relationship with CGI (through its provision of services and maintenance of the ASP Database) and with i2iQ (it spoke to it about the UCDA's request for dollar value claims data). It is also clear that CGI and i2iQ have close ties to CarProof. Its searches are provided to IBC's members through CGI, and i2iQ appears to have some control over CarProof's operations and sells its searches through its website.

[60] Finally, it is reasonable to conclude based on its past conduct, that CarProof would like to see Auto Check's low cost business closed so that the UCDA's dealers could become potential customers for CarProof's searches.

[61] However, while I can conclude that it is possible that the Termination occurred as a result of IBC's wish to support CarProof's business objectives as a favour to either CGI or i2iQ, I cannot conclude that there is sufficient credible evidence to show the possibility that the Termination by IBC was due to Auto Check's low pricing policy. In these circumstances, an order could not be made.

ORDER

[62] The UCDA is hereby granted leave, pursuant to subsection 103.1(7) of the Act, to commence an application under section 75 of the Act. However, leave to apply under section 76 of the Act is denied.

[63] The UCDA is to have its costs fixed as a lump sum amount payable forthwith based on Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106. The UCDA is to prepare a bill of costs for review by IBC and, if an amount cannot be agreed, the Registry may be contacted and I will fix the amount once a procedure has been agreed.

DIRECTION

[64] The parties are to consult to see if they can agree about whether an interim supply order can be made and, if so, on what terms. Failing agreement, the Registry may be contacted to discuss arrangements for the hearing of the UCDA's application for interim relief.

DATED at Ottawa, this 9th day of September, 2011

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

COUNSEL:

For the applicant:

Used Car Dealers Association of Ontario

A. Neil Campbell
Casey W. Halladay

For the respondent:

Insurance Bureau of Canada

Peter Glossop
Graham Reynolds
Geoffrey Grove

Tab 6

PUBLIC VERSION

Paras 753-758

Reference: *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7
File No.: CT-2011-003
Registry Document No.: 385

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

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Toronto Real Estate Board
(respondent)

and

Canadian Real Estate Association
(intervenor)

Dates of hearing: 20120910 to 20120914, 20120918 to 20120919, 20120924 to 20120925, 20120927 to 20120928, 20121002 to 20121003, 20121009 to 20121010, and 20121017 to 20121018 (Initial hearing); 20150921 to 20150924, 20151005 to 20151007, and 20151102 (Redetermination hearing)
Before: P. Crampton C.J., D. Gascon (Chairperson) and Dr. W. Askanas
Date of reasons and order: April 27, 2016

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I. Executive summary

[1] The Commissioner of Competition (the **"Commissioner"**) has filed an application pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34, as amended (the **"Act"**), for an order prohibiting the Toronto Real Estate Board (**"TREB"**) from engaging in certain anti-competitive acts in connection with the supply of residential real estate brokerage services in the Greater Toronto Area (**"GTA"**).

[2] In brief, the Commissioner contends that, by restricting access to certain Multiple Listing Service (**"MLS"**) information on the password-protected virtual office websites (**"VOW"**) of its real estate brokers and salesperson members (the **"Members"**), and by restricting the manner in which its Members may display and use that information, TREB's conduct constitutes an abuse of dominant position under section 79. The Commissioner asks the Tribunal to remedy TREB's alleged substantial prevention of competition in two general ways: First, by prohibiting TREB from enforcing its current restrictions on the display and use of MLS data, and second, by requiring TREB to include certain data in an electronic data feed to its Members who use it for display on their password-protected VOWs. TREB responds that it opted to exclude the disputed information from its VOW data feed after careful consideration of privacy and copyright issues, and that its VOW policy does not substantially lessen or prevent competition. Among other things, it maintains that any incremental impact that its VOW policy may have on competition is not substantial.

[3] For the reasons that follow, the Tribunal has decided to partially grant the application brought by the Commissioner. The terms of the Tribunal's order (the **"Order"**) will primarily address certain restrictive aspects of the rules and policy that TREB has adopted with respect to VOWs, which are defined below as the VOW Restrictions. The specific terms of the Order will be determined after the parties have provided written submissions addressing this issue of remedy and have had an opportunity to make oral submissions. A Direction to that effect will be issued by the Tribunal shortly following the issuance of these reasons.

[4] In the course of reaching its decision, the Tribunal determined that the Commissioner has established, on a balance of probabilities, that the three elements of section 79 have been satisfied. The Tribunal first concluded that TREB substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA, within the meaning of paragraph 79(1)(*a*) of the Act. The Tribunal then found that TREB has engaged in, and continues to engage in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*). In essence, that practice is comprised of the enactment and maintenance of the VOW Restrictions. In addition, the Tribunal concluded that the VOW Restrictions have had, are having and are likely to have the effect of preventing competition substantially in a market, as contemplated by paragraph 79(1)(*c*). The Tribunal reached that conclusion after finding, among other things, that the VOW Restrictions have substantially reduced the degree of non-price competition in the supply of MLS-based residential real estate brokerage services in the GTA, relative to the degree that would likely exist in the absence of those restrictions. Most importantly, this includes a considerable adverse impact on innovation, quality and the range of residential real estate

brokerage services that likely would be offered in the GTA, in the absence of the VOW Restrictions.

[5] The Tribunal observes that the Commissioner's application raised particular challenges for several reasons: (i) it involved an assessment of dynamic competition and innovation, (ii) significant developments have occurred in the relevant market since this application was initially filed in May 2011, and (iii) limited quantitative evidence was adduced regarding the impact of changes in certain local markets in the United States and in Nova Scotia, relative to other local markets where similar changes did not occur.

[6] Among other things, the remedy to be imposed on TREB under the Tribunal's Order will remove important restrictions on the ability of innovative, Internet-based brokerages and other competitors in the GTA residential real estate brokerage services market to offer new products and services to consumers, in competition with brokers and agents who rely on more traditional products and services.

II. Introduction and overview

A. *Procedural history*

[7] The Tribunal's decision in this proceeding follows a long procedural history going back to May 2011 when the Commissioner first filed a Notice of Application (the **"Initial Application"**) for an order against TREB under the abuse of dominance provisions of the Act.

[8] In the fall of 2012, the Tribunal held an initial hearing over a period of six weeks (the **"Initial Hearing"**). In April 2013, the panel dismissed the Commissioner's application (*The Commissioner of Competition v The Toronto Real Estate Board*, 2013 Comp. Trib. 9 (**"*TREB CT*"**)). However, in February 2014, the Federal Court of Appeal set aside the Tribunal's order dismissing the application and referred the matter back to the Tribunal for a reconsideration on the merits (*Commissioner of Competition v Toronto Real Estate Board*, 2014 FCA 29 ("***TREB FCA***"), leave to appeal to SCC refused, 35799 (24 July 2014)).

[9] The Commissioner's application was reconsidered on the merits by a differently-constituted panel, and a redetermination hearing was held by the Tribunal in the fall of 2015, over a period of eight days (the **"Redetermination Hearing"**).

B. *The parties' pleadings*

[10] In May 2011, the Commissioner had applied to the Tribunal for an order under subsection 79(1) of the Act, prohibiting TREB from directly or indirectly enacting, interpreting or enforcing certain rules, policies and agreements (the **"MLS Restrictions"**) that allegedly have excluded, prevented or impeded the emergence of innovative business models and service

offerings in respect of the supply of residential real estate brokerage services in the GTA. Those business models and service offerings involve the use of a particular Internet-based data-sharing vehicle known as a VOW to offer new products and services to home buyers and home sellers.

[11] The Commissioner also sought an order under subsection 79(2), directing TREB to take certain actions to overcome the effects of its alleged practice of anti-competitive acts.

[12] The Commissioner's Initial Application focused on MLS Restrictions that exclude or prevent TREB's Members from innovating by using certain information in TREB's MLS system to operate a VOW. However, the relief sought by the Commissioner was cast in language that appeared to extend beyond the MLS Restrictions. In this regard, the statement of relief sought was couched in terms of "<u>any</u> restrictions, <u>including</u> the MLS Restrictions" that have the alleged anti-competitive effects. Other passages of the Initial Application expressed a concern about the impact of such effects on brokers who operate VOWs <u>or other innovative business models</u>, or who offer services similar to VOWs.

[13] That wording remained in the Amended Notice of Application (the **"Application"**) filed by the Commissioner in July 2011. That version of the Application augmented the initial version primarily by addressing the VOW policy proposed by TREB and the provisions that were added to TREB's MLS rules in respect of VOWs (collectively, the **"VOW Policy and Rules"**) and that TREB sent to its Members a few weeks after the Initial Application was filed. The Application was not modified for the Redetermination Hearing.

[14] As it turned out, the Commissioner's focus in this proceeding was primarily on the restrictive aspects of TREB's VOW Policy and Rules and terms included in TREB's VOW Data Feed Agreement (the **"Data Feed Agreement"**) (collectively, the **"VOW Restrictions"**). These restrictions notably exclude certain types of information from the VOW data feed (the **"VOW Data Feed"**) that TREB makes available to its Members. This excluded information concerns data with respect to: sold and "pending sold" homes; withdrawn, expired, suspended or terminated listings (the **"WEST"** listings); and offers of commission to brokers who represent the successful home purchaser, known as "cooperating brokers" (collectively, the **"Disputed Data"**). Two other principal aspects of the VOW Restrictions include prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

[15] Nevertheless, at the end of his closing submissions at the Redetermination Hearing, the Commissioner confirmed that the relief being sought extends beyond a request for an order requiring TREB to include the Disputed Data in its VOW Data Feed, and to eliminate the above-mentioned prohibitions. The Commissioner maintained that his overarching objective is to ensure that there is no discrimination between the modes in which information is delivered by TREB to its Members.

[16] Accordingly, in addition to requiring the Disputed Data to be included in the VOW Data Feed, the order being sought by the Commissioner would reflect this general non-discrimination principle, as well as ensuring that the VOW Data Feed includes all MLS information that is available in other ways to TREB's Members, and that there are no restrictions on how VOW operators or other Members may use MLS information on the VOW portions of their websites.

[17] In brief, the Commissioner seeks an order that would, in his view, ensure a level playing field between more traditional "bricks and mortar" brokers and those who wish to provide new products and services based on MLS information in the manner that they think is appropriate, and in particular over the Internet.

[18] The Commissioner also acknowledged in his closing submissions at the Redetermination Hearing that no relief is being sought in this proceeding in respect of TREB's conduct prior to 2011. Accordingly, these reasons will not assess whether any of that conduct constituted a practice of anti-competitive acts that prevented or lessened competition substantially, or was likely to do so.

[19] In the Application, the Commissioner alleges that each of the three elements that must be satisfied under paragraphs 79(1)(*a*), (*b*) and (*c*) of the Act, respectively, before an order may be made by the Tribunal under section 79, are met. More specifically, the Commissioner contends that:

a. TREB substantially or completely controls the supply of residential real estate brokerage services in the GTA;

b. The MLS Restrictions constitute a practice of anti-competitive acts, the purpose and effect of which is to discipline and exclude innovative brokers who would otherwise compete with TREB's Members who use more traditional business methods; and

c. The MLS Restrictions have 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. In particular, the Commissioner asserts that by restricting brokers' use of VOWs, the MLS Restrictions discourage entry and expansion by brokers wishing to offer innovative services, with the result that the positions of more traditional brokers are entrenched, their market power is maintained, and innovation is inhibited.

[20] In its Response, TREB asserts, among other things, that the Commissioner has ignored its copyright in the MLS database and that, under subsection 79(5) of the Act, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived from the *Copyright Act*, RSC 1985, c C-42 is not an anti-competitive act for the purposes of section 79.

[21] Moreover, TREB maintains that none of the three elements set forth in subsection 79(1) is met. Specifically, TREB submits that:

a. It does not substantially or completely control the supply of residential real estate brokerage services in the GTA, primarily because it has no market power in that market and has no motivation to exercise any market power, due to the fact that it is not itself a supplier of residential real estate brokerage services;

b. Neither the VOW Policy and Rules nor any of the other conditions that TREB places on its Members' access to and use of the MLS system have the purpose of having a negative effect on a competitor that is predatory, exclusionary or disciplinary. Instead, they have been implemented for a number of legitimate purposes. These include preserving the value of the MLS system for the benefit of its Members, and safeguarding the privacy rights of its Members and their customers by ensuring that its Members are compliant with their respective obligations under privacy legislation and the *Code of Ethics*, O Reg 580/05 (the ***"Code of Ethics"***) established by the Real Estate Council of Ontario (**"RECO"**), pursuant to the *Real Estate and Business Brokers Act, 2002*, SO 2002, c 30, Sched C (***"REBBA"***); and

c. There is no basis for the Commissioner's allegation that, "but for" TREB's impugned conduct, there would likely be greater innovation, enhanced quality of service or increased price competition in the supply of residential real estate brokerage services in the GTA. TREB contends that the VOW Policy and Rules do not create, maintain or enhance market power. Furthermore, in the context of the broader competition that is occurring in the supply of real estate brokerage services to buyers and sellers of homes in the GTA, TREB submits that the incremental negative effect of its VOW Policy and Rules, if any, is not significant.

[22] In the Reply filed in September 2011, after the VOW Policy and Rules were formally adopted by TREB and its Members, the Commissioner rejects TREB's above-mentioned positions.

[23] With respect to TREB's alleged substantial or complete control of the supply of residential real estate brokerage services in the GTA, the Commissioner submits that TREB's position that it does not compete with brokers ignores the reality that TREB enacts and enforces its rules, policies and agreements for the benefit of its Members, most of whom pursue a traditional business model. The Commissioner maintains that the enactment of the VOW Policy and Rules demonstrates TREB's substantial or complete ongoing control of the relevant market, and that brokers cannot realistically compete without access to TREB's MLS system.

[24] With respect to TREB's alleged practice of anti-competitive acts, the Commissioner states that the purpose and effect of TREB's MLS Restrictions is to discipline and exclude innovative brokers who would otherwise compete with TREB's traditional member brokers using their VOWs. The Commissioner adds that by preventing its Members from providing certain MLS data through a VOW, including "highly valuable information" pertaining to the sold prices of homes, TREB discriminates against innovative brokers. This is because TREB imposes

no corresponding restrictions on traditional brokers who provide the very same MLS information to consumers by means other than a VOW. The Commissioner submits that the ultimate effect of the MLS Restrictions is to exclude potential competitors who are not yet in the market as well as those innovative member brokers who are eager to compete using a VOW.

[25] The Commissioner further submits that TREB's business justifications for the MLS Restrictions should be rejected. Regarding privacy, the Commissioner argues that TREB's position is belied by the fact that the information at issue in this proceeding is currently and freely distributed by traditional brokers to consumers on a regular basis by means other than a VOW.

[26] Regarding TREB's copyright, the Commissioner asserts that the exception in subsection 79(5) of the Act does not apply because TREB has not established a copyright in the MLS database (including the Disputed Data) and because, even if it had, the MLS Restrictions go well beyond a mere exercise of any rights that TREB may have under the *Copyright Act*.

[27] Finally, the Commissioner maintains that the MLS Restrictions, and in particular the narrower VOW Restrictions, have 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. The Commissioner affirms that this is so because, "but for" those restrictions, consumers would benefit from substantially greater competition in that market. Specifically, the Commissioner states that the MLS Restrictions effectively protect and perpetuate the static traditional brokerage model for the delivery of residential real estate brokerage services. The impugned restrictions on innovative, Internet-based business models such as VOWs thus have negatively affected the range and quality of services being offered over the Internet by brokers to their customers and have denied consumers the benefits of downward pressure on commission rates that would otherwise exist.

[28] Given that the parties' submissions and the evidence filed in this case centered almost entirely on the VOW Restrictions, those specific restrictions are the focus of this decision. However, the Tribunal will remain open to considering the inclusion of terms in its Order that go beyond the VOW Restrictions, after it has reviewed the parties' written submission on remedy and has considered the oral submissions that will be made during the hearing that will be scheduled with respect to the specific issue of the remedy to be imposed in this case.

C. *Section 79 of the Act*

[29] Pursuant to subsection 79(1) of the Act, the Tribunal may make an order prohibiting all or any of the persons described in paragraph 79(1)(*a*) from engaging in a practice described in paragraph 79(1)(*b*), where it finds, on a balance of probabilities, that the three elements described in that subsection have been met. Those are 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.

[30] It is important to note that section 79 specifies three distinct elements that must each be determined independently. In *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 (***"Canada Pipe FCA"***), leave to appeal to SCC refused, 31637 (10 May 2005), the Federal Court of Appeal stressed that, in abuse of dominance cases, the Tribunal must avoid "the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests" (*Canada Pipe FCA* at para 28). However, the same evidence can be relevant to more than one element (*Canada Pipe FCA* at paras 27-28).

[31] Pursuant to subsection 79(2), if an order is not likely to restore competition, the Tribunal may, in addition to or in lieu of making an order under subsection 79(1), make an order directing any or all of the persons against whom an order is sought to take such actions as are reasonable and necessary to overcome the effects of the practice in a market in which the Tribunal has found the three above-mentioned elements to have been met.

[32] In determining whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, subsection 79(4) further requires the Tribunal to consider whether the practice is a result of superior competitive performance.

[33] An exception to the Tribunal's order-making powers under subsections 79(1) and (2) of the Act is provided by subsection 79(5), which stipulates that for the purposes of section 79, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under certain legislation pertaining to intellectual or industrial property, including the *Copyright Act*, is not an anti-competitive act.

[34] The Commissioner bears the burden of establishing the three elements of subsection 79(1), and the Tribunal must make a positive determination in respect of each of those elements before it may issue an order. The burden of proof with respect to each element is the civil standard, that is, on the balance of probabilities.

[35] The full text of section 79 of the Act, and of section 78, which sets forth a non-exhaustive list of anti-competitive acts, is reproduced in Schedule "A" to this decision.

D. *The Tribunal's initial decision*

[36] In *TREB CT*, the initial panel of the Tribunal dismissed the Commissioner's Application.

[37] In brief, the panel concluded that the Commissioner had not met the requirements of paragraph 79(1)(*b*) for three reasons. First, it relied on its interpretation of *Canada Pipe FCA* at paragraph 68, where the Federal Court of Appeal held that "to be considered 'anti-competitive' under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor." The panel found that, because TREB does not compete with its Members, the MLS Restrictions could not have the negative effect on a competitor required by *Canada Pipe FCA*, as interpreted by the panel. It found that *Canada Pipe FCA* served as a binding precedent.

[38] Second, the panel found that the Application was inconsistent with the guidelines entitled *The Abuse of Dominance Provisions*, issued in September 2012 by the Commissioner (the **"*Guidelines*"**). The panel noted that while the *Guidelines* state, at section 3.2, that "certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose," the *Guideline*s do not clearly stipulate that a dominant firm's conduct might fall within the purview of section 79, even though that firm may not compete in the relevant market.

[39] Third, the panel stated that the language of subsection 79(4), which requires the Tribunal to consider whether an impugned practice is a result of superior competitive performance, makes it clear that paragraph 79(1)(*b*) applies only if the dominant firm in question is a competitor.

[40] The panel therefore concluded that the Application did not meet the requirements of paragraph 79(1)(*b*). The panel also observed, with respect to paragraph 79(1)(*a*), that even if it could be established that TREB had market power, the requirements of that paragraph would not be met because that market power would not be exercised by a firm that competes in the relevant market identified by the Commissioner, namely, the supply of residential real estate brokerage services in the GTA. Finally, the panel also observed that the requirements of paragraph 79(1)(*c*) had not been met, as there were no anti-competitive acts under paragraph 79(1)(*b*).

E. *The Federal Court of Appeal's decision*

[41] In February 2014, the Federal Court of Appeal set aside the Tribunal's order dismissing the Commissioner's Application and referred the matter back to the Tribunal for reconsideration (*TREB FCA*).

[42] In reaching its conclusion, the Court acknowledged that, in the passages of *Canada Pipe FCA* relied upon by the Tribunal, the panel interpreted the word "competitor" to mean "competitor of the person who is the target of the Commissioner's application for a subsection 79(1) order." Speaking for the Court, Sharlow JA stated that there was "nothing in the language or context of the *Competition Act* to justify the addition of those qualifying words" (*TREB FCA* at para 17). She added that the addition of those qualifying words also could not be justified by

the facts as found in *Canada Pipe FCA*. With respect to the dispute between the Commissioner and TREB, Sharlow JA stated that she did not accept that the Court intended its decision in *Canada Pipe FCA* to preclude the application of subsection 79(1) to TREB in respect of a rule that it makes binding on its Members (*TREB FCA* at para 18).

[43] In further discussing that conclusion, Sharlow JA referred to paragraph 78(1)(*f*) of the Act. That specific provision describes one type of act that is deemed to be anti-competitive for the purposes of section 79. It appears as part of a non-exhaustive list of other acts contained at subsection 78(1) that are also deemed to be anti-competitive. Paragraph 78(1)(*f*) refers to the "buying up of products to prevent the erosion of existing price levels." Sharlow JA observed that, in *Canada Pipe FCA*, the Court recognized that this paragraph 78(1)(*f*) describes an act that is not necessarily taken by a person against that person's own competitor. She proceeded to note that the Court in that case did not reconcile this with its view that "to be considered 'anti-competitive' under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor" (*TREB FCA* at paras 15 and 19, referring to *Canada Pipe FCA* at paras 64-68). In expressing disagreement with the interpretation given to *Canada Pipe FCA* by the Tribunal, Sharlow JA stated that "paragraph 78(1)(*f*) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to [TREB] in this case" (*TREB FCA* at para 20). She added that if the Court had intended to adopt the contrary interpretation as a general rule, she "would be compelled to find that aspect of *Canada Pipe* to be manifestly wrong because it is based on flawed reasoning (specifically, the unexplained inconsistency in the reasons)" (*TREB FCA* at para 20).

[44] Sharlow JA then proceeded to briefly address two other points identified by the Tribunal in its reasons for dismissing the Commissioner's Application.

[45] With respect to the *Guidelines*, she simply mentioned that they provide no useful guidance to the Court in interpreting section 79 (*TREB FCA* at para 21). With respect to subsection 79(4), she agreed with the Commissioner that it only applies for the purpose of assessing whether a practice has had, is having or is likely to have the effect of preventing or lessening of competition substantially in a market, as contemplated by paragraph 79(1)(*c*) of the Act. In other words, this provision does not support the view that, "as a matter of law, a subsection 79(1) order cannot be made against [TREB] simply because it does not compete with its members" (*TREB FCA* at para 22).

III. Parties and intervenors

[46] The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the enforcement and administration of the Act.

[47] TREB is a not-for-profit corporation that was incorporated in 1920 pursuant to the laws of Ontario. It is Canada's largest real estate board and serves approximately 42,500 Members. Its core purpose is to advance the continuing success of its Members. To that end, it provides a range of services to those Members, including access to and use of the MLS system. TREB's

activities are guided by a 16-member Board of Directors elected by TREB's Members from among their ranks. Additional information regarding TREB's operations will be provided later at various points in these reasons.

[48] The Canadian Real Estate Association (**"CREA"**) and Realtysellers Real Estate Inc. (**"RRE"**) were granted leave to intervene in this proceeding.

[49] Prior to the Initial Hearing, the Tribunal was advised that RRE was no longer represented but was reserving its intervention rights. However, no one appeared for RRE throughout that hearing and no submissions were made on its behalf. Subsequently, the Tribunal issued an order quashing its prior order granting RRE leave to intervene (*The Commissioner of Competition v The Toronto Real Estate Board*, 2014 Comp. Trib. 5). Accordingly, no further references will be made to RRE as an intervenor.

[50] CREA is a not-for-profit trade association that represents over 110,000 real estate brokers and agents working through approximately 90 real estate boards and associations across Canada, including provincial and territorial associations. Among other things, it describes itself as the national voice for the Canadian real estate industry, including on competition law and technological issues. Membership in CREA is open to real estate boards and associations, as well as to their members in good standing, provided that they agree to be bound by, among other things, CREA's Realtor Code, and by various rules, by-laws and policies that it has issued.

IV. Industry background

A. *Provincial legislation*

[51] Each province/territory in Canada regulates and licenses the brokers and agents within its jurisdiction. In Ontario, brokers and agents are regulated by the *REBBA*. Among other things, the *REBBA* provides that no one may trade in real estate in Ontario unless they are registered under that legislation.

B. *The Real Estate Council of Ontario*

[52] RECO is responsible for administering the *REBBA* and the regulations promulgated thereunder, on behalf of the provincial government. One such regulation is RECO's *Code of Ethics*.

C. *The Ontario Real Estate Association*

[53] According to information on its website, the Ontario Real Estate Association (**"OREA"**) was founded in 1922 to organize real estate activities across the province. It represents approximately 65,000 real estate broker and salesperson members of Ontario's 40 real estate

boards. In addition to serving its members through a wide variety of publications, educational programs and special services, it apparently provides all real estate licensing courses in Ontario.

D. *Brokers, agents, realtors and salespersons*

[54] Real estate brokerages are businesses that are registered under the *REBBA* to trade in real estate. Brokerages can be independent but are often franchisees, operating one or more offices under the banner of a corporate franchise, such as RE/MAX, Royal LePage, Sutton Group or Century 21.

[55] Brokerage franchisees pay fees to their franchisor in exchange for the use of the latter's corporate brand.

[56] Each brokerage must have a broker of record. Among other things, that individual is responsible for all of the trading activities of a registered brokerage.

[57] The terms "broker" and "salesperson" are defined in the *REBBA* as persons who have the prescribed qualifications to be registered as such under the *REBBA* and who are employed by a brokerage to trade in real estate. A broker is subject to additional requirements under the legislation, typically supervises salespersons and may be the owner of the brokerage.

[58] The term "agent" is not defined by the *REBBA*. However, the Tribunal understands the term to mean a person who is registered as a salesperson and who is employed by a brokerage to trade in real estate.

[59] "REALTOR" is a certification trade-mark that is indirectly jointly owned in Canada by CREA and the National Association of Realtors (**"NAR"**). The NAR is essentially the equivalent of CREA in the United States.

[60] The Tribunal understands that a broker, salesperson or agent becomes a "realtor" in Canada when he or she becomes a member of CREA and agrees to be bound by CREA's Realtor Code, its by-laws, its rules and its policies.

[61] Although the terms "broker", "salesperson", "agent" and "realtor" appear to have been used interchangeably throughout these proceedings, the term "agent" will typically be used in these reasons when referring to individuals who trade in real estate.

E. *The home purchase and sale process*

[62] Although the involvement of an agent is not required in order for real estate transactions to be completed in Ontario, the majority of buyers and sellers choose to work with agents.

[63] Most agents routinely deal with both categories of clients, and sometimes represent both the seller and the buyer in the same real estate transaction.

[64] A home seller who retains an agent ordinarily will enter into a contractual arrangement known as a "listing agreement" with the agent's brokerage. Among other things, the standard listing agreement prepared by OREA (the "**Listing Agreement**") and recommended by TREB for use by its Members authorizes the brokerage to market and sell the home on behalf of the owner.

[65] Services typically provided by agents to home sellers include: (1) educating the seller about the real estate market; (2) assisting the seller to determine the asking price for his or her home; (3) preparing the listing; (4) marketing the home to potential buyers; (5) representing the seller in negotiations on behalf of the seller; and (6) finalizing the transaction.

[66] As with home sellers, residential buyers will often retain an agent to assist them with the purchase of a house. As noted earlier, the agent representing a buyer is known as a "cooperating broker."

[67] In most circumstances, and at the recommendation of TREB, the agent and buyer will enter into either OREA's standard Buyer Representation Agreement (the **"BRA"**) or OREA's Buyer Customer Service Agreement (the **"BCSA"**). Services typically provided to home buyers by agents include: (1) educating the buyer about the real estate market; (2) assisting the buyer to determine the characteristics and price of the home he or she wishes to purchase; (3) identifying and showing homes which meet the buyer's objectives; (4) assisting the buyer to determine the price to be offered; (5) negotiating a purchase on the buyer's behalf; and (6) finalizing the transaction.

[68] In determining a recommended asking or offer price for a client, an agent usually conducts a comparative market analysis (**"CMA"**). A CMA typically compares a property which is listed or is about to be listed with nearby properties that have recently sold. This assists in determining the market value of the subject property. CMAs vary widely, and can involve a simple or a very detailed analysis.

[69] Agents typically receive compensation in the form of a commission payment calculated as a percentage of the sale price. Generally, home sellers pay a commission to the listing brokerage, which then offers a portion of that commission to the cooperating brokerage. Among other things, this encourages the cooperating broker to show the home.

F. *The MLS system*

[70] An important service provided by TREB to its Members is access to the MLS system. The MLS system is a cooperative selling system which allows agents to share information and provide maximum exposure of properties listed for sale. The MLS system is not accessible to

members of the general public. TREB's Members access the MLS system by way of a secure log-in intranet website.

[71] CREA owns the Multiple Listing Service trade-mark, the MLS trade-mark and the associated logos, each of which is licensed to TREB and the other real estate boards that are members of CREA.

[72] In addition to providing agents with information about available properties listed for sale and the list prices of homes, the MLS system provides agents with a broad range of other information, including interior and exterior photographs, the time a property has been on the market, and historical and other data regarding the property. OREA's standard forms (including its Listing Agreement, its BRA and its BCSA) are also available on the MLS system.

[73] Not all residential properties that are for sale can be found on a MLS system. For example, information regarding exclusive listings, properties that are "for sale by owner" (**"FSBO"**) and many newly constructed properties such as condominiums is not available to agents through a MLS system.

[74] To obtain and maintain access to the MLS system, TREB Members must execute and agree to be bound by the terms of an Authorized User Agreement (**"AUA"**), as well as TREB's MLS rules and policies (the **"MLS Rules and Policies"**).

[75] Properties listed on the MLS system are included in an extensive database (the **"MLS Database"**) that contains both current active listings and an archive of inactive listings on properties. TREB's MLS Database is a searchable repository of real estate listings that have been provided to the MLS system by its Members throughout the GTA and is accessible over an intranet on a Member-to-Member basis.

[76] Active listings include properties that have not been sold and are still available for sale. Inactive listings include sold listings, "pending sold" listings and WEST listings. Though the term is not always defined consistently, the Tribunal understands that "pending sold" refers to a sold property that has not yet closed and is "firm," in the sense that it does not have or no longer has any conditions to closing. Where there are such conditions to closing, the sale is considered to be a "sold conditional" home as opposed to a "pending sold," and the sale price is then not available in the MLS Database. A sale is conditional when the buyer and seller have executed an agreement of purchase and sale with conditions precedent. WEST listings are listings of homes that did not sell and, as such, there is no sale price associated with these inactive listings in the MLS Database.

[77] Pursuant to the MLS Rules and Policies, Members are obliged to report to TREB the existence of a conditional sale, but not the final selling price, within two business days of the execution of the agreement of purchase and sale. Two days after any stipulated conditions have been satisfied, the sale price must then be provided, along with the potential closing date.

[78] The listing information that is inputted in the MLS Database is collected by way of an "MLS Data Information Form" filled out by the seller and the agent. Certain fields are mandatory, including the address of the property, its list price, the number of rooms, the municipal taxes, the seller's name, information about the interior and exterior of the home, the cooperating brokerage commission, and whether permission has been given to display the address on the Internet. The form also has other fields that are optional, such as the approximate age of the building, estimated square footage information, and open house dates.

G. *Stratus Data Systems Inc.*

[79] The MLS Database is provided to TREB's Members through a platform operated by Stratus Data Systems Inc. ("**Stratus**"). Members can search for information about both unavailable and available properties on the MLS Database. The Stratus software can also generate a report which can be used to prepare CMAs, provide information to clients regarding listings, conduct market research, etc. The public has no access to the Stratus system. However, Members can arrange to have their clients automatically receive emails about new or changed listings in the neighborhoods in which they have expressed interest and that have been uploaded to the TREB MLS Database. Stratus also has a specific application to permit agents to conduct CMAs for consumers.

H. *The U.S. antitrust investigation and 2008 settlement*

[80] The Tribunal understands that TREB first began considering adopting a policy on VOWs in approximately 2003, when it obtained a copy of the draft VOW policy that NAR proposed to adopt in the United States at that time (the **"2003 Draft NAR Policy"**).

[81] In 2005, the United States Department of Justice (the **"U.S. DOJ"**) began proceedings against NAR in relation to NAR's then existing VOW policy. That version of NAR's VOW policy permitted individual listing agents in the United States to withhold their listings from display on VOWs, by means of an opt-out right. The U.S. DOJ alleged, among other things, that such an opt-out discriminated against VOWs and was anti-competitive.

[82] In late 2008, the U.S. DOJ and NAR settled their litigation. That settlement was ultimately embodied in a final judgment of the U.S. District Court for the Northern District of Illinois, Eastern Division, to which was appended an amended NAR VOW policy (the **"2008 NAR VOW Policy"**).

[83] The Tribunal understands that, among other things, the 2008 NAR VOW Policy effectively no longer allowed listing agents to opt-out or to otherwise refuse to share their MLS listings with operators of VOWs, or with real estate boards. It also effectively prohibited discrimination against VOWs by imposing requirements on them that were not imposed on agents accessing the MLS system through other means, including with respect to the Disputed Data.

I. *The Commissioner's investigation*

[84] Following the announcement of the possible settlement between the U.S. DOJ and NAR in mid-2008, the Competition Bureau (the **"Bureau"**) approached TREB about implementing a similar VOW policy based on the principles of non-discrimination.

[85] Among other things, this led CREA to establish a VOW task force (**"CREA's VOW Task Force"**), as TREB believed that the VOW issue had national implications and should therefore be dealt with at a national level.

[86] However, CREA's VOW Task Force stalled after reaching a point of impasse with the Bureau in approximately 2010.

[87] In July 2010, TREB conducted a strategic planning exercise with its newly elected Board of Directors and decided to establish its own VOW task force (**"TREB's VOW Task Force"**). TREB did not actually begin to set up its task force until March of 2011.

[88] In the meantime, in November 2010, the Commissioner sent a voluntary information request to TREB concerning VOWs. That action appears to have spurned TREB to prepare a draft VOW policy, dated May 18, 2011, which tracked to a considerable extent the 2008 NAR VOW Policy. However, TREB eliminated from its draft VOW policy the provisions in the 2008 NAR VOW Policy that prohibited listing agents from discriminating against VOW operators, and added certain other provisions that are the subject of dispute in this proceeding.

[89] For example, whereas the 2008 NAR VOW Policy permitted the restriction on the display of certain information by VOWs *only* if the restriction applied to other delivery mechanisms (such as fax and telephone), TREB's draft VOW policy contained no restriction upon how its Members could communicate the Disputed Data through other delivery mechanisms.

[90] Nine days later, on May 27, 2011, the Commissioner filed the Initial Application with the Tribunal.

[91] In the wake of that action by the Commissioner, TREB made further revisions to its draft VOW policy in June 2011. However, that policy continues to prohibit VOWs from displaying the Disputed Data at all. Indeed, as discussed below, TREB also does not include the Disputed Data in its VOW Data Feed and prohibits the use of any information included in the VOW Data Feed for purposes other than display on a website.

[92] Following a 60-day period during which Members were invited to comment on the draft VOW policy, the VOW Policy and Rules were approved by TREB's Board of Directors in late August 2011. The VOW Data Feed discussed below then went "live" in mid-November 2011.

J. *TREB's VOW Policy and Rules*

[93] The term "virtual office website" is somewhat incongruous, as it refers neither to a website nor to a virtual office. Rather, the term is used to describe an area of a brokerage's website where MLS information is made available to potential home sellers and buyers in a particular searchable format. In the GTA, that information is received by TREB's Members over the VOW Data Feed. The fact that a VOW Data Feed is received does not reveal anything about the principal nature of an agent's office arrangements. Those arrangements may be based on the traditional "bricks and mortar" business model or they may simply be based on a model where a brokerage's agents log-in from home or other locations.

[94] The Tribunal will use the term VOW simply to describe a password-protected area of a brokerage's website where consumers can access and search a database containing MLS information.

[95] TREB's VOW Policy and Rules govern how Members can operate a VOW in the GTA. For the purposes of this proceeding, the key provisions of the VOW Policy and Rules include the following:

1. A member of the public may only access MLS information on a Member's VOW if: (1) the Member has first established a broker-consumer relationship; (2) the Member obtains the name and a valid email for a consumer; (3) the consumer has agreed to prescribed "terms of use"; and (4) the consumer creates a user name and password for the Member's VOW (Rules 800 and 805);

2. A Member's VOW may provide other features, information, or functions in addition to the display of TREB's MLS information (Rule 803);

3. A Member, whether through their VOW or by any other means, may not make available for search by, or display to, consumers the following MLS data intended exclusively for other Members and their brokers and salespersons, subject to applicable laws, regulations and the RECO rules:

    a. Expired, withdrawn, suspended or terminated listings, and pending solds or leases, including listings where sellers and buyers have entered into an agreement that has not yet closed;

    b. The compensation offered to other Members;

    c. The seller's name and contact information, unless otherwise directed by the seller to do so;

    d. Instructions or remarks intended for cooperating brokers only, such as those regarding showings or security of listed property; and

e. Sold data, unless the method of use of actual sales price of completed transactions is in compliance with RECO rules and applicable privacy laws (Rule 823).

K. *The VOW Data Feed*

[96] TREB Members receive data for their VOWs *via* TREB's VOW Data Feed. The VOW Data Feed is an electronic connection over the Internet between a Member's website and TREB's MLS third party database (the "**Third Party Database**"). The Third Party Database is a copy of TREB's MLS Database that TREB uses to transmit data to third parties pursuant to various agreements. The VOW Data Feed appears to contain all of TREB's MLS active listing data, except for cooperating broker commissions, listings which the seller has elected to withhold from the Internet, information that cannot be distributed by any mechanism of delivery, the seller's name and contact information (unless otherwise directed by the seller), and instructions or remarks intended for cooperating brokers only. For greater certainty, none of the Disputed Data is included in the VOW Data Feed, which is offered to TREB's Members at no charge.

[97] TREB's MLS data is transmitted to the VOW operator in a raw data format, to enable the Member to present the data to a customer in whatever manner the Member chooses, subject to the certain restrictions.

[98] Use of the VOW Data Feed is governed by the VOW Policy and Rules as well as by TREB's VOW Data Feed Agreement.

[99] To have access to TREB's VOW Data Feed, Members (and Affiliated VOW Partners (**"AVPs"**), where applicable) must sign the Data Feed Agreement. An AVP is an entity or person designated by a Member to operate a VOW on behalf of the Member, subject to the Member's supervision, accountability and compliance with the VOW Policy and Rules. For the purposes of this proceeding, an important provision of the Data Feed Agreement is the following:

> **4.1 Services and Licence.** Subject to the terms and conditions of this Agreement and the VOW Policy and Rules, TREB will provide to Member or AVP, if operating Member's VOW(s) on behalf of Member, a VOW Data Feed to Member or AVP, <u>solely and exclusively for the Purpose</u> ("Services"). Subject to the terms and conditions of this Agreement, TREB hereby grants to Member and AVP, if operating Member's VOW on behalf of Member, a non-exclusive, non-transferable, non-sublicensable, revocable limited license to use such Listing Information as may be provided to Member or AVP through the VOW Data Feed <u>solely and exclusively for the Purpose</u>.
>
> (Emphasis added)

[100] The term Purpose is defined as follows in the Data Feed Agreement:

> "Purpose" means to permit a Member to display on the Member's VOW given Listing Information which is transmitted through a VOW Data Feed to the Member for the sole purpose of use by Consumers that have a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through Member's VOW.
>
> (Emphasis added)

[101] The Data Feed Agreement also provides that access to the VOW Data Feed may be suspended or terminated if a Member or AVP breaches the Data Feed Agreement or TREB's MLS Rules and Policies.

V. Evidence – Overview

A. *Lay witnesses*

(1) For the Commissioner

[102] The Commissioner led evidence from the following lay witnesses:

a. William McMullin: Mr. McMullin is the Chief Executive Officer (**"CEO"**) of ViewPoint Realty Services Inc. (**"ViewPoint"**). ViewPoint is an Internet-based, technology-driven, residential real estate brokerage based in Halifax, Nova Scotia that offers a broad variety of services through its website, www.viewpoint.ca. Those services include tools and features that make extensive MLS information available to potential home sellers and purchasers, as well as analyses of that information.

b. Urmi Desai: Ms. Desai is a co-founder of Realosophy Realty Inc. (**"Realosophy"**), a full-service brokerage in the GTA which provides services through two websites as well as a storefront office in the Leslieville area of Toronto. Ms. Desai is responsible for Realosophy's strategy and marketing.

c. John Pasalis: Mr. Pasalis is a co-founder and broker of record of Realosophy. In addition to working as a broker, he provides analytics and real estate commentary for Realosophy's website and in the public media.

d. Scott Nagel: Mr. Nagel is the CEO of real estate operations for Redfin Corporation (**"Redfin"**). Redfin is an Internet-based real estate brokerage based in the United States that operates in approximately 74 metropolitan areas throughout the United States.

e. Shayan Hamidi: Mr. Hamidi is a co-founder and a former CEO of TheRedPin.com Realty Inc. (**“TheRedPin”**). He left the company in 2014. TheRedPin is an online brokerage based in the GTA that operates through its website www.TheRedPin.com.

f. Tarik Gidamy: Mr. Gidamy is a co-founder and the broker of record of TheRedPin. He has been licensed to practice in real estate in Ontario and has been a Member of TREB since 1997. Since Mr. Hamidi left the company in 2014, Mr. Gidamy has shared the duties of TheRedPin’s CEO with two other individuals.

g. Joel Silver: Mr. Silver is the Managing Director of Trilogy Growth, LP (**“Trilogy Growth”**), which strategically invests in early stage, innovative companies. In 2012, Trilogy Growth invested in TheRedPin. Mr. Silver is a member of TheRedPin’s Board of Directors and has shared the duties of TheRedPin’s CEO with Mr. Gidamy and another individual.

h. Mark Enchin: Mr. Enchin is a Guelph-area real estate agent with a history of developing technology-based tools for use by agents. He is a sales representative with Realty Executives Plus Ltd. **(“Realty Executives”**) who has an interest in expanding into the GTA by licensing his VOW, which appears to be still in development, to agents located there. Prior to a development in 2007 that will be discussed later in these reasons, Mr. Enchin developed a VOW that was licensed to approximately 1,000 realtors, including many in the GTA.

i. Sam Prochazka: Mr. Prochazka is the founder and CEO of Sam & Andy Inc. (**“Sam & Andy”**), a real estate software company (also known as an AVP) that built websites for real estate professionals in Western Canada, the United States and the GTA prior to its sale to Ubertor, a Vancouver-based firm, in May 2015.

[103] Messrs. McMullin, Pasalis, Nagel, Gidamy and Prochazka testified at both the Initial Hearing in 2012 and the Redetermination Hearing in 2015, whereas the other witnesses identified above only testified at the Initial Hearing. The Tribunal generally found Messrs. McMullin, Pasalis, Nagel, Gidamy and Prochazka to be credible and forthright. Given that none of the members of the redetermination panel participated in the Initial Hearing, the Tribunal will refrain from making such observations regarding Ms. Desai, Mr. Hamidi, Mr. Silver and Mr. Enchin, who testified only at that hearing.

[104] The Tribunal pauses to note that further to an order issued in April 2014 (*The Commissioner of Competition v The Toronto Real Estate Board*, 2014 Comp. Trib. 4), all witness statements, expert reports, exhibits, transcripts, and opening and closing submissions from the Initial Hearing form part of the record of the Redetermination Hearing. The Tribunal’s order further provided that the pleadings of the parties would not be amended and that opening and closing statements could refer to evidence given at both the Initial Hearing and the Redetermination Hearing.

(2) For TREB

[105] TREB led evidence from the following lay witnesses:

a. Donald Richardson: Mr. Richardson was TREB's CEO for approximately 14 years prior to his departure from TREB in 2014. He is now partially retired and currently holds the position of consultant for TREB. Before joining TREB as its CEO, he worked for approximately 20 years at OREA in a variety of roles, including CEO for the last six of those years.

b. Tung-Chee Chan: Mr. Chan has been the sole owner and broker of record of Tradeworld Realty Inc. ("**Tradeworld**") since 1985. Tradeworld is a brokerage with four offices in the GTA.

c. Pamela Prescott: Ms. Prescott is the owner and a broker at Century 21 Heritage Group Ltd. (**"Century 21 Heritage"**), an independently-owned brokerage with several offices in the northern part of the GTA and approximately 475 real estate agents. Century 21 Heritage operates under the Century 21 banner. Ms. Prescott served as a Director of TREB for a period of three years in the early 2000s.

d. Evan Sage: Mr. Sage is a Vice President and Sales Representative at Sage Real Estate, which describes itself as "Toronto's most philosophically and technologically advanced boutique brokerage." He was a member of TREB's VOW Task Force.

e. Timoleon (Tim) Syrianos: Mr. Syrianos is the principal owner, President and broker of record of Ultimate Realty Inc. (**"Ultimate Realty"**), a RE/MAX franchisee with two offices in the GTA and approximately 235 salespersons. Mr. Syrianos has been a Director of TREB since July 2012 and was previously a member of its VOW Task Force and of its MLS committee (the **"MLS Committee"**).

[106] Messrs. Richardson, Sage and Syrianos, as well as Ms. Prescott, testified at both the Initial Hearing in 2012 and the Redetermination Hearing in 2015, whereas Mr. Chan only testified at the Initial Hearing. For the reason explained at paragraph 103 above, the Tribunal will refrain from making observations regarding the testimony of Mr. Chan during the Initial Hearing. With respect to the Redetermination Hearing, the Tribunal generally found Messrs. Sage and Syrianos to be credible, forthright, helpful and impartial. The Tribunal found Ms. Prescott to be somewhat less impartial and helpful. The Tribunal also had concerns about the reliability of certain aspects of Mr. Richardson's testimony, which are discussed at paragraphs 355 and 356 below. In addition, the Tribunal found some of his testimony on cross-examination to have been evasive in nature. Where Mr. Richardson's testimony was inconsistent with other evidence, the Tribunal therefore generally found such other evidence to be more reliable.

(3) For CREA

[107] Mr. Gary Simonsen testified on behalf of CREA. Mr. Simonsen is CREA's CEO. Prior to assuming that position in July 2011, he was CREA's Chief Operating Officer. The Tribunal generally found Mr. Simonsen to be credible and forthright.

B. *Expert witnesses*

(1) For the Commissioner

[108] Dr. Greg Vistnes testified on behalf of the Commissioner. Dr. Vistnes is an economist specializing in the fields of industrial organization and the economics of competition. He holds a Ph.D. in economics from Stanford University. He is a Vice President in the Washington, DC office of Charles River Associates. The Tribunal generally found Dr. Vistnes to be credible, forthright and more willing to concede weaknesses/shortcomings in his evidence or in the Commissioner's case, than was the case for Dr. Jeffrey Church, TREB's expert witness. Where his evidence was inconsistent with that provided by Dr. Church or by Dr. Fredrick Flyer (CREA's expert witness), the Tribunal found his evidence to be more persuasive, objective and reliable than that of the latter individuals. However, the Tribunal accepts TREB's position that Dr. Vistnes did not have a good understanding of the legal test for what constitutes a "substantial" prevention or lessening of competition, as contemplated by paragraph 79(1)(*c*) of the Act. For this reason, the Tribunal refrained from accepting Dr. Vistnes' evidence on that particular issue.

(2) For TREB

[109] Dr. Jeffrey Church testified on behalf of TREB. Dr. Church is a Full Professor in the Department of Economics at the University of Calgary. He holds a Ph.D. in economics from the University of California, Berkeley. The Tribunal found Dr. Church to be less forthright, objective and helpful than Dr. Vistnes or Dr. Flyer. The Tribunal also found Dr. Church to be evasive at several points during his cross-examination and to have made unsupported, speculative assertions at various points in his testimony and in his written expert reports.

(3) For CREA

[110] Dr. Fredrick Flyer testified on behalf of CREA. Dr. Flyer is an economist holding a Ph.D. in economics from the University of Chicago and an M.S. in labour and industrial relations from the University of Illinois. He is an Executive Vice President at Compass Lexecon. The Tribunal generally found Dr. Flyer to be objective and forthcoming. However, it also found that his testimony often remained general and high-level, and that he did not immerse himself in the details of the Canadian real estate industry and in the specific evidence and matters at issue in this proceeding to the same degree as Dr. Vistnes and Dr. Church.

C. *Documentary evidence*

[111] Attached at Schedule "B" is a list of the exhibits that were admitted in this proceeding.

VI. Issues

[112] The following broad issues are raised in this proceeding:

a. What is or are the relevant market(s) for the purposes of this proceeding?;

b. Does TREB substantially or completely control a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act?;

c. Were the VOW Restrictions adopted for an exclusionary or disciplinary purpose, as contemplated by paragraph 79(1)(*b*) of the Act, or was their adoption motivated by legitimate business justifications? If so, does that continue to be the case?;

d. Have the VOW Restrictions had the effect of preventing or lessening competition substantially in the relevant market(s), or are they having or likely to have that effect, as contemplated by paragraph 79(1)(*c*) of the Act?;

e. Does TREB have a copyright over the MLS Database and, if it is the case, do the VOW Restrictions constitute the "mere" exercise of TREB's intellectual property rights?; and

f. What is the appropriate remedy, if any?

[113] Each of these issues will be discussed in turn.

VII. Analysis

A. *What is or are the relevant market(s) for the purposes of this proceeding?*

[114] The first issue to be determined by the Tribunal is the identification of the relevant market(s) for the purposes of this proceeding. For the reasons detailed below, the Tribunal concludes that the relevant market is the supply of MLS-based residential real estate brokerage services in the GTA.

(1) Analytical framework

[115] The ultimate focus of the analysis contemplated by subsection 79(1) of the Act is upon whether a practice of anti-competitive acts by a dominant firm has had, is having or is likely to have the effect of preventing or lessening competition substantially in a *market*. The market in

question is the market in which the practice in question is alleged to have had, to be having, or to be likely to have such an impact.

[116] Where the firm that is the focus of an application under section 79 is alleged to substantially or completely control a different market, it will be necessary to define that *other* market *for the purposes of paragraph 79(1)(a)*. This is further discussed below, in section VII.B.(3) of these reasons, including at paragraphs 203-207.

[117] In defining relevant markets in proceedings brought under section 79 of the Act, the Tribunal has focused upon whether there are close substitutes for the product "at issue" (*Commissioner of Competition v Canada Pipe*, 2005 Comp. Trib. 3 (***"Canada Pipe CT"***) at para 68). In the cases that it has considered to date, that product has been the same for the purposes of the Tribunal's analysis of both paragraph 79(1)(*a*) and paragraph 79(1)(*c*).

[118] In turn, "close substitutes" have been defined in terms of whether "buyers are willing to switch from one product to another in response to a relative change in price, i.e., if there is buyer price sensitivity" (*Canada (Commissioner of Competition) v Canada Pipe*, 2006 FCA 236 (***"Canada Pipe FCA Cross Appeal"***), leave to appeal to SCC refused, 31637 (10 May 2005) at paras 12-16, and *Canada (Commissioner of Competition) v Tele-Direct Publications Inc* (1997), 73 CPR (3d) 1 (Comp. Trib.) (***"Tele-Direct"***) at p. 35, both citing the test adopted by the Federal Court of Appeal in *Canada (Director of Investigation and Research) v Southam Inc*, [1995] 3 FC 557, 63 CPR (3d) 1 (CA) (***"Southam"*),** rev'd on other grounds [1997] 1 SCR 748, a merger case).

[119] Essentially the same approach has been adopted with respect to assessing whether supply at one geographic location is a close substitute for supply at another location.

[120] However, an objective benchmark for assessing "a relative change in price" or "buyer price sensitivity" was not provided in any of those cases.

[121] More recently, in merger cases, the Tribunal embraced the hypothetical monopolist approach, as defined at paragraph 4.3 of the Bureau's 2011 *Merger Enforcement Guidelines* (the ***"MEGs"***) (*Commissioner of Competition v CCS Corporation,* 2012 Comp. Trib. 14 (***"CCS"***) at para 94). That approach has been defined as follows in the *MEGs*:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.

[122] This is the approach adopted by the Commissioner in this case and in the Bureau's *Guidelines*. It is also essentially the analytical framework adopted by the economic experts who testified on behalf of both the Commissioner and TREB, namely, Dr. Vistnes and Dr. Church, respectively.

[123] In *CCS* at paragraph 94, the Tribunal noted that in applying the "small but significant and non-transitory" components of the hypothetical monopolist approach, the Tribunal will typically use a test of a five percent price increase lasting one year. In other words, if sellers of a product or of a group of close substitute products in a provisionally defined market, acting as a hypothetical monopolist, would not have the ability to profitably impose and sustain a five percent price increase lasting one year, the product bounds of the relevant market will be progressively expanded until the point at which a hypothetical monopolist would have that ability and degree of market power. Essentially the same approach is applied to identify the geographic dimension of relevant markets.

[124] The Tribunal considers that the time has come to recognize that this analytical framework can make a conceptually helpful contribution to market definition in the context of proceedings under section 79 of the Act. This is in no small part because it supplies objective benchmarks (five percent, one year and the "smallest group" principle) that have been missing from the approach adopted in past abuse of dominance cases brought before the Tribunal under section 79. In the absence of such objective benchmarks, the exercise of assessing whether one product is a close substitute for another product can be highly subjective in nature.

[125] However, it must be recognized that the practical challenges associated with applying the hypothetical monopolist framework will often be greater in an abuse of dominance proceeding brought under section 79 than in the merger area. This is because of the difficulty associated with determining the "base price" for the purposes of that framework (**"Base Price"**).

[126] In a proceeding brought under section 79 of the Act, the Base Price is the price that would likely have existed "but for" the alleged practice(s) of anti-competitive acts. It is the Commissioner's burden to demonstrate that price. Determining such a price in a section 79 proceeding will often be more difficult than determining the Base Price in a merger context, i.e., the price that would likely exist in the absence of a merger. This may be so notwithstanding that it is not necessary for the Commissioner to demonstrate the Base Price with precision (*CCS* at para 59).

[127] This is because, if a merger has not yet been completed, the Base Price frequently will simply be the prevailing price, especially if it is being alleged that the merger is likely to *lessen* competition. In addition, direct recent evidence of substitutability, for example in the form of evidence of competitive responses to recent price changes or promotional activities, will often be available.

[128] Even where it is being alleged that the merger is likely to *prevent* competition, there will often be direct evidence, for example in the form of one of the merging parties' business plans, regarding the likely future price in the absence of the merger. Alternatively, there may well be

sufficient direct evidence to demonstrate a range over which the likely future price would have fallen (*CCS* at para 59).

[129] In a proceeding under section 79 of the Act, such direct evidence with respect to the Base Price will often not be available. This is especially so where, as in the present proceeding, the principal allegation is that the impugned conduct is *preventing* competition, or will prevent competition in the future. However, even in a case in which the principal allegation is that the impugned conduct is *lessening* competition, or has already lessened competition, the practical challenges associated with applying the iterative exercise contemplated by the hypothetical monopolist approach may be insurmountable. This is in part because products that may appear to be close substitutes at the prevailing price may not be close substitutes at the Base Price level, i.e., at the price that likely would have prevailed in the absence of the impugned conduct.

[130] Accordingly, it should be recognized that market definition in section 79 proceedings will largely involve assessing indirect evidence of substitutability, including factors such as functional interchangeability in end-use; switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; physical and technical characteristics; and price relationships and relative price levels (*Canada Pipe FCA Cross Appeal* at paras 15-16; *Tele-Direct* at pp. 36-82). In assessing such indirect evidence, functional interchangeability in end-use is a necessary but not sufficient condition for products to be included in the same relevant market (*Tele-Direct* at p. 38).

[131] In the geographic context, transportation costs and shipment patterns, including across Canada's borders, should also be assessed.

[132] In carrying out such assessments of indirect indicia of substitutability, it should be recognized that it will often neither be possible nor necessary to define the product and geographic dimensions of the relevant market(s) with precision. However, an assessment must ultimately be made (at the paragraph 79(1)(*c*) stage of the analysis) of the extent to which products and supply locations that have not been included in the relevant market provide or would likely provide competition to the products and locations that have been included in the market (*CCS* at paras 59-60 and 92; *Director of Investigation and Research v NutraSweet Co* (1990), 32 CPR (3d) 1 (Comp. Trib.) (***"NutraSweet"***) at p. 20).

(2) The product dimension

[133] The Commissioner submits that the product dimension of the relevant market is the supply of residential real estate brokerage services that provide MLS accessibility.

[134] In his 2012 written closing submissions, the Commissioner recognized that sellers of homes require different services than purchasers of homes and that therefore, from a demand-side perspective, it might be more appropriate to define distinct relevant markets consisting of each of those distinct categories of purchasers of real estate brokerage services. This was also the position advanced by Dr. Vistnes.

[135] However, given that brokers and agents generally provide both sell-side and demand-side MLS-based services, and given that consumers sometimes retain the same agent or broker to sell their home and then to purchase another home, the Commissioner advanced, and continues to advance, a single relevant market comprised of both sell-side and buy-side residential real estate brokerage services. Dr. Vistnes also sometimes referred to essentially the same single relevant market in his expert reports.

[136] TREB acknowledges that the ultimate focus of the Tribunal's assessment should be upon the supply of residential real estate brokerage services. However, it alternately refers to both the "market" and the "markets" for real estate brokerage services in its written submissions.

[137] In discussing the relevant market, CREA generally used the same "residential real estate brokerage services" language used by the Commissioner. The same is true of Dr. Flyer, who explicitly declined to accept Dr. Vistnes' position that there are separate relevant markets for sell-side and buy-side real estate brokerage services.

[138] For the purposes of this proceeding, it does not appear to matter whether there is a single relevant market for the supply of MLS-based real estate brokerage services, or two separate relevant markets, consisting of the supply of real estate brokerage services to home sellers and home buyers, respectively. In brief, it appears to be common ground between the parties and CREA that competitive conditions in respect of the supply of real estate brokerage services to home buyers and home sellers are highly similar.

[139] Accordingly, for ease of reference, the Tribunal will define a single relevant market for the supply of MLS-based residential real estate brokerage services to home sellers and home buyers, respectively.

[140] The Tribunal is satisfied that this is a relevant market, for the following reasons.

[141] First, the evidence suggests that home buyers and sellers generally enter into contracts for the supply of a bundle of MLS-based residential real estate brokerage services, rather than paying separately for unbundled services. Although there is evidence that some home buyers and sellers may prefer to contract for smaller bundles of such services if offered at a discount, the Tribunal accepts Dr. Vistnes' view that discount and limited-service brokerage services are in the same relevant product market as full-service brokerage services. The Tribunal notes that this view was not contested by TREB or CREA.

[142] Second, home buyers have not switched away from MLS-based services to a significant degree, despite the fact that the average absolute level of money they indirectly pay in commissions to purchase a home in the GTA increased by more than 20% (in nominal and adjusted terms) over the period 2008 to 2011, and has increased even further since that time. This, according to Dr. Vistnes, has occurred as a result of the increase in home prices, and not as a result of an increase in the commission rates.

[143] Dr. Vistnes testified that, between 2007 and October 2014, the percentage of home purchasers who have chosen to use MLS-based residential real estate brokerage services increased from approximately 89.7% to approximately 90.9 % of all home buyers. The Tribunal was not provided with evidence to suggest that home sellers have switched away from MLS-based real estate brokerage services in recent years, at a rate proportionate to the increase in total brokerage commissions paid. Indeed, Dr. Vistnes' uncontradicted testimony was that he is aware of no such evidence.

[144] Third, there is no readily available substitute for the full range of information and services that are provided to home buyers and sellers by suppliers of MLS-based residential real estate brokerage services. Although some of that information is available separately or in much smaller bundles on the Internet or from some of the other sources discussed in the next section below, home purchasers and sellers have not switched away from MLS-based services to those other sources of supply. To the extent that the evidence suggests that home buyers and home sellers may be sourcing information that they value on the Internet, they are doing so *in addition to* procuring MLS-based real estate brokerage services, as confirmed by the figures immediately above. The same is true with respect to the complementary services offered by home appraisers, home inspectors, mortgage specialists and real estate lawyers. In other words, those services are used as *complements*, not substitutes, for the MLS-based real estate brokerage services.

[145] Fourth, the evidence provided in this proceeding by agents and brokers supports the view that their customers require access to a broad range of the information available on TREB's MLS system, and that those customers would not likely seek or be able to readily obtain that information from alternative sources.

[146] Fifth, industry documentation reflects a view that industry participants consider that there is a single and distinct market for MLS-based residential real estate brokerage services.

[147] Finally, TREB did not contest Dr. Vistnes' view, which the Tribunal accepts, that there would likely be significant substitution from agents' services to the services offered by brokers, if the price of agents' services were to rise relative to brokers' services, and *vice versa*.

[148] Dr. Church suggested that a market defined in terms of the supply of MLS-based residential real estate brokerage services may be too narrow. For example, he suggested that "exclusive listings" tend not be listed on the MLS system and that it is now much easier for alternatives to the MLS system, such as FSBO offerings, to meet consumers' demands for the range of services that they desire. He further suggested that Dr. Vistnes' evidence that substitution away from MLS-based brokerage services has not increased while the absolute level of money charged for commissions has increased in recent years, is undermined by his failure to take account of rising income levels during that period. He made a similar critique of Dr. Vistnes' failure to take account of substitution at the margins between rentals and home purchases, and between purchases of existing homes and new homes.

[149] The Tribunal takes Dr. Church's point regarding rising income levels. However, the fact remains that home purchasers appear to have increased their usage of MLS-based residential real estate brokerage services over a period of time when the absolute level of commissions (in dollar terms) rose substantially, including in the years prior to both of the Tribunal's hearings in this proceeding. Moreover, no evidence was tendered by Dr. Church or TREB to suggest that there is a material degree of substitution at the margins between rentals and home purchases, or between purchases of existing homes and new homes. Likewise, no evidence was adduced to suggest that "exclusive listings" account for a significant percentage of overall listings in the GTA. Indeed, Mr. Syrianos suggested the contrary and indicated it was not a very high number of Ultimate Realty's business.

[150] Dr. Church also asserted that, in a proceeding under section 79 of the Act, the relevant markets for establishing dominance and competitive effects must be informed by the nature of the alleged exclusionary practices.

[151] Dr. Church's position with respect to the market contemplated by paragraph 79(1)(*a*) will be discussed in the next section below. The relevant market in which to assess competitive effects is the market referred to in paragraph 79(1)(*c*). The Tribunal is satisfied that an assessment of the alleged exclusionary practices in this case would not alter the conclusions that it has reached with respect to the product dimension of that market. Dr. Church's positions regarding the relevant market are discussed further below in section VII.B.(3) as well as at paragraphs 208-212 of these reasons.

[152] In conclusion, the Tribunal is satisfied, based on the considerations discussed above and the evidence on the record in this proceeding, that the product dimension of the relevant market contemplated by paragraph 79(1)(*c*) should be defined in terms of the supply of MLS-based residential real estate brokerage services.

(3) The geographic dimension

[153] It is common ground between the parties that the geographic scope of the relevant market for the supply of residential real estate brokerage services is local and likely is no broader than the GTA, which is comprised of the city of Toronto and the regional municipalities of Halton, Peel, York and Durham. This was not disputed by CREA. Indeed, the local nature of the market was acknowledged by its expert, Dr. Flyer. Dr. Church, on behalf of TREB, also agreed with this position.

[154] The local nature of the relevant market is generally supported by the following evidence.

[155] Dr. Vistnes' analysis of MLS data for the period of January 2010 to February 2012 indicates that approximately 76% of sell-side transactions and approximately 69% of buy-side transactions occurred within 10 kilometres of agents' principal bases of operations. At 20 kilometres from those bases, the corresponding figures are approximately 92% and 89%. At 30 kilometres, they increase to approximately 97% and 96%.

[156] The testimony of several agents, including Messrs. Gidamy, Pasalis and Enchin, as well as Ms. Prescott, confirms that agents tend to specialize at the local level, to meet consumer demand for local expertise. This appears to be confirmed by Dr. Vistnes' analysis, which indicates that even where there are differences in commissions between adjacent local areas, the geographic range within which agents conduct their business does not materially increase.

[157] However, Ms. Prescott also stated that since the Initial Hearing, agents are increasingly competing for business across the entire city of Toronto. No evidence was adduced to suggest that home buyers or home sellers in the GTA retain the services of agents whose principal base of operations is located outside the GTA.

[158] Although the foregoing evidence suggests that there may be several local relevant markets within the GTA, nothing in this proceeding turns on whether there is a single relevant geographic market that extends throughout the GTA, or several separate and discrete geographic markets within the GTA.

[159] Given that the focus of this proceeding is upon certain of TREB's practices, and given that TREB's focus and activities extend throughout the GTA, the Tribunal is of the view that it is appropriate to define a single geographic market consisting of the GTA. This will simplify the discussion and analysis below, without adversely impacting upon the interests of either party or CREA.

[160] The Tribunal observes in passing that the Commissioner confirmed in his closing argument at the Redetermination Hearing that he is not seeking relief that goes beyond the GTA, except to the extent that TREB's MLS data can be accessed outside the GTA, including through inter-board agreements that allow agents located outside the GTA to access that data.

(4) Conclusion

[161] For all the foregoing reasons, the Tribunal concludes that the relevant market for the purpose of this proceeding is the supply of MLS-based residential real estate brokerage services in the GTA (the **"Relevant Market"**).

B. *Does TREB substantially or completely control a class or species of business in any area of Canada?*

[162] The Tribunal now turns to the second issue to be determined in this proceeding, namely, whether TREB substantially or completely controls a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act. For the reasons set forth below, the Tribunal finds, on the balance of probabilities, that TREB substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA.

(1) Analytical framework

[163] Paragraph 79(1)(*a*) deals with the "dominance" dimension of section 79. It requires the Tribunal to find that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business.

[164] The Tribunal has consistently interpreted the words "throughout Canada or any area thereof" and "class or species of business" to mean the geographic and product dimensions of the relevant market in which the respondent is alleged to have "substantial or complete control" (*Canada Pipe CT* at paras 65-67). This position was upheld by the Federal Court of Appeal in *Canada Pipe FTA Cross Appeal* at paragraphs 16 and 44.

[165] The Tribunal has also consistently interpreted the words "substantially or completely control" to be synonymous with market power. In turn, it has defined market power using various formulations, in particular "the ability to set prices above competitive levels for a considerable period" (*Canada Pipe CT* at para 122, aff'd *Canada Pipe FCA Cross Appeal* at paras 6 and 23-25; *Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd* (1995), 64 CPR (3d) 216 (Comp. Trib.) (***"Nielsen"***) at pp. 232 and 254); "an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms" (*Tele-Direct* at p. 82); and "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Commissioner of Competition v Canadian Waste Services Holdings Inc*, 2001 Comp. Trib. 3 at para 7, aff'd 2003 FCA 131, leave to appeal refused [2004] 1 SCR vii). This latter definition was embraced by the Supreme Court of Canada in *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 (***"Tervita"***) at paragraph 44.

(a) *The degree of market power required*

[166] The jurisprudence to date leaves unanswered the question of what constitutes a "competitive level" of prices. It also does not appear to recognize that, except in perfectly competitive markets, firms often have *some* market power. Indeed, if paragraph 79(1)(*a*) simply requires a demonstration of some market power, even to a *material* degree, it would arguably be redundant. This is because an ability to exercise materially greater market power than in the absence of the impugned anti-competitive practice must be established to satisfy the requirement in paragraph 79(1)(*c*) that the impugned practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

[167] Fortuitously, the Supreme Court of Canada has shed some light upon the issue. Specifically, in *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 (***"PANS"***), the Court contrasted the level of market power required by former paragraph 32(1)(*c*) of the *Combines Investigation Act*, RSC 1970, c C-23 with the level required by what is now paragraph 79(1)(*a*). Paragraph 32(1)(*c*), which subsequently became paragraph 45(1)(*c*) of the Act, before it was repealed, made it an offence to conspire, combine, agree or arrange with another person to prevent or lessen competition unduly.

[168] In defining the degree of market power necessary to trigger the application of that criminal offence, the Supreme Court stated that it was less than what is contemplated by paragraph 79(1)(*a*). The Court held that the degree of market power required to trigger the application of paragraph 32(1)(*c*) was simply "the capacity to behave independently of the market, in a passive way" (*PANS* at p. 654). It characterized this as requiring a moderate degree of market power, and contrasted this with the greater degree of market power required to "influence the market" under paragraph 79(1)(*a*).

[169] Having a degree of market power that is more than "moderate" to trigger the application of paragraph 79(1)(*a*), and that is higher than the degree of increased or maintained market power generally required to demonstrate a substantial prevention or lessening of competition, would therefore appear to be required to give effect to the Supreme Court's observations in *PANS* and to avoid an interpretation of paragraph 79(1)(*a*) that arguably renders that provision redundant.

[170] Such an approach would also be more consistent with the view that subsection 79(1) is intended to apply to firms with dominant positions, as reflected in the jurisprudence (*Canada Pipe FCA* at para 21; *Canada Pipe CT* at para 7) and in the heading above section 78 ("Abuse of Dominant Position") (*Commissioner of Competition v Visa Canada Corporation*, 2013 Comp. Trib. 10 at para 112). The Tribunal observes that similar wording appears in the marginal notes above section 79, although it recognizes that, pursuant to section 14 of the *Interpretation Act*, RSC 1985, c I-21, marginal notes form no part of the enactment and are inserted for convenience of reference only. In brief, given that non-dominant firms often have *some* degree of market power, a firm with a "dominant" position should be considered to be a firm that has more than merely "some" market power, and more than the "material" degree of market power contemplated by paragraph 79(1)(*c*).

[171] Requiring a level of market power that is more than "moderate", and more than what is contemplated by paragraph 79(1)(*c*), would also be broadly consistent with the Tribunal's prior observation that "no *prima facie* finding of dominance would arise" when it is determined that the respondent's share of the relevant market is below 50% (*Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp. Trib.) (***"Laidlaw"***) at p. 317).

[172] This approach would also make good sense, because having an intervention threshold under paragraph 79(1)(*a*) for single firm conduct that is higher than the threshold for mergers and agreements among competitors would avoid chilling potentially pro-competitive single firm behaviour.

[173] With all of the foregoing in mind, the Tribunal considers that the degree of market power contemplated by paragraph 79(1)(*a*) is a *substantial* degree of market power. This is greater than the *material* degree of increased or maintained market power (compared to the "but for" world) that is required to demonstrate a substantial lessening of competition under paragraph 79(1)(c) (*Tervita* at paras 50 and 80-81; *CCS* at para 377).

[174] In the Tribunal’s view, a *substantial* degree of market power is a degree of market power that confers upon an entity considerable latitude to determine or influence price or non-price dimensions of competition in a market, including the terms upon which it or others carry on business in the market. This roughly approximates the degree of market power that is used to measure whether a firm has a “dominant position” under Article 82 of the *Treaty Establishing the European Community* (2002/C 325/01), namely, an ability to behave to an appreciable extent independently of its competitors (Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking (2009/C 45/02) at para 10; Case 27/76 *United Brands Company and United Brands Continental v Commission*, [1978] ECR 207 at para 65; Case 85/76 *Hoffman – La Roche & Co v Commission,* [1979] ECR 461 at para 38; Case COMP/C-3/37.792 *Microsoft* at para 428).

(b) *Exclusionary behaviour and market power*

[175] The Commissioner and TREB dispute whether market power includes the ability to restrict the output of one’s rivals. The Commissioner submits that market power includes the power to engage in exclusionary behaviour such as preventing rivals from introducing products to the market. However, TREB disputes that position, and maintains that the power to exclude is not a cognizable form of market power under the Act. It states that this is so because the power to exclude is not captured by the definition of market power articulated by the Supreme Court in *Tervita* at paragraph 44, namely, “the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition.”

[176] The Tribunal disagrees with TREB’s position. To the extent that the power to exclude comprises an ability to restrict the output of other actual or potential market participants, and thereby to profitably influence price, it falls squarely within the definition of market power articulated in *Tervita*. Indeed, it is often the exercise of the power to exclude that facilitates a dominant firm’s ability to profitably influence the dimensions of competition referred to in *Tervita*.

[177] TREB further maintains that it cannot “profitably” influence price because it is a not-for-profit entity that does not participate in the relevant market for MLS-based residential real estate brokerage services. Rather, it is an input supplier to that market, and has no stake in who wins or who loses in that market. Contrasting the situation in which a dominant upstream supplier may exercise market power for the benefit of its downstream affiliated entity, TREB maintains that it has no “horse in the race.”

[178] The Tribunal disagrees.

[179] To begin, the Federal Court of Appeal explicitly determined, in setting aside the Tribunal’s initial decision in this proceeding, that the words used in paragraph 79(1)(*a*) are sufficiently broad to apply to a firm that does not compete in the market that it allegedly substantially or completely controls. This includes a firm that controls a significant input to

competitors in the market, or that makes rules that effectively control the business conduct of those competitors (*TREB FCA* at para 13).

[180] The Court in that case proceeded to find that subsection 79(1) is sufficiently broad to be applicable to TREB in respect of a rule that it makes binding on its Members (*TREB FCA* at para 18). That is to say, “Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to [TREB] in this case” (*TREB FCA* at para 20). In making those findings, the Court refrained from determining whether TREB in fact substantially or completely controls any market. However, it recognized that the rule at the heart of this case is “a rule prohibiting members from posting historical data on a virtual office website” and that “[t]he effect of that rule is that a member who operates through a virtual office website cannot enable clients to access the historical data online” (*TREB FCA* at para 5). The statement that the Court made at paragraph 18 of *TREB FCA* must be read with that in mind.

[181] It follows from the foregoing statements of the Court that a trade association that does not participate in a market with its members can nevertheless be found to have market power, particularly when it acts on behalf of the majority of its members.

[182] Trade associations can exercise such market power in a broad range of ways, including by establishing or mandating product standards or other rules, by-laws or practices that insulate all or some of its members from one or more sources of actual or potential competition. To the extent that a trade association has such an ability, it has market power. To the extent that its actions can enable or facilitate the ability of its members to maintain higher prices, or to maintain lower levels of service, product quality, variety or advertising levels than would otherwise prevail in the absence of those actions, they meet the definition of market power set forth by the Supreme Court in *Tervita*. The same is true where a trade association has the ability to forestall the entry and expansion of innovative products and services.

[183] In such circumstances, trade associations can be said to have the ability to *profitably* influence price, quality, variety, service, advertising or innovation, within the meaning of *Tervita*, on behalf of some or all of their members. In this context, it is the members whose profits would be increased or maintained by the actions of their trade association.

[184] In the Tribunal’s view, the definitions of market power set forth in *Tervita* and the other authorities on the meaning of market power mentioned at paragraph 165 above are sufficiently broad to encompass trade associations that act on behalf of some or all of their members, and in the manner described above. This was clearly the view of the Federal Court of Appeal in *TREB FCA*. Although that decision pre-dated *Tervita*, there is nothing in *Tervita* or any of the other authorities mentioned above to suggest that the definitions of market power that they articulated were intended to preclude their application to trade associations that do not directly participate in the relevant market.

[185] The Tribunal considers that such a result would be perverse, as it would enable competitors to do indirectly what they may be prohibited from doing directly, namely, agreeing or arranging among themselves to take action that prevents or lessens, or is likely to prevent or

lessen, competition in a market. Trade associations often do indeed have "horses in the race," namely, members of the associations whose interests they may be endeavouring to protect from competition.

[186] Such a result would also be inconsistent with the various objectives set forth in the purpose clause of the Act (section 1.1), namely:

to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[187] In the alternative, TREB submits that even if a respondent has market power, it cannot be said to substantially or completely control a market within the meaning of paragraph 79(1)(*a*) if it is a not-for-profit entity with no incentive to exercise market power against its members.

[188] The Tribunal disagrees. To the extent that a respondent trade association has the ability to exercise substantial market power to insulate all or some of its members from competition, and thereby enable them to maintain significantly higher prices, or significantly lower levels of non-price competition, than would otherwise be the case, it can be found to come within the purview of paragraph 79(1)(*a*).

[189] It bears underscoring, as a general proposition, that it is the *ability* to exercise the required degree of market power, not whether in fact a dominant firm finds it to be in its interest to exercise that power from time to time, that is relevant for the purposes of paragraph 79(1)(*a*), and indeed of paragraph 79(1)(*c*).

[190] Of course, where a trade association *actually exercises* substantial market power, this would demonstrate that it has that requisite degree of market power. The same is true of any entity alleged to have substantial market power.

(2) Measuring market power

[191] Market power can be measured either directly or indirectly. The direct approach focuses upon whether profits are indicative of substantial market power. The indirect approach considers other indicia such as market share, entry barriers or the countervailing power of customers. However, neither approach is easy to apply in practice (*Canada Pipe CT* at para 122; *Canada Pipe FCA Cross Appeal* at para 52).

[192] To date, the Tribunal has only been able to establish market power pursuant to the direct approach on two occasions. The first was in *Tele-Direct* at page 101, where it concluded that evidence of economic rents in the form of consistent payments by the respondent to its parent company of 30% - 40% of its collective revenues provided a direct indication of the respondent's market power. The second was in *Canada Pipe CT* at paragraph 161, where the Tribunal found that the evidence of high margins on certain products and an ability to lower prices selectively indicated supra-competitive pricing.

[193] In the absence of direct evidence of market power, the Tribunal has endeavoured to measure market power indirectly. In so doing, it has invariably assessed market shares and barriers to entry and has sometimes concluded that the respondent substantially or completely controlled a market largely on the basis of those two factors (*NutraSweet* at pp. 28-31; *Tele-Direct* at pp. 85-96; *Nielsen* at pp. 254-255). However, it has also assessed other factors such as the excess capacity of other firms (*Laidlaw* at p. 327), pricing practices and accounting profits (*Laidlaw* at pp. 327-330), the limited penetration of competitors (*Canada Pipe CT* at para 161) and the limited growth potential of the market (*Canada Pipe CT* at para 161).

[194] With respect to market shares, the Tribunal has suggested that a *prima facie* finding of substantial control of a market will be made with a large market share exceeding 50% (*Laidlaw* at pp. 317 and 325; *Nielsen* at pp. 254-255; *Canada Pipe CT* at para 138). Such a presumption would become stronger as the disparity between the market share of the respondent and the market shares of the other firms in the market increases, or if the respondent's share is fairly stable over time. Of course, a high market share of another rival could indicate joint dominance, particularly as the market share of that rival rises above 25%, or if the shares of the top two firms remain stable over time. Relatively stable shares of the top three or four firms could also be an indicator of joint dominance.

[195] With respect to barriers to entry, the Tribunal has noted that, in the absence of barriers to entry, even a very large market share will not support a finding of market power (*Canada Pipe CT* at para 138) and even a single seller cannot exercise market power (*Tele-Direct* at p. 85).

[196] As a practical matter, a finding that the respondent has substantial market power would ordinarily be justified where the evidence demonstrates that prices were, are or likely would be *significantly* higher, or that non-price benefits of competition such as quality, service, variety or innovation were, are or likely would be *significantly* lower, than they would have been or would be in the absence of the impugned practice of anti-competitive acts.

(3) Class or species of business

(a) *Overview*

[197] The Commissioner submits that, for the purposes of paragraph 79(1)(*a*), the “class or species of business” or product market that TREB controls is the relevant market that is the ultimate focus of this proceeding under section 79. That market is the market for MLS-based residential real estate brokerage services.

[198] The Commissioner asserts that TREB controls that relevant market because it controls how its Members compete through its rule-making ability. It controls access to the MLS system; it has the ability to discipline Members who do not follow its rules, including by withdrawing their access to the MLS system; it has imposed such discipline in the past; and it can and does insulate its Members from competition by excluding the innovative products of actual or potential competitors who threaten to disrupt the *status quo*.

[199] The Commissioner maintains that the foregoing enables TREB to dictate who can and cannot compete, and on what terms, and can prevent an entire class of competition from emerging in the relevant market. He adds that TREB is horizontally integrated by virtue of its structure as an association and joint venture between competitors and that TREB’s control over the market is reinforced by its vertical and horizontal integration with its Members. He suggests that such integration is a practical reality because TREB is controlled by a Board of Directors, all 16 members of which are licensed and practising realtors, who assume their board duties on a volunteer basis.

[200] For its part, TREB submits that the assessment of market power for the purposes of paragraph 79(1)(*a*) must take into consideration the conduct that is at issue in a particular case. In this case, that would primarily be its withholding of the Disputed Data from its VOW Data Feed, its prohibition of the display of the Disputed Data on a VOW, and its imposition of restrictions on an agent’s ability to use the data in its VOW feed for purposes other than mere display to the public.

[201] The Tribunal does not accept the proposition that an assessment of market power at the paragraph 79(1)(*a*) stage of its analysis must always take into consideration the conduct that is at issue in a particular case. As the Federal Court of Appeal has noted, the three elements of subsection 79(1) of the Act are distinct. Although certain evidence may be considered in the assessment of more than one of those elements, the three elements themselves must remain conceptually distinct (*Canada Pipe FCA* at para 28).

[202] The conduct that is at issue in any particular case is the principal focus of the assessment at the second step of the three-step assessment contemplated by subsection 79(1), namely, the assessment of whether the respondent has engaged in or is engaging in a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*). The actual or likely effects of such conduct are then the focus of the third stage of the analysis, as contemplated by paragraph

79(1)(*c*), although they may also be relevant at the second stage, as discussed in the next section of these reasons. However, at the first stage of the analysis, the focus is upon the existence of dominance and whether the respondent substantially or completely controls throughout Canada or any area thereof, any class or species of business. At that stage of the analysis, the conduct "at issue" in a proceeding is not necessarily relevant.

[203] In this particular case, TREB submits that there is one or more relevant market(s) for the purposes of the analysis contemplated by paragraph 79(1)(*a*), namely, the market(s) for the supply of the principal components of the Disputed Data. That is to say, TREB submits that, for the purposes of paragraph 79(1)(*a*), there may be distinct relevant markets for the supply of information with respect to solds, "pending solds," WEST listings and the commissions of cooperating brokers. In any event, a separate assessment of the close substitutes for each of those types of information is required.

[204] In the Tribunal's view, it does not particularly matter for the purposes of the assessment contemplated by paragraph 79(1)(*a*) whether TREB controls what it characterizes as an "upstream input" to brokers, or the downstream market for the supply of MLS-based residential real estate brokerage services. If it controls or substantially controls either an upstream market or a downstream market, that is sufficient for the purposes of paragraph 79(1)(*a*).

[205] Nothing turns on this particular issue in this proceeding, as the Tribunal is satisfied, for the reasons explained below, that (i) there are no close substitutes for the supply of any of the principal components of the Disputed Data, (ii) TREB therefore controls the supply of those inputs to agents in the GTA, and, in any event, (iii) TREB controls the market for the supply of MLS-based residential real estate brokerage services.

[206] TREB submits that it would have to be dominant in one or more "upstream markets" for it to be dominant in the downstream market for the provision of residential real estate brokerage services.

[207] The Tribunal disagrees. If it is established that TREB has substantial or complete control of either an upstream market or the downstream market for the supply of MLS-based residential real estate services, that is the end of the matter, for the purposes of the assessment contemplated by paragraph 79(1)(*a*).

[208] Dr. Church proposed the "essential facilities" framework as being conceptually useful to determine the question of whether TREB substantially or completely controls a relevant market. In his view, one of the remedies sought by the Commissioner (i.e., the inclusion of the Disputed Data in TREB's VOW Data Feed) amounts to a mandated access to what the Commissioner must consider is an essential upstream input.

[209] Accordingly, he submitted that the framework advanced by the Bureau in the past with respect to essential facilities should be applied. As a first step in that framework, it must be established that the respondent is dominant in both the upstream and downstream markets

(*Submission by the Commissioner of Competition Before the Canadian Radio-Television and Telecommunications Commission – Telecom Notice of Consultation CRTC 2013-551 – Review of Wholesale Services and Associated Policies*, at footnote 7, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03655.html).

[210] The Tribunal questions whether it is necessary to establish, in an "essential facilities" case, that the respondent is dominant in both an upstream and a downstream market. The Tribunal does not wish to preclude the possibility that a demonstration could be made, in a particular case, that the respondent substantially controls a market for an upstream input, that it has engaged in a practice of anti-competitive acts in respect of that input, and that such practice has had, or is having the effect of preventing or lessening competition in a downstream market. This could include a downstream market in which the respondent is a new entrant or, in any event, a competitor that is not yet able to exercise market power in that market.

[211] It is not necessary to resolve this issue in this proceeding, because the Tribunal agrees with the Commissioner, Dr. Vistnes and Dr. Flyer that this is not an "essential facilities" case.

[212] In brief, this is not a case in which an upstream input supplier is denying customers *access* to an input. TREB's Members already have access to the Disputed Data through TREB's Stratus system. Rather, the withholding of that information from TREB's VOW Data Feed, and the rules that restrict the manner in which TREB's Members can use and display that and other information, are what is at issue in this case. As Dr. Vistnes testified, TREB is simply saying to its Members "who have always had the information, you're not allowed to compete with it in this way" (Transcript, October 5, 2015, at p. 578).

[213] Accordingly, access is not the issue. As CREA recognized in its closing submissions, the issue is how the Disputed Data is made accessible to TREB's Members.

(b) *The supply of the Disputed Data*

[214] Dr. Church's focus for the purposes of paragraph 79(1)(*a*) was upon the upstream supply of the Disputed Data. He submitted that the Tribunal's focus ought to be on whether there are close substitutes for the Disputed Data. He then proceeded to identify several potential substitutes for the Disputed Data.

[215] For Dr. Church, the analysis of substitution depends upon whether the consumer is in the search phase or the valuation/offer phase of the home selling/buying process.

[216] He suggested that, at the search phase, consumers become informed about the market for homes. Among other things, they assess factors such as the relative characteristics of different communities, the relative values of homes in those communities, the relative values of different home characteristics, and price trends.

[217] By contrast, at the valuation/offer phase, home sellers and purchasers are much more advanced in their thinking and require information to, among other things, set the actual price of their home, or establish the price they are willing to offer for a home.

[218] By the time they reach that more advanced phase of the process of selling or purchasing a home, the vast majority of home sellers and buyers will have retained the services of an agent, who is able to supply them with the Disputed Data, which the agent will have obtained from TREB through the Stratus system. (As discussed at paragraph 364 below, there is persuasive evidence that there is a widespread practice among TREB's Members of providing Disputed Data to consumers in various ways other than through a VOW, such as in person, by fax or by email). Therefore, Dr. Church and TREB maintain that, at the valuation/offer phase, the existing source of the Disputed Data (i.e., TREB's Stratus system) provides a close substitute for potential purchasers and sellers of homes, as they are easily able to obtain that information from their agent.

[219] TREB and Dr. Church therefore submit that making the Disputed Data available over TREB's VOW Data Feed would, at most, only be useful to *potential home sellers and home buyers* at the initial search phase, when they are seeking a general ballpark sense of the value of a home.

[220] At this search phase, Dr. Church maintains that there are many substitutes for the Disputed Data, even though those substitutes do not necessarily provide entirely the same data that would be available through TREB's VOW Data Feed, if the Disputed Data were included in that data feed. These substitutes allegedly include list prices, and information available from Teranet Inc. (**"Teranet"**), the Municipal Property Assessment Corporation (**"MPAC"**), brokers, appraisers and other innovative data-sharing vehicles.

(i) List prices

[221] Dr. Church submitted that list prices are very good substitutes for sold and "pending sold" listings because they incorporate market information relevant to the search phase and there is a very stable relationship between list prices and sales prices. Based on an analysis that Dr. Church conducted of GTA area data, he found that list prices maintain a relationship of an average of 95% of sold prices over time. He inferred from this that the distribution of list prices is a good substitute for the distribution of sold prices. Accordingly, he suggested that list price information provides essentially the same information that consumers would extract at the search phase from the Disputed Data if it were available on an agent's VOW. In other words, information regarding the average list prices of homes in particular communities would enable potential purchasers and sellers of homes to obtain a good sense of the relative values of homes in those communities, the relative values of different home characteristics, and price trends.

[222] The Tribunal does not accept that list prices of homes in any particular community are a good substitute for information pertaining to "solds" and "pending solds" in that community. Among other things, while information pertaining to the *average* list prices of homes in the GTA or even in a community within the GTA, having a particular set of characteristics, may enable

potential purchasers and sellers of homes to estimate the *average* selling prices of homes in that area that have those characteristics, such information will not assist buyers and sellers to estimate the value of the specific homes in specific neighbourhoods that they may find to be of potential interest. This is particularly so where the homes that are in their initial set of comparators have materially different characteristics from each other (as can frequently be the case), where communities have different types of homes (e.g., detached/semi-detached, three bedroom/four bedroom, homes near busy streets/quiet streets, etc.) or where sellers deliberately undervalue their home, in an effort to generate a "bidding war."

[223] More importantly, data with respect to average list prices in the GTA or in specific communities therein isn't a good substitute for "solds" or "pending solds" for innovative *agents* who want to be able to better compete with traditional agents, e.g., by preparing innovative forms of analysis or more accurate estimates of home prices than can be obtained by using a statistic such as 95% of the average list prices of homes in the GTA or a particular community.

[224] Similarly, the fact that *consumers* are able obtain information with respect to "solds" and "pending solds" directly from an agent, either in person, by fax or by email at the valuation/offer phase does not assist innovative *agents* who would like to be able to access such information over TREB's VOW Data Feed, and then provide it to their customers through products and services offered over the Internet.

(ii) Teranet, MPAC, brokers and appraisers

[225] Dr. Church also suggested that historical and current data with respect to sold prices is available from other sources, such as Teranet; MPAC; large real estate brokerages like Royal LePage, Century 21 and RE/MAX; and firms that provide appraisal services, such as Zoocasa and Centract Settlement Services (now Brookfield RPS).

[226] According to Dr. Church, Teranet is in the business of selling reports and analysis derived from Ontario's Land Registration System. In this regard, he noted that it runs a service called GeoWarehouse, which describes itself as a "web-based, centralized, property information source that provides state-of-the-art mapping and research tools, as well as professional reports." Based on information that it is able to access from the Land Registration System, GeoWarehouse has the potential to offer real estate agents and others access to sold information on particular homes, dating back many years. This includes sold prices of homes that were sold as recently as 60-90 days ago. In his 2012 expert report, Dr. Church hypothesized that there is nothing to suggest that any industry participant cannot contract with Teranet to be able to obtain and use information with respect to the sold prices of homes. He maintained this position at the Redetermination Hearing.

[227] Likewise, Dr. Church noted that MPAC's mandate includes providing property owners and business stakeholders with consistent and accurate property assessments, based on the recent sales prices of comparable properties. In his testimony, he maintained that MPAC is an alternative to MLS information with respect to sold prices. While acknowledging that the "raw

data" may not be the same, he maintained that the content is sufficiently similar to constitute a good substitute for the supply of the Disputed Data from TREB.

[228] Dr. Church added that TREB currently provides its Members with access to Teranet and MPAC information through "portals" that it has specifically purchased for TREB's Members. However, neither Dr. Church nor TREB referred to any evidence which demonstrates that any agents actually source sold information from Teranet or MPAC, particularly as a substitute for MLS information.

[229] Dr. Church also suggested that there is a *potential* for large brokerages and corporate franchisors to self-supply information with respect to sold prices. In his 2012 expert report, he estimated that the top five such brokerages/franchisors collectively accounted for over 70% of the transactions in the GTA in 2011, and he speculated that such entities *could* compile or *might be able to* provide data that is statistically representative of the MLS sold data that is more broadly available through Stratus. To ascertain whether an agent might be able to make reasonable price estimates based only on **[CONFIDENTIAL]** internal data, relative to using the full MLS Database, he estimated two sets of simple hedonic price regressions on data for detached homes that sold between January 2007 and December 2011. He concluded that his analysis implied that **[CONFIDENTIAL]** data are a good substitute to the "full" MLS data, not just for **[CONFIDENTIAL]** own listings, but for all listings in the communities in question.

[230] However, based on the following evidence, which the Tribunal accepts, the Tribunal is satisfied that information available from Teranet/GeoWarehouse, MPAC and large brokerages/franchisors cannot be considered to be a good substitute for MLS sold information that the Commissioner submits should be available over TREB's VOW Data Feed.

[231] After assessing each of the above-mentioned potential substitutes for the Disputed Data, Dr. Vistnes concluded that none of them are good substitutes for the Disputed Data, and that there is no other alternative source for this information.

[232] With respect to Teranet/GeoWarehouse, Dr. Vistnes noted the following:

a. It does not currently allow the data that it makes available to TREB's Members to be "republished" by brokers, whether on their VOWs or otherwise;

b. It has demonstrated an unwillingness to enter into new contracts with brokers that would allow "republication" of that information on brokers' websites. This was corroborated by Mr. Enchin, who referred to his request to obtain square footage information, and stated that Teranet left him with "the clear impression that they were very reluctant to sell [him] this information" (Exhibit A-021, Reply Witness Statement of Mark Enchin dated August 17, 2012, at para 11);

c. It has not made its sold listings available to others in the real estate industry, such as ZooCasa;

d. The fact that Teranet charges TREB **[CONFIDENTIAL]** per year for its Members' access to the very limited scope of data available through its GeoWarehouse product, suggests that brokers might incur substantial costs to gain access to Teranet's sold data. This is further corroborated by the fact that Teranet's representatives apparently told Mr. Enchin that one or two data fields could cost as much as $5 per property, which would work out to approximately $37,500 per month (or $450,000 per year) to display information on 7,500 new sold listings per month;

e. The data available on GeoWarehouse is not as up-to-date as the information available on the MLS system. In addition to the medium time lag of over seven weeks from the time a home is sold to the time the sale agreement closes, it takes an additional 10-14 days before sold data is available to users of GeoWarehouse;

f. Even if Teranet had comprehensive sold data that it was willing to provide at minimal cost, brokers would still face costs associated with integrating that data into their VOWs; and

g. Teranet does not have the same extent of information that appears in the MLS system (e.g., days on the market, original price and price changes).

[233] With respect to MPAC, Dr. Vistnes noted that Dr. Church provided no evidence that MPAC can provide comprehensive information, that it would be willing to provide such data, that it would be willing to do so at a price brokers pay for the same information from the MLS system, or that the data would be timely, reliable and capable of being integrated into brokers' VOWs. He added that because much of MPAC's data appears to be derivative of Teranet's data, many of the same reasons that Teranet/GeoWarehouse would be a poor substitute for the information available from TREB's MLS system, would apply to MPAC.

[234] Dr. Vistnes' evidence with respect to Teranet/GeoWarehouse and MPAC is consistent with the evidence provided by several of the Commissioner's lay witnesses, who also maintained that there are no good substitutes to TREB's MLS system for information regarding sold listings or other Disputed Data, whether from Teranet/GeoWarehouse, MPAC or elsewhere. This includes the following evidence:

a. Mr. Hamidi indicated that Stratus and GeoWarehouse are weak and inflexible technologies that require agents to perform a lot of work in order to make sense of the information. He stated that with a complete data feed from TREB, TheRedPin "could put all of the information from several sources together, seamlessly and in innovative ways for [its] agents and [its] customers and not be limited by the information and pre-packaged format of Stratus and Geowarehouse" (Exhibit A-013, Witness Statement of Shayan Hamidi dated June 22, 2012 (**"2012 Hamidi Statement"**), at para 51);

b. **[CONFIDENTIAL]** Elsewhere, Mr. McMullin stated that there is no comprehensive source of information for residential properties for sale and sold, other than TREB's MLS system. He noted that, among other things, Teranet does not even have information with respect to sold data (except for sold prices, though Mr. McMullin understands that there is a time lag), "pending solds," WEST listings, and other status changes that are vital to

ViewPoint's value proposition. At the Redetermination Hearing, he added that Teranet representatives "were not willing to license the sales data they had or have in their possession" (Transcript, September 22, 2015, at p. 102);

c. In addition to the evidence discussed at paragraphs 232-233 above, Mr. Enchin stated that Teranet and MPAC do not have information with respect to "pending solds" and that their sold information is not as up to date and therefore not as useful to realtors and their customers as data in a real estate board's MLS system; and

d. Mr. Prochazka testified that he attempted to obtain information from Teranet on at least two occasions but never heard back from them.

[235] With respect to the potential for large brokerages and corporate franchisers to "self supply" sold data, Dr. Vistnes once again disagreed with Dr. Church. In this regard, he noted that even the largest franchises and brokerages would have only limited sold listings, i.e., only their own sold listings. By way of example, he estimated that by relying solely on sold information from its own listings, **[CONFIDENTIAL]** would lose access to approximately 70 percent of sold listings in the GTA. Smaller brokerages would have even less coverage of the market. He further observed that this possibility of "self supply" was mere speculation.

[236] Turning to appraisers, Dr. Vistnes noted that they do not collect all of their own information, but instead rely on the same data sources that brokers rely upon, including the MLS system, Teranet and MPAC. Insofar as the MLS system is concerned, it is not realistic to believe that appraisers would be able to obtain the same Disputed Data that TREB is prohibiting its Members from displaying on their VOWs. Likewise, there is no reason to believe that appraisers would be any more successful than brokers/agents have been at obtaining sold information from Teranet/GeoWarehouse and MPAC.

[237] With respect to the possibility that the websites operated by brokers offering FSBO services might be a possible source of supply of sold information to other brokers/agents, Dr. Vistnes appropriately noted that FSBO sales appear to constitute a small share of all sales in the GTA, and thus would be unable to provide much coverage of the market.

[238] In summary, based on the evidence discussed above, the Tribunal accepts Dr. Vistnes' conclusion that Teranet's GeoWarehouse, MPAC, large brokerages and other sources are not good substitutes for the sold information that is available on TREB's MLS system. Moreover, if Teranet's GeoWarehouse or MPAC were acceptable substitutes for the sold information that is available on TREB's MLS system, one would expect to see at least some brokers sourcing sold information from one or both of those sources, instead of sourcing exclusively from the MLS system. TREB provided no evidence that this is occurring or ever has occurred to any meaningful degree in the GTA. The same is true with respect to the potential for brokerages to self-supply, or to share their "sold data" between themselves, and with respect to the proposition that sold information available on the websites of brokerages offering FSBO services are an acceptable substitute for the MLS sold information that is available from TREB.

[239] Dr. Church also observed that innovative agents can obtain information with respect to "solds" the same way that other agents obtain that information. However, the Tribunal accepts the evidence provided by Dr. Vistnes and certain innovative agents, who stated that there are no good substitutes for obtaining the Disputed Data, whether over the Stratus system or otherwise. Specifically:

a. Mr. Pasalis stated that the information that TREB currently makes available to its Members (including over the Stratus system) requires agents to engage in a time consuming and costly manual process of assembling and uploading sold information to their websites. He added that this process is prone to human error, and that this can undermine the reliability of the analysis produced. If sold information were available in TREB's VOW Data Feed, Realosophy "could automate the assembly of the information, reduce [its] costs, eliminate human error, and ensure that the information [its] agents are relying on is as up-do-date as possible" (Exhibit A-120, Second Witness Statement of John Pasalis dated February 2, 2015, at para 11);

b. Mr. McMullin stated that the VOW Data Feed offered by TREB lacks content and that without an ability to access all of the MLS data through an efficient means, ViewPoint has "no realistic basis for competing effectively" in the GTA (Exhibits A-100 and CA-099, Second Witness Statement of William McMullin dated February 5, 2015 (**"2015 McMullin Second Statement"**), at paras 49-50). Mr. McMullin testified that ViewPoint, "to do [its] business, [requires] the data in both real-time through a data feed which use [sic] as [sic] protocol known as RETS, Real Estate Transaction Standard, and also in the bulk format" (Transcript, September 11, 2012, at pp. 246-247); and

c. Dr. Vistnes stated that "since brokers cannot practically turn to other equivalent sources of information regarding the excluded data fields, brokers are effectively prevented from providing that information on their VOWs." He added that "to the extent that substitution is possible, it would be to an inferior, more costly, alternative" (Exhibits A-136 and CA-137, Reply Expert Report of Dr. Greg Vistnes dated August 4, 2015 (**"2015 Vistnes Reply Expert Report"**), at pp. 9 and 13). Elsewhere, he observed that by being unable to offer the Disputed Data over a VOW, "brokers must incur the costs of serving as an information intermediary in which consumers ask for particular information, the broker conducts the necessary search, and then the broker transmits the information via a phone call, email or fax to the consumer" (Exhibits A-138 and CA-135, Expert Report of Dr. Greg Vistnes dated February 6, 2015, at p. 6).

(iii) Other innovative vehicles

[240] TREB also submitted that it has a demonstrated history of innovation and that VOWs are simply one tool that real estate professionals can use to deliver real estate services over the Internet. CREA makes a similar argument. According to TREB, another effective tool is the centralized Internet Data Exchange (**"IDX"**) program that it launched in January 2010. That program enables brokers who participate in the IDX to advertise each other's listings on their respective websites. This effectively creates a large pool of shared listings. Participation is optional and reciprocal and, according to TREB, over 90% of its Members have subscribed to its IDX program, which is quicker, easier and less expensive to operate than a VOW.

[241] However, the Tribunal understands that IDXs cannot show *any* of the Disputed Data fields.

[242] The same is also true for other Internet-based data-sharing vehicles such as CREA's IDX, realtor.ca (a public website operated by CREA), or CREA's data distribution facility (**"DDF"**). Realtor.ca was developed by CREA and displays for free active listings from across the country. The information found on realtor.ca is a subset of listing content from MLS systems across the country. The website does not display the Disputed Data and does not require registration. Likewise, the Tribunal understands that the information available through DDF does not include the Disputed Data.

[243] Dr. Church further suggested that any attempt by TREB to exercise market power in respect of the Disputed Data might elicit a supply-side response similar to what has occurred in the United States. He noted that there are three suppliers of national assessor and recorder bulk data in that country (CoreLogic, RealtyTrac and Black Knight), as well as several additional regional suppliers, which have commercialized their real estate data, including by licensing data to provide automated valuation models, home price indexes, or to power consumer-facing tools. He suggested that the popularity of valuation tools and information on search portals suggests that MLS-sourced "sold" price information is unlikely to be *uniquely* useful.

[244] In this latter regard, Dr. Church noted that the most visited real-estate websites in the United States are search portals, namely, realtor.com, Zillow and Trulia. He observed that the latter two entities obtain their data on sold prices from non-MLS sources, including public records, and display that data to the public on their websites. He asserted that there is no evidence that any of these websites are perceived by *consumers* to be less valuable or useful than VOW sites using MLS-sourced information such as the Disputed Data.

[245] The Tribunal finds three principal shortcomings with these submissions. The first is that they are speculation. They are simply assertions that are not supported by any evidence that any of these U.S. entities has ever considered expanding into Canada, notwithstanding that TREB has consistently refused to provide the Disputed Data over its VOW Data Feed for several years. The second shortcoming is that Dr. Church did not indicate where those potential entrants would obtain information with respect to the sold prices of homes in the GTA. Finally, Dr. Church's

arguments are focused on consumers, rather than agents, particularly innovative agents who would like to be able to disrupt the market by offering the Disputed Data over a VOW.

[246] Dr. Church further maintains that concrete conclusions regarding the availability of substitutes to MLS information, including the Disputed Data, cannot be based on what can be currently witnessed in the market, because MLS information "may actually be priced at an infra-competitive level, consistent with TREB's non-profit status on non-commercial pricing" (Exhibits R-079 and CR-080, Expert Report of Dr. Jeffrey Church dated July 27, 2012, at para 222). He refers to this as a "reverse cellophane problem." In this regard, he notes that TREB's Members pay an annual membership fee that provides access to many resources and benefits, only one of which is access to the MLS system. According to Mr. Richardson, TREB's brokers and salespersons pay annual membership dues of $611.80, as well as an initiation fee ($4,960 for businesses and $460 for individuals) that, in part, reflects the fact that new Members gain access to the information that has been "built up over years" in TREB's MLS Database (Exhibits R-141 and CR-142, Updated Witness Statement of Donald Richardson (**"2015 Richardson Statement"**), at paras 11-12).

[247] In this context, Dr. Church observes that the marginal access price of the MLS system is zero. He suggests that other potential suppliers of sold information *might* begin to make that information available to agents, if TREB were to increase the price of MLS access beyond a competitive level.

[248] The Tribunal does not consider it necessary or appropriate to speculate upon what might happen if TREB were to exercise a different form of market power (increasing the price of MLS access) than those alleged in this application (i.e., withholding of the Disputed Data over its VOW Data Feed, restrictions on how the data from the VOW Data Feed may be used, and the prohibition of the display of Disputed Data). The question is whether the latter conduct constitutes a practice of anti-competitive acts that has had, is having or is likely to have the effect of preventing or lessening competition substantially in the market for the supply of MLS-based residential real estate brokerage services. For the purposes of answering that question, it is not necessary to engage in the exceptionally difficult exercise that would be required to ascertain what the economically "competitive" price of access to MLS information is or should be.

[249] Dr. Church also speculates that the fact that commercial supply of sold information does not currently exist *could* reflect a lack of *consumer demand* for such data. However, once again, this fails to recognize that the focus of this application is upon whether there is significant *agent demand* for this information, and, if so, whether TREB's withholding of that information from the VOW Data Feed, together with the other VOW Restrictions, meets the requirements of paragraphs 79(1)(*b*) and (*c*) of the Act. Moreover, the evidence in the record suggests that wherever sold information is not arbitrarily restricted from display over the Internet, that information is obtained by brokers and made available to potential home buyers and sellers over the Internet. For example, this is the case in the Halifax Regional Municipality (**"HRM"**) of Nova Scotia, where ViewPoint has availed itself of this opportunity. The same is true in a large number of U.S. states, where Redfin has done the same. Mr. Prochazka's AVP also used the sold data provided by the boards in Edmonton and three jurisdictions in British Columbia before its

access to such information was discontinued around 2008-2010. He testified that he "pressed them for a long time, for over a year, to give [the sold data] back to [them]" (Transcript, September 18, 2012, at p. 933).

[250] In summary, for the reasons discussed above, the Tribunal concludes that there are no acceptable substitutes for the sold information in the MLS system. In addition, neither Dr. Church nor TREB provided any persuasive evidence to demonstrate that there are acceptable substitutes for the other components of the Disputed Data, namely, "pending solds," WEST listings and cooperating broker commissions.

[251] Accordingly, even if, as suggested by Dr. Church, it were necessary to define markets in which the Disputed Data, or the distinct components thereof, is supplied, the Tribunal would conclude there are no acceptable substitutes for the Disputed Data, in aggregate or individually, and that therefore TREB substantially or completely controls one or more markets for the supply of those inputs.

[252] However, it is not necessary to define such markets, because as discussed below, the Tribunal is satisfied that TREB controls the market for the supply of MLS-based residential real estate brokerage services.

(c) ***The supply of MLS-based brokerage services***

[253] As noted at paragraph 198 above, the Commissioner submits that TREB controls the market for the supply of MLS-based residential real estate brokerage services because it controls how its Members compete through its rule-making ability. In brief, the Commissioner contends that TREB controls access to the MLS system; it has the ability to discipline Members who do not follow its rules, including by withdrawing their access to the MLS system; it has imposed such discipline in the past; and it can and does insulate its Members from competition by excluding the innovative products of actual or potential competitors who threaten to disrupt the *status quo*.

[254] The Tribunal agrees for the following reasons:

a. To obtain and maintain access to the MLS system, TREB's By-Laws (the **"By-Laws"**) prescribe that TREB's Members must execute and agree to be bound by TREB's MLS Rules and Policies as well as its AUA (By-Laws at Article 2, s. 3.01(a));

b. In the event that a Member breaches the terms of the AUA and its breach is not cured within two weeks after receipt of a notice from TREB, the latter may terminate the AUA pursuant to s. 12(a) of the AUA;

c. Such action would effectively terminate a Member's access to the MLS system;

d. Members' access to the MLS system, and indeed their membership in TREB, can also be terminated if they breach TREB's MLS Rules and Policies (By-Laws at Article 3, s. 4.02(f));

e. TREB's MLS Rules and Policies establish a detailed code "for the orderly, competitive and efficient operation of TREB's MLS System" (MLS Rules and Policies, Introduction, at p. 1). Among other things, that code establishes rules that: regulate the solicitation of home buyers and sellers who have signed exclusive agreements with another Member; mandate the type of information that must or may be uploaded to the MLS system and when information must be posted to that system; mandate when listings on the MLS system must be available for showings, inspections and registration of offers; regulate and limit certain aspects of property advertising that are not covered by RECO's rules pertaining to advertising; regulate the reporting of transactions; limit when offers of commissions to cooperating agents can be altered; and restrict what information may be displayed on a Member's VOW, as well as the conditions under which a consumer may search for or retrieve any listing information on a Member's VOW;

f. Pursuant to the AUA, TREB's Members agree, among other things, to access and use the MLS Database and other services provided by TREB in accordance with the AUA and only in the manner and for the purpose expressly specified in the AUA;

g. Messrs. Pasalis, McMullin and Enchin testified that access to the MLS system is critical to providing residential real estate brokerage services. This was not disputed by TREB, although it represented that an unspecified number of agents/brokers in the GTA are not Members of TREB, which now has approximately 42,500 Members;

h. TREB has described the MLS system as "one of the most important tools used by virtually every REALTOR" (Exhibit A-004, Document 382, at p.1);

i. Dr. Vistnes noted that a board's MLS system was described on a CREA-sponsored website as "the single most powerful tool for buying and selling a home" (Exhibits A-030 and CA-029, Expert Report of Dr. Greg Vistnes dated June 22, 2012 (**"2012 Vistnes Expert Report"**), at para 148);

j. In 2006, CREA reported that approximately 87% of home buyers and 89% of home sellers in Toronto used the services of a realtor during their last home transaction in 2005 or 2006 (Exhibit A-004, Document 869, at pp. 42 and 50);

k. Dr. Vistnes, whose testimony on this point the Tribunal accepts, stated: "Without access to the MLS the broker effectively cannot compete in the market." Dr. Vistnes added that "because [TREB] controls access to the MLS … it's effectively dictating the rules under which brokers are allowed to compete and not compete. It's dictating whether they can compete and it's dictating the forum in which they can compete" (Transcript, October 5, 2015, at pp. 458-459);

l. Dr. Vistnes also stated: "Consumers expect their broker to have access to the MLS: absent MLS access, buy-side brokers will be unable to show prospective clients the full range of homes available for sale or provide all the information about those homes, and sell-side brokers will be unable to expose the seller's home to the full range of buyers" (Exhibits A-032 and CA-031, Reply Expert Report of Dr. Greg Vistnes dated August 23, 2012 (**"2012 Vistnes Reply Expert Report"**), at para 23);

m. TREB has demonstrated its willingness to terminate a Member's access to the MLS. For example, in 2007, it terminated the access of Mr. Fraser Beach, who was the broker of record for BNV Real Estate Inc. ("**BNV**"); and when BNV later partnered with RRE, TREB terminated the latter's access. This was not disputed by TREB. More recently, in October 2014 and February 2015, TREB threatened to stop providing MLS access to Members who were violating its VOW Policy and Rules or its AUA; and

n. TREB has effectively prevented some innovative brokers who wish to enter or expand within the market for MLS-based supply of residential real estate brokerage services, based on an innovative VOW-based business model, from doing so.

[255] The Tribunal observes that the Ontario Superior Court of Justice reached a similar conclusion as Dr. Vistnes in 2009 when it noted that it was a "practical reality of the market that a realtor who wishes to trade in resale residential properties in the GTA requires access to the MLS Database to carry on an effective business and, therefore, needs to be a member of TREB" (*Beach v Toronto Real Estate Board*, [2009] OJ No 5227 (***"TREB OSCJ"***) at para 10). On appeal, the Ontario Court of Appeal noted that without access to TREB's MLS system, the appellant "was not able to carry on business as a real estate broker" (*Beach v Toronto Real Estate Board*, [2010] OJ No 5541 (***"TREB OCA"***) at para 3).

[256] TREB maintains that it does not substantially or completely control the Relevant Market for several reasons. These include a number of legal arguments that were addressed and rejected at paragraphs 175-190 of these reasons.

[257] In addition to those arguments, TREB states that it has no financial or other interest in how competition occurs among its Members. In oral argument, this was put in terms of TREB having no "horse in the race" (Transcript, November 2, 2015, at p. 1270). TREB adds that its governance structure provides a constraint on the exercise of any market power that TREB could have or might otherwise wish to exercise against its Members.

[258] However, TREB's mission is to act for the benefit of its Members. This includes acting in ways that its Board of Directors, all of whom are licensed and practising brokers/agents in the GTA, direct it to act, whether it be to insulate them from new and disruptive forms of competition, or otherwise.

[259] In this context, the Tribunal is satisfied that TREB does indeed have an interest in how competition occurs among its Members, and does indeed have a "horse in the race," namely, the Members whose success TREB pursues as its "core purpose" (2015 Richardson Statement, at para 5). The Tribunal is also satisfied that TREB can and does exercise the substantial market power that it derives from its control over access to the MLS system, as well as under the terms of the By-Laws, the MLS Rules and Policies, and the AUA, for the benefit of its traditional

brokers, who comprise the vast majority of TREB's membership. As noted by Dr. Vistnes, TREB's control of the MLS system "gives TREB the opportunity to dictate who can compete and who cannot compete, and that provides it with significant market power" (Transcript, October 5, 2015, at p. 458).

[260] The Tribunal also agrees with the following observation made by Dr. Vistnes:

> As long as TREB serves as a vehicle through which its members can act to promote their own self-interest, TREB's conduct can be expected to largely mimic those members' collective preferences. Thus, from an economic perspective, it does not matter that TREB uses its market dominance to benefit its members rather than itself (…).
>
> (2012 Vistnes Reply Expert Report, at para 28)

[261] TREB asserts that paragraph 79(1)(*a*) of the Act "is directed at determining whether a firm has substantial or complete control over a market, not whether a firm controls *how competition occurs* in a market" (TREB's 2012 Closing Submissions, at para 199). The Tribunal disagrees. The wording in paragraph 79(1)(*a*) is sufficiently broad to bring within its purview situations where a firm controls *how* competition occurs in a market. There is nothing in that wording, or in the scheme of the Act, to suggest otherwise.

[262] TREB also maintains that it cannot substantially or completely control the Relevant Market because it does not have the ability to set prices above competitive levels therein. However, the Tribunal finds that, through its ability to exclude disruptive innovators, including those who would like to become full-information VOWs, TREB has the ability to indirectly influence important non-price dimensions of competition in the supply of real estate brokerage services.

[263] TREB further suggests that it cannot substantially or completely control the Relevant Market because there are insignificant barriers to entry into the market, as evidenced by the large number of brokers who become Members of TREB each year.

[264] However, this misses the point. The source of TREB's substantial market power is its control over its MLS system and how information on that system can be used. As noted above, TREB's control over that system is reinforced by the By-Laws, by TREB's MLS Rules and Policies, and by the terms of the AUA. In this context, the potential entry that is relevant is the entry of a competing MLS system, not the potential entry of new Members. The Tribunal accepts Dr. Vistnes' evidence that, due to the important network effects associated with TREB's MLS system, the entry of a competing MLS system "is extremely unlikely" (2012 Vistnes Reply Expert Report, at para 23). The Tribunal also accepts that even in a market with a large number of competitors, a dominant firm can engage in conduct that "results in a market that is less competitive than it would have been otherwise" (2015 Vistnes Reply Expert Report, at p. 6).

[265] Finally, TREB submits that its ability to exercise market power is constrained by innovative forces in the Relevant Market. In this regard, TREB notes that its Members "are eager adopters of new technology generally, and of VOWs in particular" (TREB's 2015 Closing Submissions, at para 210). It adds that hundreds of member firms, representing the substantial majority of its salespersons and broker Members, are subscribed to its IDX feed and that over 300 Members have subscribed to its VOW Data Feed.

[266] However, notwithstanding these developments in the market, the Tribunal is satisfied that the evidence demonstrates, on a balance of probabilities, that TREB substantially or completely controls the Relevant Market through its control over its MLS system and how information on that system can be used.

(4) Area of Canada

[267] As noted at paragraph 164 above, the Tribunal has consistently interpreted the words "throughout Canada or any area thereof" to mean the geographic dimension of the relevant market in which the respondent is alleged to have "substantial or complete control." For the reasons discussed at paragraphs 153-161 above, the Tribunal considers it appropriate to define the geographic dimension of the market as extending throughout the GTA.

(5) Conclusion

[268] For the reasons set forth above, the Tribunal thus concludes that the Commissioner has demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*a*) are met and that TREB substantially or completely controls, throughout Canada or any area thereof, a class or species of business, namely, the market for the supply of MLS-based residential real estate brokerage services in the GTA.

C. *Has TREB engaged in, or is it engaging in, a practice of anti-competitive acts?*

[269] The Tribunal will therefore turn to the third issue to be determined in this proceeding. This is whether TREB has engaged in, or is engaging in, a practice of anti-competitive acts, as contemplated by subsection 79(1)(*b*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that TREB has engaged and continues to engage in a practice of anti-competitive acts, namely, the VOW Restrictions. In that regard, the Tribunal concludes that the evidence of TREB's subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweighs the evidence provided in support of its asserted legitimate business justifications.

(1) Analytical framework

(a) *The purpose-focused assessment*

[270] The second element of the Canadian abuse of dominance provision is the “abuse” dimension of the conduct contemplated by section 79. Pursuant to paragraph 79(1)(*b*), this is expressed in terms of whether the person or persons in question have engaged or are engaging in a “practice of anti-competitive acts.”

[271] Almost two decades ago, the Tribunal observed that “distinguishing between competition on the merits and anti-competitive conduct … is not an easy task” (*Tele-Direct* at p.179). That remains as true today as it was then. However, an analytical framework has gradually emerged.

[272] The Federal Court of Appeal dealt extensively with this element in *Canada Pipe FCA*. As a result, it is now settled law that the focus of the assessment under paragraph 79(1)(*b*) of the Act is upon the purpose of the impugned practice, and specifically upon whether that practice was or is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor (*Canada Pipe FCA* at paras 67-72 and 77).

[273] The term “practice” in paragraph 79(1)(*b*) is generally understood to contemplate more than an isolated act, but may include an ongoing, sustained and systemic act, or an act that has had a lasting impact on competition (*Canada Pipe FCA* at para 60). In addition, different individual anti-competitive acts taken together may constitute a “practice” (*NutraSweet* at p. 35).

[274] In this context, subjective intent will be probative and informative, if it is available, but it is not required to be demonstrated (*Canada Pipe FCA* at para 70; *Laidlaw* at p. 334). Instead, the Tribunal will assess and weigh all relevant factors, including the “reasonably foreseeable or expected objective effects” of the conduct, in attempting to discern the “overall character” of the conduct (*Canada Pipe FCA* at para 67). In making this assessment, the respondent will be deemed to have intended the effects of its actions (*Canada Pipe FCA* at paras 67-70; *Nielsen* at p. 257).

[275] It bears underscoring that the assessment is focused on determining whether the respondent subjectively or objectively intended a predatory, exclusionary or disciplinary negative effect on a competito<u>r</u>, as opposed to on competiti<u>on</u>. While adverse effects on competition can be relevant in determining the overall character or objective purpose of an impugned practice, it is not necessary to ascertain an actual negative impact on competition in order to conclude that the practice is anti-competitive, within the meaning contemplated by paragraph 79(1)(*b*). The focus at this stage is upon whether there is the requisite subjective or objective intended negative impact on one or more competitors. An assessment of the actual or likely impact of the impugned practice on competition is reserved for the final stage of the analysis, contemplated by paragraph 79(1)(*c*) (*Canada Pipe FCA* at paras 74-78).

[276] To the extent that past pronouncements of the Tribunal may have suggested that it is *necessary* for an adverse impact on competition be demonstrated before it can be concluded that impugned conduct is anti-competitive within the meaning of paragraph 79(1)(*b*), (e.g., *Canada Pipe CT* at para 171; *Nielsen* at p. 257; *Laidlaw* at p. 333), they should be disregarded. However, to the extent that those cases held that an adverse impact on competition can be relevant to the assessment of the overall character or objective purpose of an impugned practice, they remain good law (*Canada Pipe FCA* at paras 74-79).

[277] Likewise, although past jurisprudence may have suggested that it is necessary to demonstrate the requisite negative impact on a direct competitor of the respondent, it is now clear that this is not the case. The meaning of the word *competitor* in the phrase “predatory, exclusionary or disciplinary negative effect on a *competitor*” means *a person who competes in the relevant market, or who is a potential entrant into that market*. It does not mean *a competitor of the respondent* (*TREB FCA* at paras 17-20).

[278] Accordingly, a trade association may be found to have engaged in a practice of anti-competitive acts if those acts are found to have been intended, subjectively or objectively, to have a predatory, exclusionary or disciplinary negative effect on one or more persons who compete in the relevant market, or who would like to enter that market. The same is true of an entity situated upstream or downstream from the relevant market.

[279] However, before a practice engaged in by a respondent who does not compete in the relevant market can be found to be *anti-competitive*, the Commissioner will be required to satisfy the Tribunal that the respondent has a plausible *competitive interest* in the market.

[280] In the case of a trade association, this may be as straightforward as demonstrating that it has a plausible interest in protecting some or all of its members from new entrants or from smaller disruptive competitors in the market. In such circumstances, the complete or partial exclusion of potential or actual competitors or new products will be assessed in essentially the same way as similar conduct engaged in by a joint venture (see, for example, Herbert Hovenkamp, “Exclusive Joint Ventures and Antitrust Policy,” (1995) *Columb Bus L Rev* 1 at pp. 64-66).

[281] In the case of an entity that is upstream or downstream from the relevant market, this may involve demonstrating that the entity has a plausible competitive interest that is different from the typical interest of a supplier in cultivating downstream competition for its goods or services, or the typical interest of a customer in cultivating upstream competition for the supply of the goods or services that it purchases. Among other things, this will ensure that garden-variety refusals to supply or other vertical conduct that has no link to a plausible competitive interest by the respondent in the relevant market will not be mistaken for the type of anti-competitive conduct that is contemplated by paragraph 79(1)(*b*).

[282] For greater certainty, if a respondent, who is a dominant supplier to, or customer of, participants in the relevant market, is found to have no plausible competitive interest in adversely impacting competition in the relevant market, other than as described immediately above, its

practices generally will not be found to fall within the purview of paragraph 79(1)(*b*). This is so regardless of whether that entity's conduct might incidentally adversely impact upon competition. For example, an upstream supplier who discontinues supply to a customer because the customer consistently breaches agreed-upon terms of trade typically would not be found to have engaged in a practice of anti-competitive acts solely because that customer is no longer able to obtain supply (perhaps because of its poor reputation) and is forced to exit the market, or becomes a weakened competitor in the market.

[283] In any event, there must be evidence linking an impugned practice to the requisite subjectively or objectively intended negative effect on a competitor. Where such an effect has already occurred, it must be demonstrated that the practice caused or contributed to those effects (*Canada Pipe FCA* at para 78).

[284] However, the required anti-competitive purpose can also be demonstrated from evidence establishing that there was a subjective intent to engage in predatory behaviour against, to completely or to partially exclude or to discipline one or more competitors; or that one of these types of effects was a reasonably foreseeable consequence of the conduct.

(b) ***Weighing evidence of anti-competitive purpose and legitimate business justifications***

[285] In considering all of the relevant circumstances relating to the purpose of the impugned practice, a critical part of the Tribunal's assessment involves evaluating any legitimate business considerations that may be advanced by the respondent, and then *weighing* them against any predatory, exclusionary or disciplinary negative effects on firms participating in the market that it finds were subjectively intended or reasonably foreseeable (*Canada Pipe FCA* at para 67).

[286] The Tribunal emphasizes the weighing aspect of the assessment to underscore that the demonstration of a legitimate business justification does not necessarily provide an absolute defence to an allegation that an impugned practice is anti-competitive, within the meaning of paragraph 79(1)(*b*). Instead, "a business justification is properly employed to counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under 79(1)(*b*)" (*Canada Pipe FCA* at para 88).

[287] Where any predatory, exclusionary or disciplinary motivations are found to have played a more important role in the respondent's overall subjective intentions than one or more asserted legitimate business justifications, the overall character of the impugned practice typically will be found to have the anti-competitive purpose contemplated by paragraph 79(1)(*b*). Likewise, where it is determined that any predatory, exclusionary or disciplinary effects that are objectively deemed to have been intended outweigh one or more legitimate business justifications, the impugned practice typically will be found to have an anti-competitive purpose.

[288] As is the case for all components of section 79 of the Act, in conducting this balancing exercise, the Tribunal assesses the evidence on the "balance of probabilities" standard. The Tribunal notes that, in *FH v McDougall*, 2008 SCC 53 (**"*McDougall*"**), the Supreme Court held that there is only one civil standard of proof in Canada, a balance of probabilities. Speaking for a unanimous Court, Mr. Justice Rothstein further stated in his reasons that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45-46). He concluded by saying that, in all civil cases, "the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49). The Supreme Court reaffirmed this in *Tervita*, at paragraph 66.

[289] Therefore, in assessing the balancing test under paragraph 79(1)(*b*), the Tribunal must determine whether sufficiently clear, convincing and cogent evidence exists to demonstrate that the overriding purpose of the impugned practice was anti-competitive. If it is not satisfied that such evidence has been adduced, the Tribunal will conclude that this element has not been demonstrated by the Commissioner. The Tribunal considers this to be particularly important in section 79 cases, to avoid chilling unilateral conduct that is primarily motivated by legitimate business justifications, but may also be objectively expected to have some adverse impact on competition. That being said, while "sufficiently clear, convincing and cogent" evidence is required to meet the evidentiary burden on this weighing test, it is still the balance of probabilities standard of proof that applies.

[290] It is implicit in the foregoing that the existence of *some* business justification will not shield conduct that was principally motivated by predatory, exclusionary or disciplinary objectives, or that has predatory, exclusionary or disciplinary effects that are deemed to have been intended by the respondent.

[291] The Tribunal further observes that the balancing exercise contemplated above is not the type of quantitative assessment contemplated by the efficiency exception in section 96 of the Act. No similar exception or defense exists in section 79, for good reason: it would be much more difficult, and perhaps even completely intractable, in the section 79 context.

[292] Rather, the weighing exercise under paragraph 79(1)(*b*) involves determining whether there is clear and convincing evidence, quantitative or otherwise, that establishes that the actual or reasonably foreseeable predatory, exclusionary or disciplinary effects and/or subjective intent outweigh the efficiency or pro-competitive rationales of the respondent (*Canada Pipe FCA* at paras 73 and 88). In this exercise, the efficiency or pro-competitive benefits actually obtained or likely to be realized by the respondent can provide helpful and relevant evidence bearing on the respondent's intentions.

[293] In conducting this balancing exercise, the Tribunal will endeavour to ascertain whether, on a balance of probabilities, the actual or reasonably foreseeable anti-competitive effects are disproportionate to the efficiency or pro-competitive rationales identified by the respondent; or whether sufficiently cogent evidence demonstrates that the respondent was motivated more by

subjective anti-competitive intent than by efficiency or pro-competitive considerations. In other words, even where there is some evidence of subjective anti-competitive intent on the part of the respondent, such evidence must convincingly demonstrate that the overriding purpose of the conduct was anti-competitive in nature. If there is evidence of both subjective intent and actual or reasonably foreseeable anti-competitive effects, the test is whether the evidence is sufficiently clear and convincing to demonstrate that such subjective motivations and reasonably foreseeable effects (which are deemed to have been intended), taken together, outweigh any efficiencies or other pro-competitive rationale intended to be achieved by the respondent. In assessing whether this is so, the Tribunal will assess whether the subjective and deemed motivations were more important to the respondent than the desire to achieve efficiencies or to pursue other pro-competition goals.

(c) *Defining and identifying legitimate business justifications*

[294] To be considered "legitimate" in the context of paragraph 79(1)(*b*), a business justification must involve more than a respondent's self-interest. Rather, it "must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts" (*Canada Pipe FCA* at paras 73 and 90-91). The business justification must also be independent of the anti-competitive effect of the practice concerned. Of course, there may be legal considerations, such as privacy laws, that legitimately justify an impugned practice, provided that the evidence supports that the impugned conduct was primarily motivated by such considerations.

[295] The Commissioner has interpreted this test for what constitutes a "legitimate business justification" to include cost reductions in production or other aspects of a firm's operations, improvements in technology or production processes that result in innovative new products, and improvements in product quality or service (*Guidelines* at section 3.2). The Tribunal typically would be inclined to consider these types of business justifications to be legitimate. However, all of the circumstances must be considered. For example, the cost reductions that might be contemplated or realized by driving one's rivals from the relevant market would not suffice to shield conduct that was primarily motivated by a predatory, exclusionary or disciplinary purpose.

[296] Insight into the requirement that there be a credible efficiency or pro-competitive rationale that is attributable to the respondent, and that goes beyond the respondent's self-interest, can be provided by considering the two business justifications that were advanced by the respondent in *Canada Pipe CT*. First, the respondent asserted that the uniform rebates that it offered through its impugned stocking distributor program (**"SDP"**) encouraged competition by creating a level playing field between small and large distributors. Second, it claimed that the SDP permitted it to achieve the high volume of sales necessary to enable it to maintain a full line of cast iron drain, waste and vent (**"DWV"**) products. Put differently, the respondent maintained that, to be able to continue to offer distributors a complete line of DWV products, including less frequently sold items, it needed to ensure a high volume of sales on other (higher volume and higher margin) DWV products (*Canada Pipe CT* at paras 208-210).

[297] The Tribunal rejected the first of the respondent's justifications on the basis that competition between distributors in the downstream market was not at issue, and had no bearing on whether the respondent was exercising its market power in a way that precluded competition between suppliers of DWV products (*Canada Pipe CT* at para 209). However, the Tribunal accepted the second business justification, on the basis that maintaining smaller, less profitable, but nevertheless important products in inventory served the interests of distributors, contractors and ultimately consumers (*Canada Pipe CT* at para 212). The Federal Court of Appeal rejected this reasoning, on the ground that "improved consumer welfare is *on its own* insufficient to establish a valid business justification" (*Canada Pipe FCA* at para 90 (emphasis added)). The Court elaborated by stating:

> In the case at bar, the Tribunal's reasons do not establish the requisite efficiency-related link between the SDP and the respondent, and hence do not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti-competitive purpose. Without such a link, self-interest remains as the only justification for the SDP which is attributable to the respondent for the purposes of paragraph 79(1)(*b*).
>
> (*Canada Pipe FCA* at para 91)

[298] The Tribunal does not understand the Court, in making the above-quoted statement, to have put into question the conventional view that, absent an anti-competitive purpose, a desire to gain competitive advantage by offering something new and of value to consumers constitutes legitimate competition on the merits. Indeed, the Court appeared to recognize this when it observed that "[t]he effect of an act on consumers may in some circumstances be relevant in assessing the credibility and weight of a proffered business justification" (*Canada Pipe FCA* at para 79). This recognition is also arguably reflected in the Court's observation that a "valid business justification must provide a credible efficiency or pro-competitive explanation, *unrelated to an anti-competitive purpose*, for why the dominant firm engaged in the conduct alleged to be anti-competitive" (*Canada Pipe FCA* at para 90 (emphasis added)).

[299] The very essence of competition involves finding new and innovative ways to make one's products more attractive to one's customers. So long as such practices are unrelated to an anti-competitive purpose, whether subjective or deemed, they are pro-competitive in nature and constitute legitimate competition on the merits. However, where this is not obvious, an explanation needs to be provided as to how an impugned practice assists or is likely to assist the respondent to better compete in the relevant market.

[300] The Federal Court of Appeal appears to have rejected the second business justification asserted by the respondent in *Canada Pipe CT* on the basis that the Tribunal's rationale for accepting that justification did not provide the requisite link between the interests of "distributors and contractors … and ultimately … the consumer" (*Canada Pipe CT* at para 212), on the one hand, and the respondent, on the other hand (*Canada Pipe FCA* at paras 90-91). In reaching that conclusion, the Court did not comment on the fact that, earlier in the same paragraph of the Tribunal's reasons, the Tribunal noted that the respondent had asserted that it needed the

additional sales volume expected to result from the SDP, to ensure efficiencies and to lower its cost of production. The Tribunal also noted that the Commissioner had not challenged that assertion.

[301] It thus appears that the Court interpreted the Tribunal's failure to mention these facts again, in explaining why it accepted the respondent's second business justification, as indicating that its sole rationale for accepting the justification was the fact that the SDP "serves the interests of distributors and contractors … and ultimately benefits the consumer." Without any stated link between this and the respondent, the Court concluded that there was no acceptable, credible, efficiency or pro-competitive rationale for the SDP. In addition, the Court may have concluded, on the particular facts of that case, that the sole rationale identified by the Tribunal could not be said to be "unrelated to an anti-competitive purpose" (*Canada Pipe FCA* at paras 90-91).

[302] It follows from the foregoing that to be acceptable under paragraph 79(1)(*b*), a business justification for an impugned practice must not only provide either a credible efficiency or a credible pro-competitive rationale for the practice, it must also be linked to the respondent (*Canada Pipe FCA* at paras 90-91). This is subject to the important caveat that legal considerations, such as privacy, may provide a legitimate justification for an impugned practice.

[303] For efficiencies to be linked to the respondent, they must have been intended to be attained, at least in part, by the respondent itself. In other words, there must be persuasive evidence that the respondent intended that the impugned practice would likely result in the attainment of efficiencies *by the respondent*. These efficiencies may include cost reductions in production or other aspects of its operations, improvements in technology or production processes that result in innovative new products or product enhancements, or improvements in quality or service.

[304] Likewise, for other types of pro-competitive rationales, the respondent must provide a credible and persuasive explanation of how the impugned practice was intended to enable it to compete on the merits. While it will often be the case that a practice intended to benefit consumers will assist a firm to compete on the merits, that is not necessarily always the case. Indeed, examples of anti-competitive practices that may have benefited consumers, at least in the short-run, can be found in the Tribunal's jurisprudence (e.g., some of the impugned practices in *NutraSweet* at pp. 38-43; and the inducements paid to retailers in *Nielsen* at pp. 263-264 and 266). Accordingly, an explanation should be provided as to how an impugned practice assists, or is likely to assist, the respondent to better compete in the relevant market.

[305] In determining whether a practice was intended to have this result, the Tribunal ordinarily will focus on determining whether the practice was intended to assist the respondent to compete more effectively with its rivals, whether in terms of prices or of non-price competition. To the extent that a practice may eliminate rivalry altogether, it cannot be "pro-competitive" (*CCS* at para 120), unless the practice is a manifestation of superior competitive performance, or what might more aptly be called "decisive" competitive performance.

[306] In determining the overall character of a practice, the Tribunal will also assess the extent to which anti-competitive effects and justifications based on benefits to consumers will be manifested beyond the short-term. This is because practices, such as targeted practices that exclude new competitors, may have ambiguous effects in the short-term, but may be likely to harm consumers and competition in the longer term (*Tele-Direct* at p. 199).

[307] Competing on the merits is one thing. Pre-empting meaningful competition from emerging over a sustained period of time may be quite another thing, particularly where the respondent faces little present competition.

[308] Nevertheless, targeted practices that merely "meet" the competition, as opposed to "beating" it, typically will be considered to constitute "competition on the merits," and be legitimately justified. Likewise, the introduction of a new or better quality product typically will be considered to constitute competition on the merits, even if that initiative can be said to "beat" the competition.

[309] This is not intended to imply that other practices that involve "beating" the competition will necessarily be considered to be anti-competitive, if they have a predatory, exclusionary or disciplinary negative effect on a competitor. It bears underscoring that the Tribunal will assess and weigh all of the relevant factors, including the reasonably foreseeable effects of the conduct, in attempting to discern the overall character of an impugned practice.

[310] In considering arguments based on "competition on the merits," the Tribunal does not apply a safe-harbour for practices which a non-dominant firm would likely have undertaken in similar circumstances. On the contrary, any conduct that is subjectively intended or deemed to have been intended to have a predatory, exclusionary or disciplinary negative effect on a competitor can be found to be anti-competitive within the meaning of section 79, even if the same conduct would be considered to constitute "competition on the merits" if pursued by a non-dominant firm (*Tele-Direct* at pp. 180-181).

[311] In assessing the overall character of a practice that has reasonably foreseeable anti-competitive effects on one or more competitors, the Tribunal may consider whether the practice has involved or would likely involve a sacrifice of short-term profits that would not likely be recouped by the respondent, "but for" such effects. As an alternative, the Tribunal may consider whether the practice would make economic sense, "but for" such anti-competitive effect. The Tribunal is aware that the latter approach has been advocated by the U.S. DOJ in several proceedings under § 2 of the *Sherman Antitrust Act*, 15 USC §§ 1-7 (Gregory J Werden, "Identifying Exclusionary Conduct under Section 2: the 'No Economic Sense' Test" (2006) 2:73 *Antitrust LJ* 413).

[312] In considering whether a practice has involved or would likely involve a sacrifice of short-term profits that would not likely be recouped by the respondent "but for" any reasonably foreseeable anti-competitive effect, the Tribunal will attempt to determine and weigh the avoidable costs incurred in pursuing the practice as well as the cognizable benefits likely to be obtained by the firm as a result of the practice. Cognizable benefits can include any cost savings

or other efficiencies attained or likely to be attained by the firm, as well as revenues from additional units of products sold as a result of the practice, plus increased revenues that may be attributable to quality improvements.

[313] In conducting this latter assessment of cognizable benefits, the hypothetical “but for” world will be the one in which there were no predatory, exclusionary or disciplinary effects on competitors. For greater certainty, if actual or future competition likely would have driven down the price of the relevant product “but for” the impugned practice, the relevant price in the assessment will be that lower future price, rather than the price that prevailed immediately prior to the commencement of that practice.

[314] The alternative approach of assessing whether a practice made economic sense “but for” any actual or reasonably foreseeable anti-competitive effects may be more helpful and straightforward to apply than the profit-sacrifice approach in a range of circumstances. This is in part because the former approach does not require a determination that there has been, or is likely to be, a sacrifice of short-term profits. Instead, the Tribunal would simply assess whether it made economic sense to incur the costs associated with the practice, “but for” the anti-competitive effects in question.

[315] In other words, the Tribunal would attempt to determine whether the respondent likely would be able to recover the costs incurred in pursuing the practice, solely with profits that do not depend on the actual or reasonably foreseeable anti-competitive effects in order to be realized. If those costs are such that it would not have made economic sense for the respondent to have engaged in the practice absent the profits or other benefit obtained by excluding or disciplining one or more established competitors or new entrants, then the Tribunal likely would conclude that the objective purpose of the practice was anti-competitive in nature.

[316] For greater certainty, as with the profit-sacrifice approach, in assessing whether an impugned practice made economic sense, the Tribunal will consider in its assessment profits that do not depend on anti-competitive effects in order to be attained. However, in contrast to the profit-sacrifice approach, no adverse conclusion would be drawn where there may appear to have been a profit sacrifice, if the conduct otherwise made economic sense.

[317] In assessing whether an impugned practice made economic sense, the Tribunal would attempt to determine the reasonably anticipated impact of the challenged conduct at the time it was initiated, rather than focusing upon the actual impact of the conduct. Among other things, this would assist to avoid unwarranted conclusions being drawn in situations where there have been unforeseen, unfavourable developments for the respondent or its rivals in the intervening period. Nevertheless, the Tribunal would also consider the actual impact of the conduct in assessing what the reasonably anticipated impact of the conduct would have been, at the time it was initiated.

[318] Inquiring into whether a practice made economic sense at the time it was initiated is helpful even where the costs associated with pursuing the practice are minor or trivial. Even in such circumstances, this analysis may assist to reveal that it would have made no economic sense

to engage in the practice, "but for" its predatory, exclusionary or disciplinary negative effects on one or more established competitors or new entrants.

(2) Did TREB have a subjective intention to exclude actual or potential participants in the relevant market(s) by adopting the VOW Restrictions, or were those restrictions motivated by legitimate business justifications?

[319] The Commissioner submits that TREB had a subjective intention to exclude, through the VOW Restrictions, potential entrants into the relevant market and existing TREB Members who were poised to disrupt the traditional residential brokerage business model that is followed by TREB's other Members in the GTA. The Tribunal agrees.

[320] The Commissioner asserts that the VOW Restrictions comprise at least three acts that individually and collectively constitute a practice. These are:

i. The exclusion of the Disputed Data from TREB's VOW Data Feed;

ii. Provisions in TREB's VOW Policy and Rules that prohibit Members who want to provide services through a VOW from using the information included in the VOW Data Feed for any purpose other than display on a website; and

iii. Prohibiting TREB's Members from displaying certain information, including the Disputed Data, on their VOWs, notwithstanding that, in practice, there is no similar limitation on the Members' ability to share essentially the same information with consumers, when Members access such information through the Stratus system, or otherwise. This prohibition is reinforced by terms in TREB's Data Feed Agreement that limit the use of the MLS data in the VOW Data Feed to a purpose that is narrower than the corresponding provision in the AUA that applies to Members using the Stratus system. Among other things, the Commissioner maintains that those terms severely restrict the ability of VOW operators to use certain MLS data to improve the efficiency of their operations and to provide enhanced services to their customers and clients through their VOWs.

[321] TREB maintains that it ultimately decided to exclude the Disputed Data from its VOW Data Feed *because* of concerns about consumer privacy. It asserts that those concerns were central to the decision-making process that it followed in discussing and implementing its VOW Policy and Rules. However, this is not borne out by the evidence.

[322] The Tribunal finds that each of the above-mentioned acts challenged by the Commissioner is in fact anti-competitive and that, individually and collectively, they constitute a practice. In carefully calibrating the parameters of its VOW Policy and Rules, in deliberately eliminating provisions from the corresponding U.S. VOW policy that served as a "good starting point for the development of a TREB policy," and in ultimately implementing the VOW Restrictions, TREB was motivated primarily by a desire to insulate its Members from disruptive competition.

(a) *Background and development of the VOW Policy and Rules*

[323] Mr. Richardson states that TREB first became aware of, and began monitoring, the VOW concept as early as 2002. Around that time, TREB sent some of its Members to attend conferences in the United States to stay up to date on developments there. However, TREB appears to have been content to let CREA take the lead with respect to the study of VOWs.

(i) The EDU Task Force

[324] Roughly contemporaneously, CREA established its Electronic Data Usage Task Force ("**EDU Task Force**"), which included two Members of TREB, namely, Mr. DiMichele, TREB's then Chief Information Officer (**"CIO"**) (now TREB's CEO) and Mr. Silver, who was president of TREB in 2011-2012. (This is a different Mr. Silver from the Commissioner's lay witness mentioned earlier in these reasons.)

[325] In early 2003, two of the members of the EDU Task Force were deputized to review the 2003 Draft NAR Policy and to make recommendations to the rest of the group. Shortly afterwards, CREA obtained a copy of the 2003 Draft NAR Policy and sent it to the members of the EDU Task Force. Two weeks later, they circulated a revised draft of the policy to the full group. It appears that the one noteworthy change they made to the draft document was to remove the ability of local real estate boards to choose whether to permit VOWs to display sold data.

[326] Specifically, the following language from the 2003 Draft NAR Policy was deleted from the "proposed guidelines" that were circulated to the EDU Task Force:

> An MLS may permit Participants to make "Sold" data available on a VOW for search by Registrants. If "Sold" data is made available, the MLS may establish reasonable limits on the number of listings that Registrants may retrieve or download in response to an inquiry.
>
> (Exhibit CA-003, Document 1124, at p. 5)

[327] Subsequent email exchanges between the members of the EDU Task Force reflected ongoing concerns. For example, one member reported back that he had received "the distinct feeling that clear guidelines [were] wanted by everyone who [had spoken to him] but [had] a feeling from some that [they] should not tolerate any kind of VOW" (Exhibit CA-003, Document 10026, at p. 1). Another member suggested that "[b]rokers must have the choice of opting in or out and full disclosure to the VOW visitor is also very important" (Exhibit CA-003, Document 10026, at p. 1). A third person observed: "I see that NAR is proposing fairly extensive restrictions on VOW's [sic]. We would be advised to do the same" (Exhibit A-004, Document 865, at p. 1). Another person mentioned that "no matter what type of rules we put in for VOW's [sic]- the second they are adopted - many people will try to find a way around the rules. Has the idea of not allowing VOW's [sic] been set aside?" (Exhibit A-004, Document 10033, at p. 1).

[328] Ultimately, revisions were made to the draft guidelines that were prepared by the EDU Task Force which contained two important restrictions. First, VOWs were limited to displaying active listings – the same data available on CREA's website (MLS.ca, which was later renamed realtor.ca). One EDU Task Force member appears to have been referring to this provision when he observed: "Why would anyone use a password and jump through hoops when he can get the same information directly from mls.ca without going through it" (Exhibit CA-003, Document 52, at p.1).

[329] Second, the guidelines permitted any agent to opt out of having its listings displayed on a VOW. As a result, VOWs would not be as useful or attractive as they were in the United States.

[330] The purpose of the guidelines proposed by the EDU Task Force was stated to be as follows:

> This discussion paper is for the purpose of developing guidelines for the effective, efficient and beneficial use of electronic data for Boards, Associations and REALTORS.
>
> There is a legitimate fear on one hand of capitulating to misuse of REALTORS' hard-earned data banks, and on the other hand of being left behind in an electronic revolution moving at the speed of light.
>
> *The objective always is to ensure the REALTOR remains central to the real estate transaction and that efforts to guide the use of MLS® data are to that end*.
>
> (EDU Task Force Report, Exhibits IC-084 and CIC-085, Witness Statement of Gary Simonsen dated August 3, 2012 (**"2012 Simonsen Statement"**), Exhibit 18, at p. 494)
>
> (Emphasis added)

[331] The italicized words in the foregoing statement of purpose essentially reflect a concern about "disintermediation." That concern was reflected later in the report of the EDU Task Force, as follows:

> We have heard dire predictions of disintermediation, which basically implies removal from involvement in the transaction. We have heard wild projections of financial windfalls. These have not come to pass. Nonetheless, the Internet has had a profound effect on us.
>
> The threat of disintermediation has certainly affected other industries. Travel agents and stock brokers have been heaviest hit. Bankers are scrambling to change with the new technologies.

> Others offering homogeneous products have and will continue to be affected as well. The major determination of disintermediation seems to be the type of product and the degree of complication in the transaction. If the consumer can be sure of getting exactly the same thing from various sources, like an airline ticket or even an automobile, the likelihood of using the Internet increases dramatically.
>
> (EDU Task Force Report, 2012 Simonsen Statement, Exhibit 18, at pp. 495-496)

[332] Rather than concerns about privacy, it was this concern about disintermediation and, more broadly, the unknown disruptive impact of being unable to control how the MLS data might be utilized, that appears to have been of principal concern to the EDU Task Force and to other Members of TREB who expressed their views on this matter during that period.

(ii) Development of TREB's VOW Policy and Rules

[333] In the following years, TREB opted not to make a VOW Data Feed available to its Members. Instead, to display MLS listings on their websites, TREB's Members were required to sign data transfer agreements (**"DTAs"**) with each brokerage whose listings the Member wished to have appear on their website. Mr. Hamidi testified that this proved to be very labour intensive and difficult, and created a practical barrier to making a complete set of listings available on TheRedPin's website.

[334] During that period, Mr. Enchin continued to develop a VOW product that included an appraisal feature that used MLS data sourced from TREB's MLS Database. After he presented his product to Mr. DiMichele, the latter informed him that "politics" likely would prevent him from pursuing his vision for his product. Mr. Enchin was subsequently informed by TREB's then President, Ms. Cynthia Lai, that she doubted she would have time to "put this through with all the other things that were on her mandate to do" (Transcript, September 14, 2012, at p. 758).

[335] In the years following the U.S. DOJ's initiation of proceedings against NAR in 2005 in relation to NAR's then existing VOW policy, TREB monitored that dispute and was reluctant to proceed with its own VOW policy pending its resolution.

[336] One of the contentious issues in the U.S dispute was the provision in NAR's then existing VOW policy that permitted individual agents to opt out or withhold their listings from display on VOWs.

[337] In 2007, while the dispute was ongoing in the United States, TREB disabled a bulk download feature that had previously enabled its Members to download a large volume of listing information in a single transfer from TREB's MLS system. This action was taken after two brokerages allegedly "scraped" TREB's MLS Database to create their own online databases, in violation of the AUA. Among other things, this led to the termination of those brokers' access to

the MLS system. TREB asserts that its position that such scraping violated the AUA was upheld by the Ontario Superior Court in *TREB OSCJ*.

[338] The DOJ and NAR ultimately settled their dispute in November 2008 after NAR agreed to make certain changes to its VOW policy. Those changes included eliminating the requirement for VOW operators to seek the permission of listing brokers to display information on a VOW (Exhibit A-004, Document 233, NAR VOW Policy attached to Final Judgment (**"Proposed Final Judgment"**), at p. 14 of 26). As a practical matter, this effectively precluded agents from opting-out or otherwise refusing to share their MLS listings with VOW operators.

[339] Equally importantly, NAR's amended VOW policy included principles of non-discrimination. In brief, operators of MLS systems could only prohibit VOWs from displaying certain listing information if that prohibition applied equally to non-VOW operators:

1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms:

    a. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS Participants and their affiliated licensees:

        i. Expired, withdrawn or pending listings.

        ii. Sold data unless the actual sales price of completed transactions is accessible from public records.

        iii. The compensation offered to other MLS Participants.

        iv. The type of listing agreement, i.e., exclusive right to sell or exclusive agency.

        v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.

        vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.

(Proposed Final Judgment, at pp. 20-21 of 26)

[340] This non-discrimination principle was reinforced in Part IV of the Proposed Final Judgment, which, among other things, prohibited NAR from adopting, maintaining or enforcing any rule, or entering into or enforcing any agreement or practice, that directly or indirectly:

a. Prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

b. Unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery.

(Proposed Final Judgment, at p. 5 of 26)

[341] As discussed further below, notwithstanding that TREB used the 2008 NAR VOW Policy as a "good starting point" for its own policy, it made important modifications to the language above.

[342] In July 2008, following the announcement of the possible settlement between NAR and the U.S. DOJ, the Bureau approached TREB to discuss the adoption of a similar VOW policy. However, TREB believed that this was a national issue that should involve CREA, which then established its own CREA's VOW Task Force. TREB therefore waited to see what would come out of that initiative.

[343] Even before that time, references to VOWs, which had appeared in TREB's 2004 and 2005/2006 Strategic Plans, disappeared from TREB's Strategic Plan, beginning with its 2006/2007 Strategic Plan.

[344] Shortly after being approached by the Bureau in July 2008, CREA's then President, Mr. Calvin Lindberg, described forced data sharing with VOWs as a "line in the sand" and predicted a backlash if brokerages were forced to "open what they have spent years creating to just any REALTOR to frame on their VOW, and not offer them an opt out." Among other things, he observed that:"[This] is not something I could accept in my business and neither could my company agree to change their [sic] business model, and I believe there are numerous companies across the country that have spent hundreds of thousands of dollars creating their very successful niche market" (Exhibit A-004, Document 1148, at p. 1).

[345] Mr. Lindberg's concerns appear to have been shared by at least some of the members of CREA's VOW Task Force. Ultimately, that group's work "stalled after reaching a point of impasse with the Bureau" in approximately 2010, "around the same time that the Commissioner commenced a proceeding against CREA regarding a different matter" (Exhibits R-039 and CR-040, Witness Statement of Donald Richardson dated July 27, 2012 (**"2012 Richardson Statement"**), at para 116; Exhibit IC-177, Updated Witness Statement of Gary Simonsen (**"2015 Simonsen Statement"**), at para 75). The minutes of the third meeting of CREA's VOW Task Force reflect that "opt-outs and sold data" were the most contentious issues (Transcript, October 10, 2012, at p. 2329; Exhibit A-087, Minutes from CREA's VOW Task Force, December 1-2, 2008, at p. 4).

[346] In the meantime, Mr. Hamidi met with Mr. DiMichele of TREB to discuss the website platform that he and his business partners had developed. He was told by Mr. DiMichele that TREB did not have a policy to permit Mr. Hamidi's brokerage to receive MLS data in an electronic data feed, as he had hoped. Instead, he would have to collect signatures "from each and every individual brokerage" to be able to display their listings on his website. After he and his partners tested their platform using a data feed transfer from two brokerages, they realized that "it would take a lot of work trying to get other brokerages to provide [them] with listings in a data feed format." Without "all the resale home listings data in a feed from the TREB MLS," they decided to abandon the home resale business and focus on new condominiums (2012 Hamidi Statement, at paras 18-22).

(iii) TREB's VOW Task Force

[347] According to Mr. Richardson, TREB revived its own efforts to establish its VOW Task Force in July 2010, during a strategic planning exercise with its newly elected Board of Directors. Names of potential task force members were subsequently submitted to the TREB Board in March 2011 for ratification. Mr. Richardson, who was then TREB's CEO, acted as the staff liaison to the task force, while Mr. DiMichele, its CIO (and now CEO) acted as the group's advisor. The mandate of TREB's VOW Task Force was "to investigate and recommend to the Board of Directors, the feasibility of TREB adopting a VOW Policy" (2012 Richardson Statement, at para 458).

[348] During that period (July 2010 – March 2011), no action was taken by TREB in connection with VOWs.

[349] However, it appears that the impetus for action increased after the Commissioner sent TREB a voluntary information request concerning VOWs, in November 2010.

[350] TREB's VOW Task Force met for the first time on March 31, 2011. The minutes of that meeting reflect that the group's members were supplied with a copy of the 2008 NAR VOW Policy that was appended to NAR's settlement agreement with the U.S. DOJ, and that the members of TREB's VOW Task Force agreed that the NAR Policy "was a good starting point for the development of a TREB policy rather than starting from scratch" (2012 Richardson Statement, Exhibit CC, at p. 495).

[351] According to Mr. Richardson, it was also agreed that "the NAR VOW Policy would need to be modified in light of Canadian laws, including *PIPEDA* [*Personal Information Protection and Electronic Documents Act*, SC 2000, c 5], and RECO's code of ethics" (2012 Richardson Statement, at para 125). However, that is nowhere reflected in the minutes of that meeting.

[352] TREB's VOW Task Force met three more times in 2011, on April 21, May 12 and May 20. The minutes of those meetings reflect that the group agreed upon a need for "Terms of Use for VOW Operators" and for VOW "Visitors." Among other things, it was recommended that website visitors be required to register, validate, agree to terms of use and then enter the VOW area of the website with a time-limited password. The minutes reflect that other issues addressed

included: the nature of information that could be provided to a "consumer" as opposed to a "client;" whether advertisements could be included in a VOW; whether brokers and home sellers could be given the option to "opt-out" of providing information to a VOW operator (this was considered to be "essential" for home sellers); whether CMAs could be provided online, and if so, on what conditions; whether brokerages could have their own policies regarding their agents' use of VOWs; and whether universal participation by all brokers would be required – subject to an opt-out for home sellers.

[353] In the minutes of the May 20 meeting, it was also noted that the VOW "[i]ssue is reminiscent of "white label" ATMs – In the end, they were in [the] best interest of Consumers – VOWs are an "extra" service for Members to offer Consumers" (2012 Richardson Statement, Exhibit GG, at p. 538).

[354] In addition, for what appears to be the first time in the documentation on the record in this proceeding, there was a reference in the minutes of the May 12 meeting to the need to ensure that information with respect to "solds" was treated "in accordance with RECO and PIPEDA requirements" (2012 Richardson Statement, Exhibit EE, at p. 507). In this regard, it was noted that ""pending solds" were not appropriate for VOW display", that there were "consents issues" with regards to "other solds" (2012 Richardson Statement, Exhibit EE, at p. 508) and that "information or systems which did not identify specific properties should be ok" (2012 Richardson Statement, Exhibit EE, at p. 507).

[355] The minutes of the May 20 meeting noted that concerns continued to exist with respect to "solds" and that "clarification under PIPEDA and RECO Rules [was] necessary," and that, while consistency in treatment between "bricks and mortar" and Internet operations was desirable, the Internet "is a little more 'out there' re: Privacy" (2012 Richardson Statement, Exhibit GG, at pp. 537-538). According to Mr. Richardson, privacy law concerns were also raised at the April 21 meeting of TREB's VOW Task Force. However, there is no reference to such discussions in the minutes of that meeting, which address a broad range of other issues. This inconsistency, together with the corresponding inconsistency regarding whether privacy issues were discussed at the initial meeting of TREB's VOW Task Force on March 31, gives the Tribunal significant doubts regarding the reliability of Mr. Richardson's evidence in respect of this issue. Those doubts are reinforced by the fact that Mr. Richardson stated that TREB's VOW Task Force also discussed concerns regarding WEST listings, at its final meeting on May 20. However, while the minutes of that meeting reflect a desire to obtain greater clarification regarding the potential application of the *PIPEDA* and RECO's rules to "solds," they do not mention WEST listings.

[356] The Tribunal's concerns regarding the reliability of Mr. Richardson's evidence in respect of TREB's motives in relation to its VOW Policy and Rules are further reinforced by the fact that he initially strongly denied that TREB's Members were concerned about having to share TREB's MLS information with VOW operators. In cross-examination, he stated that he was "sure" of his position in this regard. However, when confronted with emails addressed to him reflecting such concerns, Mr. Richardson admitted that his memory was not accurate on this point (Transcript, September 27, 2012, at pp. 1683-1685). That said, he maintained that such concerns were not widespread within TREB's membership.

[357] On May 19, 2011, prior to the final meeting of TREB's VOW Task Force, Mr. Richardson circulated a draft of the VOW policy to its Members and to TREB's Board of Directors. That draft was in the form of a blackline against the 2008 NAR VOW Policy, so that readers could readily ascertain the differences between what was being proposed by TREB and NAR's VOW policy. Among other things, that draft removed the language that prohibits NAR's MLS members from discriminating against VOW operators, by refusing to make available information that is provided to brokers in other formats, and by restricting what can be done with certain MLS data. As a result of that change, TREB's Members would not be able to make certain information, including the Disputed Data available for search by, or display to, consumers, and it was made clear that the Disputed Data was "intended exclusively for other Members and their brokers and salespersons" (2012 Richardson Statement, Exhibit FF, at p. 521).

[358] This change from the 2008 NAR VOW Policy is reflected immediately below:

~~1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants'use of MLS listing data in providing brokerage services via all other delivery mechanisms:~~

a. A ~~Participant's~~ Member's VOW may not make available for search by or display to ~~Registrants~~ Consumers the following data intended exclusively for other ~~MLS Participants~~ Members and their ~~affiliated licensees~~ brokers and salespersons:

i. Expired, withdrawn, suspended or ~~pending~~ terminated listings.

ii. Pending solds or sold data unless the method of use of actual sales price of completed transactions is ~~readily publicly accessible. from public records.~~ in compliance with RECO Rules and Privacy Laws.

iii. The compensation offered to other ~~MLS Participants~~ Members.

iv. ~~The type of listing agreement, i.e., exclusive right to sell or exclusive agency.~~

v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.

vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.

(2012 Richardson Statement, Exhibit FF, at p. 521)

[359] It is also noteworthy that although the issue of "privacy laws and consents" was mentioned in the May 18, 2011 Task Force Report to TREB's Board of Directors, it was simply noted in that report that this issue was "of particular concern" and that the "Task Force felt some

additional legal research would be appropriate on both the PIPEDA and RECO requirements" (2012 Richardson Statement, Exhibit FF, at p. 512).

[360] There does not appear to be any evidence on the record as to whether that legal research or any legal advice regarding privacy law and the adequacy of the existing consents signed by home sellers and buyers was ever sought and provided, although Ms. Prescott subsequently provided the Tribunal with her interpretation of those consents. Likewise, there is no evidence that the advice of the Privacy Commissioner was ever sought and obtained prior to the finalization of the VOW Policy and Rules. (The Tribunal acknowledges that TREB explained that it was subjected to pressure by the Commissioner to act very quickly during that timeframe).

(iv) Events surrounding the adoption of the VOW Policy and Rules

[361] On May 27, 2011, the Commissioner filed the Initial Application seeking relief under section 79.

[362] Three days later, **[CONFIDENTIAL]** a member of TREB's Board of Directors, sent an e-mail to **[CONFIDENTIAL]** colleagues on the Board stating: "This is worse than a knee replacememt [sic] … I say let them start their own VOW.. [sic] let them get their own information and show us how great it is.. [sic] never mind all the privacy issues […] and what type of mess would we all be in if they have their way …" (Exhibit CA-056, **[CONFIDENTIAL]** RE: Competition Bureau and TREB- Notice of Application, at p. 1; Transcript, September 27, 2012, at pp. 1689-1694).

[363] On June 1, 2011, after both TREB's VOW Task Force and TREB's Board of Directors approved a draft of the VOW Policy and Rules, TREB's MLS Committee met to initiate the process necessary to change TREB's MLS Rules and Policies to permit the use of VOWs. The minutes of that meeting reflect that the draft was adopted for recommendation to TREB's Board of Directors, after some apparently minor changes were made. Although those minutes reflect that the proposal would be "sent for legal review and to CREA to ensure that these are in adherence to the Competition Law," they did not refer to privacy issues or to the *PIPEDA*. The same is true of the minutes of the meeting of the MLS Committee that took place on June 13, 2011, as well as the meetings of TREB's Board of Directors, which took place on June 9, 2011 and June 23, 2011, at which the VOW Policy and Rules, as amended, were endorsed once again. The latter minutes reflect that a "legal review and CREA input with respect to competition law" occurred during the in camera portion of that meeting. However, there was no reference in the minutes to privacy issues or to the *PIPEDA*.

[364] Following the June 13, 2011 meeting of the MLS Committee, changes were made to what is now Rule 823 of the VOW Policy and Rules as part of the review with the MLS Committee, and after input was received from legal counsel. Specifically, the opening language of that Rule was changed to include the words "or by any other means," as well as the words "subject to applicable laws, regulations and the RECO rules." While the first of those changes ostensibly addressed the discriminatory nature of the VOW Policy and Rules, the evidence on the record makes it abundantly clear that it is commonplace among TREB's Members to share sold data

with their clients in person, by fax and by email on a fairly widespread basis, and that this practice is at least tolerated by TREB. The Tribunal notes that TREB and CREA have referred to some evidence to the contrary, but it is satisfied that the practice exists (Transcript, September 13, 2012, at pp. 638-641; Transcript, September 25, 2012, at pp. 1452-1455; Transcript, October 6, 2015, at pp. 750-751; Exhibits R-079 and CR-080, Expert Report of Dr. Jeffrey Church dated July 27, 2012 at paras 15, 179 and 263; Exhibits IC-182 and CIC-183, Expert Report of Dr. Fredrick Flyer dated June 2, 2015 at paras 10-11 and 14-17; 2015 Vistnes Reply Expert Report at page 3, footnote 3; Exhibit IC-088, Expert Report of Dr. Fredrick Flyer dated August 13, 2012 at para 25; and 2012 Vistnes Expert Report at paras 268-270).In addition, TREB tools such as *Toronto MLS Contacts & CMA* (Exhibit A-004, Document 1348) and *Appraisal for Superior Sales and Listings* (Exhibit A-004, Document 1345) teach TREB Members how to use sold and other MLS data to create CMAs for actual and potential clients. In their testimony, Messrs. Richardson and Syrianos confirmed that CMAs containing sold information can and are provided by TREB's Members to their clients, provided that the appropriate consent has been obtained. As to the second change, one is left to speculate as to what specifically it was intended to address.

[365] TREB notes that the press release that it issued on June 24, 2011 to launch a 60-day consultation process with its Members stated that its new VOW policy gave "due consideration to TREB's legal responsibility to ensure the protection of consumer data" and that TREB "took great sensitivity and care" in balancing this consideration with its desire to avoid "restricting Members' ability to provide the highest level of service to their customers." However, this does not appear to be borne out by the minutes of the meetings discussed above, or by TREB's prior history with the VOW issue, dating back to 2003. There is also no mention of privacy concerns or *PIPEDA* in the minutes of the meeting of TREB's Board of Directors dated August 25, 2011, following the expiry of the 60-day consultation period with TREB's Members. Those minutes simply reflect that, after legal counsel "entertained [a] round table Q&A regarding TREB's VOW Policy and Rules," TREB's Board of Directors approved the final VOW Policy and Rules and commenced the process of developing the technological infrastructure to implement the VOW Data Feed, which ultimately was launched on November 15, 2011.

[366] Indeed, in a report entitled "MLS Focus Group Report," dated June 27, 2011, which was considered by TREB's MLS Committee at its meeting of September 13, 2011, it was noted that rulings from the Privacy Commissioner and from RECO were still needed in respect of VOWs (Exhibit CA-003, Document 1304, at p. 6). Mr. Richardson confirmed that such a ruling from RECO was never sought or obtained. Mr. Richardson also confirmed that TREB's VOW Task Force did not obtain any additional information about the *PIPEDA* or RECO, even though the minutes of the May 12, 2011 meeting stated that the task force "felt some additional legal research would be appropriate on both PIPEDA and RECO requirements" (Transcript, September 27, 2012, at pp. 1667-1668). There is no evidence on the record to suggest that such a ruling from the Privacy Commissioner was ever sought or obtained. Nevertheless, TREB argued that the decision to exclude the Disputed Data from the VOW Data Feed was "prudent given the requirements of PIPEDA, and in particular given the 2009 decision from the Office of the Privacy Commissioner, which was known to and considered by the Task Force in its deliberations" (TREB's 2015 Closing Submissions, at para 239).

[367] That same MLS Focus Group Report also reflected a concern that data "should be safeguarded and consumers should not be allowed to copy and paste into other sites." This suggests that a "display only" form of the Disputed Data on VOW operators' websites might well have satisfied TREB's Members, and that their concerns related more to *the uses* to which the data might be put, than to privacy.

[368] In fact, when the Tribunal asked Mr. Richardson whether allowing the Disputed Data to be seen on a VOW operator's website in a "read only" manner would be a possible solution to TREB's concerns, he replied that every time a compromise such as that was offered to the Commissioner, it was rejected. He added: "If there is a technological solution to things like CMAs and demonstrating sold information that does not involve data transfer over to another computer, it's worthwhile pursuing" (Transcript, October 6, 2015, at pp. 748-751).

[369] This makes it very apparent to the Tribunal that TREB's real concern, at least as understood by TREB's CEO during the relevant period, was with *losing control* over the Disputed Data, rather than with that data being simply *displayed* to anyone who might visit a VOW operator's website. Stated differently, to the extent that there was any concern about safeguarding the Disputed Data, the evidence indicates that such concern related more to the loss of control over the data, rather than to privacy.

[370] When pressed during the Initial Hearing as to why TREB's Members appeared to be so concerned about the emergence of VOW brokerages in the GTA, Mr. Richardson simply responded that "[s]ome may be a little fearful of new technology" (Transcript, September 27, 2012, at pp. 1741-1742).

[371] On cross-examination, Mr. Sage admitted that some TREB Members were concerned that the "introduction of more and more technology will put pressure on commission rates" (Transcript, September 28, 2012, at pp. 1873-1874). This concern was also reflected in the Concise Statement of Economic Theory that was attached to TREB's Response in this proceeding. At paragraph 24 of that document, it is stated that "[u]nrestrained VOWs may create excessive incentives for price competition among buyers' brokers and divert the focus away from non-price competition," and that "[r]ather than compete over price (by offering a discount) to a buyer already in the market, sellers may prefer instead to provide incentives for finding new buyers by promising a large commission."

(v) Recent developments

[372] The Tribunal also considers it noteworthy that TREB did not take any action against two large, traditional brokerages that made sold information available on their websites for an extended period of time in 2014/2015. In particular, Bosley Real Estate Ltd. Brokerage (**"Bosley"**) and RE/MAX Hallmark Realty Ltd. Brokerage (**"RE/MAX Hallmark"**) displayed sold information on their respective websites for at least ten months in 2014/2015, in apparent violation of TREB's VOW Policy and Rules.

[373] This was particularly noteworthy because TREB's President, Marc McLean, has a management position with Bosley, and Bosley's President, Mr. Tom Bosley, is a former President and Director of TREB, CREA, RECO and OREA. It was not until Mr. Pasalis complained about this, while defending himself in the face of a threatened suspension of his MLS account for allegedly failing to comply with TREB's VOW Policy and Rules, and then reported this in his 2015 witness statement in this proceeding, that TREB eventually took action. Although there does not appear to be evidence of prior communications between TREB and the two brokerages in question, TREB sent a letter to all of its Members on February 4, 2015 reminding them that the use, distribution, and/or display of sold data in whatever form and on the Internet without all appropriate consents constitutes a violation of their obligations under their AUA with TREB, as well as violation of the *PIPEDA* and RECO's *Code of Ethics*. A short while later, **[CONFIDENTIAL]** sent an email message to **[CONFIDENTIAL]** at TREB, confirming that **[CONFIDENTIAL]** brokerage had pulled the offending sold information and expressing hope that TREB would "take the appropriate action or those of us following the rules will have no choice but to follow [the] lead" of those who were posting such information. There was no reference whatsoever in **[CONFIDENTIAL]** email message to any concerns about privacy, and no mention of TREB's position that such information might violate the *PIPEDA*.

[374] The Tribunal further notes that, according to the testimony of Ms. Prescott, and despite a decision of Century 21 Heritage to stop sending sold price information to the Century 21 website, the practice was still going on in 2015 and that more than 290 properties with sold prices were posted on the website of Century 21 Heritage at some point that year.

(vi) Alleged privacy concerns

[375] The Tribunal recognizes that TREB implemented privacy policies in 2004 in an effort to ensure that its and its Members' practices conformed with the requirements in the *PIPEDA*, and that TREB has a Chief Privacy Officer who is its designated representative under the *PIPEDA*. TREB also educates and provides resources and support to its Members on issues of privacy through a variety of methods. In addition, the Tribunal acknowledges that TREB sought input from the Office of the Privacy Commissioner (**"OPC"**) in August 2012 in respect of its "Questions and Answers" document, which addresses a variety of privacy-related topics, including the distribution of CMAs, the disclosure of sold prices, and the use of expired listings. However, TREB was informed by the OPC that it did not provide advance rulings regarding the statutes that it enforces, such as the *PIPEDA*, and that it was unable to comment on the accuracy of interpretations of that legislation by external parties.

[376] Those communications with the OPC post-dated the development of TREB's VOW Policy and Rules and, in any event, were not principally concerned with that policy. Moreover, there is no evidence that TREB's privacy policies received much, if any, consideration during the development of TREB's VOW Policy and Rules.

[377] While TREB led evidence from two of the members of its VOW Task Force, Mr. Sage and Mr. Syrianos, neither one was able to shed any light on reasons why important provisions in the 2008 NAR VOW Policy were eliminated from TREB's final VOW Policy and Rules.

[378] TREB similarly did not lead evidence from anyone who was on its Board of Directors during the relevant period, to testify and be cross-examined regarding what occurred at the meetings of the Board at which the VOW Policy and Rules were discussed on May 26, June 9, June 23 and August 25, 2011. (The Tribunal understands that, while he acted as the staff liaison to TREB's VOW Task Force, Mr. Richardson is not a Director of TREB, he did not attend the final hour-long discussion of the Board at which it discussed and voted on the final VOW Policy and Rules, he was not a member of TREB's VOW Task Force, and he did not vote on the issues discussed by the task force.)

[379] TREB also did not put forward Mr. Palmer, its Chief Privacy Officer, or Mr. DiMichele, who was TREB's CIO during the development of its VOW Policy and Rules, and who is now its CEO, to testify on this privacy issue.

[380] In short, TREB had ample opportunity to lead evidence to establish its alleged privacy justification for the VOW Restrictions. However, it failed to do so. Given that it was TREB's burden to establish that justification on a balance of probabilities, it is not necessary for the Tribunal to draw an adverse inference from this failure by TREB to adduce evidence from the persons mentioned in the two immediately preceding paragraphs, as the Commissioner requested.

[381] In any event, for the reasons explained at paragraphs 355-356 above, the Tribunal does not find Mr. Richardson's evidence regarding the intentions of the members of TREB's Board of Directors, its MLS Committee and its VOW Task Force to be persuasive or reliable. The Tribunal also agrees with the Commissioner that Mr. Richardson's testimony regarding such intentions is not particularly probative of such intentions.

[382] TREB also led evidence by Ms. Prescott, who is the owner and a broker at Century 21 Heritage, an independently owned real estate brokerage with offices in Thornhill, Richmond Hill, Newmarket and Bradford in the GTA. In her 2015 witness statement, Ms. Prescott states: "At the time of the initial hearing before the Competition Tribunal, Century 21 Heritage Group sales representatives obtained the consent of clients for th[e] 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" (Exhibits R-132 and CR-133, Updated Witness Statement of Pamela Prescott, at para 12). She added that since the Initial Hearing, her brokerage made a decision to stop sending sold price information to the Century 21 website and now has a standalone "Permission to Advertise the Sale of the Property" document that her sales representatives ask the parties to a residential real estate transaction to sign. Less than 5% of her brokerage's clients sign that form.

[383] However, there is no evidence that any of Century 21 Heritage's customers ever complained to Ms. Prescott or her colleagues, or otherwise communicated concerns regarding the privacy of their information, prior to when TREB's VOW Policy and Rules were finalized. Ms. Prescott also did not explain what information was and is given to her brokerage's clients at the time they were and are asked to sign the documents referred to immediately above.

[384] TREB mentions that Mr. Gidamy of TheRedPin testified that he didn't think that TREB was concerned about him expanding his share of the market. However, that is simply Mr. Gidamy's impression. It is not direct evidence of TREB's lack of subjective intent to exclude disruptive competitors such as TheRedPin.

[385] The Tribunal also observes that Mr. Richardson testified that TREB typically receives two complaints per year from members of the public throughout the GTA regarding the privacy of the information that they provide to TREB's Members, including sold information that is subsequently shared extensively, as described in paragraphs 395-398 below.

[386] This evidence of an absence of significant consumer concern about privacy issues is supported by Mr. McMullin, who testified in 2012 that there had only been nine occasions when a person had contacted ViewPoint to request that information be removed from the website. Mr. McMullin testified at the Redetermination Hearing that, since June 2012, ViewPoint had received a "couple of dozen a year" privacy complaints (Transcript, September 23, 2015, at p. 171). He explained that "most of the complaints that [ViewPoint gets] are about information that is readily available on many websites." He added that "[i]t just so happens that because ours is really popular we get more complaints" (Transcript, September 23, 2015, at p. 172). Mr. McMullin further explained the few number of complaints relative to the utilization of www.viewpoint.ca by stating that there is a "give-and-take", and that "most consumers […] believe that it's necessary [for ViewPoint to have the information that they provided] there because someday they are going to be on the other side of the trade and that this information is imperative to enable them to make a quality decision" (Transcript, September 22, 2015, at p. 98). He added that there was one complaint made to the OPC by an individual who alleged that ViewPoint had disclosed personal information without consent by publishing the purchase price of the person's home on www.viewpoint.ca for view by registered users. The complaint was resolved during the course of the investigation and ViewPoint was advised that no further action would be taken. ViewPoint did not take any action and was not asked by the OPC to remove any information from the website.

[387] The evidence that few consumers have complained regarding the privacy of the Disputed Data extends to the United States where sold information is widely available. According to Mr. Nagel, Redfin receives only "limited complaints about privacy concerns about information displayed on redfin.com" and those "usually revolve around taking photos of sold homes down from Redfin's website" (Exhibits A-129 and CA-130, Second Witness Statement of Scott Nagel dated February 5, 2015 (**"2015 Nagel Statement"**), at para 32(a)).

[388] Finally, TREB asserts that its decision to exclude the Disputed Data from the VOW Data Feed was prudent given the requirements of the *PIPEDA* and a 2009 decision of the OPC which essentially held that the publication of an advertisement stating that a property had sold for 99.3% of the asking price contravened the *PIPEDA*, because it enabled the public to calculate the sold price. Although the sold price of the home was available on the public property register, the OPC held in that decision that the exception for public information in paragraph 7(3)(h.1) of the *PIPEDA* did not apply because the information in question was obtained pursuant to the

purchase agreement to which the salesperson was privy, and was not actually collected from a publicly available source.

[389] Mr. Richardson testified that this decision influenced the ultimate recommendation by the members of TREB's VOW Task Force regarding sold and "pending sold" information. However, this is not borne out by the minutes of the task force's meetings. More importantly, the evidence as a whole suggests that privacy considerations were not a principal motivating factor behind TREB's VOW Policy and Rules.

[390] In summary, the Tribunal has determined that the evidence on the record in this proceeding demonstrates that TREB's motivations in initially resisting the emergence of VOWs in the GTA, and then in adopting and maintaining a more restrictive and discriminatory policy than what is reflected in the settlement reached between NAR and the U.S. DOJ, were primarily to limit or at least restrict a potentially disruptive form of competition in the GTA, and to retain full control of TREB's MLS data. Among other things, TREB appears to have been concerned that VOWs could lead to increased price and non-price competition, to reducing TREB's and its Members' control over MLS data, and to reducing the role played by TREB's Members in residential real estate transactions. Privacy played a comparatively small role, and only towards the end of TREB's process. Based on the evidence adduced, the Tribunal has concluded that the privacy concerns that have been identified by TREB were an afterthought and continue to be a pretext for TREB's adoption and maintenance of the VOW Restrictions.

[391] To insulate its Members from the full force of the disruptive competition posed by VOW operators, TREB deliberately modified in a number of ways the 2008 NAR VOW Policy that had served as "a good starting point" for its own policy. It did so by modifying that policy to include the VOW Restrictions, which include: (i) excluding the Disputed Data from its VOW Data Feed; (ii) prohibiting its Members from using the information included in the VOW Data Feed for any purpose other than display on a website (Rules 802 and 824), notwithstanding the fact that, in practice, there is no similar *de facto* limitation on its Members' ability to make available or use in other ways the exact same information when it is obtained from TREB in other ways, such as over the Stratus system; and (iii) prohibiting its Members from displaying certain information, (including sold, "pending sold," WEST listings and cooperating broker commissions) on their VOWs (Rule 823), again, notwithstanding that in practice, there is no similar limitation on its Members' ability to share essentially the same information with consumers, when Members access such information through the Stratus system, or otherwise.

[392] The Tribunal is satisfied that these changes from the 2008 NAR VOW Policy were crafted primarily for an exclusionary purpose, and not out of privacy concerns.

(b) *TREB's approach to the consents used by its Members*

[393] TREB asserts that the consent clauses in the Listing Agreement, the BRA and the BCSA that it recommends be used by its Members, and that the Tribunal understands are typically used by TREB's Members, are not sufficient for the purposes of the *PIPEDA*.

[394] In brief, TREB's position appears to be that, while those consent clauses are sufficient to enable the confidential information of home buyers and home sellers to be disclosed to its Members and to their customers if done in person, by fax or by email, they are not sufficient to permit the wide display of that information on a VOW and over the Internet. In other words, TREB maintains that there is a "practical obscurity" of personal information that exists under TREB's current rules that would be lost with the vast reach of the Internet.

[395] The Tribunal acknowledges that making the Disputed Data available over the Internet through TREB Members' VOWs would result in that information being much more widely distributed than is currently the case. However, the Tribunal finds it difficult to reconcile the privacy concerns that TREB now expresses with the fact that TREB previously appeared to be unconcerned about privacy, as reflected by the fact that it made the Disputed Data available to:

a. Its 42,500 Members over its Stratus system;

b. The members of most other real estate boards in Ontario, through a data sharing program known as CONNECT, which was available to approximately 92% of Ontario realtors in August 2012 and to 98% in June 2015;

c. The clients of its Members and the clients of members of those real estate boards mentioned immediately above (provided such information is disclosed to those clients in person, by fax or by email); and

d. Certain appraisers.

[396] TREB also admitted in 2012 that it was aware of the fact that one of its Members had a practice of providing an email subscription service that sent emails with current MLS sales data, the day following its posting on TREB's MLS system. Moreover, one of TREB's witnesses, Mr. Sage, acknowledged that his brokerage sends monthly reports to its customers by email that include very detailed transaction information, including sold prices, which can be forwarded by their customers to whomever they choose. Although the address of sold homes is now redacted, those addresses are provided upon request to customers, and in any event can often easily be deduced if a customer knows what the list price of a home was or approximately how long it was on the market.

[397] The Tribunal further notes that TREB makes all or part of the Disputed Data available to various third parties, such as CREA (for statistical purposes), Altus Group Limited (for the purposes of preparing a House Price Index), the CD Howe Institute (as part of a research project on the impact of the Toronto Land Transfer Tax), and Interactive Mapping Inc. (for the purpose of its MLS Data Verification System known as ICHECK). However, it appears that the information disclosed to those parties does not wind up being available to the public in a manner that would allow the confidential information of an individual home buyer or seller to be ascertained.

[398] Moreover, TREB's own intranet system enables TREB's Members to forward by email up to 100 sold listings at a time to anyone.

[399] The Tribunal agrees with the Commissioner that if TREB were truly concerned about privacy, it would, at a minimum, have taken steps to ensure that the Disputed Data is not distributed beyond its Members. It has not done so.

[400] TREB asserts it would contravene the *PIPEDA* to create a tie between buying or selling a house on the MLS system, and a mandatory consent to the wide dissemination of sold information over the Internet. However, TREB's past actions with respect to consents reinforce the Tribunal's view that TREB's privacy justification is largely a pretext to attempt to legitimize its practice of anti-competitive acts. For example, in 2004, TREB refused a request by a home seller to remove the seller's MLS Listing Information from TREB's MLS system, on several grounds. For example, TREB maintained that the "retention of the MLS Listing history on the system is important and the retention of 'expireds' is just as important as retaining 'solds,' especially in a quick moving market and the option of 'exclusives' is available to those who do not wish to list on the MLS system." TREB added that, "due to the 'holdover' clause, it is important to keep track of and to retain 'expireds' on the MLS system for legal and other reasons which benefit the consumer." In addition, TREB stated that "the integrity of TREB over the years has been based on its ability to serve the public through a cooperative system and [it] cannot allow encroachment on a good service that has evolved to serve both Realtors and the public well, while respecting PIPEDA requirements" (Exhibit A-004, Document 89, at pp. 1-2).

[401] TREB's existing "Questions and Answers" on privacy issues reflects essentially the same position. The same is true of *Frequently Asked Privacy Questions* and answers that CREA developed for its members, which states: "Both current and historical data is essential to the operation of the MLS® system and by placing your listing on the MLS® system, you are agreeing to allow this ongoing use of listing and sales information" (2012 Simonsen Statement, Exhibit 8, at p. 350). The Tribunal observes that TREB's Policy 102 and Policy 103 add that, apart from inaccurate data: "No other changes will be made in the historical data" (2012 Richardson Statement, Exhibit D, at p. 168).

[402] In addition, when TREB received legal advice that the posting of interior home photos raised privacy issues, TREB's MLS Committee recommended to TREB's Board of Directors that it "**[CONFIDENTIAL]"** (Exhibit CA-003, Document 1192, at p. 2). Subsequent versions of that consent provision contained express language to address the retention and use of interior photos in TREB's MLS system. However, there is no evidence that TREB ever considered taking similar action to address the privacy concerns that it now advances with respect to sold and "pending sold" information.

[403] The Tribunal observes in passing that interior photos and other highly personal information, including virtual tours, are not only available on the websites of TREB's Members, but are also available on popular and frequently visited websites, such as realtor.ca, which not only display such information, but also allow it to be emailed to "a friend."

[404] TREB also appears to have obtained legal advice with respect to its Members' ability to provide CMAs containing sold data to their clients. That advice seems to be reflected in the "Questions and Answers" document that it has prepared for its Members. Among other things, that document states as follows:

> Although it cannot be said with absolute certainty given the lack of precedents or case law on the ultimate interpretation of many aspects of PIPEDA, a strong argument can be made that the words "conduct comparative market analyses" contained in the consent clause of the OREA standard form listing agreement can be interpreted broadly enough to include the essential part of "conducting a CMA", that is, providing that information to a prospective seller or prospective buyer.
>
> (2015 Richardson Statement, at p. 494)

[405] Notwithstanding TREB's lack of certainty regarding the privacy law issues related to the display of the Disputed Data on a VOW, it admitted that no written legal opinion was ever received on this point. (The Tribunal recognizes that TREB's admissions related to the time frame "prior to June 24, 2011.") Moreover, in contrast to the action it took to reinforce the consent language in the Listing Agreement to cover the posting of interior home photos, there is no evidence that such action was ever considered to address the privacy issue that TREB now raises as a justification for the restrictive aspects of its VOW Policy and Rules.

[406] In summary, the approach that TREB has taken with respect to the consents in the standard Listing Agreement that it recommends its Members sign, and in the agreements typically signed by home buyers (namely either the BRA or the BCSA), suggests that TREB has not in the past been concerned about privacy. On the contrary, it has resisted attempts by consumers to have their information removed from the MLS system or even altered, unless such information is inaccurate; it has sought to expand its consents when it has received advice that they might not be sufficiently broad to include highly personal and confidential information such as pictures of the inside of homes; and it interprets its existing consents as being sufficiently broad to enable sold information to be provided to potential customers.

[407] Indeed, Mr. Richardson testified that the existing language in Section 11 of the Listing Agreement likely is sufficiently broad to permit the disclosure of WEST listings, even though there are some concerns or sensitivities from homeowners about such information, and that the existing language in the BRA is also sufficient to permit the disclosure of sold information to a prospective purchaser. Mr. Richardson also acknowledged that other solutions, such as using a separate consent form, are available to permit "pending sold" and sold listings to be included in the VOW Data Feed.

(c) ***RECO's advertising policy***

[408] TREB maintains that, as with the *PIPEDA*, RECO's *Code of Ethics* requires informed consent to be obtained by TREB's Members before they advertise the "sold" price of a client's home, or other confidential information. TREB asserts that because one of the central functions of a VOW is to help to generate "leads" for VOW operators, a VOW is by definition an advertising tool. For greater certainty, TREB submits that the fact that a VOW might also be a method of delivering real estate services does not necessarily imply that it is not an advertising vehicle.

[409] At the time of the Initial Hearing, "advertising" was defined in RECO's 2011 Advertising Guidelines (see Exhibit R-083, at p. 450) in the following terms:

> Any notice, announcement or representation directed at the public that is authorized, made by or on behalf of a registrant and that is intended to promote a registrant or the business, services or real estate trades of a registrant in any medium including, but not limited to, print, radio, television, electronic media <u>or publication on the internet (including websites and social media sites)</u>. Business cards, letterhead or fax cover sheets that contain promotional statements may be considered as "advertising."
>
> (Emphasis added)

[410] Pursuant to subsection 36(8) of RECO's *Code of Ethics*, a registrant shall not include anything in an advertisement that could reasonably be used to identify specific real estate unless the owner of the real estate has consented in writing. Pursuant to subsection 36(9), a registrant shall not include anything in an advertisement that could reasonably be used to determine any of the contents of an agreement that deals with the conveyance of an interest in real estate, including any provision of the agreement relating to the price, unless the parties to the agreement have consented in writing.

[411] The Commissioner notes that the Ontario Superior Court of Justice decided in 2009 that the publication of MLS listing information on a website did not constitute advertising in contravention of TREB's Rule R-430 or subsections 36(8) or (9) of RECO's *Code of Ethics* (*TREB OSCJ* at paras 109 and 112).

[412] Be that as it may, it is not immediately apparent to the Tribunal how the inclusion of sold information on a VOW would constitute advertising, irrespective of how that sold information is displayed (including in the form of a CMA), when providing that same information in a "conventional" CMA would not constitute advertising. It is also not clear why the provision of sold information would constitute "advertising," when the provision of other MLS information regarding a home would not. The Tribunal observes that the minutes of TREB's VOW Task Force which are discussed at paragraph 352 above drew a distinction between "advertisements" and other information that would be included in a VOW, presumably including raw data.

[413] As discussed at paragraphs 354-355 and 359 above, TREB's VOW Task Force identified the need to ensure that information with respect to "solds" was treated in accordance with RECO's requirements and noted that clarification in that regard should be sought.

[414] However, Mr. Richardson confirmed in cross-examination that no one on TREB's VOW Task Force requested RECO's position on whether posting any of the Disputed Data on a VOW would constitute advertising.

[415] There is no other evidence that TREB's VOW Policy and Rules may have been adapted from the 2008 NAR VOW Policy, or were otherwise crafted, to ensure compliance with RECO's *Code of Ethics*. The Tribunal notes that TREB did not lead evidence from TREB's Director and former President Ms. Cynthia Lai, even though she was a member of RECO's Board of Directors at the time of the Initial Hearing. (The Tribunal also notes that TREB sought to have RECO's CEO, Mr. Wright, attend the Initial Hearing and produce certain decisions made by RECO's disciplinary tribunal as well as certain interpretations that RECO had adopted in respect of the *Code of Ethics*. After Mr. Wright retained counsel to quash the subpoena served by TREB's counsel, the Commissioner and TREB agreed to permit those documents to be introduced without the need for them to be proved by Mr. Wright or another representative of RECO.)

[416] The Tribunal further observes that Bosley disclosed sold prices on its website for approximately one year in 2014/2015, in apparent violation of TREB's VOW Policy and Rules, notwithstanding that its President and co-founder, Mr. Bosley, is a former RECO Chairperson, and notwithstanding that another Bosley broker, Keith Tarswell, is also a former RECO Chairperson and has been a member of its Board of Directors for several years. In fact, as mentioned at paragraph 373 above, when **[CONFIDENTIAL]** agreed to stop posting sold information on its website, **[CONFIDENTIAL]** informed Mr. Richardson that he hoped that TREB would "take the appropriate action or those of us following the rules will have no choice but to follow [the] lead" of those who were posting such information. This suggests that Messrs. Bosley and Tarswell did not think that their brokerage was violating RECO's *Code of Ethics* or its advertising policy.

[417] Moreover, although RECO investigated a number of agents at Sage Real Estate when they sent daily email communications containing sold information for approximately one year to anyone who provided an email address, its investigation was confined to the failure of those agents to include the Sage logo on their website. That investigation did not concern the daily communication of sold information. Likewise, Mr. Enchin stated that although he was contacted by a representative of RECO after a realtor complained that he advertised listings on his VOW without permission, RECO did not pursue any disciplinary action after he explained that his VOW had a registration and password requirement and that he did not advertise MLS listings to the public at large.

[418] TREB maintains that the Tribunal should accord significance to the fact that RECO has since taken action to clarify that VOWs constitute advertising. However, the support that it provides for this assertion is a RECO Publication entitled *For The RECOrd*, which was published in the Winter of 2013, and which simply states that RECO's Advertising Guidelines

apply to all forms of advertising, including electronic media, websites and social media sites. That document proceeds to add that VOW operators have an obligation to ensure that their VOWs are compliant with those guidelines. It is far from clear that RECO has clarified that providing sold information or other Disputed Data over a VOW would constitute advertising, in contravention of its *Code of Ethics*.

[419] In any event, the fact that RECO may have adopted this position in 2013 does not help to persuade the Tribunal that the principal motivation, or even a principal motivation, of TREB at the time that it developed and finalized its VOW Policy and Rules in 2011, including by adapting them from NAR's 2008 VOW Policy, was, or now is, to ensure compliance with RECO's *Code of Ethics*.

[420] The same applies to the fact that TREB took the position in a notice sent to its Members in February 2015 that the use, distribution, and/or display of sold data in whatever form and on the Internet without all appropriate consents is in violation of their obligations under their AUA and in violation of the *PIPEDA* and RECO's *Code of Ethics*. The Tribunal further notes that TREB's own Rules and documentation do not suggest that it considers VOWs to constitute advertising.

(d) *Other business justifications*

[421] TREB states that, in addition to privacy, there are several other justifications, which it labels "efficiency justifications," for the VOW Restrictions. However, there is no persuasive evidence that any of these other justifications played a principal role in the development and implementation of TREB's VOW Policy and Rules, let alone the VOW Restrictions. Indeed, for some of them, there is no evidence that they played any role whatsoever. Moreover, those alleged justifications appear to relate solely to TREB's restrictions on the display of individual sold and "pending sold" prices.

[422] First, TREB asserts that its VOW Policy and Rules promote the liquidity of the MLS system in three ways: by protecting privacy, by preventing strategic advantage, and by preventing potential interference with contractual relations.

[423] With respect to the protection of privacy, TREB suggests that if the use of its MLS system to sell a property is tied with automatic inclusion of sold information on its VOW Data Feed, consumers may choose to sell their homes through non-MLS channels. However, TREB provided no evidence to suggest that this has occurred to any meaningful degree in Nova Scotia or in areas of the United States where MLS sold information is available on VOWs. Indeed, a recent survey conducted by NAR reflects that the percentage of consumers in the United States who retain the services of a realtor to sell their home has increased from 84% in 2008 to 88% in 2014. This happened notwithstanding the growth of VOWs displaying sold information since the release of the 2008 NAR VOW Policy (Exhibit IC-140, NAR 2014 Profile of Home Buyers and Sellers (**"NAR 2014 Profile"**), at pp. 92-93 and 117). In the absence of any persuasive evidence

to support this justification put forward by TREB, the Tribunal concludes that it is simply a speculative assertion.

[424] Concerning the protection of strategic advantage, TREB states that the disclosure of WEST and "pending sold" listings on a VOW would provide sensitive information to purchasers that could be used to the disadvantage of sellers. For example, if a purchaser knew what price a seller had conditionally accepted, the purchaser would know the seller's "reserve" price and be able to use that to the seller's disadvantage, if the conditional sale fell through. However, the only evidence that this was a concern for TREB at the time it was developing its VOW Policy and Rules is a brief statement contained in the minutes of one of the four meetings of TREB's VOW Task Force during which the VOW Policy and Rules were developed. Specifically, the minutes of the May 12, 2011 meeting state: "It was the consensus of the Task Force that 'pending solds' were not appropriate for VOW display …" The same statement was included in the VOW Task Force's draft report, dated May 18, 2011, to TREB's Board of Directors. Those documents however do not elaborate upon the reasons why TREB's VOW Task Force concluded that "pending sold" listings were not appropriate for display on a VOW. (The Tribunal notes that there is a difference between a conditional sale and a "pending sold," and that the sale price of conditional sales is not available on the MLS system at all. It is only once the conditions have been met that the sale price will be entered into the MLS Database.)

[425] Even if the Tribunal were to give TREB the benefit of the doubt on this point, the Tribunal remains persuaded, considering the totality of the evidence, that TREB's principal motivation for not including any of the Disputed Data in its VOW Data Feed was to prevent potential and existing TREB Members from being able to make sold information and various innovative offerings derived from that information available on their VOWs.

[426] The same is true with respect to TREB's assertion that the VOW Restrictions promote the liquidity of the MLS system by preventing potential interference with contractual relations. However, the Tribunal accepts TREB's claim that the display of "pending sold" information would expose home sellers to being targeted by unsolicited approaches by other service providers, or even unsolicited offers by other purchasers.

[427] In addition, TREB maintained that the VOW Restrictions preserve the incentives of its existing Members to invest in its MLS database, by continuing to contribute listings. It suggested that, if, as the Commissioner appears to contemplate, the inclusion of the Disputed Data in its VOW Data Feed were to have the effect of assisting VOW-based brokers to gain market share at the expense of its traditional Members, large traditional brokerages and franchise groups would have an incentive to leave TREB's MLS system to establish a rival MLS. However, once again, TREB provided no evidence to support the proposition that this was a concern for TREB at the time it developed its VOW Policy and Rules. In addition, there is no evidence that this has occurred in Nova Scotia, where information on "solds" and other components of the Disputed Data has been available for several years. With respect to the United States, Dr. Church acknowledged in cross-examination that there was only one example of real estate agents leaving a MLS system to establish a rival one, and that was in 2004, before NAR's existing VOW policy came into effect. There is no evidence as to why those agents took that action.

[428] Finally, in its Concise Statement of Economic Theory, at paragraph 24, TREB further asserted that its VOW Policy and Rules may be pro-competitive, in part because they reduce the scope for VOW operators to “free ride” on the efforts of full-service brokers “because they do not contribute appropriately to the cost of maintaining the TREB MLS® and because they do not contribute to the number of listings.” However, Mr. Richardson confirmed in questioning from the Tribunal during the 2012 hearing that TREB is not suggesting that new Members should not have access to all of the information in TREB’s MLS system on the ground that they did not contribute to the MLS system in the past. He also acknowledged that the initiation fee paid by all new Members, including new VOW-based operators, essentially represents a purchase of the equity in the MLS system, or a payment “for the work that has been done [in the past] and the service that has been generated …” (Transcript, September 27, 2012, at pp. 1740-1741).

(e) *Conclusion*

[429] In summary, it was TREB’s burden to establish that there were legitimate business justifications for the restrictive aspects of its VOW Policy and Rules and that those justifications were at least as important as any subjective or deemed anti-competitive intent that it is demonstrated to have had. The Tribunal’s review of TREB’s subjective motivations alone leads it to conclude that TREB did not meet that burden.

[430] Indeed, the Tribunal concludes, on a balance of probabilities, that TREB’s principal motivation in implementing the VOW Restrictions was to insulate its Members from the disruptive competition that innovative, Internet-based brokerages such as ViewPoint wished to bring to the Relevant Market. The Tribunal is satisfied that the business justifications TREB now advances are without persuasive evidentiary support.

[431] The Tribunal’s conclusion in this regard is reinforced by its view that, “but for” the exclusionary effects on disruptive competitors that were intended by TREB, the VOW Restrictions did not make economic sense. In this regard, the Tribunal was not provided with any persuasive evidence to demonstrate that, “but for” the anti-competitive effects of the VOW Restrictions on VOW-based rivals or others who might otherwise challenge the traditional approaches to business adopted by the vast majority of TREB’s Members, the VOW Restrictions conferred any other benefit on those Members. That is to say, there is no persuasive evidence before the Tribunal that TREB’s Members benefitted from the VOW Restrictions, except to the extent that those restrictions insulated them from the new forms of competition.

(3) Was it reasonably foreseeable that the VOW Restrictions would have an exclusionary effect on one or more competitors?

[432] TREB submits that it was not reasonably foreseeable that the VOW Policy and Rules would have a predatory, exclusionary or disciplinary negative effect on its Members, or on potential entrants who wished to operate brokerages offering a VOW. On the contrary, it maintains that the reasonably foreseeable consequence of the VOW Policy and Rules was that

brokerages would be able to offer VOWs in the GTA; and that this is exactly what actually happened.

[433] The Commissioner replies that it was reasonably foreseeable that the VOW Restrictions would have an exclusionary effect on VOW-based competitors. The Tribunal agrees.

[434] Notwithstanding that TREB's VOW Task Force was well aware of the 2008 NAR VOW Policy, and indeed considered it to be a "good starting point" for TREB's VOW policy, it intentionally modified important provisions, including with respect to "sold" data, that NAR included in its VOW Policy to reach a settlement with the U.S. DOJ.

[435] TREB's Board of Directors can be presumed to have been well aware of the significance of these modifications when they met to discuss the draft VOW Policy and Rules in June and August 2011, because TREB had been closely monitoring the U.S. dispute and the Commissioner's detailed Initial Application in this proceeding was filed on May 27, 2011.

[436] In any event, as noted at paragraph 328 above, after the EDU Task Force modified the 2003 Draft NAR Policy to limit VOWs to displaying active listings – the same data that is available on realtor.ca –, one EDU Task Force member observed: "Why would anyone use a password and jump through hoops when he can get the same information directly from mls.ca without going through it" (Exhibit CA-003, Document 52, at p.1).

[437] In the Tribunal's view, this statement reflects that the EDU Task Force member who made the statement was well aware that limiting the information available on TREB's VOW Data Feed to largely the same information that was already generally available on the Internet, and imposing limitations on how information displayed on VOWs can be accessed by potential home buyers and sellers, would make it difficult for VOW-based competitors to attract potential home buyers and sellers to their websites.

[438] A key provision of the VOW Policy and Rules is paragraph 24, which is essentially duplicated in Rule 823. The most relevant changes between the final text of that Rule and the corresponding provision in the 2008 NAR VOW Policy were mentioned above and are reproduced below for convenience:

> ~~An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants'use of MLS listing data in providing brokerage services via all other delivery mechanisms:~~
>
> A <u>Member</u>, <u>whether</u> through a Member's VOW <u>or by any other means</u>, may not make available for search by, or display to, Consumers the following MLS® data intended exclusively for other Members and their brokers and salespersons, <u>subject to applicable laws, regulations and the RECO Rules</u>:

a. Expired, withdrawn, suspended or terminated Listings, and pending solds or leases, including Listings where sellers and buyers have entered into an agreement that has not yet closed;

b. Sold data, unless the method of use of actual sales price of completed transactions is <u>in compliance with RECO Rules and applicable privacy laws</u>;

c. The compensation offered to other Members

d. The seller's name and contact information, <u>unless otherwise directed by the seller to do so</u>; and

e. Instructions or remarks intended for cooperating brokers only, such as those regarding showings or security of listed property.

[439] These changes that were made to the language in the 2008 NAR VOW Policy effectively removed the principle that local real estate boards could not discriminate against VOW operators by preventing them from displaying or making available for search information described in paragraphs (a), (b) and (c) above, while allowing that same information to be communicated to actual and potential home buyers and sellers by alternative means, including in person, by fax or by email. As discussed at paragraph 364 above, the Tribunal is satisfied that although TREB's VOW Policy and Rules prevent TREB's Members from displaying and making available that information for search on a VOW, TREB does not in fact prevent its Members from communicating such information to actual home buyers in person, by fax or by email. The Tribunal acknowledges that both Rule 823 and Policy 24 prevent TREB's Members from making certain information, including the Disputed Data, available for search by or display to consumers (subject to applicable laws, regulations and RECO's Rules). However, the evidence demonstrates that the practice of the Disputed Data being available to potential home purchasers and sellers remains commonplace in the GTA.

[440] TREB further discriminated, and continues to discriminate, against VOW operators by excluding the Disputed Data from its VOW Data Feed. This appears to be effected pursuant to Policies 15 and 17. Members who wish to provide that information to their actual or potential customers must continue to do so in the traditional manner, namely, in person, by fax or by email. This exclusion, together with the elimination from the VOW Data Feed of information on a home as soon as it becomes a "sold" or a "pending sold," will be discussed in section VII.D of these reasons.

[441] In addition, the VOW Policy and Rules prohibit TREB's Members from using the information included in the VOW Data Feed for any purpose other than display on a website, notwithstanding the fact that, in practice, there is no similar limitation on its Members' ability to make available or use the exact same information when it is obtained from TREB in other ways, such as over the Stratus system. For example, pursuant to Rule 802, TREB's Members are limited to displaying MLS information supplied by TREB, in accordance with the VOW Policy and Rules. The Tribunal understands that this prevents Members from using the information

obtained over the VOW Data Feed to provide statistical analyses or other innovative services that are based on such information.

[442] This restriction is reinforced by section 4.1 of TREB's VOW Data Feed Agreement, which specifies that the VOW Data Feed is provided by TREB to a Member or an AVP that operates a Member's VOW on the Member's behalf, "solely and exclusively for the Purpose." In turn, "Purpose" is defined in terms of "permit[ing] a Member to display on Member's VOW given Listing Information which is transmitted through a VOW Data Feed to Member for the sole purpose of use by Consumers that have a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through Member's VOW."

[443] The Tribunal understands that this language operates to prevent TREB's Members from doing more than simply displaying on their VOWs the MLS information received from TREB over the VOW Data Feed. This was also Mr. Richardson's understanding. In addition, Mr. Pasalis testified that his understanding is that Members cannot use that information to perform statistical analysis and share that analysis online with potential home buyers and sellers. This general restriction is further reinforced by section 6.2(f) of the VOW Data Feed Agreement, which explicitly prohibits TREB's Members from directly or indirectly duplicating, altering, modifying or transferring any information transmitted through a VOW Data Feed. That provision also prohibits TREB's Members from merging such information with other data; and from publishing any Listing Information in any form, or creating any derivative work(s) or adaptations(s) based on such information.

[444] Such restrictions do not apply to Members wishing to use MLS information in these or other ways, so long as the information is used "for the purpose of and directly related to the [Member's] ordinary carrying on if its business" (AUA, section 2). For greater certainty, Members who obtain access to MLS information pursuant to the AUA are simply restricted from using that information "in any manner not directly related to the business of real estate," as defined in the *REBBA* (AUA, section 4(a)). The Tribunal understands that this effectively leaves TREB's Members free to perform and share with potential home sellers and purchasers sophisticated analysis of MLS information obtained over TREB's Stratus system, as Sage Real Estate does.

[445] The Tribunal is satisfied that any person acquainted with the residential real estate brokerage market in the GTA would have been able to foresee the objective impact that the VOW Restrictions, as reinforced by the VOW Data Feed Agreement, would have on VOW operators. That is to say, such persons would have reasonably foreseen that the VOW Restrictions, as reinforced by the VOW Data Feed Agreement, likely would have an exclusionary effect on VOW operators, by severely restricting their ability to differentiate themselves from traditional brokers, and by raising their costs of doing business.

[446] As a direct consequence of the more restrictive nature of the VOW Policy and Rules, as reinforced by the VOW Data Feed Agreement, relative to the 2008 NAR VOW Policy, potential competitors such as ViewPoint have not entered the Relevant Market in the GTA. The evidence demonstrates that TREB was very aware of many of the innovations that ViewPoint had

introduced to the residential real estate brokerage market in the HRM and elsewhere in Nova Scotia, and that TREB recognized the impact that its VOW Restrictions would have on ViewPoint and other VOW-based operators.

[447] The VOW Restrictions are also having a significant adverse impact on Redfin's ongoing assessment of potentially entering the GTA, **[CONFIDENTIAL]**.

[448] In addition, the VOW Restrictions have prevented other competitors, such as the TheRedPin and Realosophy, from expanding by offering new and innovative products and have effectively imposed higher costs of doing business on them.

[449] Moreover, two AVPs, Sam & Andy (which was sold in May 2015) and Mr. Enchin, were not able to offer brokerages the website and VOW products that they would have been able to provide, but for the VOW Restrictions. As a result of those restrictions, Sam & Andy focused its efforts on other markets and ultimately sold its business. However, its co-founder Mr. Prochazka testified that if the Commissioner obtained the relief he is seeking in this proceeding, he would contact people such as Mr. McMullin, with a view to assisting them to offer the products that they have been prevented from offering in the GTA as a result of TREB's VOW Policy and Rules.

[450] Furthermore, the VOW Restrictions have resulted in increasing the costs of doing business for those who are attempting to offer new products and services over their websites. As Mr. Pasalis testified, assembling sold information manually from the MLS system is a time consuming and costly process. It is also prone to human error, which can undermine the reliability of the analysis produced. In addition, Mr. Enchin stated that he was able to show approximately 30% fewer homes, and spend less time responding to client requests, during the period of time, between 2001 and 2007, when he was able to download data from the MLS system in bulk and was able to display sold and "pending sold" listings on his VOW. He added that having to manually enter new TREB listings was too time consuming, costly and inefficient, once the option of downloading MLS data in bulk was no longer available. Mr. Nagel indicated on his part that his VOW-based model saves customers and agents lots of time and effort.

[451] Based on all of the foregoing, the Tribunal is satisfied that the exclusionary impacts of VOW Restrictions were reasonably foreseeable. They can therefore be deemed to have been intended by TREB.

(4) Does the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweigh the evidence of legitimate business justifications?

[452] For the reasons set in sections (2) and (3) immediately above, the Tribunal concludes that the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweighs the very limited evidence that was adduced in support of the alleged legitimate business justifications that TREB claims underpinned the development and implementation of the VOW Restrictions.

[453] The Tribunal further concludes that the VOW Restrictions, as reinforced by the VOW Data feed Agreement, constitute ongoing, sustained and systemic acts that individually and collectively amount to a practice of anti-competitive acts, within the meaning of paragraph 79(1)(*b*) of the Act (*Canada Pipe FCA* at para 60).

(5) Conclusion

[454] Based on the foregoing, the Tribunal concludes that the Commissioner has demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*b*) are met and that TREB has engaged in, and continues to engage in, a practice of anti-competitive acts.

D. *Have the VOW Restrictions prevented or lessened competition substantially, or are they likely to have that effect?*

[455] The Tribunal will now turn to the fourth issue to be determined in this proceeding. This is whether TREB's VOW Restrictions have prevented or lessened competition, or are preventing or lessening competition, substantially in the Relevant Market, or are likely to have that effect, as contemplated by paragraph 79(1)(*c*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that they have indeed had such effect and that, in the absence of an order of the Tribunal, they are likely to continue to do so.

(1) Analytical framework

(a) *Overview*

[456] Paragraph 79(1)(*c*) deals with the third component of the abuse of dominance provision, the anti-competitive effect of the impugned conduct.

[457] Paragraph 79(1)(*c*) has two distinct and alternative branches. The first requires the Tribunal to find that an impugned practice has had, is having or is likely to have the effect of *preventing* competition substantially in a market. The second requires the Tribunal to find that

the practice has had, is having or is likely to have the effect of *lessening* competition substantially in a market.

[458] The test in assessing cases brought under each of those two branches is essentially the same. In brief, paragraph 79(1)(*c*) contemplates an approach that emphasizes comparative and relative considerations of past, present and future time frames, as opposed to absolute ones (*Canada Pipe FCA* at para 44).

[459] In conducting this assessment, the Tribunal will assess both the degree of the prevention or lessening of competition as well as its duration (*Tervita* at paras 45 and 78). Where a prevention or lessening of competition does not extend throughout the relevant market, the Tribunal will also assess whether it extends throughout a "material" part of the market (*CCS* at paras 375 and 378).

[460] With respect to the degree, or magnitude, the Tribunal assesses whether the impugned practice has enabled, is enabling or is likely to enable the respondent to exercise *materially* greater market power than in the absence of the practice (*Tervita* at paras 50-51 and 54). In brief, a practice that enables a firm to exercise a materially greater degree of market power than it otherwise have been able to exercise, is a practice that prevents or lessens competition substantially. What constitutes "materially" greater market power will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. When the respondent is a trade association, the Tribunal's focus will include whether the impugned practice has enabled the association's members to exercise materially greater market power in the relevant market than in the absence of the practice.

[461] As discussed at paragraph 165 above, market power has been defined in the jurisprudence alternatively in terms of "the ability to set prices above competitive levels for a considerable period," "an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms," and "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition." In the first two variations of these tests, the term "price" is considered to be shorthand for all of the dimensions of competition mentioned in the third variation.

[462] These price and non-price dimensions of competition are assessed because they are generally reliable proxies for the intensity of rivalry. In the absence of rivalry, competition does not exist and cannot constrain the exercise of market power, unless the threat of potential competition is particularly strong. It is therefore the process of rivalry that ordinarily prevents or constrains the exercise of market power, as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in competition with other firms.

[463] In turn, the competitive prices, non-price offerings and innovations that result from that process of rivalry generally serve to increase aggregate economic welfare in an economy, the economy's international competitiveness and the median standard of living of people in the economy. This is particularly true of the innovations that result from the competitive process.

[464] When assessing whether competition with respect to *prices* has been, is or is likely to be prevented or lessened *substantially*, the test applied by the Tribunal is to determine whether prices were, are or likely would be, materially higher than in the absence of the impugned practice. With respect to *non-price* dimensions of competition, such as quality, variety, service, advertising or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition was, is or likely would be materially lower than in the absence of the impugned practice (*Tervita* at para 80; *CCS* at paras 123-125 and 376-377).

[465] With respect to the duration aspect of its assessment, the test applied by the Tribunal is whether this material increase in prices or material reduction in non-price dimensions of competition resulting from an impugned practice has lasted, or is likely to be maintained for, approximately two years (*Tervita* at para 80; *CCS* at para 123).

[466] Where it is alleged that future competition has been, is, or is likely to be prevented by an impugned practice, this period will run from the time when that future competition would have likely materialized, in the absence of the impugned practice. If such future competition cannot be demonstrated to have been, or to be, *likely* to materialize in the absence of the impugned practice, the test contemplated by paragraph 79(1)(*c*) will not be met.

[467] To be *likely* to materialize, the future competition must be demonstrated to be more probable than not to occur in the absence of the impugned practice (*Tervita* at para 66). To meet this test, the Commissioner is required to demonstrate that the future competition, whether in the form of entry by new competitors or expansion by existing competitors (including in the form of the introduction of new product offerings), likely would have materialized within a discernible time frame. This time frame need not be precisely calibrated, but must be based on evidence of when the entry or expansion in question realistically would have occurred, having regard to the typical lead time for new entry or expansion to occur in the relevant market in question. The farther into the future predictions are made, the less reliable and more speculative in nature they will be (*Tervita* at paras 68-74). This demonstration can be made with respect to either identified or unidentified potential or actual competitors, although it may be easier to adduce the requisite evidence with respect to identified potential or actual competitors (*Tervita* at paras 61-63). In any event, it must be demonstrated that the future competition that was, is or is likely to be prevented by the impugned practice would have been sufficiently important to have a substantial impact on competition in the relevant market (*Tervita* at para 78).

[468] In addition to all of the foregoing, in assessing whether the degree or magnitude of a prevention or lessening of competition is sufficient to be considered “substantial,” the Tribunal will consider the overall economic impact of an impugned practice in the relevant market. For example, the Tribunal may conclude that a large price increase, or a large reduction in non-price benefits of competition, constitutes a substantial prevention or lessening of competition, even if that anti-competitive effect is likely to last less than two years, relative to the level of price or non-price competition that likely would have prevailed in the absence of the practice.

[469] "Substantiality" can be demonstrated by the Commissioner through quantitative or qualitative evidence. CREA contends that a qualitative assessment of the anti-competitive effects is only appropriate when these effects cannot be quantitatively estimated, and that the Commissioner has the burden to demonstrate that the effects cannot be quantified before turning to qualitative evidence. The Tribunal disagrees. In contrast to merger cases in which the efficiency exception is invoked by the respondent(s), there is no obligation on the Commissioner to quantify the anti-competitive effects of an impugned practice of anti-competitive acts (*Tervita* at para 166). In *Tervita*, the Supreme Court clearly distinguished between the measurement of anti-competitive effects under section 92 and the balancing exercise under section 96 on efficiencies. Quantification is only mandatory for the latter. In the context of a merger, the Court found that the "the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantity deadweight loss" (*Tervita* at para 166). The Tribunal is of the view that such analysis similarly applies to a finding of substantial prevention of competition in the context of an abuse of dominant position.

[470] Therefore, in order to meet the requirements of paragraph 79(1)(*c*), the Commissioner can resort to either quantitative or qualitative evidence, or both. However, the Commissioner must always adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition is likely to be prevented or lessened substantially (*Tervita* at paras 65 and 76). The Tribunal recognizes that it may be more difficult to meet this burden when the Commissioner relies largely on qualitative evidence, in part because quantitative evidence can be more probative to demonstrate the presence or absence of anti-competitive effects. In any event, the Tribunal will be entitled to draw an adverse inference if evidence that would or could be available has not been adduced.

[471] The Tribunal also recognizes that there may be a greater need for the Commissioner to rely on qualitative evidence in innovation cases like this one. This is because dynamic competition is generally more difficult to measure and to quantify. Indeed, when dealing with innovation, reliable statistical or empirical evidence is sometimes not available and the Commissioner may need to resort to more qualitative tools and instruments to demonstrate the competitive effects of a challenged conduct. Such evidence can take the form of business documents, witness statements and testimonies, industry analyses, etc. As long as such qualitative evidence collectively meets the requirements of the applicable standard of proof of balance of probabilities, it can be sufficient to support an application, even with limited quantitative evidence, or indeed none at all. In other words, no particular type of evidence is necessarily required. However, it bears repeating that the Commissioner ultimately bears the burden of proof and the Tribunal must be convinced on a balance of probabilities (*Canada Pipe FCA* at para 46).

[472] Despite the similarity in the general focus of the Tribunal when considering the two branches of paragraph 79(1)(*c*), there are nevertheless important differences in its assessment of the "lessen" and "prevent" dimensions of competition (*Tervita* at para 55).

[473] Specifically, in assessing whether competition has been or is likely to be *lessened*, the more particular focus of the assessment is upon whether the impugned practice has facilitated, or is likely to facilitate, the exercise of new or increased market power by the respondent. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry has been, or is likely to be, diminished or reduced, as a result of the impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be lessened at all, let alone substantially. This is subject to the caveat discussed below regarding a trade association respondent.

[474] By contrast, in assessing whether competition is likely to be *prevented*, the Tribunal's more particular focus is upon whether the impugned practice has preserved, or is likely to preserve, any existing market power enjoyed by the respondent, by preventing or impeding new competition that otherwise likely would have materialized in the absence of the impugned practice. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry likely would have increased, "but for" the implementation of that practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be prevented at all, let alone substantially. Once again, this is subject to the caveat regarding a trade association respondent.

[475] Where the respondent is a trade association, the Tribunal will consider whether the impugned practice is likely to facilitate the exercise of new or increased market power by some or all of the members of the association, or to preserve their market power, relative to the situation that would likely have prevailed in the absence of the respondent's impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be prevented or lessened at all, let alone substantially.

[476] Finally, where a respondent with a high degree of market power is found to have engaged in a practice of anti-competitive acts, smaller impacts on competition resulting from that practice will meet the test of being "substantial" (*Tele-Direct* at p. 247).

(b) *The "but for" approach*

[477] In comparing the level of competition in the presence of the impugned practice with the level of competition that likely would have prevailed in the absence of the impugned practice, the Tribunal typically asks what likely would have occurred "but for" the impugned practice (*Tervita* at paras 50-51; *Canada Pipe FCA* at paras 44 and 58).

[478] Where the practice has been in place for a significant period of time and its effects have already been fully manifested, the Tribunal will begin its assessment by comparing the state of competition that prevailed before the implementation of the practice, with the state of competition at the time the Tribunal hears the application. The Tribunal may also compare the former state of competition with that which existed at a particular time prior to the hearing of the application, if that is relevant to its consideration of the Commissioner's application and the relief sought. However, where the state of competition was in any event likely to change,

regardless of the implementation of the impugned practice, the Tribunal will compare the state of competition at the time of its hearing with the state of competition that likely would have prevailed "but for" the implementation of the practice.

[479] Similarly, where the effects of the practice on competition have not yet fully manifested themselves, the Tribunal will compare the state of competition that existed prior to the implementation of the practice, with the state of competition that likely will exist once the effects of the practice on competition have been fully manifested (*Canada Pipe FCA* at para 55). Once again, this assessment may be adjusted where the state of competition was in any event likely to change, regardless of the implementation of the impugned practice.

[480] As is apparent from the foregoing, the Tribunal's analysis under paragraph 79(1)(*c*) is *relative* in nature. That is to say, the Tribunal compares, on the one hand, the level of competition that exists, or would likely exist, after the implementation of the impugned practice, and on the other hand, the level of competition that likely would have existed "but for" the impugned practice. As stated in the preceding section of these reasons, the test contemplated by this paragraph is whether the difference between those two levels of competition is, was, or would likely be, *substantial*; and this test is met when the price of the relevant product is likely to be materially higher, or the level of one or more significant dimensions of non-price competition is likely to be materially lower, than in the absence of the impugned practice.

[481] It follows from the foregoing that the *absolute* level of competition in, or entry into, the relevant market, is not the focus of the Tribunal's assessment. Stated differently, the issue is not whether competition continues to be intense, or whether *some* new entry continues to occur. The issue typically is whether competition likely would have *even been more intense*, perhaps as a result of *even more* entry or innovation, "but for" the implementation of the impugned practice (*Canada Pipe FCA* at paras 36-37, 53 and 57-58).

[482] It also follows from the foregoing that the failure of the Commissioner to provide historical data comparing the competitiveness of the relevant market in the past with its competitiveness at the time of the hearing (or other relevant intermediate time), is not necessarily fatal to the Commissioner's application. The Commissioner can also succeed by adducing evidence to establish a substantial difference between the level of actual or likely competition in the relevant market in the presence of the impugned practice and the level of competition that likely would have prevailed in the absence of that practice (*Tervita* at paras 50-51; *Canada Pipe FCA* at paras 55 and 58). However, it bears emphasizing once again that the burden to demonstrate both the substantial nature of the alleged prevention or lessening of competition, and the basic facts of the "but for" scenario that are required to make that demonstration, lies with the Commissioner (*Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 at paras 107-108).

[483] Although the Tribunal ordinarily applies this "but for" approach, it maintains the right to adopt a different approach in appropriate cases (*Canada Pipe FCA* at para 44).

(2) The alleged anti-competitive effects

(a) *Summary and commentary*

[484] In his Concise Statement of Economic Theory, the Commissioner submits that TREB's practice of anti-competitive acts constitutes *a significant barrier to entry and expansion* for brokers who would like to offer brokerage services over the Internet. He asserts that, by limiting the degree to which TREB's Members compete with one another, the positions of TREB's traditional brokers are entrenched and their market power maintained.

[485] More specifically, the Commissioner maintains that the VOW Restrictions *negatively affect the range of brokerage services* being offered to consumers by VOWs and other innovative business models in the Relevant Market.

[486] In addition, he maintains that the VOW Restrictions *reduce the overall level of innovation* in the Relevant Market, including the development of more efficient business models by brokers who would otherwise offer new forms of competition to traditional "bricks and mortar"-based brokerages. Among other things, he asserts that this has prevented innovative brokers from increasing their efficiency and productivity, for example, by reducing their costs, working with more customers at a time and specializing in providing a subset of brokerage services in respect of which they have a comparative advantage.

[487] In his Application, the Commissioner elaborates by stating that TREB's practice of anti-competitive acts prevents agents from providing over the Internet information that otherwise would be labour-intensive to assemble for clients. In the absence of that anti-competitive practice, agents would be freed up from those labour-intensive tasks, and would therefore be able to focus on providing additional value to consumers.

[488] The Commissioner adds that the exclusion of VOWs and other innovative business models *denies consumers the benefits of the downward pressure on commission rates* that would likely otherwise exist. For example, he maintains that, by preventing increases in efficiency and productivity, TREB is preventing VOW-based operators and other innovative brokerages from passing the cost savings that would be realized from such efficiencies on to their customers through reduced commission rates or through increased rebates, as is being done by some VOWs operating in the United States.

[489] Moreover, the Commissioner submits that, in the absence of the VOW Restrictions, *the quality of services* in the Relevant Market would be substantially greater, and consumers would benefit from *substantially greater choice*.

[490] In his 2015 Closing Submissions, the Commissioner added that the adverse impact of those restrictions on non-price competition have *reduced the total output* of residential real estate brokerage services in the GTA, relative to what it would otherwise be "but for" those restrictions.

[491] Finally, the Commissioner's expert, Dr. Vistnes, asserts that TREB's refusal to permit VOW operators to display the Disputed Data on their VOWs helps to *maintain agents' incentives to steer consumers into inefficient matches*, at the expense of the home buyer, the seller or both. Stated differently, he maintains that with the better information that full-information VOWs would provide regarding a home's market value, buyers would be less vulnerable to being encouraged to offer an excessive price, and sellers would be less vulnerable to being encouraged to accept too low a price.

[492] In its Response, TREB begins by stating that it has no market power in the Relevant Market, that the VOW Restrictions do not create, enhance or maintain any market power for TREB and that, in any event, TREB has no motivation to exercise any market power that it may have. For the reasons discussed in section VII.B.(3) of these reasons above, including at paragraphs 256-266, the Tribunal disagrees with these propositions.

[493] In its written and oral submissions, TREB also maintained that its Members do not have market power. Among other things, it asserted that competition in the Relevant Market has only intensified since the Initial Hearing.

[494] With respect to the range of brokerage services being offered in the Relevant Market, TREB states that its policies do not materially reduce the broad array of services that continue to be offered, including new services that continue to be introduced over the Internet and otherwise.

[495] Regarding price competition, TREB maintains that its VOW Policy and Rules do not prescribe the commission structures that must be adopted by its Members, and that in any event, there is clear evidence of price competition among participants in the Relevant Market. In this regard, TREB notes that negotiations can and routinely do occur regarding the level of commissions on both the "sell" and the "buy" side of residential real estate transactions, and that agents often give rebates or other consideration that effectively reduces the level of their commission.

[496] Turning to innovation, TREB maintains that a VOW is only one type of a wide range of innovation initiatives that are ongoing in the Relevant Market, as manifested by a plethora of new service offerings that continue to be introduced by new and existing market participants on an ongoing basis.

[497] Regarding the total output of brokerage services in the Relevant Market, Dr. Church testified, in response to questioning from the Tribunal, that demand for residential real estate brokerage services is inelastic, because it is derived from the demand for buying and selling homes, and that therefore any change in the quality of such services probably has no impact on that demand for buying and selling homes. More generally, TREB objected to the fact that this allegation of the Commissioner was raised too late in the proceeding to permit it (TREB) to fully respond.

[498] Finally, with respect to buyer steering, TREB submits, among other things, that the Commissioner has not demonstrated that this behaviour occurs in the Relevant Market, or that it has harmed competition.

[499] CREA supported many of the positions taken by TREB. It also raised concerns regarding the potential effect of the remedy requested by the Commissioner on its trade-marks (which include the Multiple Listing Service trade-mark, the MLS trade-mark and the associated logos), as well as on the REALTOR trade-mark, REALTORS trade-marks and the associated logos that CREA indirectly co-owns with NAR.

[500] The Tribunal acknowledges that individual real estate brokers and agents in the Relevant Market do not have market power. However, that is not the issue raised by this proceeding. The issue is whether the VOW Restrictions have insulated, are insulating, or are likely to insulate TREB's Members from new forms of rivalry that, in aggregate, would likely substantially increase competition in their absence, as reflected in materially lower prices or in materially greater non-price benefits of competition. When a group of rivals, whether through their trade association or otherwise, insulates itself from increased competition, they are in essence exercising a cognizable form of market power. In brief, to prevent a material increase in quality, variety or innovation, or a material reduction in price, is to prevent a material reduction in one's market power, whether such market power exists at the individual or group level. For the reasons discussed in section VII.D.(3) of these reasons below, the Tribunal is satisfied that TREB has exercised, and continues to exercise, such market power on behalf of its Members who sought to be insulated from innovative forms of competition.

[501] The Tribunal also acknowledges that there is a high degree of competition in the Relevant Market, as reflected in considerable ongoing entry and exit, a significant degree of discounting activity with respect to net commissions, and a significant level of ongoing technological and other innovation, including with respect to quality and variety and through Internet-based data-sharing vehicles.

[502] However, as noted at paragraph 481 above, the absolute level of competition in, or entry into, a relevant market is not the focus of the Tribunal's assessment. Instead, that focus is upon whether competition likely would have been substantially even more intense "but for" the VOW Restrictions. The fact that other aspects of the VOW Policy and Rules might increase competition, for example, by virtue of the fact that they now enable VOWs to operate in the GTA, albeit in a limited way, is irrelevant.

[503] Nevertheless, the Tribunal agrees with TREB and CREA that the appropriate focus of assessment under paragraph 79(1)(*c*) of the Act should be upon the *incremental* effect of the VOW Restrictions on competition. More specifically, the specific focus of this stage of the assessment is upon whether competition would likely be substantially greater in the absence of the VOW Restrictions than it is at the present time, or is likely to be in the future, if they remain unchanged.

[504] For the reasons discussed below, the Tribunal concludes that the incremental adverse effect of the VOW Restrictions on competition has been, is, and is likely to continue to be substantial, relative to the "but for" world in which those restrictions did not exist. These anti-competitive effects take the form of increased barriers to entry, increased costs for VOWs, reduced range and quality of brokerage services, and reduced innovation.

(b) *Increased barriers to entry and expansion*

[505] In assessing whether competition has been, is or is likely to be substantially prevented or lessened by a practice of anti-competitive acts, one of the factors to consider is whether entry or expansion into the relevant market likely would have been, or likely would be, substantially faster, more frequent or more significant "but for" that practice (*Canada Pipe FCA* at para 58). This factor has played a central role in several cases that the Tribunal has dealt with under section 79 of the Act (*NutraSweet* at pp. 27 and 47-48; *Laidlaw* at pp. 347-348; *Nielsen* at p. 277).

[506] The Commissioner submitted that TREB's MLS Restrictions, including the VOW Restrictions, constitute a significant barrier to entry or expansion for brokers who would like to be able to operate a full-information VOW in the Relevant Market.

[507] TREB acknowledged that an assessment of whether an impugned practice impedes entry or expansion in a market can assist the Tribunal to determine whether market power has been or is likely to be created, enhanced or preserved by an impugned practice. However, it submitted that there are no significant barriers to entry into the Relevant Market, and this is confirmed by the fact that its membership grew from approximately 35,000 to approximately 42,500 in the period between the Initial Hearing and the Redetermination Hearing in this proceeding.

[508] In the absence of evidence that some of TREB's new Members have entered the Relevant Market as full-information VOWs, the fact that TREB's membership continues to grow does not significantly assist the Tribunal to determine whether the VOW Restrictions constitute a significant barrier to entry or expansion for brokers who would like to be able to operate a full-information VOW in the Relevant Market. Moreover, the Tribunal notes that data provided by Dr. Church suggests that approximately 30% of those who register for access to TREB's MLS system cease accessing that system within three years.

[509] TREB further submitted that VOW technology has been popular with "brand name" affiliated brokerages, and can be easily adopted by any TREB Member. In this regard, TREB stated that its VOW Data Feed has been adopted by 322 brokerages, including by several that are affiliated with large franchise-affiliated brokerages.

[510] However, once again, this evidence does not significantly assist the Tribunal to address whether the VOW Restrictions have had, are having or are likely to have an exclusionary effect on brokers who would like to be able to operate a full-information VOW in the GTA. By contrast, several of the Commissioner's witnesses provided credible and persuasive evidence

regarding the exclusionary impact that the VOW Restrictions have had on them. This evidence includes the following.

(i) ViewPoint

[511] Mr. McMullin stated in 2012 that ViewPoint would like to expand into the GTA but could not do so in a commercially viable way due to TREB’s VOW Restrictions, including the lack of certain content in TREB’s VOW Data Feed. Specifically, he stated that ViewPoint requires data about properties that have sold (including recently sold properties) and other Disputed Data that are provided in “real time,” in order to compete effectively using its brokerage model. He added that if ViewPoint could access all of the MLS data that is currently available to brokers through non-VOW channels, it would have a basis for competing in the GTA. Without such information, he stated that ViewPoint has no realistic basis for competing effectively in that market. In his updated 2015 witness statement, Mr. McMullin confirmed that the above statement remains true.

[512] Mr. McMullin elaborated on the foregoing as follows:

> In the case of both potential buyers and potential sellers, convenience and transparency are key ingredients in being able to use viewpoint.ca to attract customers. We have to be able to compete for consumers’ business with traditional brokerages. Unless we can provide the same MLS information through our website as those traditional brokerages can through conventional means (in person, by phone, email, etc.), then we will rarely succeed to convince a customer to list or buy with ViewPoint. Without a full dataset from the MLS system, we would be unable to compete effectively. With access to the same information and the ability to display it on our website, the consumer can compare and choose between the convenience and transparency of using our website to obtain information about their potential purchase or sale, and the personal relationship of a traditional Realtor to obtain that same information.
>
> (Exhibits A-002 and CA-001, Witness Statement of William McMullin dated June 18, 2012 (**“2012 McMullin Statement”**), at para 78)

[513] Mr. McMullin added that without the ability to provide innovative products and services based on the MLS system and other property-related information over the Internet, it would have required “years of work [to] overcome the advantages of the incumbent traditional brokerages” and to gain the amount of business that ViewPoint has achieved in Nova Scotia (2012 McMullin Statement, at para 28).

[514] ViewPoint's interest in the GTA dates back to December 2010, about a year after it launched its website in Nova Scotia, in January 2010. At that time, Mr. McMullin sent a lengthy email to Mr. DiMichele, who was TREB's CIO, to express his interest in the GTA market. After failing to receive a response to that communication and after several subsequent unsuccessful attempts to meet with Mr. DiMichele, ViewPoint became a Member of TREB in August 2011. Contemporaneously, Mr. McMullin wrote an email to TREB's President at the time, Mr. Richard Silver. Among other things, Mr. McMullin requested a meeting with Mr. Silver. After further unsuccessful attempts to reach Messrs. Silver and DiMichele by email or by telephone, Mr. McMullin went to TREB's offices in November 2011, where he had an unproductive meeting with TREB's Chief Privacy Officer, Mr. Von Palmer.

[515] Shortly after TREB's VOW Data Feed became available in November 2011, ViewPoint executed TREB's Data Feed Agreement. However, in the absence of the Disputed Data, ViewPoint still has not entered the GTA.

[516] In the six years of its existence, ViewPoint has grown to become the largest independent real estate brokerage in Nova Scotia, with 22 agents in the field. (The term "independent" in this sense means that it is not part of one of the large franchise systems, such as RE/MAX or Royal LePage.) Its gross revenues have risen from $**[CONFIDENTIAL]** in 2012 to $**[CONFIDENTIAL]** in 2013, and then to $**[CONFIDENTIAL]** in 2014, including revenues from advertising (which went from $**[CONFIDENTIAL]** to $**[CONFIDENTIAL]** between 2012 and 2014). It continues to register approximately **[CONFIDENTIAL]** new users each day. Over that same period, the number of total page views on www.viewpoint.ca rose from approximately **[CONFIDENTIAL]** million in 2012 to **[CONFIDENTIAL]** million in 2013 and then **[CONFIDENTIAL]** million in 2014. Since the launch of www.viewpoint.ca in January 2010, registered and unregistered visitors have viewed more than **[CONFIDENTIAL]** million pages of property and listing information. The Google Analytics reports attached to the 2015 McMullin Second Statement indicate that, in 2014, there were **[CONFIDENTIAL]** sessions, **[CONFIDENTIAL]** users (Google's estimate of the number of persons who accessed www.viewpoint.ca), and **[CONFIDENTIAL]** page views on www.viewpoint.ca.

[517] According to Mr. McMullin, registered users account for approximately 90% of the traffic on ViewPoint's website. ViewPoint had **[CONFIDENTIAL]** new registered users in 2012; **[CONFIDENTIAL]** in 2013; and **[CONFIDENTIAL]** in 2014. It participated in **[CONFIDENTIAL]** brokered transactions in the HRM in 2012, **[CONFIDENTIAL]** in 2013, and **[CONFIDENTIAL]** in 2014. This represented growth in its share of total brokered transactions in the HRM from **[CONFIDENTIAL]** to **[CONFIDENTIAL]** over that period, notwithstanding overall yearly declines in the total number of brokered transactions in the region of 12.9% in 2013 and a further 3% in 2014. During the Redetermination Hearing, Mr. McMullin estimated that ViewPoint was on track to realize growth of approximately 25-28% in the total number of its brokered transactions (for the whole of Nova Scotia) in 2015.

[518] The foregoing figures were not disputed by TREB or CREA.

[519] Mr. McMullin further testified that if the VOW Restrictions were eliminated, ViewPoint would enter the Relevant Market within three to four months. The Tribunal accepts that this would be a likely result of the elimination of the VOW Restrictions.

(ii) TheRedPin

[520] TheRedPin evolved out of an entity known as Realty Teller, which started operations in 2008. In 2009, TREB's refusal to make resale home listings data available in an electronic data feed led Realty Teller to focus its efforts on the new condominium market, by creating an online platform to connect builders and developers with potential buyers. In September 2010, the Realty Teller website was launched publicly.

[521] In June 2011, soon after TREB launched its 60-day consultation process in relation to its VOW Policy and Rules, Mr. Hamidi and his partners decided to move forward with their original Realty Teller vision from 2008, by becoming an official brokerage and a Member of TREB. TheRedPin was launched later that month and was, according to Mr. Hamidi, one of Canada's first online brokerages at that time.

[522] In December 2011, shortly after TREB launched its VOW Data Feed, TheRedPin became the first brokerage to launch a website using TREB's VOW Data Feed.

[523] Since its initial launch, TheRedPin has focused on being a web-based brokerage oriented towards meeting customer desires and needs, all in a single user-friendly website. In particular, TheRedPin endeavours to provide a single online source of information that home buyers and sellers value. In addition to simply displaying that information, TheRedPin seeks to innovate with the MLS data and other information that it is able to obtain.

[524] However, the VOW Restrictions have limited TheRedPin's ability to "get better traction as a brokerage." Among other things, TheRedPin believes that obtaining access to the Disputed Data would enable it to offer better and more services to attract a greater number of people to its brokerage. Mr. Gidamy elaborated as follows:

> Because potential customers already have access to current listing information online on realtor.ca, TheRedPin has to offer potential customers more than just current listings to attract them to TheRedPin.com over realtor.ca, and to convert them into clients of our brokerage. Having sold information in the VOW datafeed and the innovative tools we expect to develop using it, would provide powerful new ways of first attracting and then of converting website visitors into clients. For example, on the listing side, heatmaps and other neighbourhood-specific sold information could help us show home sellers how TheRedPin's technology can help them value and ultimately sell their home.

(Exhibits A-113 and CA-114, Second Witness Statement of Tarik Gidamy dated January 30, 2015 (**"2015 Gidamy Statement"**), at para 21)

[525] Mr. Gidamy also stated that the VOW Data Feed remains critical to his ability to generate traffic on TheRedPin website and use it to generate leads, since "TREB's VOW data feed enables website users to see 100% of current MLS® listings on TheRedPin.com" (2015 Gidamy Statement, at para 7). Mr. Gidamy however admitted that realtor.ca does post or show the current MLS listings from real estate boards across the country.

[526] Mr. Gidamy also stated that, with access to the Disputed Data, and the freedom to use it in innovative ways, TheRedPin would be in a much better position to prepare accurate and in-depth advice and CMAs; and to more generally better distinguish TheRedPin from its competitors by putting MLS data to its best and highest use for home sellers and buyers. By contrast, without that data and freedom, he believes that TheRedPin is at "a serious competitive disadvantage" with other brokerages, which are able to provide the Disputed Data such as sold information to their clients in conventional ways (Exhibit A-015, Witness Statement of Tarik Gidamy dated June 22, 2012, at para 22). He added that if TheRedPin is not able to achieve greater efficiencies such as those that would flow from the innovations described below, and to achieve the increased brand recognition that it believes would be generated by its new products, it will have to scale down its business and operate at a much smaller size to remain in operation. Mr. Silver added that the likely effect of providing brokerages with a data feed containing more key information held closely by the real estate industry would be to allow brokerages to compete more effectively in providing real estate brokerage services.

(iii) Realosophy

[527] Mr. Pasalis asserted that the absence of sold, "pending sold," status change and geomapping data in TREB's VOW Data Feed is constraining Realosophy's growth.

[528] Mr. Pasalis explained that Realosophy's business model depends on having access to data, particularly from TREB's MLS system. As a result, its inability to obtain a data feed with sold and "pending sold" data limits Realosophy's ability to provide services to consumers online and to its clients.

[529] Among other things, he asserted that the limitations in TREB's VOW Data Feed are impeding Realosophy's ability to provide more advanced analytics and commentaries online and through the media, and to engage with clients more frequently by providing more updates of information. In addition, Ms. Desai and Mr. Pasalis stated that the registration requirement in the VOW Policy and Rules is having a significant chilling effect on potential clients who are reluctant to register to access the innovative services provided by Realosophy. Although Mr. Pasalis has less objection to requiring potential home buyers and sellers to register on his website to access specific sold and "pending sold" data on an individual listing basis, he believes that there should be no need to register to access aggregated information about sold property prices.

(iv) Redfin

[530] According to Mr. Nagel, Redfin is the leading real estate brokerage website in the United States. Between early February 2015, when he signed his second witness statement, and the end of September 2015, when he testified at the Redetermination Hearing, Redfin expanded from 48 metropolitan areas in 24 states to 74 metropolitan areas in 35 states. In addition, it expanded from 1,102 agents to approximately 1,800 agents, and from approximately 1,600 partner agents to over 2,300 partner agents, during that same period. However, it is not clear from the evidentiary record what this growth translates into, in terms of Redfin's share of brokered residential real estate transactions in any given urban market. The Tribunal was left with the sense that Redfin may remain well under 5%. Nevertheless, over the first nine months of 2015, Redfin had approximately 1,045,000 registrations on its website.

[531] In 2012, Mr. Nagel stated that Redfin had been considering expanding into Canada because it has "several metropolitan areas with strong housing markets and a tech-savvy population." In particular, Redfin was considering expanding into Vancouver, Toronto and possibly Calgary (Exhibit A-008, Witness Statement of Scott Nagel dated June 20, 2012, at para 56). However, it had not yet done a detailed analysis in respect of such potential expansion. Mr. Nagel added that the lack of available sold, recently sold and other current information about specific properties would have a significant impact on whether Redfin enters a market.

[532] In his 2015 witness statement, Mr. Nagel stated that **[CONFIDENTIAL]** (2015 Nagel Statement, at paras 26-28).

[533] When pressed by the Tribunal on this issue during his testimony, Mr. Nagel explained that Redfin decided "to take an active look again" at expanding into Toronto after the Commissioner's Application was remitted to the Tribunal. He reiterated that one of the factors that is relevant to Redfin's decision regarding a potential expansion into Toronto is whether it will be able to provide information with respect to "sold" properties, which is required "to provide our full customer experience in Canada." He added that one of the reasons why he was participating in the Tribunal's proceedings "is because [Redfin would] prefer to provide everything, just like [it does] in the vast majority of U.S. jurisdictions" (Transcript, September 24, 2015, at pp. 429-430).

[534] Based on Mr. Nagel's evidence, the Tribunal cannot conclude that the VOW Restrictions have prevented Redfin from expanding into the GTA, or that Redfin *likely would expand* into the GTA "but for" those restrictions. Accordingly, the Tribunal will not consider the adverse effect that the VOW restrictions appear to be having on Redfin's decision in this regard, in determining whether those restrictions have prevented or lessened, or are preventing or lessening competition substantially in the Relevant Market, or are likely to have that effect.

[535] However, the Tribunal observes in passing that those restrictions are having a deterring effect on Redfin, and that if they were eliminated, the potential for Redfin to expand into the GTA would increase.

(v) Other full-information VOW operators

[536] Two witnesses representing AVPs gave evidence on behalf of the Commissioner, namely, Mr. Prochazka, one of the founders of Sam & Andy, and Mr. Enchin, a sales representative with Realty Executives.

[537] Sam & Andy was an AVP that operated turnkey websites, including with VOWs, for agents in various cities in Canada and the United States, prior to its sale to Ubertor, a Vancouver-based firm, in May 2015.

[538] The VOW product that Mr. Prochazka provided was called Platinum Clicksold. For $45 per month, clients were provided with an unlimited number of active listings, photos per listing and custom domains as well as some additional technical features.

[539] As of February 2015, Sam & Andy had 90 Platinum Clicksold customers in the GTA. However, by the time Sam & Andy was sold to Ubertor in May 2015, this number may have been reduced by approximately half.

[540] Between 2005 and 2011, Sam & Andy contacted TREB up to twice per year to explore obtaining access to its MLS data, so that it could begin offering its services to realtors in the GTA. However, it was not until TREB issued its VOW Policy and Rules, and began to provide a VOW Data Feed, that Sam & Andy was able to obtain access to TREB's MLS data. In Mr. Prochazka's words, it was not until "this case was launched that TREB kind of started to play ball a little bit, give us a little bit of access to VOW and IDX data" (Transcript, September 23, 2015, at p. 306).

[541] However, the information provided in TREB's VOW Data Feed fell short of what Sam & Andy was able to obtain from MLS entities in the United States, which provided historical listing information (including sold data), mapping coordinates, status changes and identification codes in their data feeds.

[542] Moreover, various terms in TREB's VOW Policy and Rules increased Sam & Andy's operating costs and created barriers for agents who wished to purchase its products and services. For example, the VOW Data Feed did not contain fields with listing changes, mapping coordinates or agent identification codes to link agents with their listings agents. In addition, agents who wished to obtain a website with a VOW were required to obtain a signed agreement from their supervising broker. Mr. Prochazka testified that TREB is the only MLS entity with which he has dealt which imposes this requirement. At the time of the Initial Hearing, supervising brokers had refused to permit approximately 20 agents from obtaining a Clicksold website. By the time of the Redetermination Hearing, the requirement that agents obtain a signed agreement from their supervising broker had "arrested [Sam & Andy's] growth in the GTA" (Transcript, September 23, 2015, at p. 307).

[543] After concluding that "there really was no big opportunity for expansion and that [they] had run into too many barriers" in the GTA and other areas of Canada (Transcript, September 23, 2015, at p. 318), the majority shareholders of Sam & Andy sold the firm to Ubertor. As a result of those barriers, the GTA had become Sam & Andy's "worst-performing market" (Transcript, September 23, 2015, at p. 324).

[544] When Mr. Prochazka evaluated the potential to open a web-based brokerage in Edmonton and Calgary, he determined that it was necessary to provide sold data to be able to assist the public to gain insights into the property market, for example, through statistical tools such as price trends and sales velocity. This is because a web-based brokerage must be able to provide something more than what is already available on realtor.ca. He testified that it is "impossible to compete" as a web-based brokerage based on what is currently in TREB's VOW Data Feed (Transcript, September 23, 2015, at p. 311).

[545] Mr. Prochazka testified that if the Commissioner were to obtain what he is seeking in his Application, he would seek an opportunity to invest in, and sit on the board of, a web-based brokerage such as ViewPoint.

[546] Turning to Mr. Enchin, he created his first VOW in 2001, which he licensed to approximately 1,000 other realtors. That VOW was created at a time when TREB permitted its Members and certain others, including Mr. Enchin, to download its MLS listings in bulk. Mr. Enchin's VOW displayed MLS listing data, including sold and pending sold information, until TREB disabled its Members' ability to download TREB's MLS data in large quantities in 2007. He then sold his software and contracts with brokers to another company.

[547] In the summer of 2011, after becoming aware of TREB's VOW Policy and Rules, Mr. Enchin contacted TREB to obtain more details about its VOW policy and data feed. He then began to develop a new VOW and retained the assistance of a third-party, Adpioneers, which specialized in website development. He and his partners committed to a $100,000 contract to complete the initial version of his 2012 VOW. At the time of the Initial Hearing, he had demonstrated his 2012 VOW to five large brokerages in the GTA, who had all committed to adopting it for their approximately 4,000 agents once it became available. Smaller brokerages, representing approximately 1,000 agents, had also expressed interest in or committed to adopting Mr. Enchin's 2012 VOW, once it became available. Mr. Enchin stated that he believed his 2012 VOW would have been more popular with realtors and their clients if he could have offered the appraisal feature, which required sold and "pending sold" data.

[548] Unfortunately for Mr. Enchin, Adpioneers admitted in October 2012, after Mr. Enchin testified at the Initial Hearing, that it lacked the expertise to complete the VOW. Mr. Enchin and Adpioneers then terminated their relationship. After investing additional time and money to develop his VOW with the assistance of another third-party (who was also unable to complete the task), Mr. Enchin paused the development of his VOW for a period of time. In February 2015, he stated that he was working with a new software developer and hoped to have a trial version of his VOW completed by the end of that month.

[549] The Tribunal was not provided with any update regarding Mr. Enchin's efforts to launch his new VOW, as he did not appear at the Redetermination Hearing. As a result, the Tribunal cannot conclude that it is more probable than not that Mr. Enchin will actually launch that VOW and begin making it available. With respect to the VOW Restrictions, the Tribunal cannot conclude that they have had any adverse impact on the development of Mr. Enchin's current VOW or that, "but for" those restrictions Mr. Enchin likely would launch that VOW and begin making it available to agents in the GTA. In other words, any impact that those restrictions may have had on Mr. Enchin's re-entry into the GTA will not be considered by the Tribunal in assessing whether they have prevented or lessened, or are preventing or lessening, competition substantially in the Relevant Market, or are likely to have that effect.

(vi) Conclusion

[550] Based on the foregoing, the Tribunal concludes that the VOW Restrictions have had a significant adverse impact on entry into, and expansion within, the Relevant Market by web-based and other brokerages that would like to offer full-information VOWs in the GTA. Stated differently, "but for" those restrictions, such entry and expansion likely would have been faster or more significant (*Canada Pipe FCA* at para 58).

[551] In summary, those restrictions have prevented ViewPoint, a very disruptive and substantial potential competitor, from entering into the Relevant Market; and have prevented two additional disruptive brokerages, TheRedPin and Realosophy, from expanding within that market. Those restrictions also prevented Sam & Andy from expanding within the market, and prevented their brokerage customers from doing the same.

(c) *Increased costs imposed on VOWs*

[552] The Commissioner also submitted that the VOW Restrictions undermine the ability of full-information VOWs to compete because they have the effect of raising their costs. TREB replied that the evidence does not demonstrate that the VOW Policy and Rules have had, or are likely to have, the effect of raising these costs at all, let alone substantially. The Tribunal disagrees with TREB.

[553] With respect to ViewPoint, TREB noted that Mr. McMullin testified that his agents complete approximately 20 to 22 transactions per year, as compared with what he characterized as being a "provincial average" of 10 to 12 transactions per year per agent. Among other things, Mr. McMullin mentioned that while the traditional brokerage model is based on recruiting agents who will then go out and find customers, his model is based on minimizing, rather than on maximizing, the number of agents, and then using ViewPoint's website to attract prospects who are then connected with its agents. However, TREB and CREA pointed out that Mr. McMullin's calculations were given during the Redetermination Hearing for the first time and were not adequately supported or proven. TREB added that the Tribunal was not provided with any evidence to demonstrate that ViewPoint's agents complete more transactions per year than the average number completed by brokerages operating in the Relevant Market under TREB's existing VOW Policy and Rules. The Tribunal accepts this latter point.

[554] The Tribunal nonetheless also accepts Mr. McMullin's testimony that the costs associated with having to manually upload information with respect to price or other listing status changes would be prohibitive. In addition, the Tribunal accepts his testimony that ViewPoint uses its website www.viewpoint.ca as a lead generating device and that this frees up time for its agents to complete other tasks.

[555] Turning to TheRedPin, TREB and CREA noted that Mr. Gidamy stated that the inclusion of sold information in TREB's VOW Data Feed would enable TheRedPin to develop automated CMA tools that would save its agents time. Mr. Hamidi also testified to the time saving aspect. Nonetheless, TREB and CREA estimated that this time saving would be less than five hours per month per agent. On cross-examination, Dr. Vistnes did not dispute this particular estimate, and he agreed that this specific cost saving was not substantial.

[556] What TREB and CREA omit to mention, though, is that Dr. Vistnes was careful to confine his agreement on this point to this particular example of cost saving that Mr. Gidamy had identified. He did not resile from his broader point that the VOW Restrictions have the effect of raising the operating costs and reducing the productivity of VOW-based competitors in various ways.

[557] Each of TheRedPin's representatives who testified stated that the VOW Restrictions are imposing higher costs on TheRedPin, or are preventing it from reducing its costs. Generally speaking, Messrs. Hamidi, Gidamy and Silver supported the Commissioner's position that empowering the customer to do more assists the brokerage in becoming more efficient, in part because less time is spent generating leads in the time-consuming manner that is adopted by traditional brokerages, thereby freeing agents up to focus on work that adds value to customers. In addition, TheRedPin could provide more automated and other tools to make its agents more efficient and responsive. Mr. Gidamy further noted that such automated tools would not be confined to CMAs.

[558] With respect to Realosophy, TREB observed that Mr. Pasalis testified on cross-examination that the "dashboard" tool recently launched by Realosophy had already enabled Realosophy to achieve considerable time saving for its agents by automating the assembly and display of certain information. However, TREB failed to note that Mr. Pasalis also testified that because that information is manually uploaded, it must be double checked before its agents make any offers on a home, to ensure that important information was not missed. Therefore, Realosophy's agents end up duplicating much of the work that is required to produce the existing dashboard, at least for the particular property that its customer decides to make an offer on.

[559] More broadly, Mr. Pasalis stated that, with access to sold, "pending sold," live update and other information in TREB's VOW Data Feed, Realosophy's agents would need to spend less time merely gathering data for their clients, which would free them up to assist clients to understand the data and reports they are getting, and to better understand the options available to them. In addition, he maintained that much of the preparatory and education work required to prepare CMAs could be automated if sold and "pending sold" data were included in the VOW Data Feed.

[560] In addition to the foregoing, as discussed at paragraph 542 above, Mr. Prochazka stated that certain aspects of TREB's VOW Policy and Rules increased Sam & Andy's operating costs. For example, the absence of agent identification codes in TREB's VOW Data Feed forced Sam & Andy to create a workaround solution that required its clients to manually associate themselves with their listings.

[561] Mr. Enchin also testified that his ability to provide home buyers with access to sold and "pending sold" data through his VOW prior to 2007, when TREB stopped permitting its Members and others such as Mr. Enchin to download its MLS listings data in bulk, contributed to him showing approximately 30% fewer homes to his clients and assisted him to spend less time responding to client requests. During the Initial Hearing, he added that having access to sold information contributed significantly to saving him a significant amount of time when preparing CMAs for his clients.

[562] Based on the foregoing, the Tribunal concludes that the VOW Restrictions have increased the costs of TheRedPin, Realosophy and Sam & Andy to a non-trivial degree in the Relevant Market, and have increased the costs that ViewPoint would have to incur to compete effectively in the GTA. Stated differently, "but for" those restrictions, their costs of doing business likely would have been lower.

[563] The Tribunal also accepts Dr. Vistnes' evidence that the VOW Restrictions discriminate against full-information VOW operators, place those brokerages at a significant competitive disadvantage, reduce their competitive viability and diminish the likelihood that they will succeed in the marketplace.

(d) *Reduced range of brokerage services*

[564] The Commissioner further submitted that the exclusion of full-information VOWs and other innovative business models has negatively affected the range of brokerage services being offered to consumers. In other words, he maintained that "but for" TREB's MLS Restrictions, including the VOW Restrictions, the range of real estate brokerage services offered in the Relevant Market likely would be substantially greater.

[565] CREA responded that VOWs do not and were never intended to replace brokers. They simply provide a means by which a broker can partially provide over the Internet one of the services a broker normally provides in person to a client, namely, the provision of relevant property information that a client needs or wants. VOWs do not physically show homes, negotiate prices, close a transaction or perform various other important functions that are performed by brokers and their agents, including the refinement of listing and offer prices at the final stages of the listing and offer process. Moreover, a lot of the content available on VOWs is readily available to consumers elsewhere, including on a broad range of websites operated by brokerages and others.

[566] The Tribunal agrees that VOWs do not, and were never intended to, replace brokers. Messrs. McMullin, Silver and Pasalis were very clear on this point, both to the Tribunal and to TREB.

[567] Indeed, the experience in the United States reflects that even as VOWs have become more popular since the 2008 NAR VOW Policy came into force, the percentage of home purchasers who use a real estate agent or broker had increased from 81% to 88% by 2014. The corresponding statistic for those who used the Internet at some point in their search for a home was 92% in 2014 (NAR 2014 Profile, at pp. 45, 53, 58 and 60).

[568] However, the question remains whether the VOW Restrictions are nevertheless materially reducing the range of brokerage services that would likely be offered in the Relevant Market, "but for" those restrictions, such that competition has been or is being prevented substantially, or is likely to be prevented substantially.

[569] TREB and CREA assert that brokerages in the GTA currently offer a broad array of services, including on the Internet. In addition to the services mentioned above and in the discussion on innovation below, they note that Realosophy's website already offers features such as geocoding, school ranking profiles, a "Neighborhood Match" product, public transit information, local business information, demographic information and "walk scores." **[CONFIDENTIAL]** In a similar vein, Sage Real Estate's website features videos and professional photographs, floor plans and 3D tours, and a variety of information about properties, including asking price, neighbourhood information and proximity to shopping and schools.

[570] For the reasons discussed below, the Tribunal has concluded that, notwithstanding the broad array of brokerage services currently offered in the Relevant Market in the GTA, the range of such services available in that market likely would be considerably broader "but for" the VOW Restrictions.

[571] In understanding why this is so, it is important to keep in mind that those restrictions not only prevent TREB's Members from displaying the Disputed Data on a VOW in raw form, but also exclude this data from the VOW Data Feed and prevent them from using any data from the VOW Data Feed to create new features, tools and other services. This is readily apparent from a review of some of the services currently offered in other markets by ViewPoint and that TheRedPin and Realosophy would like to offer, which they are being prevented from offering in the Relevant Market by the VOW Restrictions.

(i) ViewPoint

[572] ViewPoint launched its website in January 2010. That website included detailed information on MLS listings across Nova Scotia, although ViewPoint only had agents in the HRM. It currently provides services to three different types of users:

a. *Unregistered users*, who are anonymous visitors who are able to access basic information such as the lot size and assessment value of every property in Nova Scotia, as well as current listing information on those MLS listings which are part of the IDX program;

b. *Registered users*, who are visitors who have created a user account by providing their name and email address and then verifying their email address. In addition to being able to view all of the information that may be seen by unregistered users, they are able to view all active MLS listings, as well as important information that TREB's VOW Restrictions prohibit in the GTA, including sold prices, WEST listings information, other historical information pertaining to sold properties, such as price and other listing status changes, and number of days on the market;

c. *Client Advantage users*, who are able to receive additional information, if they are willing to make a soft commitment to using a ViewPoint agent, and then provide more detailed information regarding their needs (such as when they intend to buy and sell), as well as their contact information. Among other things, these users have access to additional information that cannot currently be made available in the GTA, including:

   i. a professional valuation tool that, among other things, incorporates information pertaining to recent "sold" listings, thereby enabling the client to prepare a more accurate CMA than can be prepared without such information, and to do so *before* they meet with a broker, so that they have a better understanding of the market going into that meeting;

   ii. land registry information; and

   iii. property reports that provide detailed information summarizing real estate and click activity around a subject property.

[573] In addition, ViewPoint also offers a popular "Followed Properties" feature, which allows its registered users to ask to be alerted whenever there are any changes to the status of one or more properties, such as a change in price, a new or updated listing, or a delisting.

[574] Furthermore, for agents, ViewPoint has streamlined the process of booking showings, providing feedback to listing agents after a showing, and settling a transaction on closing. When they receive a showing request, buying agents no longer have to look up information to initiate contact with the listing agent, because ViewPoint's software immediately dispatches that information to the buyer's agent. And following a showing, the buyer's agent can initiate feedback with the click of a mouse, without having to enter any of the contact information for the listing agent. If the client proceeds to purchase the property, the agent simply has to enter the property identifier (or MLS number), and ViewPoint's software will bring up a wealth of information to pre-populate the transaction documentation. Mr. McMullin's sales coordinators have informed him that this latter innovation has led to a dramatic increase in efficiency.

[575] Mr. McMullin stated that in the absence of the VOW Restrictions, the website services that ViewPoint would offer in the GTA would be cutting-edge and would include many of the same features already available on www.viewpoint.ca.

(ii) TheRedPin

[576] Messrs. Gidamy, Hamidi and Silver each testified that, “but for” the VOW Restrictions, the TheRedPin would likely offer many new brokerage services on its website.

[577] For example, Mr. Hamidi stated that with access to the Disputed Data, TheRedPin would be able to provide better and more services, including automatic notifications to customers of price reductions in neighbourhoods of interest and information regarding trends in the relationship between sold and list prices, including aggregates to show trends to users in different formats. He added that TheRedPin would also provide more tools for its agents to make them more efficient, more responsive and able to provide better information to the brokerage’s clients. Mr. Gidamy added that he expects that having sold information in TREB’s VOW Data Feed would enable TheRedPin to develop “powerful new ways of first attracting and then of converting website visitors into clients” (2015 Gidamy Statement, at para 21). This includes by supplementing its existing potential client nurturing programs with various automated tools and other innovations. On the listing side, those tools would include heat maps, graphs, charts and other neighbourhood specific information on sold properties, as well as automated and tailored prospect matches or neighbourhood analyses that could be sent to potential buyers to make them more knowledgeable about neighbourhoods that might be a good fit for them. Mr. Gidamy mentioned creating a tool which would pull out home prices in areas that typically have bidding wars. Some of the above-mentioned tools are already being used by TheRedPin for non-MLS new home and condominium sales. These include heat maps of condominiums, and tools that enable potential investors to ascertain which views would sell better than other views and which floors offer a better return on money. In addition, TheRedPin would like to be able to provide greater transparency regarding commissions, better information regarding whether a pending sale is likely to become a firm sale, and whether there is a pattern or trend of conditions not being fulfilled in a particular neighbourhood.

[578] Although the heat maps and some of the other neighbourhood specific tools and analyses mentioned by Mr. Gidamy may already be offered by Realosophy, as suggested by CREA, the Tribunal accepts, based on the evidence provided, that the VOW Restrictions are preventing TheRedPin from offering the enhanced variations of those innovations that it would like to introduce to the Relevant Market, and from offering them in a more timely manner through a VOW. They are also preventing the greater variety of service offerings that would exist if the VOW Restrictions did not prevent such innovations from being introduced to the Relevant Market.

(iii) Realosophy

[579] Mr. Pasalis stated that, with access to more data, including sold and “pending sold” information, Realosophy could provide a more complete and precise picture of the particular

property by aggregating all information in much the same way as it has done with its neighbourhood profiles. It would likely also provide automatic updates of its neighbourhood profiles on a monthly or more frequent basis, automatic updates of changes in particular listings, innovative price trend and comparable home tools, and more accurate price trend analyses. This was confirmed by Ms. Desai, who stated: "[Realosophy] has the business model, technology, and skill set to be able to use additional data such as solds, pending solds, and price changes in a way that allows us to generate more original content to attract and educate consumers" (Exhibit A-007, Witness Statement of Urmi Desai dated June 20, 2012, at para 30).

[580] In addition, Mr. Pasalis noted that with access to that information, Realosophy would be able to determine and better advise customers with respect to price changes in the market, the percentage of homes selling for more than list price, how "hot" a neighbourhood area might be, when the property last sold, what it was listed for that time, how long it sat on the market, how many times it has been listed in the last year, recent comparable sales and how their homes are doing from an investment perspective.

[581] More broadly, he stated that Realosophy would be able to provide more advanced analytics and commentaries online and through the media. Among other things, this would allow customers to educate themselves better about property prices and market trends in neighbourhoods, and would permit Realosophy to engage with its clients more frequently.

(iv) Sam & Andy

[582] Mr. Prochazka testified that if historical listing data had been available in TREB's VOW Data Feed prior to Sam & Andy's exit from the market in May 2015, Sam & Andy would have offered its clients more products and services for their websites, including statistical neighbourhood analysis, listing price history and automatic property valuations. In addition, he testified that his firm would have been able to offer performance metrics for agents so that, for example, agents could be alerted if a listing had performance metrics that fell outside of certain parameters. He added that, in the United States, his firm provided trending tools and graphs similar to what ViewPoint provides on its website, and tools based on price history and historical transaction rates.

(v) Conclusion

[583] Based on all of the foregoing, the Tribunal concludes that, notwithstanding the broad array of brokerage services currently offered in the Relevant Market in the GTA, the range of such services likely would be considerably broader "but for" the VOW Restrictions.

[584] Although the information contained in the Disputed Data appears to be widely available to home sellers and home buyers from brokers in the Relevant Market today (in person, by fax, by email or by phone), the evidence demonstrates that "but for" the VOW Restrictions, firms such as ViewPoint, Realosophy and TheRedPin likely would have offered by now, and likely would offer in the future, a range of additional innovative and value-added tools, features and other services on a VOW based on that information. As Mr. Gidamy testified: "[It's] not about

the piece of data itself, it's how you display and how you engage and how you create stickiness …" (Transcript, September 23, 2015, at p. 293).

(e) *Reduced quality of brokerage service offerings*

[585] The Commissioner also submitted that "but for" TREB's MLS Restrictions, including the VOW Restrictions, the quality of various real estate brokerage services that are currently offered in the Relevant Market would be substantially greater.

[586] CREA maintained that there is no evidence before the Tribunal that the quality of services is suffering because of TREB's VOW Restrictions. TREB added that any alleged substantial increase in quality of service would be manifested in more customers hiring a brokerage, which is not borne out by the evidence. This is discussed in section VII.D.(3) below.

[587] TREB further asserted that the majority of the content displayed on a website with a VOW comes from sources other than the VOW Data Feed, and that the "real value of these websites is not the provision of information itself, but rather in the analysis of that information." TREB maintains that "the facilitation of some additional data analysis" by full-information VOWs would not represent a significant increase in quality of service. It states that this is particularly so given that brokerages in the GTA already provide analysis based on sold data, as does TREB through its Market Watch publication. In this regard, TREB referred to Sage Real Estate's Market Report newsletter, which provides statistical trends over the previous month for a variety of neighbourhoods in Toronto, aggregated statistics for the neighbourhood, and some individual transaction-level information about properties that sold in the neighbourhood. Those statistical trends include average sold prices for homes in the neighbourhood, trend lines depicting the relationship between sold prices and list prices, and a chart comparing the average number of days on the market each month over a three-year period. TREB also referred to various analytics provided by Realosophy on its blog, including a comparison of buyers' purchasing power across Toronto neighbourhoods. In addition, TREB noted that its Market Watch publication includes aggregated statistics on transactions processed through TREB's MLS system for the month, as well as a statistical break-down of sold house prices by type and by various regions of the city that appear to approximate large neighbourhoods. That publication also contains year-to-date statistics and year-over-year statistical comparisons.

[588] However, the Tribunal agrees with the Commissioner that the *additional* data analysis which TREB acknowledges would be provided by full-information VOW operators is an important part of what full-information VOWs likely would introduce to the Relevant Market, in the absence of the VOW Restrictions. Another important part of what those VOW operators would introduce would be other innovative service offerings that would be based on manipulation of the Disputed Data and that would be quickly accessible through the VOW. For example, full-information VOW operators would be in a position to provide the type of information that is available in TREB's Market Watch and in Sage Real Estate's Market Report much more quickly than is currently the case. (The Tribunal understands that this is monthly.)

[589] Moreover, the Tribunal disagrees with TREB’s position that the additional data analysis that full-information VOWs would likely introduce to the Relevant Market in the absence of the VOW Restrictions would not likely represent a significant increase in quality.

[590] The Tribunal has discussed in section VII.D.(2)(d) above some of the additional innovative services that the Commissioner’s witnesses have testified they would likely offer in the absence of the VOW Restrictions. In addition to those new services, those witnesses testified that, in the absence of the VOW Restrictions, they would likely be able to provide better quality versions of existing services, such as better, more accurate and more complete CMAs; more timely and automated notifications of price reductions; and more accurate, timely and complete other information regarding homes with particular characteristics in a specific neighbourhood, or other matters. Such other information includes detailed historical MLS listing information (including with respect to “solds,” “pending solds,” and WEST listings), dating back many years; statistical analysis tools that, among other things, would assist buyers to determine how long a property might take to sell, or what the sales price-to-listing price ratios are in a particular neighbourhood; and “live” status-change or other information that would enable customers to react quickly to developments in the market. The Tribunal considers the enhancement of CMAs to be particularly significant, as the evidence suggests that it is one of the more valuable sales tools used by agents.

[591] TREB also submitted that if sold data were to become available on its VOW Data Feed, it would be relatively easy for any brokerage in the GTA to display that data on its website. It therefore suggested that in examining the significance of the potential availability of that information to full-information VOWs, the Tribunal should focus on the incremental value that such information would have for full-information VOWs, by virtue of the value added that they would provide to that sold information.

[592] Once again, the Tribunal disagrees. In assessing whether TREB’s practice of withholding sold data from its VOW Data Feed and prohibiting the display of sold data on its Members’ websites is preventing competition, it is relevant to consider the incremental value that this would have for the Relevant Market as a whole, not just for full-information VOWs. To the extent that other brokerages, in addition to full-information VOWs, can be expected to respond to the enhanced quality offerings of the full-information VOWs, that is a further effect that must be taken into account in the Tribunal’s assessment. For example, the Tribunal considers it likely that many other brokerages in the Relevant Market would respond to the more accurate CMAs mentioned above, by offering more accurate CMAs of their own. A failure to do so would make it more difficult for them to effectively compete. In any event, the Tribunal considers it reasonable to infer that many of the 322 brokerages that are already offering VOWs in the GTA likely would respond to the enhanced service quality offerings of ViewPoint, Realosophy and TheRedPin, with improved service offerings of their own. In brief, if the Disputed Data were included in TREB’s VOW Data Feed, it is reasonable to expect that at least some of those brokerages would use that information on their VOWs to compete with those who will be using that information.

[593] TREB asserts that a brokerage website with the Disputed Data on its VOW would not provide a significant increase in quality at either the search phase or the valuation/offer phase of the home sale and purchase process, which are discussed at paragraphs 215-220 of these reasons. Although TREB acknowledges that the Disputed Data is valuable to potential home sellers and purchasers during the latter phase, TREB insists that there is no significant incremental value associated with that data being available on a VOW versus other delivery mechanisms, including orally or by hand from an agent, particularly since a consumer must in any event work with an agent in person at that stage. TREB adds that the Disputed Data is much less valuable to consumers during the search phase, because home buyers at that stage are just generally attempting to learn about the home buying market.

[594] TREB's position is contradicted by the testimony of several of the Commissioner's witnesses, whose testimony the Tribunal finds persuasive and credible.

[595] For example, Mr. McMullin testified that registered users on www.viewpoint.ca view the sales history of a property more often than anything else and have confirmed in surveys and verbally that they consider the sales history of a home, including with respect to sold and WEST listings information, to be the information that is most important to them. Among other things, this information enables them to make more informed decisions and to better understand the marketplace before they contact a broker or an agent. As an indication of the level of interest of ViewPoint's registered users in sales history, Mr. McMullin stated that ViewPoint's analysis of user activity on www.viewpoint.ca indicated that about **[CONFIDENTIAL]** of the distinct users who had accessed the website over a 30-day period had reviewed the sales history of at least one sold property; and that this percentage increased to **[CONFIDENTIAL]** over a 90-day period. Similarly, Mr. Nagel stated that the sold listings pages on Redfin's website are one of the most viewed types of pages, ranking only after the main home page, the main map for each metropolitan area and current listings.

[596] In addition, Mr. Gidamy stated that having the Disputed Data available in TREB's Data Feed would significantly improve the accuracy, timeliness and quality of service that TheRedPin provides to its customers. A similar point was made by Ms. Desai.

[597] Mr. Enchin observed that, prior to 2007, when TREB disabled the download function that allowed him to download MLS listings in bulk form from its MLS system, he offered a sophisticated appraisal tool on his VOW that, among other things, used sold and "pending sold" data to predict the actual selling price of homes within \$1,000-\$2,000. Mr. Enchin testified that this tool assisted home sellers to determine if their homes were listed at the appropriate price. He added that having access to sold information also helps people to determine how long a home might take to sell and to estimate sales to listing ratios. In addition, he stated that this tool was of value in assisting home purchasers to determine the appropriate price to offer for a home.

[598] Based on the foregoing, the Tribunal concludes that, "but for" the VOW Restrictions, the quality of some important service offerings in the market likely would be significantly greater (*Canada Pipe FCA* at para 58).

[599] For example, CMAs likely would be based on more comprehensive information, and therefore would be more helpful and accurate. Mr. Hamidi indicated it would be possible to create a CMA with sold data on homes with indoor swimming pools or certain school, neighbourhood or lifestyle information. Furthermore, interactive maps and other features that may currently exist in the Relevant Market would reflect sold prices and other updates (including with respect to WEST listings, and the fact that a conditional offer has been placed on a home), and would do so in "real time."

[600] In addition to the foregoing, having access over the Internet to the Disputed Data, and to analyses incorporating that information, would provide value to those home sellers and purchasers who prefer to have that information *prior to* meeting with a broker; or who may wish to choose between the convenience and transparency of obtaining that information over a full-information VOW and obtaining it directly from an agent in the traditional manner.

(f) *Reduced innovation*

[601] The Commissioner submitted that TREB's MLS Restrictions, including its VOW Restrictions, have stifled innovation or shielded its Members from innovative forms of competition, by excluding innovative brokerage models from the Relevant Market and by preventing existing brokerages from offering innovative hybrid or mixed-model services to consumers.

[602] In response, TREB and CREA maintained that there is and will continue to be a high degree of innovation in the Relevant Market, and that the overall extent of innovation in the market has not been materially reduced by the VOW Restrictions. They insisted that this is particularly so with respect to the Internet, which they stated has become and will remain an intensely competitive arena for brokers and agents.

[603] Among other things, TREB noted that its Members use technology for a variety of purposes, including: promoting individual listings through property-specific and general brokerage websites; using social networking in promoting listings; automating real estate transaction paperwork; and providing "live chat" capability with the brokerage over the Internet.

[604] TREB added that not all "innovative brokerages" choose to implement a VOW Data Feed within their brokerage website. For example, Sage Real Estate was recognized in the media as "the most philosophically and technologically advanced brokerage in the city of Toronto" despite not using a VOW Data Feed in its website. Using TREB's IDX feed and CREA's DDF feed, Sage Real Estate is turning its website into a home search portal for buyers not only in Toronto, but across Canada. Likewise, Ultimate Realty has four separate websites and two different mobile apps. Once again, its website that is geared towards residential real estate uses TREB's IDX feed and the DDF feed. (However, the mobile app that is geared towards residential real estate uses TREB's VOW Data Feed.) Between 75 and 125 leads are generated each month through these online tools. CREA noted that a number of other brokerages in the

GTA, including TheRedPin, Realosophy, Zolo and Spring Realty, are using their websites to distinguish themselves from their competitors and as their primary lead generation tool.

[605] More broadly, TREB noted that brokerages covering well over 90% of its membership are subscribed to its IDX feed; and that nationally, 73% of CREA's membership is subscribed to its DDF feed, notwithstanding that provincial regulation limits the participation of realtors in Québec, Manitoba and Saskatchewan. Among other things, the listing information available on the DDF is comparable to that found on realtor.ca, and therefore does not include the information included in the Disputed Data fields.

[606] For its part, CREA noted that its website realtor.ca is highly popular and, among other things, allows consumers to search active listings and obtain detailed information and photos about properties across Canada, without the need to call a broker or to provide their identity through a log-in requirement. In 2014 alone, realtor.ca provided approximately 1 million leads to Canadian realtors. Mr. Simonsen testified in September 2015 that year-to-date data indicated that this number was likely to approximately double in 2015. Moreover, for purchasers planning on making a real estate decision within three months, 60% of the people who responded to a survey on realtor.ca were using the website as their primary source for searching properties, 70% were working with a realtor and 72% planned to do so. Among other things, users of realtor.ca are able to keyword search or search using a map function, view listing information including up to 99 photographs for each listing (with more available by link), take virtual tours, compare properties, review neighbourhood demographic information, get directions to a property, assess the property's "walkability" by its "walk score," email the listing to others and contact an agent. CREA plans to add additional innovations in the near future.

[607] The Tribunal acknowledges that TREB and its Members have developed various Internet-based and other innovations that provide new and valuable offerings to home sellers and buyers. However, the question is not whether there are highly innovative participants in the Relevant Market, a high degree of acceptance of innovative technology, and offerings that are popular with consumers in the existing environment, notwithstanding the VOW Restrictions. The question is whether innovation would likely be, or have been, materially greater in the absence of those restrictions. In other words, notwithstanding that TREB and its Members continue to move along the innovation ladder, would the removal of the VOW Restrictions allow innovative residential real estate brokerages to move further or more quickly up on that ladder? The Tribunal is persuaded that this is likely to be the case.

[608] Several of the innovations that have already been developed by ViewPoint, and that representatives of Realosophy and TheRedPin have stated they would likely launch or would be able to launch in the Relevant Market with a full-information VOW and access to the Disputed Data, have been discussed at various points in these reasons above (see for example paragraphs 572-581 above).

[609] Another innovation that ViewPoint has introduced is the automation of its "trade accounting." According to Mr. McMullin, ViewPoint replaced what he described as the "legacy system" that is provided by a third party, Lone Wolf, and used broadly across the residential real

estate industry. Apparently, that system is not fully integrated with the MLS system. As a result, ViewPoint extended the capabilities of its platform to encompass all of the functionality that Lone Wolf had previously provided. The sales coordinators who are responsible for managing and entering trades have reported that this has resulted in a dramatic increase in efficiency because, for example, to begin the entry of a trade they simply have to enter the property identifier or the MLS number and it will bring up a screen with a wealth of pre-populated information fields that enables them to settle transactions much more efficiently.

[610] More generally, ViewPoint is an innovative company that the Tribunal expects will continue to develop innovative service offerings that likely would be, and likely would have been, made available in the Relevant Market "but for" the VOW Restrictions. The Tribunal bases its view in this regard not only on the impressive array of innovative products that were described in Mr. McMullin's initial witness statement, but also on those additional products that it launched between the time of that statement and the time of his two subsequent 2015 statements, some of which are described in the immediately preceding section above. The Tribunal recognizes that many of those products, some of which are identified in the paragraphs immediately below, would not be adversely affected by the VOW Restrictions *per se*. However, to the extent that those restrictions are preventing ViewPoint's entry into the Relevant Market, they are indirectly preventing ViewPoint from being able to introduce the full range of its existing innovations to the Relevant Market. Those restrictions are also preventing an important innovator from further disrupting the Relevant Market. In this regard, Mr. McMullin's uncontradicted testimony is that ViewPoint "continuously and from the outset until … this day look[s] for ways to use software, the internet and data to streamline and make more efficient the delivery of what we will call brokerage services. That's everything from acquiring customers to handling their inquiries to facilitating trade on the street in terms of showings and then, finally, through to actually accounting for trades that [it] assist[s] buyers and sellers in completing" (Transcript, September 22, 2015, at p. 71). The Tribunal is satisfied that ViewPoint would continue to behave in this manner if it were to enter the Relevant Market.

[611] Apart from some of the innovative offerings that have already been described at various points in these reasons, additional offerings currently available to one or more categories of users on www.viewpoint.ca include:

a. A "property rating" feature, which allows ViewPoint's clients to see comments that other visitors to the home have posted about the property;

b. Photographs of the home taken from a helicopter or a low flying aircraft and from the street, which provide more detail and are often more recent than those typically available, which are taken from a satellite;

c. Historical tax assessment information;

d. Colour coded identifiers on ViewPoint's local maps, that allow registered users to readily identify properties that have sold or are the subject of price changes – all of which are available in "real time," and in some cases depict changes that were made on that day;

e. A standard feature that places registered users on the map at the last place they were before they logged off;

f. A monthly mortgage calculator;

g. Extensive information from the province's land registration system;

h. A side-bar list of recent listings in chronological order, which gets automatically updated in "real time";

i. A feature that enables registered users to constrain the presentation of listings to only those ones that are in the map view, together with an accompanying side-bar of new or changed listings corresponding to that constrained area, which may be expanded or narrowed at the user's discretion;

j. A feature that allows registered users to follow developments with respect to a significant number of properties, including those that are not currently listed for sale; and

k. A "Property Clicks" tool that allows registered users and registered clients to track the number of followers and clicks on a property.

[612] In addition, ViewPoint offers its listing clients information about the number of web-based visitors who have looked at their property, as well as enhanced profile on its website. Its Full Service Listing service provides further features, including providing their properties with four distinct differences from other properties identified on its interactive map and a comprehensive weekly report regarding the website activity on their property.

[613] Another innovative offering currently available from ViewPoint is an optional $1,000 "flat fee" service that it offers to sellers who want to represent themselves and reduce their selling costs. As previously noted, Mr. McMullin stated that in the absence of the VOW Restrictions, the website services offered by ViewPoint would be cutting-edge and would include many of the same features already available on www.viewpoint.ca. The Tribunal acknowledges that some of these features could perhaps be developed or offered through Internet-based data-sharing vehicles other than VOWs. But the Tribunal is satisfied, based on the evidence before it, that without access to the Disputed Data, ViewPoint is not likely to enter the GTA and to offer such other features, whether on a full-information VOW or simply in the non-VOW area of its website.

[614] Turning to TheRedPin, Mr. Hamidi testified that TREB has been preventing him and his partners from innovating using TREB's MLS data for several years. In 2009, TREB's refusal to make resale home listing data available in a feed led them to focus their efforts on new condominiums. Although they subsequently entered the Relevant Market by launching TheRedPin shortly after TREB announced its VOW Policy and Rules in June 2011, he and Mr. Gidamy each stated that, "but for" the VOW Restrictions, TheRedPin would offer additional tools and services for their clients. Mr. Silver conveyed essentially the same view.

[615] In addition, as discussed at paragraphs 576-577 above, Messrs. Gidamy and Hamidi testified that if the VOW Restrictions were eliminated, TheRedPin would develop innovative new tools to assist its agents to be more efficient and serve potential customers.

[616] Based on all of the foregoing, the Tribunal concludes that "but for" the VOW Restrictions, there likely would have been, and likely would be, considerably more innovation in the Relevant Market, including as yet unidentified innovations that would be in addition to those described in these reasons above. Some of that innovation would be in the form of the additional brokerage services and enhance quality described in the two immediately preceding sections above. Additional innovation would be in the form described in this section. However, the Tribunal wishes to emphasize that it has been careful not to "double count" these anti-competitive effects in assessing whether, together, they constitute, or are likely to constitute, a "substantial" prevention of competition.

[617] The Tribunal also accepts Dr. Vistnes' evidence that VOWs represent an important form of dynamic competition, including innovation, that offer the potential to change the manner in which competition among real estate agents and brokers occurs.

[618] The Tribunal embraces the classical definition of dynamic competition offered by Joseph Schumpeter, who defined competition as a dynamic process wherein firms strive to survive under an evolving set of rules that constantly produce winners and losers. Schumpeter added that, in this process, the basic instrument that allows firms to be ahead of their competitors is the introduction of informational asymmetries which result primarily from innovation. A framework for antitrust analysis that favors dynamic competition over static competition "puts less weight on market share and concentration in the assessment of market power and more weight on assessing potential competition and enterprise-level capabilities" (J Gregory Sidack & David J Teece, "Dynamic Competition in Antitrust Law" (2009) 5:4 *J Competition L & Economics* 581 at 581).

[619] The Tribunal is satisfied that, "but for" the VOW Restrictions, full-information VOWs likely would have an important impact on the manner in which such dynamic competition occurs. For this reason, and the reasons provided above in respect of the range and quality of brokerage services, the Tribunal also agrees with Dr. Vistnes that the VOW Restrictions have substantially reduced, and continue to substantially reduce, dynamic competition, including innovation. This will be discussed in section VII.D.(3) below.

(g) ***Reduced pressure on commission rates***

[620] The Commissioner, supported by Dr. Vistnes, submitted that in the absence of TREB's MLS Restrictions, including the VOW Restrictions, customers in the Relevant Market would be more likely to be offered discounts or rebates on their commissions paid to brokers, as brokers use VOWs to deliver services more efficiently, reduce their costs, and then pass those cost savings along to home sellers and home buyers. The Commissioner maintained that the

aggregate savings to home sellers and buyers in the GTA would likely be very substantial over a period of years.

[621] TREB responded that the Commissioner has not demonstrated that full-information VOWs would likely offer materially lower commissions or increased discounts in the Relevant Market than VOWs currently competing there. The Tribunal agrees with TREB on this point.

[622] TREB notes that TheRedPin and Realosophy already offer discounts/rebates in the GTA with their current VOWs, and that there is no persuasive evidence that they would reduce their net commissions further, if the VOW Restrictions were prohibited by the Tribunal. Indeed, Mr. Gidamy stated that TheRedPin has been moving in the opposite direction, reducing its cash-back rebate from 25% to 15% effective June 1, 2014.

[623] TREB also notes that ViewPoint and some full-information VOWs in the United States have ceased their practice of offering discounts in recent years. With respect to ViewPoint, Mr. McMullin stated that it stopped offering rebates to buyers in recent years after determining that it was detrimental to ViewPoint's ability to attract new agents and that there was not a clear competitive advantage associated with offering such rebates. With respect to sellers, he added that they often fear that lower-priced brokerages do not provide the same level of sales and marketing exposure and that in a buyers' market, they may even wind up not selling their home.

[624] Likewise, the U.S. experience does not reflect that commission rates have decreased with full-information VOWs. ZipRealty stopped offering rebates in the United States after tests and focus-group studies revealed that its rebate program was not the primary driver of its business. A second U.S. full-service VOW that used to offer significant rebates (eRealty Inc.) was purchased by Prudential Financial Inc. which apparently ceased offering such rebates. In addition, Redfin reduced the level of its rebates/discounts in 2007 and then again in 2012. Mr. Nagel testified that he is not aware of whether commissions in the United States have been reduced since the 2008 settlement between the DOJ and NAR.

[625] Based on the foregoing evidence, and in the absence of any persuasive evidence supporting the Commissioner's position, the Tribunal concludes that it has not been demonstrated that the VOW Restrictions have had, or are *likely* to have, the effect of materially impacting in a negative way net commissions in the Relevant Market. Stated differently, the evidence does not establish on a balance of probabilities that, "but for" those restrictions, competition with respect to net real estate commissions likely would be more intense, and reflected in materially lower commissions or larger rebates for home sellers or home purchasers in the Relevant Market. Indeed, this appears to have been recognized by the Commissioner, who acknowledged in his 2015 Closing Submissions that the *focus* of the evidence in the Redetermination Hearing has been on non-price competition, even though he continued to maintain that the evidence of lower brokerage costs "is consistent with the expectation that lower costs will be passed on to home buyers and sellers in the form of lower prices over time" (Commissioner's 2015 Closing Submissions, at paras 168-169). Of course, to the extent that the elimination of the VOW Restrictions would lower the costs of participants in the Relevant Market, one would expect that this should ultimately lead to lower net commissions or lower fees

for accessing services on VOWs. However, that possibility will not be considered by the Tribunal in its assessment of whether the VOW Restrictions meet the test set forth in paragraph 79(1)(*c*) of the Act.

(h) *Reduced output*

[626] After the Tribunal raised a question at the Redetermination Hearing regarding the impact of TREB's impugned conduct on the output of residential real estate brokerage services, the Commissioner made submissions on this issue in closing argument. In brief, the Commissioner submitted that the VOW Restrictions likely have the effect of materially reducing the level of total output of brokerage services in the Relevant Market, relative to the level of output that likely would exist "but for" those restrictions.

[627] In response to questioning from the Tribunal, Dr. Church stated that he did not agree with that submission. He based his position on his view that the demand for residential real estate brokerage services in the Relevant Market is highly inelastic, because that demand is derived from consumer demand for buying and selling homes, and the latter demand is not likely going to change based on changes in price or non-price competition with respect to brokerage services.

[628] However, the evidence demonstrates that the amount of brokerage services consumed by home purchasers and sellers is not fixed to the number of underlying home purchase and sale transactions. This is corroborated by the evidence indicating that a very high percentage of persons consume brokerage services over the Internet and that a high percentage of such persons nevertheless ultimately retain the services of a different broker to assist them to consummate the purchase or sale of a home. In this latter regard, Mr. McMullin readily acknowledged that many consumers who visit www.viewpoint.ca retain someone other than ViewPoint to be their broker.

[629] Notwithstanding the foregoing, the Tribunal excluded this issue from its consideration of whether competition has been, is, or is likely to be prevented or lessened substantially. This is because this was not part of the Commissioner's Application and TREB did not have an opportunity to respond to the Commissioner's written submissions on this point. In addition, paragraph 16 of the Order issued by the Tribunal on April 23, 2014 expressly stipulated that "[t]he economic theory of the case will not change" for the Redetermination Hearing.

(i) *Maintenance of incentives to steer buyers away from inefficient transactions*

[630] In his initial report, Dr. Vistnes took the position that TREB's refusal to permit VOW operators to display the Disputed Data on their VOWs helps to maintain agents' incentives to steer consumers into inefficient matches, at the expense of the home buyer, the seller or both. In his view, buyers would be less vulnerable to being encouraged to offer an excessive price, and sellers would be less vulnerable to being encouraged to accept too low a price, if they had access

to the more comprehensive information that TREB's VOW Restrictions are preventing VOW operators from making available on their VOWs.

[631] Dr. Vistnes offered several examples of situations in which agents might have an incentive to steer potential home sellers or buyers into inefficient matches. For instance, he postulated that an agent may care less about a $10,000 difference in the selling price of a home, because this will only change the agent's commission by approximately $250, if the agent was splitting a 5% commission with another broker. As a result, the agent may encourage a seller to accept a lower offer (or to set a lower initial price), even if it might be in the seller's interest to wait for a higher offer to come along. Likewise, an agent might encourage a buyer to offer a higher price in order to close a sale, even if it might have been in the buyer's interest to keep looking.

[632] Another example provided by Dr. Vistnes in his 2012 expert report concerned the incentive for a buyer's agent to steer their client away from homes offering a lower buy-side commission rate, so as to protect their own commission. Using the hypothetical of two $500,000 homes on the market, offering cooperating broker commissions of 2.5% and 2.0%, respectively, he noted that the agent would earn an extra $2,500 by steering their buyer towards the higher commission home. Dr. Vistnes produced analysis which appears to provide some support for his view that this type of behaviour may be occurring in the GTA, because the frequency of different brokerages being used on both the sell-side and the buy-side of a transaction is greater when the buy-side commission exceeds 1% than when it is less than 1%.

[633] A third example provided by Dr. Vistnes concerned dual agency situations where an agent represents both buyers and sellers. Dr. Vistnes postulated that when agents have opportunities to produce dual agency outcomes, they have a strong incentive to do so, regardless of whether that may be in the interest of the buyer or seller. In this regard, Dr. Vistnes prepared a statistical analysis of sales by the five largest corporate brokerages in the GTA, which appears to show that dual-agency outcomes are more common than expected.

[634] While informative, the evidence provided by Dr. Vistnes with respect to steering does not assist the Commissioner to demonstrate that TREB's VOW Restrictions have prevented or lessened, or are likely to prevent or lessen, *competition between brokers* in the Relevant Market.

[635] The Tribunal notes that this theory was not mentioned in the Application, was not addressed to any material degree in the Commissioner's 2015 Closing Submissions, and was not supported by any significant additional evidence. For example, the Commissioner did not adduce evidence to demonstrate that full-information VOWs have ever competed in specific ways to reduce steering, let alone to demonstrate that such efforts have had a material impact on price or non-price dimensions of competition.

[636] As a practical matter, the Tribunal agrees with TREB's position that the scope for agents to act in the ways described by Dr. Vistnes is reduced, relative to what it once may have been, by the availability of substantially more information on the Internet and elsewhere regarding homes that are for sale or have sold in the Relevant Market.

[637] The Tribunal also notes that RECO's *Code of Ethics* appears to address the principal concerns raised by Dr. Vistnes. Specifically, section 19 states:

> If a brokerage has entered into a representation agreement with a buyer, a broker or salesperson who acts on behalf of the buyer pursuant to the agreement shall inform the buyer of properties that meet the buyer's criteria without having any regard to the amount of commission or other remuneration, if any, to which the brokerage might be entitled.

[638] For the foregoing reasons, the Tribunal thus concludes that the Commissioner did not demonstrate that the VOW Restrictions are preventing or lessening competition between brokers by maintaining steering incentives that would be materially diminished in the absence of those restrictions.

(j) *Conclusion*

[639] The Tribunal therefore concludes, on a balance of probabilities, that "but for" the VOW Restrictions, there likely would be a considerably broader range of services in the Relevant Market, the quality of some services in the Relevant Market likely would be significantly better, and there likely would be considerably more innovation in the Relevant Market. There would also be reduced barriers to entry and costs. However, the Tribunal is not satisfied that, "but for" the VOW Restrictions, commission rates, output or the incentive to steer buyers away from inefficient transactions would be reduced in the Relevant Market.

(3) Substantiality of anti-competitive effects

[640] The Tribunal must now determine whether the anti-competitive effects attributable to the VOW Restrictions and identified above raise to the level of "substantiality" required by paragraph 79(1)(*c*) of the Act.

[641] TREB and CREA submitted that the VOW Restrictions do not result in prices that are materially greater, or in levels of non-price competition that are materially lower, than the levels of price and non-price competition that would likely exist "but for" the VOW Restrictions. In taking this position, TREB emphasized that the Tribunal's assessment should be narrowly focused upon the incremental impact of an order requiring the Disputed Data to be made available for search and display on its Members' VOWs.

[642] The Tribunal's focus has indeed been upon the incremental impact of the VOW Restrictions. However, in determining whether the "substantiality" element is met, the Tribunal must assess the aggregate incremental impact of the three aspects of the VOW Restrictions that the Commissioner alleges constitute a practice of anti-competitive acts, namely (i) excluding the Disputed Data from TREB's VOW Data Feed; (ii) prohibiting TREB's Members from using the information included in the VOW Data Feed for any purpose other than display on a website;

and (iii) prohibiting TREB's Members from displaying certain information (including the Disputed Data) on their VOWs.

[643] For the reasons set forth in section VII.D.(2) above, the Tribunal has concluded that, "but for" that practice of anti-competitive acts, there would likely have been, and would likely be in the future:

- more and faster entry and expansion by new and existing competitors than is currently the case;
- lower costs for operating a VOW;
- a considerably broader range of brokerage service offerings;
- an increase in the quality of various product offerings; and
- a considerably greater degree of innovation.

[644] The question that therefore remains is whether, taking all these factors together (and regardless of whether they individually meet the "substantiality" threshold), the aggregate impact of these incremental anti-competitive effects of TREB's VOW Restrictions constitutes, or is likely to constitute, a *substantial* prevention of competition. It bears underscoring that, in addressing this question, the issue is not whether innovative brokers can compete without a VOW that includes the Disputed Data. Rather, the issue is whether the VOW Restrictions have prevented, are preventing, or are likely to prevent competition substantially in the Relevant Market. This "substantiality" is assessed in terms of magnitude and scope.

(a) ***Magnitude and degree***

[645] TREB and CREA suggest that the issue of substantiality cannot be answered in the affirmative unless the evidence establishes that full-information VOW-based brokerages would likely be hired by significantly more clients <u>as a real estate brokerage,</u> as a result of being able to display the Disputed Data. TREB adds that it is not relevant for the Tribunal's analysis if a website becomes more popular with "real estate voyeurs" or consumers who are ultimately going to hire another brokerage.

[646] The Tribunal considers that the first of these propositions by TREB and CREA must be recast in terms of whether full-information VOW brokerages likely would be hired by significantly more clients as a real estate brokerage, "but for" the *aggregate impact* of the three components of TREB's practice of anti-competitive acts described at paragraph 642 above.

[647] Moreover, the Tribunal's analysis cannot be confined to the impact of that practice on full-information VOW-*based* brokerages. It is also important and relevant for the Tribunal to consider whether those existing TREB Members who wish to offer full-information VOWs, while also continuing to compete as traditional "bricks and mortar" brokerages would likely be

hired by significantly more clients as a real estate brokerage, as a result of being able to operate as full-information VOWs in addition to their more traditional offerings. (The Tribunal understands that to the extent that many of the 322 Members of TREB who are now offering VOWs continue to also conduct business in the traditional manner, they are not considered to be full-information VOW-*based* brokerages.)

[648] Turning to “real estate voyeurs,” TREB submits that to the extent that those consumers proceed from a VOW to use another brokerage to complete their real estate transactions, the fact that they may have visited the VOW before that point in time is without competitive significance under paragraph 79(1)(*c*).

[649] The Tribunal disagrees. To the extent that such other brokerages likely would have to compete to a greater degree to prevent the consumers in question from becoming clients of the full-information VOW brokerages whose websites they have visited, the fact that the latter do not ultimately win the patronage of such clients is not irrelevant to the Tribunal’s assessment. Stated differently, as a general principle, innovation is not only relevant to the Tribunal’s assessment under paragraph 79(1)(*c*) to the extent that it assists the innovator to win business. It is also relevant to the extent that it prompts rivals in the relevant market to respond with competitive initiatives of their own, in order to retain such business or to win it away from either the innovator or another rival.

[650] A good example of this is the evidence that Bosley and RE/MAX Hallmark displayed sold information on their respective websites for at least ten months in 2014/2015. As discussed in paragraph 373 above, when requested by TREB to cease displaying sold information, Bosley’s President, Mr. Tom Bosley, expressed the hope that TREB would “take the appropriate action or those of us following the rules will have no choice but to follow [the] lead” of those other brokerages who were posting such information. Another example, on a much broader scale, is realtor.com’s decision to begin posting sold information subsequent to the widespread posting of such information on other websites in the United States (see paragraph 700 below). A third example would be the approximately 322 brokerages that TREB has stated now operate VOWs in the GTA, as a result of the introduction of TREB’s VOW Policy and Rules, which were pushed by a smaller number of innovators.

[651] To further buttress its position that the VOW Restrictions have had no material adverse impact on the Relevant Market, TREB noted that TheRedPin and Realosophy have continued to grow their business despite the VOW Restrictions, as confirmed by Messrs. Gidamy and Pasalis, and to expand their respective presence in the media.

[652] However, this is beside the point. What is pertinent for the Tribunal’s analysis is the testimony of Messrs. Gidamy, Hamidi and Pasalis and Ms. Desai regarding the significant value of sold information, and how the ability to display and use such information would enable TheRedPin and Realosophy to offer a range of additional new services to their clients and agents. The Tribunal is satisfied that this ability to offer a range of additional new services to their clients and agents would assist TheRedPin and Realosophy to be able to better compete, and therefore to grow, materially more than they have been growing.

(i) The limited quantitative evidence

[653] TREB and CREA submitted that if full-information VOWs were as much of a disruptive technology as the Commissioner has suggested, the impact of their presence on residential real estate brokerage markets in the United States and in Nova Scotia would be observable. However, TREB and CREA noted that the Commissioner and Dr. Vistnes failed to conduct any empirical analysis of any of those markets, notwithstanding the fact that full-information VOWs have existed in the United States for over seven years and have existed in Nova Scotia for a number of years. TREB and CREA also stated that the Commissioner failed to adduce any quantitative analysis of the relative effectiveness of VOWs with sold data and VOWs without sold data in converting website users to clients. In other words, they asserted that the Commissioner failed to present empirical evidence of the incremental effect of sold and other Disputed Data in increasing a full-information VOW operator's ability to generate clients. TREB requested the Tribunal to draw an adverse inference from the Commissioner's failure to conduct such empirical analysis.

[654] TREB further argued that information comparing Redfin's conversion rates in local markets where it can display sold information on its website, with its rates in local markets where it cannot display that information on its website, was available to Mr. Nagel, yet was not provided. Once again, TREB requested the Tribunal to draw an inference that is unfavourable to the Commissioner, because Mr. Nagel was the Commissioner's witness.

[655] During the Redetermination Hearing, the Tribunal pressed Dr. Vistnes on the Commissioner's failure to conduct an empirical assessment comparing the nature and extent of competition in areas of the United States where sold data is available on VOWs, with the level of competition in areas where sold data is not available on VOWs. Dr. Vistnes explained that he advised the Commissioner against attempting to subpoena MLS information from real estate boards in the United States because, to conduct a legitimate study, it would have been necessary to obtain "a tremendous amount of data from a significant number of MLSes." Based on his experience with the dispute that led to the 2008 settlement between the U.S. DOJ and NAR, this would have required "a huge outlay of effort" that may not "have been particularly reliable or particularly informative," given the difficulty of having to properly control for all of the differences in the local markets in question. He therefore advised the Commissioner that he did not believe that that would be the best way in which to advance the case.

[656] The Tribunal acknowledges that, as a statutory authority, the Commissioner has to be prudent with, and make difficult decisions regarding the allocation of, the limited public funds available for administering and enforcing the Act at any given time. The Tribunal also accepts that Dr. Vistnes' experience with the dispute between the U.S. DOJ and NAR provided a legitimate basis upon which to draw conclusions about the costs and utility of a comparative analysis between local markets where sold information is available and other local markets where it is not available. Therefore, the Tribunal is not prepared to draw an adverse inference from the Commissioner's failure to conduct the empirical assessment in question regarding the U.S. experience. That said, the Tribunal notes that the Commissioner continues to bear the

burden of supporting his Application on the balance of probabilities, which may well be a more challenging task in the absence of quantitative evidence.

[657] However, the Tribunal is prepared to draw some adverse inference from the failure of Messrs. Nagel and McMullin to adduce evidence regarding the experience of Redfin and Viewpoint, respectively, in areas of the United States and Nova Scotia where sold information or the "pending sold" price is and is not permitted to be displayed on its website. That is to say, the Tribunal is prepared to infer that Redfin's and ViewPoint's conversion rates in areas where they are not permitted to display "sold" information or "pending sold" prices on their website are not lower than they are in areas where those entities are permitted to display that information on their websites. However, given that this may well be explainable by the local differences mentioned by Dr. Vistnes, the Tribunal does not accord great significance to this inference. The more significant points, in the Tribunal's view, are that both Mr. Nagel and Mr. McMullin persuasively testified that sold information is critical to potential home sellers and buyers (see discussion at paragraphs 595 and 675 of these reasons), and that being prohibited from providing that information to consumers in various innovative formats is significantly impeding them from distinguishing themselves from their rivals.

[658] That being said, the Tribunal observes that even a limited comparison between one local U.S. market where sold information is available and one local U.S. market where such information is not available may have been at least somewhat helpful. The same is true with respect to Nova Scotia and the HRM, with regards to "pending sold" prices. The Tribunal further notes that in other parts of his testimony, Dr. Vistnes confirmed that the U.S. experience since 2008 could be instructive, so long as the analysis controlled for differences that might exist between the markets being compared. The absence of any such comparison, including a quantitative comparison of markets with and without full-information VOWs, rendered much more difficult the Tribunal's assessment of the "substantiality" element of paragraph 79(1)(*c*), and resulted in this case being much more of a "close call," than it otherwise may have been.

(ii) Conversion rates

[659] In addition to the foregoing, both TREB and CREA raised the issue of the low "conversion rates" of full-information VOWs. The Tribunal pauses to note that this term was sometimes used to describe the conversion of website visitors to registered users on a VOW and sometimes used to describe the subsequent conversion of registered users on a VOW to actual clients of the brokerage.

[660] TREB and CREA maintained that the available evidence on "conversion rates" indicates that full-information VOWs have not had a substantial impact on competition in the United States or in Nova Scotia. While full-information VOWs have been successful in attracting a large number of visitors to their respective websites, they have been much less successful in converting those visitors to clients who retain them on actual purchase and sale transactions.

[661] TREB noted that Redfin and ViewPoint have "conversion" rates of only **[CONFIDENTIAL]**, and **[CONFIDENTIAL]** respectively, whereas TheRedPin's conversion

rate is **[CONFIDENTIAL]** even though it does not have a full-information VOW. For Redfin, this figure represents the percentage of unique website visitors who registered on its website over the three-year period 2012-2014. For ViewPoint, it represents the number of transactions that it brokered during the period from January 1, 2015 to September 19, 2015 **[CONFIDENTIAL]** divided by the total number of new registered users during that period **[CONFIDENTIAL]**. However, if one were comparing "apples to apples," ViewPoint's "conversion" rate appears to have been **[CONFIDENTIAL]** in 2014, as there were **[CONFIDENTIAL]** new registrations out of **[CONFIDENTIAL]** users that year (Exhibit CA-103, ViewPoint Realty Business Metrics; 2015 McMullin Second Statement, at p. 28). For TheRedPin, the "conversion rate" represents the "current" percentage of registered users on its VOW who hired TheRedPin on a completed transaction, although the specific period in relation to which this percentage pertains was not provided. TREB observed from these statistics that TheRedPin is approximately **[CONFIDENTIAL]** times as successful in converting clients as Redfin, and over **[CONFIDENTIAL]** times as successful as ViewPoint.

[662] The Tribunal does not accord much significance to the fact that the low conversion rates of firms such as ViewPoint, Redfin and TheRedPin suggest that many consumers are evidently treating the information available on their websites as complements to the information available from the (different) broker they ultimately use to list or purchase their home. The fact remains that the innovative tools, features and other services available on those websites is assisting them to compete, and is forcing traditional brokerages to respond.

[663] TREB invited the Tribunal to conclude from this evidence on conversion rates that there is no causal relationship between having a full-information VOW and being able to convert website users into clients. TREB asked the Tribunal to draw a similar conclusion from the fact that technology-based competitors such as TheRedPin and Realosophy continue to grow, even though they do not have access to a VOW containing the Disputed Data.

[664] The Tribunal is not prepared to reach such conclusions. The Tribunal acknowledges that conversion rates are low and that the quantitative evidence provided by the Commissioner in this proceeding is limited. The Tribunal also recognizes that there is no quantitative evidence comparing markets where VOW operators have access to sold listings or other Disputed Data with markets where they do not. However, the Commissioner's case is focused on dynamic competition and innovation. In such cases, reliable quantitative evidence is often not available or cannot easily be obtained. In the absence of quantitative evidence comparing the performance of Redfin or ViewPoint in markets where, on the one hand, they are able to display and use the Disputed Data to offer services that are based on that information, and on the other hand, they are not able to display and use some or all of the Disputed Data, the Tribunal must make its determination on the basis of the available evidence, in this case primarily qualitative, on the record.

(iii) Qualitative evidence

[665] The qualitative evidence adduced by the Commissioner demonstrates six important things.

[666] First, as discussed in greater detail below, the Disputed Data is very important, if not critical, in assisting Internet-based brokerages to distinguish themselves from incumbent traditional brokerages. And being able to distinguish themselves from more traditional brokerages is an essential element to allow VOW operators like ViewPoint, TheRedPin or Realosophy to enter the Relevant Market, or to expand within it to the degree that otherwise likely would be the case.

[667] Second, home purchasers and sellers value being able to obtain information with respect to sold prices, the conditional sale status of homes in the market, firm "pending sold" information, WEST listings and cooperating broker commissions *prior to* meeting with their broker/agent, or in any event *prior to* finalizing the listing price of their homes or making an offer on a home.

[668] Third, an inability to display and use the Disputed Data to develop innovative products has been preventing, and is likely to continue to prevent, ViewPoint from entering the Relevant Market. This has also prevented Realosophy and TheRedPin from growing as much as they likely would have grown, and is likely continuing to prevent them from growing as much as they likely would grow, "but for" the VOW Restrictions. Moreover, this also prevented Sam & Andy from expanding within the Relevant Market, and prevented their brokerage customers from doing the same.

[669] Fourth, ViewPoint, Realosophy and TheRedPin are Internet-based innovative brokerages that, in aggregate, likely would have introduced a considerably broader range of brokerage services, increased the quality of some important services (such as CMAs), benefited from lower operating costs and considerably increased the overall level of innovation in the Relevant Market, "but for" the VOW Restrictions. The cumulative impact of these anti-competitive effects resulting from the VOW Restrictions is such that the level of non-price competition would likely be substantially greater in the absence of the impugned practice.

[670] Fifth, the VOW Restrictions have erected barriers to the entry and expansion of innovative brokers in the Relevant Market. ViewPoint's disruptive, innovative approach to its business has assisted it to become the largest independent brokerage in Nova Scotia, and to continue growing even during the downturn in the real estate business that has occurred in 2013 and 2014. Although the Tribunal cannot predict whether ViewPoint likely would achieve a share of the Relevant Market that is similar to what it has achieved in the HRM **[CONFIDENTIAL]**, the Tribunal is satisfied that, in the absence of the VOW Restrictions, ViewPoint likely would enter, grow and become an important competitor in the Relevant Market. To put ViewPoint's **[CONFIDENTIAL]** share into perspective, the Tribunal observes that Dr. Church reported in 2012 that the largest brokerage in the GTA at that time had a market share of approximately 4%. Dr. Vistnes estimated that even a 3% market share would make ViewPoint roughly the sixth or seventh largest firm in the GTA. The Tribunal notes that Mr. McMullin testified in September 2015 that ViewPoint was on track to finish the year with a 25-28% increase in its number of brokered transactions in Nova Scotia. The Tribunal is also satisfied that the VOW Restrictions are preventing TheRedPin and Realosophy from growing and becoming significantly more important competitors in the GTA.

[671] The Tribunal considers that its conclusion regarding the ability of these entities to enter into and expand within the GTA is supported by the experience of Redfin in the United States, which continues to expand and grow. Although its absolute share of the overall residential real estate brokerage business in the United States is small (i.e., well below **[CONFIDENTIAL]**% in the areas where it operates), it was ranked 13 out of the 500 top real estate brokerages in the United States in 2011, based on the number of closed transactions per sales associate. Redfin's continued growth and expansion demonstrates that its business model is successful.

[672] Sixth, the VOW Restrictions have stifled innovation in the supply of Internet-based real estate brokerage services in the GTA.

[673] The Tribunal is satisfied that that the qualitative evidence provided by the Commissioner in respect of the foregoing matters is not speculative and is specific enough to meet, on a balance of probabilities, the substantiality threshold set forth in paragraph 79(1)(*c*).

(iv) Importance of the Disputed Data

[674] Furthermore, the Tribunal accepts the qualitative evidence of several of the Commissioner's witnesses who testified regarding the importance of information pertaining to the Disputed Data (i.e., sold, "pending sold," WEST listings and cooperative broker commissions), both to them and to home sellers/purchasers.

A. Sold data

[675] Regarding sold information, Messrs. Nagel, McMullin, Pasalis, Gidamy, Hamidi and Enchin all testified that this information is very important to home sellers and buyers; and that being able to display and use that information on their VOWs would assist them to convert visitors to their VOWs into clients. The Tribunal also accepts Mr. McMullin's testimony that sold prices are "the single most reliable piece of evidence of market activity in the real estate business, because a listing price is nothing more than an advertisement, a solicitation, an aspiration of a seller, whereas a sold price is indicative of market value for a property" (Transcript, September 22, 2015, at p. 91).

[676] The Tribunal concludes that being able to obtain sold information from the VOW Data Feed, and to work with that data as they see fit, would likely enable full-information VOWs, including ViewPoint and those such as TheRedPin who would like to become full-information VOWs, to convert an increasing and significant number of website users into clients.

[677] Parenthetically, an important aspect of "sold" price data is information about the number of days that a sold home was on the market. Although days on the market (**"DOM"**) information is available in TREB's VOW Data Feed for current listings, it is not available for homes that have sold. Given that homes that have not yet sold sometimes spend more DOM on average than homes that have sold, Dr. Vistnes indicated that having access only to DOM information about *current* listings can give consumers a misleading sense of how long a home may spend on the

market. Moreover, not having access to DOM information for “sold” homes can deprive consumers of potentially very valuable information, particularly in a “hot” market.

B. Pending sold information and conditional sold status

[678] With respect to “pending sold” information, TREB noted that it is not available on Redfin’s website, and that the Commissioner has not provided evidence to demonstrate that the lack of that information impedes Redfin’s ability to compete in the United States at all, let alone substantially. It added that ViewPoint has not been able to display “pending sold” information outside the HRM since 2013, yet no evidence has been adduced that this has impeded ViewPoint’s ability to compete outside the HRM in any manner.

[679] However, the Tribunal accepts Mr. McMullin’s evidence that the fact that a conditional offer has been accepted on a home, together with “real time” access to the sold price of that home, is information that is “of enormous value” for home buyers and sellers, and therefore for ViewPoint. Among other things, this information gives consumers important information regarding the value of a comparable home at a particular moment in time, which can be extremely valuable in a market that is rising or falling. Mr. Enchin made essentially the same point during his cross-examination, and observed that “pending sold” information is “as important, if not more important, than actual sold data” (Transcript, September 14, 2012, at p. 779).

[680] Dr. Vistnes analyzed TREB’s MLS data and determined that the median duration between the “sale date” and the “close date” for sold homes in the GTA from 2007 to 2011 was approximately seven weeks. Therefore, providing home sellers and home buyers with “pending sold” information eliminates an important information lag that would otherwise exist. Timely access to this information can be very important in a rising or declining market. In the GTA, the significance of a seven-week lag can perhaps best be appreciated by considering that, between June 2010 and June 2011, market prices in the GTA increased at an average annual rate of about 10%. Thus, prices in any given two-month period increased approximately 1.5%, on average, across the GTA, with some neighbourhoods experiencing even greater increases. On the price of $500,000 home, this works out to approximately $8,000 per two-month period.

[681] Mr. McMullin added that conditional sold information also permits agents and their clients to avoid spending their time seeing or further considering a property that is the subject of a conditional sale. In addition, knowing the date by which the conditions must be satisfied enables other potential buyers who are still interested in the home to check whether the deal actually went “firm” on that date, and to act accordingly.

[682] The Tribunal also accepts Mr. Gidamy’s evidence that a buyer may well continue to be interested in a property that has just changed from an active listing to a conditionally sold listing; and that having information regarding the conditions of a purchase enables TheRedPin to better advise such buyers as to the likelihood of the conditions being met and whether there is a pattern or trend of conditions in a particular neighbourhood or building not being met.

[683] The Tribunal further notes that the NAR 2014 Profile reported that information with respect to “pending sales/contract status” was considered by 69% of those who participated in the study to be “very useful” or “somewhat useful” information to obtain on a website.

C. WEST listings

[684] With respect to WEST listings, TREB reiterated a number of the same arguments that it made with respect to “pending solds.” However, once again, the Tribunal accepts Mr. McMullin’s evidence that this information is very important to both ViewPoint and its users, and that this has been confirmed through surveys and discussions with its users. This is because it assists potential home sellers and buyers to make a well-informed decision. Stated differently, Mr. McMullin testified that this information assists clients to rationalize the marketplace and to possibly measure the motivations of the seller.

[685] In an attempt to estimate how much information a consumer would fail to see if his or her CMA excluded WEST listings and pending sales, Dr. Vistnes conducted an analysis of all past sales during the six month period preceding March 1, 2012, all WEST listings during that period, and all sales that were pending as of March 1, 2012 that had not yet closed. That analysis, set forth in his 2012 reply report, revealed that, for the top 100 communities in the GTA, consumers would lose information on approximately 46% of listings that they otherwise would be able to consider, “but for” the unavailability of the Disputed Data.

D. Cooperating broker commissions

[686] Turning to cooperating broker commissions, the Commissioner’s submissions were largely focused on his buyer steering argument, which the Tribunal has concluded was not demonstrated on a balance of probabilities.

[687] However, the Commissioner also submitted that TREB’s prohibition on the display of offers of commissions on a VOW and the exclusion of this information from its VOW Data Feed increases the costs of VOW operators and reduces their ability to distinguish themselves from their competitors. The Tribunal agrees.

[688] With respect to the impact of these restrictions on VOW operators’ costs, Messrs. Gidamy and Hamidi testified that TheRedPin would like to use offer of commission data to calculate more tailored rebates. At the present time, TheRedPin advertises rebates based on an assumed 2.5% cooperating commission, because achieving greater precision would require manually entering the offers of commission for every active listing, which would be prohibitively time consuming.

[689] Regarding the ability of VOW operators to distinguish themselves, Messrs. McMullin, Silver, Hamidi and Pasalis each stated that being able to provide this information would enable them to increase transparency in the market. Mr. Silver added that this would improve the customer experience created on TheRedPin’s website, while Mr. Pasalis observed that this would

improve consumers' trust and confidence in real estate agents. Mr. Enchin testified that educated customers would find this information to be valuable.

[690] To the extent that increasing transparency is an important aspect of their Internet-based business models, the Tribunal accepts that being able to display this offer of commission would assist full-information VOWs and other Internet-based brokerages to better distinguish themselves from traditional brokerages, who appear to prefer to disclose this information in person (to keep the broker/agent "at the centre of the real estate transaction"), if at all.

E. Conclusion

[691] The Tribunal concludes that information with respect to sold data, "pending sold," the conditional sale status of a home, WEST listings and cooperating broker commissions is very valuable to those Internet-based brokerages who testified in this proceeding and to home purchasers and sellers. The Tribunal accepts the evidence that this information is very important, if not critical, in assisting Internet-based brokerages to distinguish themselves from incumbent traditional brokerages. The Tribunal also finds persuasive the evidence that home purchasers and sellers value being able to obtain this information prior to meeting with their broker/agent, or in any event, prior to finalizing the listing price of their homes or making an offer on a home.

[692] CREA submitted that the Commissioner's witnesses consistently testified that their websites, and <u>not</u> their VOWs, were their principal source of lead generation or means of attracting customers. Upon reviewing the evidence, the Tribunal is satisfied that those witnesses, who are all web-based brokerages, were simply stating that they rely entirely or primarily on their websites to generate leads or attract customers. Those same witnesses made it also very clear that having a full-information VOW is or would be an important tool in assisting them to better compete with other brokerages.

(v) Other considerations

[693] In addition to the foregoing, TREB noted that some brokerages in Nova Scotia have stopped using VOWs. TREB appeared to suggest that the Tribunal should infer from this that VOW-based operators are not as competitively significant as the Commissioner has suggested. However, the Tribunal is satisfied, based on the above-mentioned evidence, that the elimination of the VOW Restrictions likely would result in at least some full-information VOWs collectively having a substantial positive impact on the level of non-price competition in the Relevant Market. The fact that some other market participants might try, and then abandon, full-information VOWs does not alter this conclusion.

[694] TREB and CREA further maintained that the display of the Disputed Data does not rank highly among the various types of information that consumers seek. In support of this position, CREA referred to statistics in the NAR 2014 Profile, which reported that detailed information about recently sold properties ranked eighth among website features that home purchasers who responded to NAR's survey found to be "very useful." Those same home purchasers ranked "pending sales/contract status" sixth. The five highest ranked features were photographs, detailed

information about properties for sale, interactive maps, virtual tours and neighbourhood information.

[695] TREB considers its position in this regard to have been corroborated by Mr. Hamidi, who testified that the straight provision of information to consumers (such as on a VOW) is at the lower end of importance, among the various services that consumers typically seek from a realtor. However, as discussed at paragraphs 595-597 and 675-677 above, the foregoing evidence was contradicted by Messrs. McMullin, Enchin, Nagel, Hamidi and Gidamy, as well as by Ms. Desai, all of whom testified that sold information is highly valued by home buyers and sellers.

[696] Moreover, activity data pertaining to visitors to ViewPoint's website indicates that, during the period December 20, 2014 to January 18, 2015 (30 days), approximately **[CONFIDENTIAL]** of the **[CONFIDENTIAL]** distinct users (by account ID) who accessed the site during that period reviewed the sales history of at least one sold property. Over a 90-day period, **[CONFIDENTIAL]** of users clicked on at least one sold property. Likewise, Mr. Nagel testified that Redfin's metrics indicate that pages showing sold listing information are among the most viewed pages on Redfin's website, ranking only behind the homepage, the map view and current listings. In addition, the NAR 2014 Profile reported that 75% of buyers considered detailed sold information to be somewhat or very useful on a website.

[697] In addition, TREB and CREA submitted that the Relevant Market is highly competitive and innovative, as reflected in part by the large number of very popular websites, the large number of active agents and brokers, the substantial number of agents and brokers who enter the GTA every year, and the high degree of technological innovation that is ongoing and widespread in the Relevant Market. The Tribunal does not dispute that the Relevant Market, as it currently exists, displays these various characteristics, to varying degrees.

[698] However, as noted elsewhere in these reasons, the focus of this proceeding is not on the absolute level of competition in the Relevant Market. It is upon whether, "but for" VOW Restrictions, the Relevant Market would likely be, or likely would have been, substantially more competitive. In the course of assessing this issue, the Tribunal has determined that information with respect to sold properties (including the selling price), "pending sold" properties, WEST listings and cooperating broker commissions is important, not only for full-information VOWs, but also for home sellers and purchasers.

[699] The Tribunal notes that wherever the display of sold information on brokers' websites is not prevented by a MLS system, it would appear to be displayed, not just by VOW operators, but by traditional brokers, such as Bosley and RE/MAX Hallmark. Ms. Prescott also testified that sold information is displayed on Century 21's website even if it is contrary to the office policy of her brokerage Century 21 Heritage. No persuasive evidence to the contrary was submitted.

[700] Indeed, in the United States, it would appear that the wide availability of sold information ultimately led realtor.com, which appears to be the official listing website of NAR, to make sold information available on its website. Although CREA took the position that there was insufficient evidence to prove the Commissioner's assertion that this development was caused by

competitive forces, the fact remains that realtor.com commenced displaying sold information after that information was being widely displayed by competitor websites, such as Zillow. The fact of sold information being available on realtor.com was recognized by each of Dr. Vistnes, Dr. Church and Dr. Flyer.

[701] The Tribunal is also satisfied that information with respect to the sold prices of homes, together with derivative analytical and statistical information, is made available by agents and brokers wherever they are not prevented by their local MLS system from doing so, because potential home purchasers value that information. The Tribunal accepts the Commissioner's submission that, if it were otherwise, one would expect that fewer brokers would provide that information on their websites, when free to do so.

(vi) Conclusion on magnitude

[702] For the reasons set forth above, the Tribunal concludes that the VOW Restrictions have adversely affected non-price competition in the Relevant Market to a degree that is material. Indeed, the Tribunal concludes that the aggregate adverse impact of the VOW Restrictions on non-price competition has been substantial, having regard to the considerable negative effect on the range of brokerage services, the negative effect on the quality of service offerings, and the considerable adverse impact on innovation in the Relevant Market. In the absence of an order, this substantial adverse impact is likely to continue. The Tribunal has reached this conclusion despite the fact that, the quantitative evidence on commission rates does not indicate that net commissions for real estate brokerage services were, are or likely would be, materially higher than in the absence of the VOW Restrictions.

(b) *Duration and scope*

[703] Regarding the time dimension of the anti-competitive effects discussed above, the Tribunal concludes that those adverse effects have been manifested since the implementation of TREB's VOW Policy and Rules in the fall of 2011. In brief, they have been manifested for a period longer than the two-year benchmark referred to in *Tervita*. Moreover, those adverse effects are likely to continue to manifest themselves in the absence of an order that appropriately addresses the VOW Restrictions. Stated differently, the Tribunal has concluded that the duration of those adverse effects on non-price competition is substantial.

[704] With respect to the scope of the adverse effects within the Relevant Market, the Tribunal is satisfied that the anti-competitive effects of TREB's VOW Restrictions are impacting, and in the absence of an order will continue to impact, competition throughout the GTA, and therefore are impacting a substantial part of the Relevant Market. Indeed, the fact that the VOW Restrictions extend throughout the GTA was acknowledged by TREB's expert, Dr. Church. In addition to the fact that a VOW is available to anyone throughout the GTA, the evidence indicates that VOWs typically offer information in respect of listings throughout the area covered by the local MLS system, in this case the GTA, and that VOWs target customers throughout that same area. This is consistent with evidence from Ms. Prescott that realtors are increasingly competing for business across the GTA, as opposed to staying put within a

neighbourhood or a part of the city. Further evidence that the VOW Restrictions are impacting a substantial part of the Relevant Market is that, as of May 8, 2015, there were approximately 322 brokerages that had signed up to receive TREB's VOW Data Feed.

(4) Conclusion

[705] For all the foregoing reasons, the Tribunal concludes, on a balance of probabilities, that the requirements of paragraph 79(1)(*c*) are met and that the VOW Restrictions have prevented, are preventing and, in the absence of an order, are likely to continue to prevent competition substantially in the supply of MLS-based residential real estate brokerage services in the GTA.

[706] In summary, those restrictions have resulted, are resulting and, in the absence of an Order, likely will continue to result, in a material, important and substantial incremental reduction in the degree of several non-price dimensions of competition in the Relevant Market, relative to the level of those dimensions of competition that likely would have prevailed, and that would likely prevail, "but for" the VOW Restrictions. These dimensions of competition include the range of brokerage services, the operating costs of VOWs, the quality of those services and the level of innovation. The qualitative evidence pertaining to the adverse effects of the VOW Restrictions on these dimensions of competition, as well as the barriers to entry and expansion, is sufficient to persuade the Tribunal that those restrictions have prevented, are preventing and, in the absence of an order, are likely to continue to prevent competition substantially in the Relevant Market.

[707] While the Tribunal acknowledges that demonstrating the anti-competitive effects caused by dynamic changes in the market raises more challenges and difficulty (*Canada (Director of Investigation & Research) v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289 (Comp. Trib.) at pp. 330-331), it is satisfied that, having considered the evidence as a whole, the Commissioner has met his burden under paragraph 79(1)(*c*) in this case.

[708] In addition, those anti-competitive effects have been occurring throughout the Relevant Market for a substantial period of time, namely, since the launch of TREB's VOW Policy and Rules in the fall of 2011. In the absence of an order from the Tribunal, those anti-competitive effects are likely to continue to manifest themselves throughout the GTA.

[709] The Tribunal observes that the scope of data covered by the VOW Restrictions may appear modest at first sight, given that they relate to Disputed Data forming only a small subset of all data available in TREB's MLS Database. However, to the extent that the VOW Restrictions insulate TREB's Members from increased competition from new entrants and from Members who would like to provide additional service offerings through their existing VOWs, or through new VOWs, those restrictions are maintaining what is in essence the collective market power that TREB's Members are able to exercise through their control of TREB and its rule-making functions. This collective market power is manifested in the form of materially less brokerage service offerings, innovation, quality and variety than would exist "but for" the VOW Restrictions.

[710] One of TREB's objections to the Commissioner's theory of market power maintenance is that the *Guidelines* state the following: "[v]igorous price and non-price rivalry among firms is an indicator of competitive markets. If the firms in the allegedly jointly dominant group are, in fact, competing vigorously with one another, they will not be able to jointly exercise market power" (*Guidelines* at p. 9).

[711] The Commissioner's *Guidelines* are not binding upon the Tribunal or the Courts, although they may assist them to determine the appropriate approach to adopt in general or in particular cases (*Canada Pipe CT* at para 66, aff'd, *Canada Pipe FCA Cross Appeal* at para 94; *Tele-Direct* at pp. 36-37). In any event, the Tribunal is satisfied that this statement was not intended to apply to a situation, such as here, where a trade association enacts rules and policies to shield its members from new forms of competition. This is so even if the members continue to compete "vigorously" on terms that they themselves have established through their trade association.

[712] In closing, the Tribunal notes that this case focuses on dynamic competition, including innovation, the most important type of competition. As observed by Dr. Vistnes, VOWs constitute an important new means by which brokers compete and an important way in which competition can provide consumers with better services. By shielding its Members from important forms of that disruptive competition, and thereby depriving consumers of the benefit of those enhanced services, TREB engaged in a discriminatory practice of anti-competitive acts that has prevented, and continues to prevent, competition substantially. In the absence of an Order from the Tribunal, that substantial prevention of competition is likely to continue.

[713] By preventing competition from determining how innovation should be introduced to the supply of residential real estate brokerage services in the GTA, TREB has substantially distorted the competitive market process and prevented innovative brokers such as Viewpoint, TheRedPin and Realosophy from considerably increasing the range of brokerage services, increasing the quality of existing services, and considerably increasing the degree of innovation in the Relevant Market.

[714] Although "organized real estate" recognizes that consumers are demanding "new ways of doing business, more choices, more flexibility, transparency, communication and more information quicker than ever before," and want to have greater control over the process of buying and selling homes, TREB has decided to limit what information can be disclosed by innovative brokerages who threaten the majority of its Members (2012 Vistnes Expert Report, at para 252, quoting "Exploring Possible Futures for Organized Real Estate in Canada: Insights from Cross-Canada Dialogues," CREA, 2011, at pp. 13-14).

[715] Markets are most efficient, and consumers best served, when competing firms are free to decide how to compete and whether to try to better compete by offering a new product or service. In the absence of legitimate regulatory concerns, the market and consumers, rather than competitors or their trade associations, are the best judge of whether new products or services are valued by consumers and whether such products should be offered in the market.

VIII. TREB’s Copyright

[716] The fifth issue to be decided in his proceeding relates to TREB’s copyright.

[717] TREB claims that it owns copyright in the TREB MLS Database and therefore holds valid intellectual property rights over the overall arrangement of the information in that database. Relying on subsection 79(5) of the Act, TREB submits that its VOW Policy and Rules are a mere exercise of that copyright, such that this is a complete defence to an application by the Commissioner alleging an abuse of dominance, even if the impugned practice is or is assumed to be exclusionary in effect. In other words, TREB contends that its VOW Restrictions do not constitute a practice of anti-competitive acts under section 79 because those restrictions are merely the exercise of its copyright in its MLS system, as contemplated by subsection 79(5). In any event, TREB maintains that the Tribunal does not have jurisdiction to order TREB to grant a compulsory licence of its intellectual property in this proceeding.

[718] The Tribunal notes that TREB does not claim copyright in respect of the individual components of the MLS Database, including the Disputed Data.

[719] Subsection 79(5) of the Act states:

For the purposes of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.	Pour l’application du présent article, un agissement résultant du seul fait de l’exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d’auteur*, de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

[720] The Commissioner responds that TREB’s argument must fail for two reasons. First, TREB has not led sufficient evidence to establish copyright in the MLS Database. Second, even if the MLS Database is protected by copyright, TREB's conduct amounts to more than the “mere exercise” of its intellectual property rights under subsection 79(5).

[721] For the reasons detailed below, the Tribunal agrees with the Commissioner. Based on the evidence on the record, the Tribunal is not persuaded, on a balance of probabilities, that TREB has established the existence of copyright in the MLS Database**,** including the Disputed Data. In

any event, even assuming that such copyright exists, two of the three principal VOW Restrictions constitute more than the mere exercise of TREB's intellectual property rights, namely, the prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

A. *The Copyright Act*

[722] Copyright is a creature of statute. In Canada, the rights and remedies in that respect are set forth in the *Copyright Act*, which constitutes a comprehensive regime (*Compo Co v Blue Crest Music Inc*, [1980] 1 SCR 357 at pp. 372-373). "Copyright" refers to the bundle of rights conferred by the *Copyright Act* on the author of a work and owner of the copyright in the work. It provides protection for literary, artistic, dramatic or musical works and other subject-matter including performer's performances, sound recordings and communication signals. The owner of copyright has the sole right to produce or reproduce a work (or a substantial part of it) in any form, and has the sole right to exhibit the work in public (section 3). Furthermore, pursuant to subsection 13(4) of the *Copyright Act*, the owner of copyright has the right to assign or licence the copyrighted work. However, such assignment must be in writing to be valid. If a work is unpublished, copyright includes the right to publish the work or any substantial part of it.

[723] Copyright subsists in all original literary, dramatic, musical and artistic works, including paintings, drawings, maps, photographs, designs, musical compositions, sculptures and plans, provided the conditions set out in the *Copyright Act* have been met, namely: 1) the work must be original, in that it involves some intellectual effort or skill; and 2) the author was at the date of the making of the work a citizen of, or a person ordinarily resident in, Canada or some other countries to which rights under the *Copyright Act* extends.

[724] Under the *Copyright Act*, the term "every original literary, dramatic, musical and artistic work" is defined in section 2 to include "compilations." A compilation is defined in section 2 to mean "(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data."

B. *The existence of copyright in the MLS Database*

(1) TREB's submissions

[725] TREB submits that, as the author of the TREB MLS system, it owns the copyright in the TREB MLS Database. According to TREB, its copyright claim is based on its arrangement of real estate data. TREB further specifies that its copyright claim is in the MLS Database, not the MLS system itself.

[726] In the case of a compilation, the arranger may not have copyright in the individual components, but may have copyright in the overall arrangement of the components, if there is sufficient originality in that arrangement. TREB thus argues that it is this overall arrangement that must be considered, not the individual fragments that make up the compilation (*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 (**"*CCH*"**) at para 33; *Tele-Direct (Publications) Inc v American Business Information, Inc*, [1998] 2 FC 22 (CA) (**"*Tele-Direct ABI*"**) at para 5).

[727] For a work to be sufficiently "original" to qualify for copyright protection, the work must have been the subject of at least a minimum degree of skill, judgment and labour in its overall selection or arrangement (*CCH* at para 16; *Tele-Direct ABI* at para 28). According to TREB, this threshold is an "incredibly low bar" to meet in respect of a compilation. In that regard, TREB refers to *ITAL-Press Ltd v Sicoli*, [1999] FCJ No 837 (TD) at para 110, where the Federal Court found that there was copyright in telephone listings in Italian-Canadian phone books, consisting of the names of people who appeared by their names to be of Italian origin. Mr. Justice Gibson found there to be an element of skill and judgment as well as labour, although not of the highest order, in the selection of Canadian residents who can reasonably be thought to be of Italian origin.

[728] TREB also relies on a series of U.S. decisions where courts have held that MLS operators own the copyright in their MLS databases, because the MLS database compilations in question met the test for originality in light of the efforts made by the MLS operator to oversee and control the quality and accuracy of the content of the database (*Metropolitan Regional Information Systems Inc v American Home Realty Network Inc*, 2012 US Dist LEXIS 121352 at pp. 22-23 (of Lexis) (**"*Metropolitan*"**); *Metropolitan Regional Information Systems Inc v American Home Realty Network Inc*, 2012 US Dist LEXIS 162111 at pp. 7-8 (of Lexis); *Metropolitan Regional Information Systems Inc v American Home Realty Network Inc*, 2013 US App LEXIS 14445 at pp. 10-11 (of Lexis); *Montgomery County Association of Realtors Inc v Realty Photo Master Corporation*, 1995 US Dist LEXIS 2111 at p. 7 (of Lexis)). TREB notes in particular that, in view of the *Metropolitan* decision, its MLS database compilation cannot be characterized as the mere entry of data on the computer. In *Metropolitan*, the argument to the effect that the MLS system is on "automatic pilot" was considered and rejected, and the U.S. Court instead found that the overall system, its structure and its rules ought to be considered in deciding the issue of copyright.

[729] TREB further asserts that in *TREB OSCJ* at paragraphs 100-101 and *TREB OCA* at paragraph 21, both the Ontario Superior Court of Justice and the Court of Appeal for Ontario alluded to TREB's copyright in the MLS Database, with the Court of Appeal describing TREB as having a "proprietary ownership interest" in the database.

[730] TREB also submits that the record in this proceeding is replete with evidence as to TREB's skill, judgment, and labour with respect to the MLS Database. TREB refers in particular to the following:

a. The use of TREB's MLS Database is governed by a comprehensive set of rules that are enacted and administered by TREB to ensure the accuracy and quality of the information and the orderly operation of the database, and to cover updating and uploading of data;

b. TREB provides its Members with a "MLS Data Information Form" to be used as part of the data entry process, to ensure that certain characteristics of properties are entered into the database for any listing, including some mandatory fields identified by TREB and which may differ from other MLS systems;

c. TREB ensures the accuracy of the listings in the MLS Database by way of proprietary software and encourages its Members to report any inaccuracies found in the listings;

d. TREB's AUA provides that the MLS Database is proprietary to TREB and that TREB's Members grant TREB a content licence with respect to the listings they upload into the database. Under the AUA, the user agrees to grant TREB a perpetual, worldwide, royalty-free, non-exclusive, sub-licensable and transferable right and license including all related intellectual property rights; and

e. TREB's software licence agreement with Stratus (the owner of the software that runs TREB's MLS Database) (the **"Stratus Licence Agreement"**) provides that TREB owns the intellectual property associated with the data inputted into the MLS system.

(2) Analysis

[731] The Tribunal is not persuaded that TREB owns copyright in the MLS Database, including the Disputed Data. In brief, the Tribunal has concluded that TREB has not led sufficient evidence to establish the level of skill, judgment and labour required for the MLS Database to benefit from copyright protection.

(a) *General principles*

[732] Copyright applies to a database only if the "selection or arrangement of data" is original. For a work (including a compilation of data) to be "original," it needs to be an intellectual creation (*Tele-Direct ABI* at paras 8-18). That is to say, the work must be the result of an exercise of "skill" and "judgment" (*CCH* at para 16). While the Tribunal acknowledges that the threshold is low, that threshold nonetheless does exist (*CCH* at para 16; *Tele-Direct ABI* at para 28). As stated by the Commissioner, in compilation situations, drawing a line between what signifies a minimal degree of skill, judgment and labour and what indicates an absence of creative element is not an easy task (*Édutile Inc v Automobile Protection Assn*, [2004] FC 195, 6 CPR (4th) 211 at para 13). But sufficient evidence must be adduced to convince the Tribunal, on a balance of probabilities, that such a determination can be made. This is especially the case here, since TREB does not benefit from the presumptions found at section 34.1 of the *Copyright Act*, which apply only to civil proceedings in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it.

[733] Simply capturing and compiling data supplied by real estate agents into the MLS Database does not suffice to produce a copyrighted work. To attract copyright protection, a work must add some non-trivial intellectual substance to the raw data. The test for originality in Canadian copyright law was extensively reviewed by the Supreme Court of Canada in *CCH*, where the Court found that skill and judgment are essential to a finding of originality (at para 16):

> For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.
>
> (Emphasis added)

[734] The assessment of such skill, judgment and labour is highly fact-specific and depends on the evidence provided. But there must be a meaningful degree of intellectual effort by the author in the work that is worthy of protection and reward (*Tele-Direct ABI* at para 29). The use of the word "auteur" in French conveys a sense of inventive labour, "creativity and ingenuity." A particular amount of labour is not in itself a determinative of originality (*Tele-Direct ABI* at para 29).

[735] In *Tele-Direct ABI,* the Federal Court of Appeal upheld the Federal Court's finding that Tele-Direct arranged its information, the vast majority of which was not subject to copyright, according to accepted, commonplace standards of selection in the industry. In doing so, it exercised only a minimal degree of skill, judgment and labour in its overall YellowPages arrangement, which was found to be insufficient to support a claim of originality in the compilation so as to warrant copyright protection (*Tele-Direct (Publications) Inc v American Business Information, Inc,* (1996) 74 CPR (3d) 72 (FC) at paras 52-54). The Court thus rejected Tele-Direct's assertion that the YellowPages directories were protected by copyright.

(b) *The evidence*

[736] The Tribunal agrees with the Commissioner that, like the YellowPages in *Tele-Direct ABI*, TREB's MLS Database is little more than information (the vast majority of which is not subject to copyright) arranged according to accepted, commonplace standards of selection in the real estate industry. Copyright cannot exist in these circumstances, neither in the manner in

which TREB has compiled the MLS Database nor in the manner of presenting or organizing the data on its website or on VOWs. The Tribunal is not persuaded that identifying certain mandatory fields or deciding what confidential information may be displayed on a VOW is sufficient to constitute the required degree of exercise of skill and judgment.

[737] The Tribunal recognizes that TREB takes the real estate listings data provided by its Members and presents the information on its intranet in a prescribed fashion. However, while TREB claims that the MLS Database is a compilation of data resulting from significant labour, as well as skill and judgment, the evidence suggests otherwise. More specifically:

a. None of TREB's witnesses testified about how TREB arranges the factual information that it receives from its Members, the effort that it takes, or the skill or judgment involved in determining what particular arrangement is appropriate;

b. Mr. Richardson simply testified that TREB contracts with a third-party to verify certain mandatory fields for errors. However, making sure that data is correct is not equivalent to exercising skill or judgment in its arrangement;

c. Mr. Richardson also testified on the functionality of TREB's intranet system and explained in his witness statement how to distinguish that system from the MLS Database. However, Mr. Richardson did not demonstrate to the Tribunal how TREB's MLS Database was constructed and works, but he rather discussed the software leased from Stratus and how it permits TREB’s Members to interact with the MLS Database and retrieve information from it;

d. TREB's contracts with third parties refer to its copyright, but that does not amount to proving the degree of skill, judgment or labour needed to show originality and to satisfy the copyright requirements;

e. The fact that third parties have acknowledged TREB's asserted copyright or proprietary work is not sufficient to demonstrate the existence of such copyright. For example, the recognition in the Stratus Licence Agreement that TREB owns the intellectual property associated with the data inputted into the MLS system, or that such information is proprietary, does not establish that the MLS Database is in fact subject to copyright;

f. Mr. Richardson testified that once Members upload information to TREB's MLS system by completing the Data Information Form, the listing appears on TREB's intranet system almost instantaneously. On the particular facts of this case, this suggests that there is little skill, judgment, labour or originality involved in arranging the information in the MLS Database;

g. Real estate boards across Canada operate MLS databases containing factual information on real estate listings. Far from being original, TREB also collects “home facts” in the same way that boards across Canada do, save for the mandatory fields which may vary between MLS systems. There is not sufficient evidence that TREB's MLS Database is original in comparison to those of other boards; and

h. The fact that TREB's MLS Database may be governed by a comprehensive set of rules enacted and administered by TREB to ensure the accuracy and quality of the information and the orderly operation of the database is not sufficient to confer copyright protection on what is subsequently displayed in the database. Ensuring the accuracy of the listings in the MLS Database and encouraging the Members to report any inaccuracies found in the listings does not amount to evidence reflecting the originality of the work.

[738] The process of inputting listings to the MLS system involves the listing broker directly inputting the listing information into the database through a fill-in-the-blank Data Information Form. The broker completes the form in consultation with the seller of the property, if the seller consents to having that property uploaded to TREB's MLS Database. The form has certain fields that are mandatory, such as the street name and number, the list price, and the number of rooms. The form also has other fields that are optional, such as the approximate age of the building, the approximate square footage, and open house dates. In addition, the form has a field for "remarks for brokerages," often containing information that is private or sensitive in nature, such as when the owner will be absent from the property. As stated by Mr. Richardson, the TREB MLS system "is set up to allow the listing broker, or office designate, to directly input the listing information into the database, as opposed to requiring TREB to centrally input all new listings into the database" (2012 Richardson Statement, at para 41).

[739] Merely aligning factual data in such a non-original way is not sufficient to attract copyright protection (*Distrimedic Inc v Dispill Inc*, 2013 FC 1043 at para 323). Further, where the information is arranged according to industry standards, the amount of skill, labour and judgment exercised is minimal and will not meet the originality threshold (*Denturist Group of Ontario v Denturist Assn of Canada*, 2014 FC 989 at para 65). Similarly, when an idea can only be expressed in a limited number of ways, the expression will not be protected (*Red Label Vacations Inc v 411 Travel Buys Ltd*, 2015 FC 18 at para 98). The Supreme Court of Canada has observed that, when determining what embodies the originality of a collective work (that is capable of attracting copyright), it is "whether a substantial part of a protected work has been reproduced, […] not the quantity which was reproduced that matters as much as the quality and nature of what was reproduced" (*Robertson v Thomson Corp*, 2006 SCC 43 at para 38).

(3) Conclusion

[740] Based on the foregoing, the Tribunal finds that, in essence, TREB's specific compilation of data from real estate listings amounts to a mechanical exercise that does not attract copyright protection. No evidence was adduced to demonstrate that the actual compilation of the database is more than a matter of simply assembling raw facts and routine elements from the listings in a mechanical fashion and posting them to the MLS system, without adding something original or creating elements unique to TREB's MLS system.

[741] Furthermore, the Stratus Licence Agreement suggests that, through that agreement, TREB is not protecting the specific form of selection or arrangement employed on its website, but the MLS data itself.

[742] The Tribunal acknowledges that some U.S. decisions, including *Metropolitan*, have recognized that, in light of the efforts made by the MLS operator in overseeing and controlling the quality and accuracy of the content of the database, MLS operators in the United States have been found to own the copyright in their respective MLS databases. These decisions were based on the evidence presented in these various cases. However, the Tribunal finds that the evidence provided in this proceeding does not allow it to conclude, on a balance of probabilities, that clear, convincing and cogent evidence has been provided to demonstrate the necessary degree of skill, judgment and labour required to support TREB's claim of copyright under Canadian law. In brief, TREB has not demonstrated the degree of intellectual effort required in this regard.

[743] TREB further contends that the Commissioner's submissions on the issue of copyright are completely inconsistent with his submissions on the issue of market power. According to TREB, the Commissioner is saying, on the one hand, that TREB's MLS Rules and Policy are sufficiently robust, comprehensive, and pervasive to grant them control over the market for residential real estate services in the GTA, while on the other hand the Commissioner takes the position that the MLS Database does not demonstrate sufficient skill and judgment to grant TREB copyright protection of that database. The Tribunal considers that these are two distinct issues and does not agree that this reflects an inconsistency or a contradiction.

[744] TREB rightly points out that the primary concerns expressed by the initial panel with the copyright argument revolved around the fact that the licence agreement between TREB and Stratus was not in the evidence at the time. The Tribunal acknowledges that TREB has since filed the most recently amended version of the licence agreement with Stratus. However, this Stratus Licence Agreement does not provide evidence of TREB's skill, judgment, and labour.

[745] Finally, the Tribunal observes that TREB's copyright argument is made in respect to the MLS Database as a whole, whereas TREB's practice of anti-competitive acts relates primarily to the VOW Restrictions, which concern only a small subset of the MLS Database. There is no evidence that the Disputed Data involve any degree of skill, judgment and labour on the part of TREB, and that a copyright claim could be made by TREB on this subset of the MLS Database.

C. *Mere exercise of intellectual property rights*

[746] TREB also contends that the provisions contained in TREB's VOW Policy and Rules are a mere exercise of its intellectual property rights. Given the Tribunal's conclusion on the absence of copyright, this issue does not need to be addressed. However, for completeness, the it will be briefly discussed below.

[747] Subsection 79(5) of the Act essentially states that the mere exercise of rights derived under the *Copyright Act* is not an anti-competitive act. Relying on the *Tele-Direct* decision of the Tribunal at paragraphs 60-70, TREB submits that something more than the mere exercise of statutory rights, even if such exercise is exclusionary in effect, must be present before there can be a finding of misuse of intellectual property. In *Tele-Direct*, the Tribunal found that inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to

determine whether or not, and to whom, to grant a licence. Selectivity in licensing is fundamental to the rationale behind protecting trade-marks, and this principle was applied to copyright by the Tribunal in *Director of Investigation and Research v Warner Music Canada Ltd*, [1997] CCTD No 53 (Comp. Trib.) (**"*Warner Music*"**) at paragraph 32.

[748] In *Warner Music*, the Commissioner (then known as the Director) brought an application against Warner Music Canada Ltd. and its affiliates (**"Warner"**) alleging that their refusal to grant copyright licences to BMG Canada to make sound recordings from their master recordings was an impermissible refusal to deal contrary to section 75 of the Act. Warner contracted with artists to make master recordings and had an exclusive copyright over these master recordings in Canada. In that decision, the Tribunal recognized that Parliament grants to copyright holders the right to exclude others from the use of the copyrighted work, and that this aspect is fundamental to copyright. The Tribunal found that it would be inconsistent to hold that Warner was engaging in anti-competitive practices by simply exercising a right that had been specifically granted by Parliament. Moreover, given the exclusive nature of the copyright enjoyed by Warner, it could not be considered a "product" that was in "ample supply," within the meaning of section 75.

[749] Relying on *Warner Music*, TREB further contends that its motivation for the decision to refuse to licence its intellectual property is irrelevant for the application of subsection 79(5). TREB submits that its decision not to licence the Disputed Data as part of the VOW Data Feed is squarely within the reasoning of the Tribunal in *Tele-Direct*.

[750] According to TREB, the licensing process includes choosing the mode of delivery of intellectual property rights, because intellectual property can be licensed to be used in different ways for different purposes. In support of that argument, TREB refers to *Eli Lilly and Co v Apotex Inc*, 2005 FCA 361 (**"*Eli Lilly*"**), where Eli Lilly Canada Inc. (**"Lilly"**) received the assignment of a patent from another company which, in combination with its own related patents, gave Lilly a monopoly in the antibiotic cefaclor. In that case, it was argued that patent assignments could lessen or prevent competition unduly within the meaning of section 45 of the Act, as it then was. The "something more" was found to be the increased power of Lilly in the market for bulk cefaclor, "as a result of [the addition of the assigned patents to] its existing ownership of the patents for the other known, commercially-viable processes for manufacturing the medicine" (*Eli Lilly* at para 18). In the current case, TREB argues that there is no similar "something more," as the conduct at issue here is the mere denial of access to intellectual property through a refusal to licence.

[751] TREB also maintains that the argument that TREB's conduct goes beyond the mere exercise of its intellectual property rights because its conduct creates, enhances, or maintains market power, if accepted, would render meaningless the defence in subsection 79(5) of the Act, because by definition the only conduct covered by subsection 79(1) is conduct that creates, enhances, or maintains market power. For the reasons set forth above, including at paragraphs 500 and 709, the Tribunal is satisfied that, by insulating its Members from important forms of increased non-price competition, TREB's VOW Restrictions have maintained, and are continuing to maintain, a form of market power that TREB and its Members collectively enjoy. Among other things, that market power is manifested in TREB's control of its MLS system and

its power to prevent innovative rivals from entering into, or expanding within, the Relevant Market.

[752] TREB also relies on the Bureau's *Intellectual Property Enforcement Guidelines* (September, 2000) (***"IPEGs"***), where the Bureau says at p. 7: "The unilateral exercise of the IP right to exclude does not violate the general provisions of the *Competition Act* no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, […] and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary."

[753] The Commissioner responds that even if the MLS Database or the Disputed Data was protected by copyright, TREB's conduct amounts to more than the "mere exercise" of its intellectual property rights. Subsection 79(5) of the Act does not state that "the exercise of those rights is not an anti-competitive act", nor does it exclude from the definition of anti-competitive act "the lawful exercise of intellectual property rights." The Commissioner maintains that only an act that is the mere exercise of a right, and nothing else, may fall within the statutory exception under subsection 79(5). He claims that TREB's conduct is more than a mere exercise of a copyright. He states that this is particularly so with respect to TREB's prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

[754] The Tribunal agrees with the Commissioner. Subsection 79(5) attempts to balance the extraordinary statutory monopoly rights conferred by intellectual property with the public interest in competition. To strike the right balance, the Tribunal and Federal Court of Appeal have interpreted that provision narrowly. In *Tele-Direct* at page 32, the Tribunal distinguished a refusal to licence. However, where a respondent attaches anti-competitive conditions to the use of its intellectual property, subsection 79(5) will not immunize it from scrutiny. In this case, the two prohibitions mentioned at the end of the immediately preceding paragraph above constitute anti-competitive conditions that TREB has attached to the use of intellectual property.

[755] TREB's VOW Restrictions do not simply restrict its Members' access to the Disputed Data. They instead control how TREB's Members display certain information sourced from the MLS Database, and how they use that information to deliver services to their customers. At the same time, TREB effectively permits or condones the dissemination of this information through more traditional means.

[756] Through its VOW Restrictions, TREB has used its control over the MLS Database to shield some of its Members from competition from innovators who would like to enter into, or expand within, the Relevant Market. Just as the respondent in *Eli Lilly* used its statutory rights to increase its market power beyond whatever initial power it may have enjoyed under its original patent rights, TREB is using its control over the MLS Database to insulate from innovative forces those of its Members who prefer to continue doing business in the traditional manner. This goes beyond a "mere exercise" of any intellectual property rights that TREB may have in the MLS Database.

[757] Put differently, the VOW Restrictions confer on TREB and its above-mentioned Members advantages beyond those derived from the *Copyright Act*.

[758] Based on all of the foregoing, the Tribunal concludes that, even if it were to assume that TREB owns a valid copyright on the MLS Database or on the Disputed Data, the VOW Restrictions are more than a mere exercise of its intellectual property rights. This is particularly the case with respect to the prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

D. *Jurisdiction*

[759] Finally, TREB claims that the Tribunal does not have the jurisdiction to order TREB to grant a compulsory licence with respect to its intellectual property. In that respect, TREB distinguishes between sections 32 and 79 of the Act. TREB contends that, in the absence of clear language in section 79, it would be wrong to conclude that the Tribunal has been given the power to order a respondent to grant what are, in effect, compulsory licences, when, pursuant to section 32, the Federal Court can make such an order only after the applicant meets a competition impact test and only after defences based on international treaty rights are considered (*Warner Music* at paras 26-28).

[760] The Tribunal considers that this case does not involve the imposition of a compulsory licence, as conventionally understood. TREB already makes each of the components of the Disputed Data available to its Members in other ways. More importantly, the VOW Restrictions go far beyond a refusal to include the Disputed Data in the VOW Data Feed, and include prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

[761] In any event, it is settled law that the Tribunal has the jurisdiction to order the supply of a proprietary product.

[762] In brief, outside the narrow context that was at issue in *Warner Music*, the Tribunal has not hesitated to exercise its jurisdiction to issue an order in respect of intellectual property.

[763] For example, in *NutraSweet*, the Tribunal found a number of the respondent's practices to have been anti-competitive, including trade-mark allowances offered by NutraSweet for displaying its swirl logo, exclusive supply and use clauses, cooperative marketing allowances, meet-or-release clauses and most favoured-nation-clauses. The Tribunal held that the trade-mark allowances and advertising discounts created an "all-or-nothing" choice for customers and were "essentially inducements to exclusivity" (*NutraSweet* at pp. 41-43). It therefore issued a broad remedial order prohibiting NutraSweet from enforcing, or entering into, contractual terms

relating to the exclusivity of supply or use of financial inducements for trade-mark display or other allowances, meet-or-release clauses and most-favoured-nation clauses.

[764] Likewise, in *Nielsen*, the respondent was found to have engaged in anti-competitive practices with respect to its historical scanner data. In the result, it was ordered, among other things, to provide that data to Information Resources Inc. (**"IRI"**) upon request, provided that IRI was willing to pay for 50% of the reasonable, documented expenses associated with gathering that data and 100% of the reasonable cost of making a copy and providing it to IRI (*Nielsen* at p. 282).

[765] Similarly, in *Southam*, a merger case, the remedial order issued by the Tribunal required the divestiture, at Southam's option, of either the North Shore News or the Real Estate Weekly newspapers, including the copyright in the newspapers and the trade-marks associated with those newspaper businesses.

[766] In addition, in *Director of Investigation and Research v Bank of Montreal.* (1996), 68 CPR (3d) 527 (Comp. Trib.) (**"*Bank of Montreal*"**), a consent order was issued under the abuse of dominance provisions of the Act requiring the charter members of an electronic banking network to "provide a commercially reasonable trade mark license without charge upon request to any member participating in the shared services that use the trade marks" (*Bank of Montreal* (Consent Order)).

[767] Finally, in *Director of Investigation and Research v AGT Directory Limited*, [1994] CCTD No 24 (Comp. Trib.), another consent order case under the abuse of dominance provisions, the respondents were prohibited from refusing to license the "Yellow Pages" trade-marks to certain companies for use in the sale of advertising in telephone directories, provided these companies entered into and maintained commercially reasonable standard form trade-mark licensing agreements.

[768] The Tribunal is satisfied that the *expressio unius* principle of statutory interpretation does not preclude it from exercising jurisdiction in respect of intellectual property rights, simply by virtue of the fact that section 32 of the Act sets forth specific provisions with respect to intellectual property. Among other things, this is because the language of section 32 is explicitly confined to the narrow situation of "where *use has been made of the exclusive rights and privileges conferred by*" the types of intellectual property protection mentioned therein (emphasis added). Situations that go beyond the use of the exclusive privileges *conferred by* one or more statutes creating intellectual property fall to be addressed by other provisions of the Act. Those include section 79 of the Act. In brief, where a dominant firm engages in a practice of anti-competitive acts that goes beyond the mere exercise of such rights and privileges, for example by imposing anti-competitive restrictions that materially increase or maintain any market power that would otherwise exist (having regard to intellectual property rights) "but for" those restrictions, the Tribunal has the jurisdiction to issue a remedial order to address that practice. The Tribunal is satisfied that there is nothing in the scheme of the Act to suggest otherwise. Indeed, if this were the case, firms would be free to extend any market power that may be conferred by a statute conferring rights over intellectual property beyond that which is

contemplated by the statute. In the absence of clear language curtailing the Tribunal's broad remedial jurisdiction to address abuses of dominant position, the Tribunal does not accept the suggestion that this is what Parliament intended.

IX. Remedy

[769] The Commissioner, in his final written submissions of 2015, seeks an Order that would:

a. Prohibit TREB from enforcing certain terms of its VOW Policy and Rules and its VOW Data Feed Agreement, related to the display and use of the MLS data;

b. Require TREB to include, in its VOW Data Feed, all unavailable listings in the MLS Database (including the data fields for sold listings, "pending sold" listings and WEST listings), and the data fields for offers of commission for available (current) listings, all for use by TREB's Members and to provide services over the Internet, including display of such listings on a VOW; and

c. Require TREB to amend certain of its rules and contract terms, to maintain and support its data feed and not to reverse course or exercise its rule-making powers to discriminate against its Members that use the data feed.

[770] At the Redetermination Hearing, counsel for the Commissioner re-emphasized its overarching concern that there should be no discrimination between the modes in which the information is delivered by TREB to its Members, and that what the Commissioner is seeking is a level playing field. He thus clarified that he is seeking the inclusion in the VOW Data Feed of all listing information on a non-discriminatory basis, and not just the Disputed Data. He also confirmed that he is not seeking any relief beyond the GTA. In other words, the Commissioner is not requesting an order against any other real estate board in the country.

[771] TREB asserts that the Tribunal should exercise care in crafting a remedy to ensure that the personal information of individuals is not widely disclosed on the Internet without their informed consent. It seeks the opportunity to make further submissions on the appropriate remedy.

[772] The Tribunal agrees that further submissions on the remedy are necessary in the present circumstances.

[773] As a result, the Tribunal will, shortly following the issuance of these reasons, issue a Direction providing a schedule for the filing of written representations by the parties and a date for a hearing on the remedy to be issued.

[774] That being said, the Tribunal nonetheless makes the following remarks regarding the remedy to be imposed further to its conclusions.

[775] CREA, in accordance with the terms of the Tribunal order granting it leave to intervene in these proceedings, has made submissions on the impact of the Commissioner's proposed remedies on CREA and its members, including its trade-marks (*Commissioner of Competition v Toronto Real Estate Board*, 2011 Comp. Trib. 22 (***"CREA Intervention Order"***) at para 40). CREA asserts that it has a significant concern about the negative effect of the remedy sought by the Commissioner on CREA's trade-marks and also asserts that the accessibility of the Disputed Data on a VOW may serve to diminish the credibility of a MLS system in the eyes of the consumer as well as the credibility of realtors. CREA further submits that the Tribunal's remedy should be expressly limited to the GTA.

[776] More specifically, CREA states that consumers are concerned about their property information being disclosed on a public website and adds that realtors who placed such information on the MLS system and who provide services using that system may negatively affect the credibility of CREA's trade-marks. However, as discussed at paragraphs 382-387 of these reasons, the evidence that consumers may be concerned about the display of the Disputed Data on VOWs was very limited and not persuasive. In any event, the Tribunal has not been persuaded that existing consents in the standard Listing Agreement that TREB recommends its Members to execute with their clients do not extend to the display of historical information such as the sold price of their home and WEST listings information, after their homes have been sold.

[777] CREA also submits that the Tribunal should assess both the likely benefits and the likely harm to consumers of the remedy that the Commissioner has requested. The Tribunal agrees with this approach. However, the Tribunal finds that CREA did not identify any significant harm, beyond the privacy-based concerns addressed in these reasons.

[778] The Tribunal further notes that VOWs are simply one part of one type of Internet-based data-sharing vehicles, being broker operated websites. The Tribunal agrees with CREA that any remedy resulting from this proceeding should not have the harmful effect of endorsing one type of innovative tool over another. The remedy to be imposed in this case will therefore not endorse one type of innovative tool over any other. It will simply address the restrictions applicable to VOWs, and participants in the Relevant Market will remain free to compete by offering whatever innovative services they deem appropriate, without any bias in favour or against full-information VOWs.

[779] TREB submits that conditional solds data should not be included in the VOW Data Feed because this would cause prejudice to home sellers who are parties to such "pending sold" transactions, based on the fact that it would disclose their reservation price to potential home purchasers. The Tribunal agrees that this is a very real and legitimate concern and will need to be addressed in calibrating the remedy.

[780] The Tribunal is also mindful of the fact that its orders pursuant to subsections 79(1) and 79(2) must only go as far as it considers necessary in order to restore competition in the relevant markets (*Laidlaw* at p. 351). The Tribunal will therefore look for the least intrusive remedy and determine what will be necessary to restore competition on the basis of the evidence put before it

as to how the Relevant Market operates and the effects the VOW Restrictions have had and are having.

[781] Finally, the Tribunal must also maintain the flexibility to modify the remedies proposed to it in order to achieve an order that it believes will be effective (*Nielsen* at p. 285).

X. <u>Costs</u>

[782] At the end of the Redetermination Hearing, the Tribunal encouraged the parties to reach an agreement as to the quantum of costs without knowing the outcome of the case. The Tribunal explained that if no agreement could be reached, the parties could make submissions in due course on costs. The Tribunal observes that it is increasingly favouring this approach. This is because asking the parties to agree on the issue of costs *before* they know the outcome is more likely to result in a reasonable and expeditious resolution of the question of costs. The Tribunal further notes that it will typically favor lump sum awards of costs over formal taxation of bills of costs.

[783] By way of letter January 28, 2016, counsel for the Commissioner and for TREB notified the Tribunal that they had reached an agreement with respect to Tariff B legal costs and a partial agreement with respect to disbursements. According to the agreement, if the Tribunal awards costs payable by TREB to the Commissioner, TREB shall pay to the Commissioner $215,000 in respect of Tariff B legal costs, and $113,000 in respect of disbursements other than those relating to expert witnesses. The Commissioner and TREB further agreed to consult with each other, after the release of the Tribunal’s final decision, in order to agree upon the quantum payable by one to the other in respect of disbursements for expert witnesses. If no agreement can be reached, either party may seek the Tribunal’s assistance or ruling.

[784] The Tribunal will therefore order TREB to pay to the Commissioner $215,000 in respect of Tariff B legal costs, and $113,000 in respect of disbursements other than those relating to expert witnesses. The Tribunal further directs the Commissioner and TREB to consult with each other in order to agree upon the quantum payable by TREB in respect of disbursements for expert witnesses. If no agreement can be reached within two weeks of this decision, the Commissioner and TREB are to file written submissions not exceeding five pages with the Tribunal

[785] The Tribunal understands that the Commissioner and CREA have had no discussions about costs since the Redetermination Hearing ended, and the Commissioner has reserved his position on this issue. The Tribunal, in its decision granting CREA leave to intervene, refused to order that CREA would not be liable for costs, as the Tribunal did not want to “fetter the discretion of the panel” should unforeseen circumstances develop (*CREA Intervention Order* at para 43). The Tribunal therefore directs the Commissioner and CREA to consult with each other in order to agree upon the quantum of costs payable by CREA, if any. If no agreement can be reached within two weeks of this decision, the Commissioner and CREA are to file with the Tribunal written submissions (not exceeding five pages) outlining their respective positions.

XI. Order

[786] For the reasons given above, the Tribunal partially grants the application brought by the Commissioner. The specific terms of the Tribunal Order will be determined and issued following the Tribunal's review of the parties' written submissions on remedy and the hearing at which they will be provided an opportunity to make verbal submissions on that issue.

[787] These reasons are confidential. In order to enable the Tribunal to issue a public version of this decision, the Tribunal directs the parties to attempt to reach an agreement upon the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, May 13, 2016, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the decision. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential reasons. Such submissions are to be served and filed by the close of the Registry on Monday, May 16, 2016.

DATED at Ottawa, this 27th day of April, 2016.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Paul Crampton C.J.
(s) Denis Gascon J. (Chairperson)
(s) Dr. Wiktor Askanas

Schedules

Schedule "A" – Relevant provisions of the *Competition Act*

78 (1) For the purposes of section 79, anti-competitive act, without restricting the generality of the term, includes any of the following acts:	78 (1) Pour l'application de l'article 79, agissement anti-concurrentiel s'entend notamment des agissements suivants :
(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;	a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;	b) l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;
(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;	c) la péréquation du fret en utilisant comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;	d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;
(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;	e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;
(f) buying up of products to prevent the erosion of existing price levels;	f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;
(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;	g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;
(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and	h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;
(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.	i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent.
(j) and (k) [Repealed, 2009, c.	j) et k) [Abrogés, 2009, ch. 2,

2, s. 427]

79 (1) Where, on application by the Commissioner, the Tribunal finds 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, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the

art. 427]

79 (1) Lorsque, à la suite d’une demande du commissaire, il conclut à l’existence de la situation suivante :

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d’entreprises à la grandeur du Canada ou d’une de ses régions;

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d’agissements anti-concurrentiels;

c) la pratique a, a eu ou aura vraisemblablement pour effet d’empêcher ou de diminuer sensiblement la concurrence dans un marché, le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l’une ou l’autre d’entre elles de se livrer à une telle pratique.

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu’une pratique d’agissements anti-concurrentiels a eu ou a pour effet d’empêcher ou de diminuer sensiblement la concurrence dans un marché et qu’une ordonnance rendue aux termes du paragraphe (1) n’aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l’ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l’une

divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.	ou l’autre ou à l’ensemble des personnes visées par la demande d’ordonnance de prendre des mesures raisonnables et nécessaires dans le but d’enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d’éléments d’actif ou d’actions.
(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.	(3) Lorsque le Tribunal rend une ordonnance en application du paragraphe (2), il le fait aux conditions qui, à son avis, ne porteront atteinte aux droits de la personne visée par cette ordonnance ou à ceux des autres personnes touchées par cette ordonnance que dans la mesure de ce qui est nécessaire à la réalisation de l’objet de l’ordonnance.
(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.	(3.1) S’il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les modalités qu’il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l’un de ces paragraphes, de 15 000 000 $.
(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:	(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :
(a) the effect on competition in the relevant market;	a) l’effet sur la concurrence dans le marché pertinent;
(b) the gross revenue from	b) le revenu brut provenant des

sales affected by the practice;	ventes sur lesquelles la pratique a eu une incidence;
(c) any actual or anticipated profits affected by the practice;	c) les bénéfices réels ou prévus sur lesquels la pratique a eu une incidence;
(d) the financial position of the person against whom the order is made;	d) la situation financière de la personne visée par l'ordonnance;
(e) the history of compliance with this Act by the person against whom the order is made; and	e) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;
(f) any other relevant factor.	f) tout autre élément pertinent.
(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.	(3.3) La sanction prévue au paragraphe (3.1) vise à encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.
(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.	(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.
(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other	(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi*

Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.	*sur les marques de commerce,* de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.
(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.	(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la pratique en question a cessé depuis plus de trois ans.
(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which	(7) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :
(a) proceedings have been commenced against that person under section 45 or 49; or	a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;
(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.	b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 90.1 ou 92.

Schedule "B" – List of Exhibits

CA-001	Confidential Witness Statement of William McMullin dated June 18, 2012
A-002	Witness Statement of William McMullin dated June 18, 2012
CA-003	List of Confidential Documents submitted by the Commissioner on September 10, 2012
A-004	List of Public Documents Submitted by the Commissioner on September 10, 2012
IC-005	Nova Scotia visits January - May 2012
A-006	ViewPoint Demonstration Video
A-007	Witness Statement of Urmi Desai dated June 20, 2012
A-008	Witness Statement of Scott Nagel dated June 20, 2012
CA-009	Confidential Letter re Changes to the Vow Datafeed dated September 6, 2012
A-010	Witness Statement of John Pasalis dated June 20, 2012
R-011	Email of August 2, 2011, including blog post co-written by Mr. Pasalis, entitled "The end of Realtor.ca?"
A-012	Public version of CA-009 - Letter re Changes to the Vow Datafeed dated September 6, 2012
A-013	Witness Statement of Shayan Hamidi dated June 20, 2012
R-014	RedPin News Release
A-015	Witness Statement of Tarik Gidamy dated June 22, 2012
A-016	Witness Statement of Joel Silver dated June 22, 2012
A-017	Standard Form Seller Brokerage Agreement (NSAR and AVREB)
A-018	TheRedPin VOW Registration
CA-019	Confidential Witness Statement of Mark Enchin dated June 19, 2012
A-020	Witness Statement of Mark Enchin dated June 19, 2012
A-021	Reply Witness Statement of Mark Enchin dated August 17, 2012
A-022	Witness Statement of Sam Prochazka dated June 22, 2012

IC-023	Webpages from website of Paula Amaral
IC-024	REBGV Rules of 10 Cooperation: July 2010 – Complete
CA-025	Commissioner's Confidential Request to Admit
A-026	Commissioner's Request to Admit
CA-027	TREB's Confidential Response to the Commissioner's Request to Admit
A-028	TREB's Response to the Commissioner's Request to Admit
CA-029	Confidential Expert Report of Dr. Greg Vistnes dated June 22, 2012
A-030	Expert Report of Dr. Greg Vistnes dated June 22, 2012
CA-031	Confidential Reply Expert Report of Dr. Greg Vistnes dated August 23, 2012
A-032	Reply Expert Report of Dr. Greg Vistnes dated August 23, 2012
A-033	Presentation of Dr. Greg Vistnes (PDF)
CA-034	Confidential Percentage Component of Buy-Side Offered Commissions – Summary
IC-035	2011 Profile of Home Buyers and Sellers 2011
IC-036	Excerpt from 2012 National Association of REALTORS ® Member Profile
A-037	Public version of CA-038 - Letter from Scott Nagel [RedFin] to Madam Justice Simpson providing responses to questions from the Tribunal of September 12, 2012
CA-038	Confidential Letter from Scott Nagel [RedFin] to Madam Justice Simpson providing responses to questions from the Tribunal of September 12, 2012
R-039	Witness Statement of Donald Richardson dated July 27, 2012
CR-040	Confidential Witness Statement of Donald Richardson dated July 27, 2012
R-041	STRATUS Screenshots
R-042	Updated List of VOWs and AVPs
A-043	E-Mail from Von Palmer dated September 24, 2012 attaching two chains of emails
R-044	C21 and Zoocasa

R-045	Public Accessing Solds September 26, 2012
R-046	MPAC FAQs
R-047	Pricelist Catalogue
R-048	Teranet Services
A-049	Schedule B to Agreement of Purchase
A-050	Various News Articles
A-051	RECO Advertising Guidelines
A-052	MLS Rules and Policies Effective January 1, 2006
A-053	Sample CMA of TREB'S Residential Freehold Unavailable Sale
A-054	TREB Privacy Q & A for Approval
A-055	Office of the Privacy Commissioner of Canada
CA-056	Lydia RE: Competition Bureau and TREB - Notice of Application
CA-057	Re: Lydia RE: Competition Bureau and TREB - Notice of Application
R-058	Email from Marie-Michele Caux to Will Stewart re Toronto Real Estate Board
R-059	Privacy Compliance Material on www.torontomls.net
CR-060	Tung-Chee Chan Commission Tables
R-061	Witness Statement of Tung-Chee Chan dated July 27, 2012
R-062	Witness Statement of Pamela Prescott dated July 27, 2012
CR-063	C21 Heritage Group Actual Commission
R-064	Witness Statement of Evan Sage dated July 27, 2012
CR-065	Confidential Sage Real Estate Commission Table
A-066	In the listings game, the ground shifts
A-067	Sage Real Estate September Market Report
R-068	Century 21 - Schedule B - SALE 2011
R-069	Sage – Sched B for sale – Last updated January 2012

R-070	Witness Statement of Timoleon Syrianos dated July 27, 2012
CR-071	Confidential Witness Statement of Timoleon Syrianos dated July 27, 2012
CR-072	Confidential REMAX Ultimate
A-073	REMAX Consent to Advertise Sold Properties
A-074	Schedule B to the Agreement of Purchase and Sale
CA-075	Confidential REMAX Ultimate Realty - Commission Report (June 1- June 30, 2011)
A-076	RE/MAX Ultimate Realty - Commission Report (June 1- June 30, 2011)
CA-077	Confidential RE/MAX Ultimate Realty - Commission Report (June 1- June 30, 2012)
A-078	RE/MAX Ultimate Realty - Commission Report (June 1- June 30, 2012)
R-079	Expert Report of Dr. Jeffrey Church dated July 27, 2012
CR-080	Confidential Expert Report of Dr. Jeffrey Church dated July 27, 2012
CR-081	Confidential corrections to the Expert Report of Dr. Jeffrey Church
R-082	Summary of Expert Report of Dr. Jeffrey Church
R-083	List of RECO documents entered on consent of all parties
IC-084	Witness Statement of Gary Simonsen dated August 3, 2012
CIC-085	Confidential Witness Statement of Gary Simonsen dated August 3, 2012
IC-086	Example of Residential Property Search on www.realtor.ca
A-087	Minutes from CREA VOW Task Force
IC-088	Expert Report of Dr. Fredrick Flyer dated August 13, 2012
IC-089	Powerpoint Presentation for Dr. Fredrick Flyer's Expert Evidence
IC-090	Privacy Workbook
IC-091	TREB Education Workbook - Complying with Privacy
A-092	The Commissioner of Competition Read-ins – Excerpts from the Examination for Discovery of Donald Richardson held March 19, 20, 21 and April 3, 2012

R-093	TREB Read-ins
R-094	Self-Regulated Professions - Balancing Competition and Regulation, Competition Bureau 2007
R-095	TREB’s Request to Admit
CR-096	TREB’s Confidential Request to Admit
R-097	Corrections to the Expert Report of Dr. Jeffrey Church
R-098	Completed Read-in from the Discovery of Donald Richardson
CA-099	Confidential Second Witness Statement of William McMullin dated February 5, 2015
A-100	Second Witness Statement of William McMullin dated February 5, 2015
CA-101	Confidential Third Witness Statement of William McMullin dated July 31, 2015
A-102	Third Witness Statement of William McMullin dated July 31, 2015
CA-103	Confidential ViewPoint Realty Business Metrics
A-104	Demo of Viewpoint.ca for unregistered user
CA-105	Confidential Demo of Viewpoint.ca for registered user
A-106	Demo of Viewpoint.ca for registered user
IC-107	Email chain between William McMullin and CREA – May 6, 2014 to June 26, 2014
IC-108	Email chain between William McMullin and CREA – September 3, 2013 to October 25, 2013
IC-109	2014 Consumer Insights Report for Realtors
IC-110	FOR IDENTIFICATION ONLY - Com Score Media Trend Viewpoint.ca
IC-111	FOR IDENTIFICATION ONLY - Com Score Media Key Measures June 2015 Atlantic
IC-112	Sales pending
A-113	Second Witness Statement of Tarik Gidamy dated January 30, 2015
CA-114	Confidential Second Witness Statement of Tarik Gidamy dated January 30, 2015

R-115	Online brokerage RedPin sticks it to traditional real estate
R-116	TheRedPin In The News
A-117	Second Witness Statement of Sam Prochazka dated February 3, 2015
CA-118	Confidential Second Witness Statement of Sam Prochazka dated February 3, 2015
R-119	TheRedPin Want to Make Great Service Ubiquitous in The Canadian Housing Market
A-120	Second Witness Statement of John Pasalis dated February 2, 2015
A-121	208 Pape Ave - Bosley
CA-122	155 Gainsborough - Bosley (Confidential)
A-123	155 Gainsborough - Re/Max Hallmark
A-124	#815 - 255 Richmond St. E. - Bosley
A-125	#815 - 255 Richmond St. E - Re/Max Hallmark
A-126	35 Woodfield Rd - Bosley
A-127	35 Woodfield Rd - RE/MAX Hallmark
R-128	The Future of Home Buying
A-129	Second Witness Statement of Scott Nagel dated February 5, 2015
CA-130	Confidential Second Witness Statement of Scott Nagel dated February 5, 2015
IC-131	NAR Section 19 Model Rules on Virtual Office Websites with Attachments
R-132	Updated Witness Statement of Pamela Prescott
CR-133	Confidential Updated Witness Statement of Pamela Prescott
A-134	Century 21 Heritage Group Ltd. - Directory Search
CA-135	Confidential Expert Report of Dr. Greg Vistnes dated February 6, 2015
A-136	Reply Expert Report of Dr. Greg Vistnes dated August 4, 2015
CA-137	Confidential Reply Expert Report of Dr. Greg Vistnes dated August 4, 2015
A-138	Expert Report of Dr. Greg Vistnes dated February 6, 2015
IC-139	NAR 2014 Home Buyer and Seller Generational Trends with Attachments

IC-140	NAR 2014 Profile of Home Buyers and Sellers with attachments
R-141	Updated Witness Statement of Donald Richardson
CR-142	Confidential Updated Witness Statement of Donald Richardson
A-143	Third Witness Statement of Mark Enchin dated February 2, 2015
A-144	RECO Board of Directors
A-145	RECO 2013-2014 Annual Report
A-146	For the Record Spring 2014
A-147	RECO's 2015 Board of Directors
A-148	Bosley site issue - VOW Compliance
CA-149	FW: Homes Sold on Toronto MLS®
CA-150	FW: Solds
CA-151	FW: Toronto Condos Sold
R-152	Updated Witness Statement of Tung-Chee Chan
CR-153	Confidential Updated Witness Statement of Tung-Chee Chan
R-154	Reconnect (Autumn Edition 2013) (RECO Document)
R-155	For the RECOrd (Winter 2013) (RECO Document)
R-156	Reconnect (Spring Edition 2015) (RECO Document)
R-157	Social Media for Real Estate Professionals (RECO Document)
R-158	Advertising Checklist (with attachment) (RECO Document)
R-159	Advertising Sold Properties (with attachment) (RECO Document)
A-160	Working with a Realtor
A-161	Buyer Customer Service Agreement
CA-162	Confidential Stratus Screenshots Sold Search
R-163	Updated Witness Statement of Evan Sage
CR-164	Confidential Updated Witness Statement of Evan Sage

R-165	The BREL Team Screenshots
A-166	229 Kenilworth Ave
A-167	The Future of the Real Estate Industry
R-168	Updated Witness Statement of Timoleon Syrianos
CR-169	Confidential Updated Witness Statement of Timoleon Syrianos
CR-170	Confidential RE/MAX Ultimate Realty Inc. All Written Trades - August 01, 2014 to July 31, 2015
R-171	Expert Report of Dr. Jeffrey Church dated May 15, 2015
CR-172	Confidential Expert Report of Dr. Jeffrey Church dated May 15, 2015
R-173	Summary of Second Expert Report of Dr. Jeffrey Church, dated October 6, 2015
A-174	Realtor.com to display sold listings data in Chicago, Boston, SF
A-175	NAR vote could give broker and agent listing websites a shot in the arm
A-176	Federal Antitrust Policy
IC-177	Updated Witness Statement of Gary Simonsen
IC-178	Important Changes to the Rules for Use of the REALTOR® Certification Mark
IC-179	REALTOR.ca Nova Scotia Web and Mobile Traffic Analysis: 2012, 2013, 2014
IC-180	CREA internet presentation of Gary Simonsen
A-181	CREA Board of Directors
IC-182	Updated Expert Report of Dr. Fredrick Flyer dated June 2, 2015
CIC-183	Confidential Updated Expert Report of Dr. Fredrick Flyer dated June 2, 2015
IC-184	NAR Website Statistics for January - June 2015 with Attachments
A-185	155 Gainsborough Bosley (Public version of CA-122)

Appearances

For the applicant:

The Commissioner of Competition

John F. Rook, Q.C.
Emrys Davis
Andrew D. Little
Tara DiBenedetto

For the respondent:

Toronto Real Estate Board

Donald S. Affleck, Q.C.
David N.Vaillancourt
Fiona Campbell

For the intervenor:

Canadian Real Estate Association

Sandra A. Forbes
Michael Finley
James Dinning

Tab 7

Case Name:

Canada (Commissioner of Competition) v. Canada Pipe Co.

Paras 36-38

Between
Commissioner of Competition, appellant, and
Canada Pipe Company Ltd./Tuyauteries Canada Ltée,
Respondent

[2006] F.C.J. No. 1027

[2006] A.C.F. no 1027

2006 FCA 233

2006 CAF 233

[2007] 2 F.C.R. 3

[2007] 2 R.C.F. 3

268 D.L.R. (4th) 193

350 N.R. 291

49 C.P.R. (4th) 241

150 A.C.W.S. (3d) 345

Docket A-106-05

Federal Court of Appeal
Ottawa, Ontario

Desjardins, Létourneau et Pelletier JJ.A.

Heard: February 7 and 8, 2006.
Judgment: June 23, 2006.

(100 paras.)

Commercial law -- Trade regulation -- Competition -- Unfair competition and restrictive trade practices -- Abuse of dominant position -- Appeal from a decision of the Competition Tribunal that dismissed an application by the Commissioner of Competition -- Appeal allowed, and the matter remitted to the Tribunal for reconsideration -- The Tribunal should have considered whether, without the loyalty rebate program, the relevant product market would have been substantially more competitive -- Further, with regard to its conclusion that the program was not anti-competitive, the Tribunal erred when, instead of inquiring as to whether the program's purpose was an intended negative effect on competitors, it asked whether there was evidence of a decrease in competition in the relevant market, in the abstract, and whether the identified competitive problems could be causally attributed to the SDP and hence be considered its "effects".

Appeal from a decision of the Competition Tribunal that dismissed the application by the Commissioner of Competition under sections 77 and 79 of the Competition Act. The Commissioner had sought an order against Canada Pipe to prohibit it from several purported anti-competitive acts that allegedly led to an abuse of dominant position under section 79, and to prohibit it from the practice of exclusive dealing under section 77. At issue was a "loyalty rebate" program offered by Canada Pipe and known as the Stocking Distributor Program (SDP). Under the SDP, distributors of Canada Pipe's cast iron drain, waste and vent (DWV) products obtained significant rebates and discounts in return for stocking only cast iron products produced by Canada Pipe. These distributors were free to stock other companies' DWV products which were not made of cast iron. The Commissioner alleged that this made Canada Pipe a dominant firm with respect to the product markets relevant in this case. Furthermore, the Commissioner asserted, the SDP constituted both a practice of exclusive dealing with exclusionary effects, and a practice of anti-competitive acts, and it was likely to substantially reduce competition in the markets for DWV products by impeding the entry and expansion of competitors. Canada Pipe countered that it exercised no market power in relation to the relevant product markets, when the latter were properly defined. Moreover, it alleged, the SDP was neither exclusionary nor anti-competitive, but rather was a voluntary, non-exclusive, incentive-based program which encouraged competition between DWV distributors, was compatible with competition on the merits between suppliers, and was supported by valid business justifications. The Tribunal dismissed the Commissioner's application. With respect to the alleged abuse of dominant position under section 79, the Tribunal held that (i) there were three relevant product markets, and six geographic markets, and the respondent substantially controlled all these markets; (ii) the SDP was a practice, but did not qualify as an "anti-competitive act"; and (iii) the Commissioner had not demonstrated that the SDP had substantially lessened or prevented competition. With respect to the allegation of exclusive dealing contrary to section 77, the Tribunal found that (i) the SDP was a practice of exclusive dealing; (ii) the respondent was a major supplier of the products in the relevant markets; and (iii) there was insufficient evidence to establish that the SDP had impeded entry or expansion of firms, or that it had any other exclusionary effect on the market, or that it had caused or was likely to cause a substantial lessening of competition. On appeal the Commissioner raised four issues. Firstly, that the Tribunal erred in its determination with respect to whether the SDP had prevented or lessened competition substantially. Secondly, that the

Tribunal erred in its determination with respect to whether the SDP constituted an "anti-competitive act". Thirdly, that the Tribunal erred in its determination with respect to whether the SDP had the result that competition was or was likely to be lessened substantially. Finally, that the Tribunal erred in its determination with respect to whether the SDP was likely to impede entry or expansion of a firm or a product in a market or have any other exclusionary effect in a market.

HELD: Appeal allowed. The matter was remitted to the Tribunal for reconsideration. The Tribunal should have considered whether, without the SDP, the relevant product market would have been substantially more competitive. In this regard, identification of the occurrence of entry, or reference to evidence of competition subsisting in the presence of the impugned practice, was insufficient. Accordingly, the Tribunal erred in law in its analysis, for the purposes of subsection 79(1)(c), as to whether the SDP had prevented or lessened competition substantially in the relevant markets. Further, with regard to subsection 79(1)(b), and its conclusion that the SDP was not anti-competitive, the Tribunal erred when, instead of enquiring as to whether the SDP's purpose was an intended negative effect on competitors, it asked whether there was evidence of a decrease in competition in the relevant market, in the abstract, and whether the identified competitive problems could be causally attributed to the SDP and hence be considered its "effects". This approach led the Tribunal to adopt an unwarrantedly and incorrectly narrow test for subsection 79(1)(b); essentially, the Tribunal's reasoning implied that unless an impugned act prevented entry of competitors or otherwise prevented competition, or unless it was the predominant cause of the uncompetitive attributes observed in the market, the act could not be considered anti-competitive. This interpretation was incorrect. As the Tribunal simply adopted the same legal test and analysis in respect of the substantial lessening of competition element for both section 79(1) and section 77(2), the same errors of law applied with respect to section 77(2).

Statutes, Regulations and Rules Cited:

Competition Act, ss. 1.1, 77(1)(a), 77(1)(b), 77(2)(a), 77(2)(b), 77(2)(c), 78(1), 79(1)(a), 79(1)(b), 79(1)(c), 79(4)

Counsel:

Randall Hofley and Leslie Milton, for the appellant.

Kent Thomson, James Doris et Charles Tingley, for the respondent.

The judgment of the Court was delivered by

1 **DESJARDINS J.A.**:-- This is an appeal from a decision of the Competition Tribunal ("Tribunal"), dated February 3, 2005, dismissing the application by the Commissioner of Competition ("Commissioner" or appellant) under sections 77 and 79 of the *Competition Act* (reported as 2005 Comp. Trib. 3). The Commissioner sought an order against Canada Pipe Company Ltd. ("Canada Pipe" or respondent), to prohibit the respondent from engaging in the practice of several purported anti-competitive acts leading to an abuse of dominant position under section 79, as well as to prohibit the respondent from continuing to engage in the practice of exclusive dealing under section 77. This case also involves a cross-appeal by Canada Pipe, which is dealt with in separate reasons.

2 This is the first time this Court has the opportunity to consider the tests for exclusive dealing and abuse of dominant position established respectively by sections 77 and 79 of the *Act*. Both of these provisions, generally speaking, authorize the Tribunal to make orders prohibiting a dominant firm from engaging in conduct that has had, is having or is likely to have the effect of substantially lessening competition. While the *Act* has been in force since 1986, and the Tribunal has elaborated its perspective on the requirements of sections 77 and 79 in several cases, these provisions have not to date been interpreted by any Canadian court.

3 The conduct at issue in this case consists of a "loyalty rebate" program offered by the respondent and known as the Stocking Distributor Program (SDP). Under the SDP, distributors of the respondent's cast iron drain, waste and vent (DWV) products obtain significant rebates and discounts in return for stocking only cast iron products produced by the respondent. These distributors are free to stock other companies' DWV products which are not made of cast iron.

4 According to the Commissioner, Canada Pipe is a dominant firm with respect to the product markets relevant in this case. Furthermore, the Commissioner asserts, the SDP constitutes both a practice of exclusive dealing with exclusionary effects and a practice of anti-competitive acts, and it is likely to have the effect of substantially lessening competition in the markets for DWV products by impeding the entry and expansion of competitors. The respondent contends, by contrast, that it exercises no market power in relation to the relevant product markets, when the latter are properly defined. Moreover, according to the respondent, the SDP is neither exclusionary nor anti-competitive, but rather is a voluntary, non-exclusive, incentive-based program which encourages competition between DWV distributors, is compatible with competition on the merits between suppliers and is supported by valid business justifications.

5 The Tribunal dismissed the Commissioner's application, based upon the following findings. With respect to the alleged abuse of dominant position under section 79, the Tribunal held that: (i) there are three relevant product markets, and six geographic markets, and the respondent substantially controls all these markets; (ii) the Stocking Distributor Program (SDP) is a practice, but does not qualify as an "anti-competitive act"; and (iii) the Commissioner had not demonstrated that the SDP had substantially lessened or prevented competition. With respect to the allegation of exclusive dealing contrary to section 77, the Tribunal found that: (i) the SDP can be characterized as a practice of exclusive dealing; (ii) the respondent is a major supplier of the products in the relevant markets; and (iii) there was insufficient evidence to establish that the SDP had impeded entry or expansion of firms, or that it is having any other exclusionary effect on the market, or that it has caused or is likely to cause a substantial lessening of competition.

6 The Commissioner appeals from the Tribunal's decision.

7 Broadly stated, the appeal challenges two aspects of the Tribunal's conclusions: first, the finding with respect to substantial lessening of competition for the purposes of both sections 77 and 79, and second, the finding concerning exclusionary effects under section 77 or anti-competitive acts under section 79. The cross-appeal by Canada Pipe, which concerns the Tribunal's conclusions as to the definition of the relevant product markets and the issue of market power for the purpose of paragraph 79(1)(a), is discussed in separate reasons, as stated earlier.

8 In order to facilitate the reading of these reasons, I include the following table of contents:

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I. FACTS

9 The respondent is a Canadian company based in Hamilton, Ontario, which produces and sells through its Bibby Ste-Croix division ("Bibby") cast iron drain, waste and vent (DWV) products. DWV products are used in a wide variety of structures to carry waste and drain water, and to vent plumbing systems. There are three components to a cast iron DWV system: pipe, fittings and mechanical joint (MJ) couplings (collectively, "DWV products").

10 There are currently two domestic manufacturers of cast iron DWV products: Bibby and Vandem Industries ("Vandem"). Bibby manufactures cast iron DWV pipe and fittings, and imports MJ couplings from its sister companies in the United States. Vandem, which was founded in 1997 (according to the Tribunal; the respondent claims it was 1999, but little turns on this fact) by two former officers of Bibby, manufactures DWV pipe and imports fittings and couplings. The only Canadian manufacturer of MJ couplings is Rollee Industrial Products (1987) Ltd., but it is not a major player. In addition, there are a limited number of other Canadian importers of cast iron DWV products, who generally import from the United States and the Far East (mainly China and India). Imports of cast iron DWV products for all of Canada, including imports by Bibby and Vandem, represented 5% of total sales in 2002. The respondent is the only company in Canada that manufactures and sells a full range of cast iron DWV products.

11 Distributors buy DWV products from the suppliers (either manufacturers or importers), and in turn sell to the building, mechanical or plumbing contractors involved in construction or renovation projects. Distributors generally carry DWV pipe and fittings made of various materials; cast iron DWV products usually represent only a small proportion of their inventory and sales. In Canada, there are three major distributors, all with national presence: Wolseley Canada Inc., EMCO Ltd, and Crane Supply. There are also small distributors, some of whom are members of buying groups in order to improve their bargaining power and obtain volume discount advantages.

12 Contractors buy DWV products from distributors for construction projects upon which they bid. The bidding process is highly competitive, and contractors will try to obtain the best price possible in order to make their bids attractive. Although contractors may have some leeway in deciding what material to use in construction they will generally buy the type of DWV product that has been specified by the architect or mechanical engineer.

13 The SDP was introduced by Bibby in January 1998. In contrast to the volume-based rebate programs typical in the industry, the SDP is premised on exclusivity, not the volume of purchases. Under the SDP, distributors of Bibby's DWV products obtain quarterly and yearly rebates as well as significant point-of-purchase discounts, in return for stocking only Bibby-supplied cast-iron DWV products. These distributors are free to stock other companies' DWV products which are not made of cast iron, but must purchase all three cast iron DWV products exclusively from the respondent. There are no signed contracts for the SDP: distributors can join at any time, and receive the quarterly and yearly rebates for each completed calendar quarter or year. Distributors who choose not to participate in the SDP are permitted to purchase products from Bibby, albeit at higher prices. There are no restrictions on the resale of cast iron DWV products purchased by distributors who participate in the SDP.

14 The SDP discounts consist of point-of-sale discounts (for example, 55% of list price for stocking distributors, compared to 94% for non-stocking distributors), as well as quarterly and annual rebates (in 2002, the quarterly rebates were 7, 15 and 9 percent on pipe, fittings and MJ couplings respectively, and the annual rebate was 4 percent for all products). The point-of-sale discount and the rebates vary from one region to another. Any distributor can participate in the SDP, so long as a threshold minimum purchase is made; once this threshold is met, the rebates and discounts are the same for the given region, regardless of the size of the distributor's purchase. As a result, the SDP allows small- and medium-sized distributors to access the same prices as large distributors. The discount is applied at the time of purchase, so long as the distributor has committed to participating in the program, and is not reimbursable even if the distributor leaves the program. Except for losing the rebates, there are therefore no penalties attached to opting out of the SDP.

II. LEGISLATIVE FRAMEWORK

15 Three legislative provisions govern the issues to be decided in this appeal, namely sections 77, 78 and 79 of the *Act*. These sections set out the various elements that must be proven by the Commissioner to establish exclusive dealing and abuse of dominant position, and provide some relevant statutory definitions.

16 With respect to an alleged abuse of dominant position, the requisite elements for an order are described in subsection 79(1):

Prohibition where abuse of dominant position

79. (1) Where, on application by the Commissioner, the Tribunal finds 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,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

* * *

Ordonnance d'interdiction dans les cas d'abus de position dominante

79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;
c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

17 Subsection 79(4) further specifies that possible superior competitive performance must be considered in making the requisite determination under subsection 79(1) concerning competition:

Superior competitive performance

79. (4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

* * *

Efficience économique supérieure

79. (4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

18 The term "anti-competitive act", which is a requisite element pursuant to paragraph 79(1)(*b*), is not defined in the *Act*. However, section 78 provides, under the heading "Definition", a non-exhaustive illustrative list of eleven anti-competitive acts:

Definition of "anti-competitive act"

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(*a*) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(*b*) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(*c*) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(*d*) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(*e*) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(*f*) buying up of products to prevent the erosion of existing price levels;

(*g*) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(*h*) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(*i*) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(*j*) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(*a*); and

(*k*) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

* * *

Définition de "agissement anti-concurrentiel"

78. (1) Pour l'application de l'article 79, "agissement anti-concurrentiel" s'entend notamment des agissements suivants :

a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

b) l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;

c) la péréquation du fret en utilisant comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent;

j) à l'égard des exploitants d'un service intérieur, au sens du paragraphe 55(1) de la *Loi sur les transports au Canada*, les agissements précisés à l'alinéa (2)*a*);

k) le fait pour l'exploitant d'un service intérieur, au sens du paragraphe 55(1) de la *Loi sur les transports au Canada*, de ne pas donner accès, à des conditions raisonnables dans l'industrie, à des installations ou services essentiels à l'exploitation dans un marché d'un service aérien, au sens de ce paragraphe, ou de refuser de fournir ces installations ou services à de telles conditions.

19 With respect to exclusive dealing, a statutory definition is provided in sub-section 77(1):

Definitions

77. (1) For the purposes of this section,

"exclusive dealing" means

(*a*) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(*b*) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

* * *

Définition

77. (1) Les définitions qui suivent s'appliquent au présent article.

"exclusivité"

a) Toute pratique par laquelle le fournisseur d'un produit exige d'un client, comme condition à ce qu'il lui fournisse ce produit, que ce client :

(i) soit fasse, seulement ou à titre principal, le commerce de produits fournis ou indiqués par le fournisseur ou la personne qu'il désigne,
(ii) soit s'abstienne de faire le commerce d'une catégorie ou sorte spécifiée de produits, sauf ceux qui sont fournis par le fournisseur ou la personne qu'il désigne;

b) toute pratique par laquelle le fournisseur d'un produit incite un client à se conformer à une condition énoncée au sous-alinéa *a*)(i) ou (ii) en offrant de lui fournir le produit selon des modalités et conditions plus favorables s'il convient de se conformer à une condition énoncée à l'un ou l'autre de ces sous-alinéas.

20 Sub-section 77(2) sets out the elements required to be proven for an order to issue with respect to a practice of exclusive dealing:

Exclusive dealing or tied selling

77. (2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(*a*) impede entry into or expansion of a firm in a market,

(*b*) impede introduction of a product into or expansion of sales of a product in a market, or (*c*) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

* * *

Exclusivité ou ventes liées

77. (2) Lorsque le Tribunal, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, conclut que l'exclusivité ou les ventes liées, parce que pratiquées par un fournisseur important d'un produit sur un marché ou très répandues sur un marché, auront vraisemblablement :

a) soit pour effet de faire obstacle à l'entrée ou au développement d'une firme sur un marché;

b) soit pour effet de faire obstacle au lancement d'un produit sur un marché ou à l'expansion des ventes d'un produit sur un marché;

c) soit sur un marché quelque autre effet tendant à exclure,

et qu'en conséquence la concurrence est ou sera vraisemblablement réduite sensiblement, le Tribunal peut, par ordonnance, interdire à l'ensemble ou à l'un quelconque des fournisseurs contre lesquels une ordonnance est demandée de pratiquer désormais l'exclusivité ou les ventes liées et prescrire toute autre mesure nécessaire, à son avis, pour supprimer les effets de ces activités sur le marché en question ou pour y rétablir ou y favoriser la concurrence.

21 A parallel structure and logic is readily apparent between the requisite elements for exclusive dealing under ss.77(2) and abuse of dominant position under ss.79(1). First, both provisions require an initial determination that the firm in question occupies a position of dominance: subsection 77(2) refers to a "major supplier of a product in a market", while paragraph 79(1)(*a*) requires that "one or more persons substantially or completely control... a class or species of business". Second, both provisions call for the identification of a particular type of conduct, namely a practice of exclusive dealing with an exclusionary effect in the case of ss.77(2), and a practice of anti-competitive acts in the case of ss.79(1). Third, both provisions require a finding of actual or likely substantial lessening of competition.

22 While I would not conclude that the legal tests applicable under these two provisions would necessarily produce identical results in all cases, this parallel structure suggests that an overlapping analysis is to be expected.

III. ISSUES

23 This appeal raises the following four issues:

(A) For the purposes of paragraph 79(1)(*c*), did the Tribunal err in its determination with respect to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially?

(B) For the purposes of paragraph 79(1)(*b*), did the Tribunal err in its determination with respect to whether the SDP constitutes an "anti-competitive act"?

(C) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP has the result that competition is or is likely to be lessened substantially?

(D) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP is likely to impede entry or expansion of a firm or a product in a market or have any other exclusionary effect in a market?

24 I will address each of these issues in turn. As the analysis of each issue depends heavily upon the Tribunal's particular findings and approach, I will summarize the Tribunal's decision in the context of my analysis of each question.

IV. ANALYSIS

25 Before proceeding to an analysis of the issues listed above, a preliminary observation concerning analytic methodology and evidentiary limitations in the competition law context might be helpful. Each of the legislative provisions governing this appeal define a series of elements that must be proven in order to ground the particular order that is sought; if any of these elements is not established, the Commissioner's application must fail. Both section 77 and section 79 specify three distinct elements, and each of these elements is at issue in the appeal or cross-appeal in this case.

26 The multi-element structures of sections 77 and 79 suggest that the applicable legal tests consist of several discrete sub-tests, each corresponding to a different requisite element. Indeed, this interpretation appears necessary to give effect to the "well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage" (*R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 28; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27). Each statutory element must give rise to a distinct legal test, for otherwise the interpretation risks rendering a portion of the statute meaningless or redundant.

27 The difficulty arises, however, when the necessary distinct sub-tests are examined in light of the available evidence in a given case. In the abuse of dominance context, the economic concepts upon which the legal tests are based often cannot be readily extracted from the available evidence. For example, in many cases the foundational concept of market power cannot be established directly; instead, one must look to relevant indirect indicators. However, these indirect indicators are often relevant with respect to more than one element. As a result, the same evidence -- for example, concerning barriers to entry, or market share -- is potentially and unavoidably relied upon at several points in the analysis, in respect of different requisite elements. In its first abuse of dominance case, *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 [*NutraSweet*], the Competition Tribunal noted that this difficulty "is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required" (p. 28).

28 However, it is important that the correct approach to the overlapping use of supporting evidence in the competition context be properly understood, so as to avoid the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests. Although a particular piece of supporting evidence may be employed as an indirect indicator in respect of more than one element, the elements themselves must remain conceptually distinct. I will return to this point in my analysis of the questions at issue in the appeal at bar.

(A) For the purposes of paragraph 79(1)(*c*), did the Tribunal err in its determination with respect to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially?

29 I begin my analysis with the issue of substantial lessening of competition for the purposes of paragraph 79(1)(*c*), for it is on this question that I am most clearly convinced that this Court's intervention is required. My conclusion in this regard follows directly from an interpretation of the governing statutory language. In short, I have concluded that the Tribunal erred in law in its analytic approach with respect to the legal test applicable under paragraph 79(1)(*c*).

30 Before this Court, the appellant argued that the Tribunal erred in law in its interpretation of paragraph 79(1)(*c*) and failed to apply the correct legal test. The appellant argued that the statutory language -- and in particular the use of the relative concept "lessening" -- mandates an assessment of the effect of the impugned practice on competition in the relevant markets, which can only be properly accomplished by comparing the competitiveness of the relevant markets in the presence and absence of the impugned practice. The appellant submitted that the correct legal test for assessing competitive effects therefore involves a "but for" analysis: would markets -- in the past, present or future -- be substantially more competitive *but for* the impugned practice? Or, in other words, *but for* the impugned practice, would markets be characterized by greater price competition, choice, service or innovation than exists in the presence of this practice? The Tribunal thus erred, the appellant contended, in that its assessment of substantial lessening of competition focussed virtually exclusively on the narrow question of whether the SDP prevented entry or switching of suppliers, or in other words, whether a substantial level of competition continued to exist in the relevant market. Rather, the Tribunal should have considered the broader question of whether the SDP impeded or hindered the competition that would otherwise exist if the program were absent from the market.

31 In response, the respondent submitted two main arguments challenging the Commissioner's proposed "but for" test. First, the respondent argued that the "but for" test was a "novel approach", which the Commissioner had never before advocated before the Tribunal, either in this case or in prior proceedings under section 79. As a result, the respondent contended, the appellant is precluded from introducing this new argument at the appellate level. In this regard, the respondent cited this Court's comments in *Gravel and Lake Services Ltd. v. Bay Ocean Management Inc.* (2002), 298 N.R. 369, 2002 FCA 465 at para. 8, *SMX Shopping Centre Ltd. v. Canada* (2003), 314 N.R. 365, 2003 FCA 479 at para. 32, and *Naguib v. Canada* (2004), 317 N.R. 88, 2004 FCA 40 at para. 7 for the proposition that a new argument may not be raised for the first time on appeal if the responding party would be prejudiced by having had no opportunity to adduce evidence that could, if accepted, defeat the argument. In this case, the respondent maintained that the record contains little or no evidence to establish the likely characteristics of the necessary hypothetical "but for" market. Moreover, Canada Pipe would have argued its case very differently had it had notice at the Tribunal level of the Commissioner's new "but for" test; in particular, it would have retained experts to model the hypothetical comparator markets that would exist "but for" the SDP.

32 Second, or in the alternative, the respondent asserted that the Tribunal adopted the correct, well-established approach in its determination under paragraph 79(1)(*c*), and properly considered all relevant factors. The Tribunal reached its conclusion by carefully exercising its considerable expertise in appraising and weighing the relevant factors, and the respondent argued that since its conclusion on this question of mixed law and fact was not unreasonable, this Court should not interfere.

33 Although initially appealing, the respondent's first argument cannot be sustained, for several reasons. The legal principle cited by the respondent, with respect to the impropriety of an appellate court considering an entirely new argument which had not been raised below and in relation to which additional evidence is required, is indeed well-established: see, for example, *Tordenskjold (The) v. Horn Joint Stock Co. of Shipowners* (1908), 41 S.C.R. 154; *R. v. Perka*, [1984] 2 S.C.R. 232 at 240; *R. v. Keegstra*, [1995] 2 S.C.R. 381 at para. 26; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 58. However, this principle is inapplicable in the instant case, for the appellant's argument is not in fact "entirely new" (*Perka, supra* at 240). As I explain further below, although the Competition Tribunal has not used the "but for" wording in its previous cases, this wording appears in *Enforcement Guidelines on the Abuse of Dominance Provisions* issued by the appellant, and the substance of this legal test has been articulated and applied by the Tribunal in prior decisions. The respondent thus had ample notice of this argument. Moreover, the primary concern underlying the general prohibition -- namely, that the evidentiary record is insufficient to support the new argument (*Keegstra, supra* at para. 26) -- also does not apply in this case, for the Commissioner bears the burden of establishing each statutory element; if insufficient evidence exists to meet the "but for" test, no order will issue.

34 As to the respondent's second argument, I am not persuaded that the Tribunal's error with respect to its determination under paragraph 79(1)(*c*) is one of mixed law and fact. The appellant's argument calls for an exercise of statutory interpretation, to determine whether the statutory language indeed mandates a particular analytic approach. As the Supreme Court of Canada noted in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 36 [*Southam*], questions of statutory interpretation "are generally questions of law", as such questions have "the potential to apply widely to many cases". In the case at bar, the Tribunal's actual appraisal and weighting of different factors -- that is, the question of mixed law and fact -- is a secondary question, arising only once it has been determined whether the correct legal test was applied. While the Tribunal has economics and competition law expertise in relation to the determinations of fact and mixed law and fact required for the *application* of the correct legal test, this is not sufficient to displace the expertise of this Court with respect to statutory interpretation itself. As this Court has previously determined -- and indeed, the parties do not dispute -- the Tribunal's conclusions on questions of law are to be reviewed on the standard of correctness: *Commissioner of Competition v. Superior Propane*, [2001] 3 F.C. 185 at para. 88 [*Superior Propane*].

(1) The legal test under paragraph 79(1)(*c*)

35 In light of the appellant's argument, I must consider the correct statutory interpretation of paragraph 79(1)(*c*), which, for convenience's sake, I set out again:

> **79.** (1) Where, on application by the Commissioner, the Tribunal finds that
>
> ...
>
> (*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> * * *
>
> **79.** (1) Lorsque, à la suite d'une demande du commissaire, il conclut à

l'existence de la situation suivante :

...

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

36 Two aspects of the scope of paragraph 79(1)(*c*) are immediately evident from the wording. First, the effect on competition is to be assessed by reference to up to three different time frames: actual effects in the past or present, and likely effects in the future. Second, the effect on competition which must be proven to ground an order prohibiting an abuse of dominance is one of substantial preventing or lessening. The requisite assessment is thus a relative one: it is not the absolute level of competition in a market which must be substantial, but rather the preventing or lessening of competition that results from the impugned practice must be substantial.

37 The test mandated by paragraph 79(1)(*c*) is not whether the relevant markets would or did attain a certain level of competitiveness in the absence of the impugned practice, or whether the level of competitiveness observed in the presence of the impugned practice is "high enough" or otherwise acceptable. These are absolute evaluations, while the statutory language of "effect of preventing or lessening... substantially" clearly demands a relative and comparative assessment. In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(*c*), the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial". This comparison must be done with reference to actual effects in the past and present, as well as likely future effects. Only through such a comparative approach can the Tribunal determine, as the statutory provision requires, whether the impugned practice "has had, is having or is likely to have the effect of preventing or lessening competition substantially".

38 The comparative interpretation described above is in my view equivalent to the "but for" test proposed by the appellant. Apart from its arguments concerning the evidentiary difficulties involved in the application of such a test at the appeal stage in this case, the respondent did not advance any reasons of principle or statutory interpretation as to why this approach to paragraph 79(1)(*c*) is incorrect or inappropriate. I would therefore endorse the formulation of the legal test proposed by the appellant: the question that must be assessed for the purposes of paragraph 79(1)(*c*) is, would the relevant markets -- in the past, present or future -- be substantially more competitive but for the impugned practice of anti-competitive acts?

39 It is important to note that the "but for" wording appears in the *Enforcement Guidelines on the Abuse of Dominance Provisions* issued by the appellant, which *Guidelines* are expressly intended to "help the general public, business people and their legal and economic advisors to better understand... the general approach taken by the Competition Bureau to enforce these provisions" (see Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (Industry Canada: Ottawa, 2001) at page 5). In describing the Commissioner's approach to assessing the effects of anti-competitive acts for the purposes of paragraph 79(1)(*c*), the *Guidelines* employ the "but for" wording (see page 19).

40 The expression "but for" has also appeared in American antitrust jurisprudence. In *Concord Boat Corporation v. Brunswick Corporation*, 207 F.3d 1039 at 1055 (8th Cir. 2000), the Court referred to the difficulty of constructing a hypothetical market:

> Notwithstanding the complex nature of the conduct at issue, Dr. Hall was required to construct a hypothetical market, a <u>"but for" market, free of the restraints and conduct alleged to be anticompetitive</u>. The difficulty of such a task has long been recognized by courts in antitrust cases.

41 In substance, the "but for" interpretation of paragraph 79(1)(*c*) is also accordant with the Tribunal's interpretations in earlier abuse of dominance cases. Although the "but for" wording does not appear in the statutory provision or in previous Tribunal decisions, this legal test does not, as the respondent alleges, "amount[...] to an attempt by the Commissioner to re-write the Act at the appellate stage of this proceeding" (respondent's Memorandum of Fact and Law, para. 102). Rather, the "but for" test reflects the plain meaning of the statutory language of paragraph 79(1)(*c*), and corresponds to the Tribunal's analysis in its previous decisions with respect to this provision.

42 The Tribunal's use of a comparative and relative test for paragraph 79(1)(*c*) is evident in its descriptions, in previous abuse of dominance cases, of the appropriate analytic approach for determining whether there exists an actual or likely substantial lessening of competition. In *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 [*Laidlaw*], the Tribunal specifically endorsed an assessment based upon comparison of the competitiveness of the relevant markets with and without the impugned practice (at p. 344-346):

> Laidlaw argues that the Director has not demonstrated that there has been any substantial lessening of competition in the relevant markets. It is argued that no analysis has been done of the state of competition in the markets before Laidlaw entered compared to what exists now... It is not just the number of competitors and comparative market shares which are relevant in considering whether a substantial lessening of competition has occurred... <u>[T]he substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence.</u>

> [Emphasis added.]

Similarly, in *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216, [*D & B*], the Tribunal described as follows the appropriate approach to assessing the existence of a substantial lessening of competition (at p. 267):

> First, we must establish what the conditions of entry would be without the exclusives [the impugned practice of anti-competitive acts] and, then, determine how the anti-competitive acts altered the prospects for economically feasible entry.

The correspondence between these formulations and the "but for" test described above is readily apparent.

43 The Tribunal's previous abuse of dominance decisions also highlight the centrality of *relative* comparison in the test mandated by paragraph 79(1)(*c*). The test for substantial lessening of competition articulated by the Tribunal in *NutraSweet*, *supra, Laidlaw, supra*, and *D & B*, *supra*, in all cases depends upon this relative comparative aspect:

> The factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that NSC [NutraSweet Co.] has market power [that is, market share and entry barriers]. In essence, the question to be decided is whether the anti-competitive acts engaged in by NSC <u>preserve or add to</u> NSC's market power. The issue with respect to the contract terms associated with exclusivity and the use of the United States patent as leverage in competing for Canadian customers is <u>the degree to which these anti-competitive acts add to the entry barriers</u> into the Canadian market and, additionally therefore, into the industry. (*NutraSweet*, *supra* at p. 47, emphasis added)

> There is no reason to doubt that based solely on the economics of lift-on-board service that these should be highly competitive markets. The evidence shows, however, that the effect of the contracts <u>is to make entry sufficiently difficult</u> so that it no longer <u>effectively polices</u> the market. The evidence demonstrates that a new firm can acquire a certain number of customers but that it cannot establish a customer base with <u>sufficient rapidity to make entry attractive</u>. In the markets in question there is no doubt that acquisition practices of Laidlaw buttressed by the creation of artificial barriers to entry through the contracts have resulted in a substantial lessening of competition. (*Laidlaw, supra* at p. 347-348, emphasis added)

> The central issue to be decided in determining whether the Director has satisfied this third element [of sub-section 79(1)] is the effect of the exclusives with retailers and the long-term contracts with customers on the conditions of entry into the market. Or, to paraphrase the words of the tribunal in *Nutrasweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen [D & B] <u>preserve or add to</u> Nielsen's market power. (*D & B, supra* at p. 266-267, emphasis added).

Clearly, the assessment envisaged and undertaken by the Tribunal in all these cases was not merely an absolute evaluation of the level of competition in the relevant markets, but rather a relative comparison: did the impugned practice result in a *preventing or lessening* of competition as compared to the conditions governing in the absence of the practice, and was this lessening of a degree sufficient to be considered *substantial*?

44 Based upon the plain meaning of the statutory language, and supported by the interpretation advanced by the Tribunal in its earlier cases, I conclude therefore that paragraph 79(1)(*c*) mandates an approach that properly accentuates these comparative and relative aspects, and enables this analysis to be undertaken in respect of each of the three specified time frames (past, present and future). As I have explained, the "but for" test is one such approach. I must emphasize, however, as the Tribunal rightly implied in the passage from *Laidlaw* quoted in paragraph 39 above, that the "but for" test is not necessarily the only correct approach. I therefore expressly leave open the possibility that the Tribunal might in a future abuse of dominance case find evidence corresponding to a different test sufficient to discharge the burden placed upon the Commissioner by virtue of paragraph 79(1)(*c*). However, as the "but for" test describes an approach that corresponds to the requirements mandated by the statutory language of paragraph 79(1)(*c*), it is one that the Tribunal must consider in all cases -- although it may in future cases choose to consider other appropriate tests as well.

<u>(2) Application of the statutory test for paragraph 79(1)(*c*)</u>

45 In practice, the application of the "but for" test, and in particular, determination of the appropriate methodology in any given case, is a matter for which the Tribunal is better qualified than this Court. This Court should not attempt to prescribe in the abstract the "correct" methodology, for "[s]uch a task is beyond the limits of the Court's competence" (*Superior Propane,* supra at para. 159). As the Supreme Court of Canada observed in *Southam, supra* at para. 52, for the questions of mixed law and fact involved in the application of the legal tests set out in the *Competition Act*, "what is required in the end is an assessment of the economic significance of the evidence; and to this task an economist is almost by definition better suited than is a judge".

46 As suggested by the parties in the case at bar, application of the "but for" test could conceivably involve the construction of a hypothetical comparator model, a market identical to reality in all respects except that the impugned practice is absent. In appropriate circumstances, the "but for" test might also be applied by comparing the competitiveness of the market across time, and treating the market conditions before and after the introduction of the impugned practice as proxies for the market with and without the practice. However, I would not want to be seen to suggest that any particular type of evidence would necessarily be required. Ultimately, the Commissioner bears the burden of proof for each requisite element, and the Tribunal must be convinced on the balance of probabilities. The evidence required to meet this burden can only be determined by the Tribunal on a case-by-case basis.

47 The *Act* does, however, provide some guidelines which should be borne in mind in undertaking the assessment mandated by paragraph 79(1)(*c*). In this regard, I would adopt *mutatis mutandis* the advice provided by Evans JA in *Superior Propane, supra* with respect to the methodology appropriate for determining the anti-competitive "effects" of a merger under section 96 of the *Act*:

> Whatever standard is selected (and, for all I know, the same standard may not be equally apposite for all mergers) must be more reflective than the total surplus standard [the methodology adopted by the Tribunal in that case] of the different objectives of the *Competition Act*. It should also be sufficiently flexible in its application to enable the Tribunal fully to assess the particular fact situation before it.

Similarly, whatever methodology the Tribunal chooses in any given case in its application of the "but for" analysis required under paragraph 79(1)(*c*) must be sufficiently flexible to allow a full assessment of all factors relevant in the particular fact situation at issue, and must be reflective of the different objectives of the *Act*.

48 In *Superior Propane, supra*, at paras. 104-112, this Court looked to the purposes provision of the *Act*, section 1.1, to inform its analysis of the meaning of the word "effects" in section 96. Similarly, for the purposes of paragraph 79(1)(*c*), in undertaking its assessment of whether there is an actual or likely substantial preventing or lessening of competition, the Tribunal must ensure that the methodology chosen to apply the "but for" test reflects the multiple purposes or objectives set out in section 1.1. Four different purposes are described in section 1.1:

Purpose of Act

> **1.1** The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

* * *

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

All of these purposes must be reflected in the methodology adopted by the Tribunal to assess the existence of an actual or likely substantial lessening of competition for the purposes of paragraph 79(1)(*c*).

(3) The Tribunal's paragraph 79(1)(*c*) decision

49 Having articulated the legal test for paragraph 79(1)(*c*), I turn now to an analysis of what the Tribunal actually did in the case at bar. The Tribunal's analysis directly concerning paragraph 79(1)(*c*) is brief, and I will therefore quote it in its entirety:

> 263 The Tribunal, as stated above, is satisfied that Bibby does exercise market control. This can be traced to a number of factors and specifically to the fact that Bibby is the only Canadian supplier able to supply full product lines. The SDP is certainly an instrument that helps Bibby market its products, but the Tribunal is not satisfied that the SDP has been shown to be a practice of anti-competitive acts. If, however, the Tribunal has erred in this assessment, the Tribunal is also of the view that the SDP has not been shown to be a practice that has substantially lessened or prevented competition, for the reasons that follow.
>
> 264 The Tribunal has accepted the Commissioner's submission that there are three distinct product markets, and six geographic markets. Therefore, the Commissioner has the onus of establishing a substantial lessening or prevention of competition in eighteen separate markets. Yet the Commissioner has not established to the Tribunal's satisfaction that the SDP has led to substantial lessening or prevention of competition in any of these markets.
>
> 265 In Western Canada and in Ontario, which represent approximately 75 percent of Bibby's market, there is significant evidence of competitive pricing,

> notwithstanding the SDP. This competitive pricing is due to imports and to the emergence of a new manufacturer. Although imports still represent a relatively small portion of the cast iron DWV markets, they have been steadily increasing and have had a noticeable impact on prices of cast iron DWV products. In addition, a new competing manufacturer has emerged for the first time in thirty years and has succeeded in capturing 10 percent of the market in Canada within four years, while the SDP was in effect. There is clearly effective entry in the market by Vandem, as evidenced by the lowering of prices for cast iron DWV products in Ontario. As discussed earlier, in these reasons, its viability remains to be determined. It is the Tribunal's view, however, that the evidence shows that a number of factors, unrelated to the SDP, will bear on Vandem's future. In consequence, the Tribunal is of the view that the SDP has not brought about a substantial lessening or prevention of competition for the Ontario and Western markets.
>
> 266 The Tribunal acknowledges that for Quebec and the Maritimes, which represent 25 percent of the market, prices appear not to have been constrained by competition. This, however, does not necessarily lead to a conclusion that the SDP has caused the lack of competition. The data provided by the Commissioner relate only to the period of time when the SDP was operating. Dr. Ross based his arguments concerning market power on pricing information covering the period of January 1998 to September 2003. The Tribunal has no historical data which would allow it to measure the state of competition before and after the SDP came into effect. Canada Pipe bought the assets of Canada's only manufacturer of cast iron DWV products, the Gooding foundries, a well-established player with no significant rivals. As well, Bibby has been and continues to be the only producer of a full line of products. The Tribunal therefore finds that there is insufficient evidence for it to conclude that the SDP is responsible for a substantial lessening or prevention of competition.

50 The Tribunal's substantive analysis for the purpose of paragraph 79(1)(*c*) is contained in two paragraphs, 265 and 266. Paragraph 265 considers the evidence with respect to the geographic markets of Western Canada and Ontario, and paragraph 266 considers that with respect to Quebec and the Maritimes. The Tribunal's stated reasons for concluding that substantial lessening of competition had not been established are very different for the two geographic groupings. In both cases, however, the Tribunal's reasoning evinces errors of law.

51 For Western Canada and Ontario, the reasons show that the Tribunal's conclusion was based upon its appreciation of three main factors: the existence of competitive pricing, the increasing presence of imported cast iron DWV products, and the effective entry of a new cast iron DWV manufacturer, Vandem. The Tribunal emphasized that these significant features have been observed "notwithstanding the SDP" and "while the SDP was in effect" (para. 265), and thus concluded that the SDP had not brought about a substantial lessening or prevention of competition in Western Canada or Ontario.

52 The occurrence of entry, both by importers and a new manufacturer, was evidently the key consideration in the Tribunal's analysis with respect to the absence of substantial lessening of competition. In the context of its direct analysis of paragraph 79(1)(*c*), the Tribunal's explanation of its use, for the purposes of paragraph 79(1)(*c*), of the evidence concerning entry is very brief: it merely noted that "a new competing manufacturer has emerged for the first time in thirty years and has succeeded in capturing 10 percent of the market in Canada within four years, while the SDP was in effect", and concluded that "[t]here is clearly effective entry in the market by Vandem" (para. 265). The Tribunal also noted the "steadily increasing" presence of imports, which "although still represent[ing] a relatively small portion of the cast iron DWV markets", are said to "have had a noticeable impact on prices" (para. 265).

53 This analysis of the occurrence of entry in the Western Canada and Ontario markets provides no indication that the Tribunal considered expressly whether the SDP was responsible for a *substantial increase* in the difficulty of gaining entry in the market, and hence a *substantial lessening* of competition. The occurrence of entry and the consequent existence of a certain level of competition relate to an absolute evaluation of the state of the market in the presence of the SDP, which is neither an equivalent of nor a substitute for the relative and comparative assessment that is required by the statutory language of paragraph 79(1)(*c*). The fact that entry has been observed in the presence of the SDP, and that barriers to entry are therefore not total, does not by itself address the question of whether, in the absence of the SDP, there would be substantially more competition in the relevant markets, in the past, present or future. In short, the Tribunal's analysis with respect to these geographic markets does not address the "but for" question.

54 The Tribunal provided different reasoning for its conclusion in this regard concerning the Quebec and Maritimes markets (at para. 266). In these geographic markets, the Tribunal acknowledged that competitive pricing is absent, but cautioned that this "does not necessarily lead to a conclusion that the SDP has caused the lack of competition", as the Commissioner had not led any evidence concerning the period before the SDP was in effect. Without "historical data which would allow it to measure the state of competition before and after the SDP came into effect", and in light of other markets considerations (Canada Pipe's acquisition of the assets of another cast iron DWV manufacturer, and Bibby's status as the only full-line supplier), the Tribunal concluded that "there is insufficient evidence for it to conclude that the SDP is responsible for a substantial lessening or prevention of competition" (para. 266).

55 The legal error inherent in this portion of the Tribunal's paragraph 79(1)(*c*) analysis is manifest. As the Tribunal itself recognized in *Laidlaw, supra,* substantial lessening "need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness as present", for "substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence" (p. 346). For the purposes of paragraph 79(1)(*c*), it is insufficient to conclude that the Commissioner had not met her burden because no historical data was provided, for the Tribunal was required to also consider whether the evidence on record demonstrated that the SDP had the effect of substantially lessening competition in the past, present or future, as compared to the markets' *likely* competitiveness in the absence of the practice. The failure to consider this possibility in this case constitutes an error of law.

56 Can it be argued, as the respondent suggests, that the Tribunal implicitly took into account the relative and comparative considerations required under paragraph 79(1)(*c*)? In this vein, it could be argued that the Tribunal's paragraph 79(1)(*c*) reasoning depends implicitly upon its analysis undertaken in earlier sections of its decision, for the purposes of its determinations under paragraphs 79(1)(*a*) and (*b*), of the evidence concerning entry conditions and the effects of the SDP (paras. 141-156, and 204-254 and 260-261, respectively).

57 However, the Tribunal's treatment in these earlier sections of its decision of the evidence concerning entry and effects reinforces my conclusion that it erred in law in its paragraph 79(1)(*c*) analysis. In general, this earlier analysis treats the question of entry in an absolute sense, and appears to be guided by such questions as, has entry been prevented completely, or is a certain level of competition observed in the presence of the SDP. The evidence of actual entry is explicitly accorded a dominant and even preeminent role in the Tribunal's analysis (see, for example, paras. 149, 156 and 161). Throughout the Tribunal's decision, evidence concerning entry or the effects of the SDP is considered against the standard of "prevention" in an absolute sense, rather than a more relative standard such as that implied by the words "impeding" or "lessening" (see paras. 150, 155, 207, 225-226, 237, 241, 245, 254-255, 260-261). The decision does employ the words "impede" or "lessening" at several points (see paras. 2, 6, 53, 113, 162, 263-266, 280, 282), but these occur when the Tribunal is citing the text of the statutory provisions or paraphrasing the Commissioner's submissions, and not in the context of the Tribunal's own conclusions or analysis. In short, these earlier sections of the decision provide little if any support for the argument that the Tribunal implicitly took into account the relative and comparative considerations required under paragraph 79(1)(*c*). To the contrary, a careful reading of the Tribunal's reasons indicates that the analysis throughout was conducted from the narrow, absolute perspective of preventing entry and competition, and not from the broader, relative and comparative perspective of "impeding" or "lessening".

(4) Conclusion with respect to paragraph 79(1)(c)

58 In summary, the Tribunal should have turned its mind to the question of whether, in each of the relevant markets, competitiveness was substantially lessened in the presence of the SDP, as compared to the likely state of competition in the absence of this practice. In other words, the Tribunal should have considered whether, without the SDP, the relevant product market would be substantially more competitive. Proper examination of this question might include the following considerations: whether entry or expansion might be substantially faster, more frequent or more significant without the SDP; whether switching between products and suppliers might be substantially more frequent; whether prices might be substantially lower; and whether the quality of products might be substantially greater. In this regard, identification of the occurrence of entry, or reference to evidence of competition subsisting in the presence of the impugned practice, is insufficient. I conclude therefore that the Tribunal erred in law in its analysis, for the purposes of paragraph 79(1)(*c*), as to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially in the relevant markets.

(B) For the purposes of paragraph 79(1)(*b*), did the Tribunal err in its determination with respect to whether the SDP constitutes an "anti-competitive act"?

59 The statutory test for an abuse of dominant position set out in section 79 is a conjunctive one: each of the three distinct elements must be found if an order is to issue. The Tribunal found that the market control element required under paragraph 79(1)(*a*) was established, and this finding, which is the subject of the cross-appeal, is upheld by this Court in separate reasons. This Court must also determine whether the Tribunal erred in its findings with respect to paragraph 79(1)(*b*).

60 Paragraph 79(1)(*b*) calls for a determination as to whether the respondent, through the SDP, "ha[s] engaged in or [is] engaging in a practice of anti-competitive acts". The Tribunal had no difficulty recognizing the SDP as a "practice". It wrote, at para. 171, that the term entails more than an isolated act but may be one occurrence that is sustained and systemic, or that has had a lasting impact on competition. It explained at para. 200 of its reasons that the SDP is structured, organized and applied throughout Canada, albeit with some variations in the multiplier and rebates in the different regions and that the various components of the program add up to a practice. The respondent does not appear to contest this particular finding. The dispute arises with respect to whether the SDP can be characterized as composed of "anti-competitive acts" ("agissements anti-concurrentiels").

61 The Commissioner argued that while the Tribunal stated the correct legal test for anti-competitive acts, which was established in previous Tribunal decisions, this was not the test that it ultimately applied in its analysis of the SDP. The Tribunal erred in law, the Commissioner asserts, by requiring proof of a link between the SDP and a decrease in competition, and by improperly extending the scope of the valid business justification doctrine. As a result, according to the Commissioner, the approach to paragraph 79(1)(*b*) adopted by the Tribunal conflated the discrete statutory tests established by paragraphs 79(1)(*b*) and 79(1)(*c*).

62 This question is further complicated in the case at bar by the fact that this appeal represents the first time that a court has considered the legal test applicable for the purposes of paragraph 79(1)(*b*). The Tribunal has considered, in prior abuse of dominance cases, the legal test and analytic methodology applicable in ascertaining the existence of an "anti-competitive act". The Tribunal's jurisprudence on these questions cannot by itself be determinative in the current case, as its views on questions of law are not binding on this Court. The Tribunal's jurisprudence may however be indicative of what makes sense and what has been working in the past -- if, at the same time, it corresponds to the wording of the Act.

(1) The legal test under paragraph 79(1)(*b*)

63 The *Act* does not provide an express definition of "anti-competitive act". Section 78 provides a list of eleven anti-competitive acts, expressly "without restricting the generality of the term". These examples are thus illustrative only, and indeed the Tribunal has recognized in its previous decisions that conduct not specifically mentioned in section 78 can constitute an anti-competitive act (*Nutrasweet, supra* at p. 34; *Laidlaw, supra* at p. 331-332; *D & B, supra* at p. 257; *Canada (Director of Investigation and Research) v. Tele-Direct* (1997), 73 C.P.R. (3d) 1 at 180 [*Tele-Direct*]). While clearly non-exhaustive, the illustrative list in section 78 provides direction as to the type of conduct that is intended to be captured by paragraph 79(1)(*b*): reasoning by analogy, a non-enumerated anti-competitive act will exhibit the shared essential characteristics of the examples listed in section 78.

64 In *Nutrasweet, supra*, the Tribunal applied this interpretive approach to paragraph 79(1)(*b*), and suggested (at p. 34) the following working definition of "anti-competitive act":

> A number of the acts [mentioned in section 78] share common features but... only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in paragraph 78(*f*), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. (Emphasis added.)

65 I adopt the above definition, which is very close in substance to the core characteristic of the enumerated list of section 78, save at paragraph 78(*f*). This exception was noted by the Tribunal in *Nutrasweet, supra*.

66 Two aspects of this definition should be noted. First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary or disciplinary negative effect on a competitor. I will elaborate on each of these aspects in turn.

67 First, the meaning of the term purpose deserves some comment. As the Tribunal observed in *Tele-Direct, supra* at p. 180, "'purpose' is used in this context in a broader sense than merely subjective intent on the part of the respondent... it might be more apt to speak of the overall character of the act in question" (emphasis added). In order to apply paragraph 79(1)(*b*), the purpose or character of the impugned conduct must therefore be determined. Relevant factors to be considered and weighed to determine this overarching "purpose" include the reasonably foreseeable or expected objective effects of the act (from which intention may be deemed, as I explain further below), any business justification, and any evidence of subjective intent, if available (see *Tele-Direct, supra* at p. 180).

68 The second aspect describes the type of purpose required in the context of paragraph 79(1)(*b*): to be considered "anti-competitive" under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor. The paragraph 79(1)(*b*) inquiry is thus focused upon the intended effects of the act *on a competitor*. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(*b*), if these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(*b*). While, for the *Act* as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(*b*), "anti-competitive" refers to an act whose purpose is a negative effect on a competitor.

69 Adopting this interpretive approach to section 79, it is conceivable that a practice might be found to be composed of anti-competitive acts within the meaning of paragraph 79(1)(*b*), but at the same time, for the purposes of paragraph 79(1)(*c*), be held not to have the effect of preventing or lessening competition substantially in the market in question.

70 A final comment should be made with respect to the evidence required to establish an anti-competitive purpose within the meaning of paragraph 79(1)(*b*). It is clear from the legislative history of paragraph 79(1)(*b*) that evidence of subjective intent, although certainly probative if available, is not required in order to find that a given act is anti-competitive within the meaning of paragraph 79(1)(*b*). When Bill C-91, which eventually became the *Competition Act*, was first introduced in Parliament in December 1985, the text of paragraph (*b*) of the abuse of dominance provision (then section 51) read as follows:

> **51.** (1) Where, on application by the Commissioner, the Tribunal finds that
>
> ...
>
> > (*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and the object of the practice is to lessen competition, and

* * *

> **51.** (1) Lorsque le Tribunal, à la suite d'une demande du directeur, conclut :
>
> ...

> *b*) que cette personne ou ces personnes se livrent ou se sont livrées à une practique d'agissements anti-concurrentiels dont le but est de réduire la concurrence, et

Perceived problems with the subjective intent requirement implied by the latter part of the proposed paragraph (*b*) were frequently raised in testimony before the House of Commons Legislative Committee on Bill C-91 (see Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, First session of 33rd Parliament, 1986 at pages 2:8-9, 3:7-9, 3:17, 5:13, 5:15, 5:63-64, 6:9-10; 9:20-21; note also the contrary view expressed at 4:55-56, 6:57-58; 7:55-57, 7:60-63 [*Minutes of Committee on Bill C-91*]). In response, the reference to "the object of the practice" was deleted in paragraph (*b*), in order to remove any subjective intent requirement from the statutory test for abuse of dominant position (see *Minutes of Committee on Bill C-91, supra* at pages 11:3 and 11:32-33).

71 On the basis of this legislative history, I would endorse the following comment by the Tribunal in *Laidlaw, supra* at p. 342, with respect to the proper role of evidence concerning subjective intent within paragraph 79(1)(*b*):

> Proof of subjective intention on the part of a respondent is not necessary in order to find that a practice of anti-competitive acts has occurred. Such intention is almost impossible of proof in many cases involving corporate entities unless one stumbles upon what is known as a "smoking gun". (A document which makes it clear that the purpose of the conduct in question was to exclude competitors from the market.) Section 79 of the Act provides for a civil proceeding and civil remedies. In that context corporate actors and individuals are deemed to intend the effects of their actions.

72 Proof of the intended nature of the negative effect on a competitor can thus be established directly through evidence of subjective intent, or indirectly by reference to the reasonably foreseeable consequences of the acts themselves and the circumstances surrounding their commission, or both.

73 Even though evidence of subjective intent is neither required nor determinative, intention remains an important ingredient of paragraph 79(1)(*b*). In particular, intention is relevant in the sense that while a respondent cannot disavow responsibility for the reasonably foreseeable consequences of its acts, a respondent might nevertheless be able to establish that such consequences should not, in the context of the paragraph 79(1)(*b*) inquiry, be considered the intended "purpose" or "overall character" of the acts in question. In appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation as to why the impugned act was performed. To be relevant in the context of paragraph 79(1)(*b*), a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts. The appropriate application of the valid business justification doctrine in the context of paragraph 79(1)(*b*) will be further considered below, in my discussion of the Tribunal's analysis in the case at bar.

(2) The Tribunal's paragraph 79(1)(*b*) decision

74 In the case at bar, it would appear that the Tribunal correctly articulated the legal test. At para. 171 of its reasons, at the outset of its review of the Tribunal's definition of "anti-competitive acts" in its previous cases, the Tribunal stated:

> 171 ... In order to determine whether acts are anti-competitive, the Tribunal must consider the nature and purpose of the acts in question, as well as the impact they have or may have on the relevant market. [Note: *Nielsen* at 257; *Laidlaw* at 333; *Nutrasweet* at 34] In both *Tele-Direct* and *Laidlaw*, the Tribunal assessed the alleged anti-competitive practices by taking into account what effect they had had on competitors.
>
> [Emphasis added]

In the course of quoting a longer passage from *Tele-Direct*, the Tribunal reproduced (at para. 178) the key sentence from *Nutrasweet*, *supra* at p. 34, to the effect that the feature common to anti-competitive acts is that they are all performed for a "purpose", namely "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary". This formulation was also repeated in the concluding section of the Tribunal's decision (at para. 284).

75 However, despite this correct articulation of the test, the Tribunal's analysis of the salient features of the applicable legal test is a cause for concern. At the end of the portion of its paragraph 79(1)(*b*) analysis entitled "The Law", the Tribunal summarized as follows its understanding of key aspects of the legal test (at para. 191):

> The Tribunal [in *Tele-Direct*] has stated that there must be a link between the impugned practice and a decrease in competition. Moreover, if a practice does not appear to have an exclusionary effect or cause detriment to the consumer, it cannot be said to be anti-competitive.
>
> [Emphasis added.]

76 This statement is incorrect, in at least two respects.

77 First, for the purposes of paragraph 79(1)(*b*), a link need not be proven between the impugned practice and a decrease in competition. Quite simply, such a causal link is not part of the legal test for an anti-competitive act. Moreover, an emphasis upon evidence of this type runs the risk of obscuring the correct focus of the paragraph 79(1)(*b*) test. An anti-competitive act is one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. The focus of analysis is thus on the act itself, to discern its purpose. The questions as to whether a decrease in competition in the market is evident, or whether any such decrease can be causally attributed to the impugned practice, are not directly relevant for this task. Certainly, such findings are not requisite elements of the test for an anti-competitive act.

78 Obviously, if an act is to be found anti-competitive, there must be evidence linking the impugned practice to the requisite intended negative effect on a competitor: the practice must be found to cause or at least contribute to the intended negative effect. Such a negative effect on a competitor must also be found to be the "purpose" of the practice in question, and to this end, all relevant factors must be taken into account and weighed to determine if the requisite purpose is established. One must remember, however, that in the context of paragraph 79(1)(*b*), evidentiary factors are relevant only insofar as they shed light upon the paragraph 79(1)(*b*) statutory test, that is upon the purpose of the act vis-à-vis competitors. Evidence concerning other types of effects of the impugned act that are not related to competitors -- while perhaps pertinent in respect of the paragraph 79(1)(*c*) assessment of competition -- are not directly relevant for paragraph 79(1)(*b*). Similarly, evidence concerning the general competitive state and structure of the relevant market, and whether such features can be causally attributed to the impugned act, are not the direct focus of the paragraph 79(1)(*b*) analysis, and are more properly considered under paragraph 79(1)(*c*). In short, paragraph 79(1)(*b*) simply concerns whether the act displays the requisite intended effect on competitors; it is not directly concerned with the state of competition in the market or the general causes thereof. In directing itself to the contrary, and requiring proof of a causal link between the impugned act and a decrease in competition, the Tribunal erred.

79 Second, the Tribunal appears mistakenly to suggest in the above-quoted passage that the impugned practice's effects on the consumer should or could be considered within the paragraph 79(1)(*b*) analysis. However, contrary to what the Tribunal implies in the above quotation, "detriment to the consumer" is not a relevant independent consideration for the purposes of paragraph 79(1)(*b*), as evidence of this type does not relate directly to whether an act has the requisite defining characteristic of an intended negative effect on a competitor. The effect of an act on consumers may in some circumstances be relevant in assessing the credibility and weight of a proffered business justification, as I explain further below. Otherwise, however, such evidence is largely irrelevant for the purposes of the paragraph 79(1)(*b*) assessment, and is more appropriately considered under paragraph 79(1)(*c*). To the extent that the Tribunal suggests in the above-quoted sentence that "detriment to the consumer" is an independently relevant consideration for the purposes of paragraph 79(1)(*b*), the Tribunal therefore erred.

80 The Tribunal thus embarked on its paragraph 79(1)(*b*) analysis from an incorrect foundation: it erroneously believed itself obliged to consider factors which are not relevant in the correct legal test. The Supreme Court stated in *Southam, supra* at para. 41 that "[i]f the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law". Logically, this statement can be extended to encompass the situation of the case at bar: if the Tribunal considered items of evidence that the law requires it not to consider, then the Tribunal also erred in law. Moreover, these irrelevant factors may well have played a decisive role in this case: according to the Tribunal's own articulation, evidence of a link between the practice and a decrease in competition was considered to be *required* for the purposes of paragraph 79(1)(*b*). Thus, to the extent that the Tribunal misdirected itself as to the applicable legal test, and as a consequence considered irrelevant factors in making its paragraph 79(1)(*b*) determination, the Tribunal committed a reversible error of law.

81 The Tribunal's erroneous interpretation of the paragraph 79(1)(*b*) test played a significant role in its analysis of the SDP. It is clear that in concluding that the SDP was not anti-competitive, the Tribunal relied heavily upon its mistaken understanding that a demonstrable link must exist between the impugned act and a decrease in competition. Indeed, the Tribunal expressly stated that this factor was "the most striking" basis for its conclusion:

> 261 The most striking argument against the alleged anti-competitive effect of the SDP is the fact that it has not prevented entry nor competition in certain regions. The SDP has not prevented an increase in imports, nor has it prevented the emergence, for the first time in thirty years, of a new manufacturer of cast iron DWV products. For a practice to be found anti-competitive, it must have a negative effect on competition. As was stated in *Tele-Direct*, there has to be a link between the practice and its alleged anti-competitive effect. In the instant case, the link has not been established to the Tribunal's satisfaction. The Tribunal recognizes that entry may be difficult, but this appears unrelated to the SDP. Several other factors come into play: Bibby is a known manufacturer that offers a complete line of products; the market is not a growth market, thus limiting investment potential. Yet, it has been possible for competitors to match Bibby's price and offer a reliable supply, to the point of making it an interesting proposition for distributors or contractors to change suppliers. This has occurred, notwithstanding the SDP, as illustrated by new entrants such as Sierra and Vandem, and by new arrangements such as Wolseley's change of suppliers.

82 As this passage shows, the Tribunal's incorrect assumption that a link to a reduction in competition was required under paragraph 79(1)(*b*) critically influenced its reasoning. Instead of enquiring as to whether the SDP's purpose was an intended negative effect on competitors, the Tribunal asked whether there was evidence of a decrease in competition in the relevant market, in the abstract, and whether the identified competitive problems could be causally attributed to the SDP and hence be considered its "effects". This approach, of focussing on the general state of competition in the market rather than on the purpose of the impugned act, led the Tribunal to adopt an unwarrantedly and incorrectly narrow test for paragraph 79(1)(*b*): essentially, the Tribunal's reasoning would imply that unless an impugned act prevents entry of competitors or otherwise prevents competition, or unless it is the (predominant) cause of the uncompetitive attributes observed in the market, the act cannot be considered anti-competitive. This result is clearly incorrect.

83 In my view, the Tribunal's error of law with respect to paragraph 79(1)(*b*) is partly attributable to a conflation of the legal test for paragraph 79(1)(*c*) with that applicable for paragraph 79(1)(*b*). As I mentioned above at the outset of my analysis, the multi-element structure of section 79 suggests that upon proper interpretation, each statutory element must give rise to a distinct legal test. To repeat, paragraph 79(1)(*b*) relates to whether the impugned act exhibits the requisite anti-competitive purpose vis-à-vis competitors, while paragraph 79(1)(*c*) concerns the broader state of competition, and whether the practice has the effect of substantially lessening competition in the relevant market. A particular indirect evidentiary indicator may serve subtly different -- yet importantly distinct -- purposes in regards to paragraph 79(1)(*b*) as compared to paragraph 79(1)(*c*). Since paragraph 79(1)(*b*) focuses on whether the impugned act was performed for a particular purpose with respect to competitors, the relevant factors -- that is, evidence concerning its foreseeable effects on competitors, business justifications for its adoption, and subjective intent -- are to be interpreted in this particular light. By contrast, paragraph 79(1)(*c*) mandates an assessment of the substantiality of the practice's actual or likely effects on competition in the relevant market(s), a task that proceeds from the vantage point of the market as a whole and invites consideration of a wider range of effects of the practice in question. The approach adopted by the Tribunal in this case does not properly recognize or maintain these important conceptual distinctions between the statutory elements of paragraph 79(1)(*b*) and 79(1)(*c*).

(3) The valid business justification and paragraph 79(1)(*b*)

84 The Tribunal's conflation of the legal tests for paragraph 79(1)(*b*) and 79(1)(*c*) is also apparent in its discussion of the business justification arguments proffered by the respondent. The Tribunal noted two business justifications suggested by the respondent: first, that the SDP's uniform rebate structure encourages competition, by creating a level playing field between small and large distributors; and second, that the SDP makes possible the high-volume sales necessary to enable Bibby to maintain a full line of products.

85 The Tribunal rejected the first business justification proposed by the respondent, but was persuaded by the second. With respect to the first justification, the Tribunal concluded (at para. 209) that although the creation of equitable opportunities for small- and medium-sized enterprises to participate in the Canadian economy is an objective of the *Act* set out in section 1.1, this is not a relevant consideration for the purposes of section 79:

> While the Tribunal acknowledges this to be an enunciated purpose of the Act, the

> Tribunal is of the view that this purpose is unrelated to the issue of abuse of dominance. Competition between distributors is not at issue. Rather, the case is about competition between Bibby and other suppliers of cast iron DWV products. The equitable characteristics of the SDP as it relates to distributors have little to do with whether Bibby is exercising its market power in a way that precludes competition between suppliers of the product. In consequence, this argument of business justification must fail.

86 The Tribunal was persuaded, however, by the second business justification put forward by the respondent. It explained its reasoning as follows (at paras. 212 and 259):

> High volume sales are also important to a business which is volume-driven, as Mr. Leonard, General Manager of Bibby, explained. Bibby argues that it needs the sales to ensure efficiencies and to lower its cost of production; the Commissioner did not challenge this assertion. The rebate structure provided for in the SDP does encourage distributors to deal with Bibby for all three products if they choose Bibby to supply one of them and in consequence Bibby's sales are increased. As was stated in *Laidlaw*, the self-interest justification is not sufficient. However, in this case, the Tribunal accepts, based on Mr. Leonard's evidence, that high volumes allow Bibby to maintain in inventory smaller, less profitable but nevertheless important products. As a result, items that are used less often remain available in the market. This availability serves the interests of distributors and contractors, whether or not they belong to the SDP, and ultimately benefits the consumer.

> The respondent's business argument that Bibby needs to sell a certain volume in all three products to be able to maintain full production of all product lines is valid. There are certainly recognizable advantages in having a reliable source able to manufacture and supply a full line of cast iron pipe DWV products for the Canadian market.

87 This analysis is problematic, as the Tribunal appears to have lost sight of the role of the valid business justification doctrine *within paragraph 79(1)(b)*, and instead seems to grant it an independent role. A business justification for an impugned act is properly relevant only insofar as it is pertinent and probative in relation to the determination required by paragraph 79(1)(*b*), namely the determination as to whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor. As I explained above in the discussion of the intentionality aspect of the paragraph 79(1)(*b*) test, a valid business justification can, in appropriate circumstances, overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In this way, a valid business justification essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein.

88 The valid business justification doctrine is not an absolute defence for paragraph 79(1)(*b*). Rather, a business justification is properly employed to counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under 79(1)(*b*). As the Tribunal observed in *D & B, supra*, a business justification proffered by a respondent must therefore be "weigh[ed]... in light of any anti-competitive effects to establish the overriding purpose" of the impugned act (at p. 262, also quoted in *Tele-Direct*, *supra* at p. 180). In *D & B, supra*, the Tribunal properly emphasized this balancing exercise (at p. 265):

> Proof of the existence of a business motive for long-term contracts [the impugned conduct] that was unrelated to an anti-competitive purpose would undoubtedly be relevant to an evaluation of an allegation of anti-competitive acts. The mere proof of some legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive.

89 In the case at bar, the Commissioner argued that the business justification accepted by the Tribunal is actually a self-interest argument based on selling more product, and therefore cannot qualify as a business justification for the purposes of paragraph 79(1)(*b*). The respondent countered that this was a mischaracterization of the Tribunal's reasons, as in its view the business justification actually accepted by the Tribunal related to the maintenance of a full product line and the consequent benefits for consumers: according to the respondent, "it is crystal clear from the Tribunal's reasons that the Tribunal accepted the SDP's business purpose on the basis of its benefits to <u>customers</u> and <u>end consumers</u>, rather than Canada Pipe" (Respondent's Memorandum of Fact and Law at para. 83, original emphasis).

90 In my view, the respondent's interpretation of the Tribunal's reasons with respect to the second business justification is apt. However, this reasoning, which relies solely upon consumer welfare benefits to establish the business justification, is at the core of the Tribunal's error. Simply stated, improved consumer welfare is on its own insufficient to establish a valid business justification for the purposes of paragraph 79(1)(*b*). A valid business justification must provide a credible efficiency or pro-competitive explanation, unrelated to an anti-competitive purpose, for why the dominant firm engaged in the conduct alleged to be anti-competitive. The business justification must therefore be attributable to the respondent, for it is the latter's allegedly anti-competitive conduct which is sought to be explained.

91 In the case at bar, the Tribunal's reasons do not establish the requisite efficiency-related link between the SDP and the respondent, and hence do not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti-competitive purpose. Without such a link, self-interest remains as the only justification for the SDP which is attributable to the respondent for the purposes of paragraph 79(1)(*b*). The Tribunal thus erred in concluding, on the basis of the reasoning provided in its decision, that the respondent had established a valid business justification for the SDP. While this error may not ultimately have been determinative, in that a valid business justification is at most a factor to be balanced within the paragraph 79(1)(*b*) determination, it may well have played an important supporting role in the Tribunal's decision with respect to paragraph 79(1)(*b*).

<u>(4) Conclusion with respect to paragraph 79(1)(*b*)</u>

92 In sum, the aspects of the Tribunal's decision discussed above admittedly represent short extracts of a long and complex analysis. However, the identified errors suggest a basic misapprehension and misapplication of the legal test for paragraph 79(1)(*b*), and a troubling conflation between paragraphs 79(1)(*b*) and (*c*). Thus, at the very least, the extracts highlighted above render suspect the Tribunal's analysis of the relevant factors in the context of paragraph 79(1)(*b*). I can only conclude that the matter should be returned to the Tribunal for a reconsideration of its paragraph 79(1)(*b*) determination in light of the correct legal test.

(C)For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP has the result that competition is or is likely to be lessened substantially?

93 As I described above at paragraph 21 of these reasons, there is a parallel structure and logic between the requisite statutory elements for exclusive dealing under subsection 77(2) and abuse of dominant position under subsection 79(1). The parties did not present separate arguments with respect to the substantial lessening of competition element of subsection 77(2), and instead simply referred the Court to their arguments concerning this element in the context of section 79. This same approach was adopted by the Tribunal, which concluded, "[f]or the same reasons... as in our analysis under section 79," that the Commissioner had failed to establish that the exclusive dealing practice has lessened competition substantially (para. 282).

94 In *Nutrasweet, supra*, the Tribunal observed that "the fundamental test of substantial lessening of competition is the same in both sections of the Act [section 79 and subsection 77(2)]" (p. 56). The similarity between this element in section 79 and subsection 77(2) is indeed strong, in that both provisions employ the key concepts of substantial lessening and competition. However, the two provisions also contain some differences in wording. In particular, the scope of section 79 appears to include events of the past, which are not expressly included for the purposes of subsection 77(2): paragraph 79(1)(*c*) encompasses three time frames ("has had, is having or is likely to have"), while subsection 77(2) refers to only two ("is or is likely to").

95 For the purposes of this appeal, I need not consider whether the differences in wording between paragraph 79(1)(*c*) and subsection 77(2) might in particular cases properly yield substantively different results with respect to the substantial lessening of competition element. In the case at bar, it is clear that the Tribunal simply adopted the same legal test and analysis in respect of the substantial lessening of competition element for both section 79 and subsection 77(2). To the extent that the Tribunal erred in law in the context of paragraph 79(1)(*c*) in its interpretation of the test for substantial lessening of competition, the same errors of law apply with respect to subsection 77(2).

(D) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP is likely to impede entry or expansion of a firm or a product in a market or have any other exclusionary effect in a market?

96 The parallel structure of subsection 77(2) and 79(1) is also apparent in comparing the second elements required by the two statutory provisions: both provisions call for the identification of a particular type of impugned conduct, namely a practice of exclusive dealing with an exclusionary effect in the case of subsection 77(2), and a practice of anti-competitive acts in the case of paragraph 79(1)(*b*). The parties did not present separate arguments concerning this element of subsection 77(2), but rather appear to have assimilated this element into their arguments concerning section 79.

97 The Tribunal was satisfied that the SDP was a practice of exclusive dealing according to the statutory definition provided in paragraph 77(1)(*b*) (para. 279). However, the Tribunal concluded that an exclusionary effect had not been established, based on its analysis under section 79:

> 281 We have concluded under section 79 that the SDP is not an anti-competitive practice because we found insufficient evidence to show that the SDP in itself had an exclusionary effect...
>
> 282 For the same reasons therefore as in our analysis under section 79, we find that the Commissioner has failed to establish that the exclusive dealing practice impedes or is likely to impede entry of a new competitor or have any exclusionary effect...

98 For the purposes of this appeal, I need not decide the precise scope or nature of the similarity between the statutory element of subsection 77(2) concerning exclusionary effects, and paragraph 79(1)(*b*). There may well be differences between the two provisions, which could prove pertinent in a future case. However, it is sufficient in the circumstances of this case to note that the exclusionary effects required under subsection 77(2) are clearly of a relative nature, as indicated by use of the word "impede" in paragraph 77(2)(*a*) and (*b*), rather than a more categorical verb, such as "prevent". I have already considered in detail the Tribunal's treatment of the evidence concerning barriers to entry and the effects of the SDP, and it is unnecessary to repeat this analysis here. My conclusion, stated above at paragraph 58, is equally applicable for the purposes of the Tribunal's determination with respect to the exclusionary effects element of subsection 77(2): the Tribunal's analysis of the evidence concerning barriers to entry and the effects of the SDP was conducted from the narrow perspective of prevention, and not the broader perspective implied by the word "impede". The adoption of this unduly narrow perspective constitutes reversible error.

99 Moreover, it should be noted that like subsection 79(1), subsection 77(2) establishes distinct statutory elements, each of which must be established before an order prohibiting exclusive dealing can issue. These distinct statutory elements must not be conflated: the existence of the various exclusionary effects described in paragraph 77(2)(*a*), (*b*) and (*c*) must be considered separately from the question of whether there has been a substantial lessening of competition. Since the Tribunal relied, for the purpose of its subsection 77(2) determination concerning exclusionary effects, upon its erroneous paragraph 79(1)(*b*) reasoning, its conclusion in this regard cannot stand.

V. CONCLUSION

100 For the above reasons, I would allow the appeal with costs, I would set aside the Tribunal's decision in this regard, and I would refer the matter back to the Tribunal for a redetermination in accordance with these reasons and on the basis of the evidence currently on record.

DESJARDINS J.A.
LÉTOURNEAU J.A.:-- I agree.

ELLETIER J.A.:-- I agree.

Tab 8

Competition Bureau Canada
Bureau de la concurrence Canada

Pages 15-16, 24

Enforcement Guidelines

Intellectual Property

Canada

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PREFACE

The Competition Bureau (the “Bureau”), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau endeavours to be as transparent as possible in providing information to Canadians on the application of the laws under its jurisdiction. One of the ways it does so is by issuing enforcement guidelines, which describe the Bureau’s general approach to enforcing specific provisions in the Act.

Intellectual property (“IP”) and IP rights are increasingly important in today's knowledge-based economy. In such an environment, there has been interest in how the Bureau will deal with competition issues involving IP. Accordingly, the Bureau has made it a priority to provide increased clarity on this subject.

These *Intellectual Property Enforcement Guidelines* (the “Guidelines”) articulate how the Bureau approaches the interface between competition policy and IP rights. They describe how the Bureau will determine whether conduct involving IP raises an issue under the Act. They also explain how the Bureau distinguishes between those circumstances that warrant a referral to the Attorney General under section 32 of the Act, and those that will be examined under the general provisions. Because of their subject matter, the Guidelines are necessarily technical in nature and are primarily targeted to IP and competition law practitioners.

These Guidelines are not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of each case. Final determination of the law is the responsibility of the Competition Tribunal (the “Tribunal”) and the courts.

The Bureau will review these Guidelines annually and will revise them as needed in light of experience, changing circumstances and decisions of the Tribunal and the courts.

John Pecman
Commissioner of Competition

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1. Introduction

Today's economy is increasingly based on knowledge and innovation and driven by rapid advancements in information and communications technologies. New technologies create economic, cultural, social and educational opportunities for people to put ideas to work in innovative ways that increase productivity and create employment and wealth. Adequate protection of IP plays an important role in stimulating new technology development, artistic expression and knowledge dissemination, all of which are vital to the knowledge-based economy.[1] In this context, IP becomes a valuable asset for firms' profitability and growth. However, given the importance of IP, there is a risk that it may be used strategically to engage in anti-competitive conduct.

Owners of IP, like owners of any other type of private property, profit from property laws that define and protect owners' rights to exclude others from using their private property. The special characteristics of IP have made it necessary in many instances for governments to develop laws that confer property rights to IP comparable to those for other kinds of private property.

IP laws and competition laws are two complementary instruments of government policy that promote an efficient economy. IP laws provide incentives for innovation and technological diffusion by establishing enforceable property rights for the creators of new and useful products, technologies and original works of expression. Competition laws may be invoked to protect these same incentives from anti-competitive conduct that creates, enhances or maintains market power or otherwise harms vigorous rivalry among firms. Given that competition law may result in limitations on the terms and conditions under which the owners of IP rights may transfer or license the use of such rights to others, and on the identity of those to whom the IP is transferred or licensed, these Guidelines seek to clarify the circumstances under which the Bureau would consider such intervention to be appropriate and also illustrate situations that would not call for intervention under the Act.

In the interest of transparency, the Bureau recognizes the importance of providing information on its treatment of IP under the Act. This document sets out how the Bureau views the interface between IP law and competition law. It also explains the analytical framework that the Bureau uses to assess conduct involving IP.

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[1] The World Intellectual Property Organization ("WIPO") defines IP and summarizes the role of IP rights as follows: "Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce. IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish." For more information, see the WIPO website: http://www.wipo.int/about-ip/en/.

The Guidelines discuss the circumstances in which the Bureau, under the Act, would seek to restrain anti-competitive conduct associated with the exercise of IP rights to maintain competitive markets. The approach elaborated in this document is based on the premise that the Act generally applies to conduct involving IP as it applies to conduct involving other forms of property.

The Bureau's overall approach to the application of the Act to IP is as follows:

- The circumstances in which the Bureau may apply the Act to conduct involving IP or IP rights fall into two broad categories: those involving something more than the mere exercise of the IP right, and those involving the mere exercise of the IP right and nothing else. The Bureau will use the general provisions of the Act to address the former circumstances and section 32 (special remedies) to address the latter.

- In either case, the Bureau does not presume that the conduct violates the general provisions of the Act or needs to be remedied under section 32.

- When conduct involving an IP right warrants a special remedy under section 32, the Bureau will act only in the very rare circumstances described in this document and when the conduct cannot be remedied by the relevant IP statute.

- The analytical framework that the Bureau uses to determine the presence of anti-competitive effects stemming from the exercise of rights to non-IP forms of property is sufficiently flexible to apply to conduct involving IP, even though IP has important characteristics that distinguish it from other forms of property.

Circumstances will determine how the Bureau uses its enforcement discretion to respond to any alleged contravention of the Act. Therefore, individuals contemplating a business arrangement involving IP should either consult qualified legal counsel or contact the Bureau when evaluating the risk of the arrangement contravening the Act. The final interpretation of the law rests with the Tribunal and the courts.

When developing these Guidelines, the Bureau considered the current global economic and technological environment and, in particular, the rapid rate of technological changes occurring in many industries. The Bureau also took into account its past enforcement experience, Canadian case law, and guidance documents released in other jurisdictions such as the United States and the European Union. The Bureau recognizes that the interface between competition and IP policy is constantly evolving and that a single enforcement approach may not be appropriate for all jurisdictions. Accordingly, to ensure appropriate coordination between Canadian IP and competition law and policy, the Bureau entered into a Memorandum of Understanding with the Canadian Intellectual

Property Office that will serve to identify areas of mutual interest and facilitate discussions between the two agencies.

The remainder of this document is organized into six parts:

- Part 2 discusses the purpose of IP laws, lists the various statutes that deal with IP, reviews the purpose of competition law and lists the principal provisions of the Act that relate to IP;
- Part 3 discusses the interface between IP law and competition law;
- Part 4 outlines the principles underlying the application of the general provisions and section 32 of the Act to business conduct involving IP;
- Part 5 describes the Bureau's analytical framework, which is sensitive to the particular characteristics of IP;
- Part 6 discusses the Bureau's mandate to promote competition, which may include intervening in proceedings in which IP rights are being defined, strengthened or extended inappropriately; and
- Part 7 presents a discussion and a series of hypothetical scenarios to illustrate how the Bureau would apply the Act to a wide variety of business conduct involving IP, including price-fixing; exclusive licensing; contracting; patent pooling; competitor collaborations; refusals to license; product switching and the settlement of patent litigation proceedings in the pharmaceutical industry; the sending of false and misleading claims; and certain forms of conduct in the context of standards development organizations.

2. Overview of IP Law and Competition Law

2.1 IP Law

IP laws create legally enforceable private rights that protect to varying degrees the form and/or content of information, expression and ideas. The primary purpose of these laws is to promote innovation and creativity by defining the scope of these rights and determining under what circumstances they have been infringed or violated. While the nature and scope of protection provided by each IP-related statute is different, by protecting exclusive rights, the IP laws provide an incentive to pursue scientific, artistic and business endeavours that might not otherwise be pursued.[2]

[2] It is important to note that in the context of patents, in addition to the granting of exclusive rights, the requirement of the inventor to provide and make public, a full description of the invention also plays an important role in stimulating innovation by allowing others to benefit from advances in technology and knowledge.

In the Guidelines, IP rights include rights granted under the *Patent Act*, the *Trade-marks Act*,[3] the *Copyright Act*, the *Industrial Design Act*, the *Integrated Circuit Topography Act* and the *Plant Breeders' Rights Act*. The Canadian Intellectual Property Office ("CIPO") grants or registers ownership for five types of IP: patents, trademarks, copyrights, industrial designs and integrated circuit topographies. The term "IP rights" also encompasses the protection afforded IP at common law and the *Civil Code of Quebec*, including that given to trade secrets and unregistered trademarks.

Patents

Patents cover new inventions (process, machine, manufacture, composition of matter) or new and useful improvements to an existing invention. A patent grants an inventor the right to exclude others from making, using or selling the invention within Canada for 20 years from the date of filing the application. The patent application, which includes a full description of the invention, is available to the public 18 months after filing.

Trademarks

Trademarks are words, sounds or designs (or a combination of these) used to distinguish the goods or services of one person or organization from those of others in the marketplace. Registration protects the trademark from misuse and gives the owner exclusive rights to use it, in association with the goods and/or services for which the mark is registered, throughout Canada for renewable 15 year periods.

Copyright

Copyright is the sole right to produce, reproduce, publish or perform an original literary, artistic, dramatic or musical work (including computer programs) for a limited term. Copyright also applies to performances, sound recordings and communication signals. Generally, copyright lasts for the life of the author, the remainder of the calendar year in which the author dies, and for 50 years following the end of that calendar year.

Industrial Designs

An industrial design consists of the visual features of a shape, configuration, pattern or ornament, or any combination of these features, applied to a finished article. An industrial design must have features that appeal to the eye. To be eligible for registration, the design must be original. Registration provides exclusive, legally enforceable rights for up to 10 years in Canada.

[3] Although the same general competition law principles apply to trademarks as to other forms of IP, the Guidelines are generally concerned with technology transfer and innovation-related issues. Consequently, when applying its enforcement approach to trademarks, the Bureau will additionally consider in its analysis the source and quality differentiation issues that arise in respect of trademarks.

Integrated Circuit Topographies

Integrated circuit topography refers to the three-dimensional configuration of electronic circuits embodied in integrated circuit products or layout designs. Registration offers exclusive rights for up to 10 years on an original circuit design, and protection can extend to the layout design as well as to the finished product.

Plant Breeders' Rights

The Canadian Food Inspection Agency administers the *Plant Breeders' Rights Act,* which grants the owner of a new plant variety the exclusive rights to produce for sale, and to sell, reproductive material of the variety. It provides legal protection for up to 25 years for a variety of tree or vine (including their rootstocks) and 20 years for all other plant varieties.

It is important to note that some remedies are available under the IP-related statutes to protect against abuses. For example, as stipulated in section 65 of the *Patent Act*, commencing three years after the grant of a patent, a party may apply to the Commissioner of Patents alleging abuse of the patent through unduly restrictive licensing conditions. If the Commissioner of Patents is satisfied that there has been abusive conduct, there are a number of actions he/she may take, including ordering that the patent be revoked or licensed to the applicant on such terms as the Commissioner of Patents may think expedient.

2.2 Competition Law

The principle underlying competition law is that the public interest is best served by competitive markets, which are socially desirable because they lead to an efficient allocation of resources. Competition law seeks to prevent companies from inappropriately creating, enhancing or maintaining market power that undermines competition without offering offsetting economic benefits.[4] Market power refers to the ability of firms to profitably cause one or more facets of competition, such as price, output, quality, variety, service, advertising or innovation, to significantly deviate from competitive levels for a sustainable period of time.[5] However, a firm would not contravene the Act if it attains its market power solely by possessing a superior product or process, by introducing an innovative business practice or by other reasons of exceptional performance.[6]

The provisions of the Act that set out when it may be necessary for the Bureau to intervene in business conduct, including conduct involving IP, fall into two categories: those that cover criminal offences and those that cover reviewable

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[4] For certain types of conduct, such as price-fixing conspiracies, the creation of market power and the harm to competition is presumed from the conduct.

[5] *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606, defines market power as "the ability to behave relatively independently of the market." *Canada (Director of Investigation and Research) v. The NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), defines it as the ability to maintain prices above competitive levels for a considerable period.

[6] In the abuse of dominance provision of the Act, subsection 79(4) provides that superior competitive performance is a consideration in determining whether a practice has an anti-competitive effect in a market.

matters. Several reviewable matters provisions state that the Bureau must, before it intervenes, show that the conduct substantially lessens or prevents competition.[7]

Criminal offences include conspiracy (section 45), bid-rigging (section 47), and some forms of misleading advertising and related deceptive marketing practices (sections 52 to 55). These provisions do not require proof of market power or anti-competitive effects. Some of them (sections 45, 47, 52 and 52.01) have a *mens rea* component; that is, proof is required that the defendant had the required intent to engage in the criminal conduct.

The provisions on reviewable matters deal with conduct that is generally pro-competitive but that may, in certain circumstances, significantly constrain competition. Reviewable matters include misleading advertising and related deceptive marketing practices (sections 74.01 through 74.06), refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77), abuse of a dominant position (section 79), anti-competitive agreements or arrangements between competitors (other than "hard core" cartels) (section 90.1), and mergers (section 92).[8]

When a court determines that a firm has contravened the criminal provisions of the Act, it can impose fines, imprisonment and prohibition orders.[9] In addition, parties may bring private actions seeking damages.[10] With respect to reviewable matters, the Tribunal may issue a variety of remedial orders, some of which restrict private property rights. For example, the Tribunal has, in the past, ordered merging firms to divest themselves of assets, including IP, when it concluded that the proposed merger was likely to substantially lessen or prevent competition, thereby overriding the rights of property owners to acquire or dispose of their private property.[11] Similarly, remedies under the abuse of dominant position provision have involved orders affecting IP.[12]

Section 32, which is in the special remedies part of the Act, gives the Federal Court the power, on application by the Attorney General, to make remedial orders if it finds that a company has used the exclusive rights and privileges conferred by a patent, trademark, copyright or registered integrated circuit

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[7] The refusal to deal provision (section 75) and the price maintenance provision (section 76) require proof that the refusal is having or is likely to have an adverse effect on competition in a market. Section 75 also requires that the person's inability to obtain adequate supply is the result of insufficient competition among suppliers. The deceptive marketing practices provisions (sections 74.01 through 74.06) do not include a competitive effects requirement.

[8] Section 103.1 of the Act allows parties to apply to the Tribunal for leave to make an application under section 75, 76 or 77.

[9] See the Bureau's *Competition and Compliance Framework Bulletin*, November 10, 2015, for a detailed discussion of case resolution alternatives.

[10] See section 36 of the Act.

[11] See *Canada (Director of Investigation and Research) v. Southam Inc.* (1992), 47 C.P.R. (3d) 240 (Comp. Trib.), rev'd (1995), 63 C.P.R. (3d) 67 (F.C.A), rev'd (1997), 71 C.P.R. (3d) 417 (S.C.C.).

[12] See *Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd*. (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) (hereinafter *Nielsen*).

topography to unduly restrain trade or lessen competition (see subsection 4.2 of these Guidelines for circumstances in which the Bureau may seek to have the Attorney General bring an application under section 32).

When the Federal Court determines that a special remedy is warranted under section 32, it may issue a remedial order declaring any agreement or licence relating to the anti-competitive use void, requiring the licensing of the IP right (except in the case of trademarks), revoking the IP right or directing that other things be done to prevent anti-competitive use. This provision provides the Attorney General with the statutory authority to intervene in a broad range of circumstances to remedy an undue lessening or prevention of competition involving the exercise of statutory IP rights. In practice, the Attorney General likely would seek a remedial order under the Act only on the recommendation of the Commissioner.

3. Interface between IP and Competition Law

3.1 Property Rights

Private property rights are the foundation of a market economy. Property owners must be allowed to profit from the creation and use of their property by claiming the rewards flowing from it. In a market system, this is accomplished by granting owners the right to exclude others from using their property, and forcing those wishing to use it to negotiate or bargain in the marketplace for it, thereby rewarding the owner. This creates incentives to invest in developing, and leads to the exchange of, private property, thus contributing to the efficient operation of markets.

3.2 IP Law

IP has unique characteristics that make it difficult for owners to physically restrict access to it and, therefore, exercise their rights over it. The owner of physical property can protect against its unauthorized use by taking appropriate security measures, such as locking it away, but it is difficult, if not impossible, for the creator of a work of art or an invention to prevent his or her property from being copied once it has been shown or distributed. This is exacerbated because IP, while often expensive to develop, is often easy and inexpensive to copy. IP is also typically non-rivalrous – that is, two or more people can simultaneously use IP. The fact that a firm is using a novel production process does not prevent another firm from simultaneously using the same process. In contrast, the use of a physical property by one firm prevents concurrent use by another.[13]

[13] To enforce common law property rights, it must be possible to identify the property's owner and to clearly delineate the boundaries of the property. Both tasks can prove problematic in the case of IP. For other kinds of private property, possession can generally be seen as an indication of ownership. However, since many individuals can possess IP simultaneously, it may be difficult to establish the identity of the original creator and true owner of the IP. Furthermore, since IP is generally intangible, it is often difficult to clearly delineate the boundaries of the property. Without a legal delineation of these boundaries, IP owners may have difficulty showing that others have infringed their property.

Accordingly, IP laws confer on an IP owner the right to unilaterally exclude others from using that property. While each IP-related statute grants this right to varying degrees, and the right may be subject to limitations that vary across statutes, all of the statutes position the owners of the IP to maximize the IP's value through trade and exchange in the marketplace. This claim on the rewards flowing from IP enhances the incentive for investment and future innovation in IP, just as it does for other forms of private property. With the exception of the protections afforded unregistered trademarks and other common law rights, the legal protection of IP is a function of, and does not exist outside the scope of, IP statutory regimes.

3.3 Competition Law

Since the right to exclude, which is the basis of private property rights, is necessary for efficient, competitive markets, the enforcement of the Act rarely interferes with the exercise of this basic right. Enforcement action under the Act nonetheless may be warranted when there are conspiracies, agreements or arrangements among competitors or potential competitors; when anti-competitive conduct creates, enhances or maintains market power;[14] or when firms use deceptive marketing practices.

3.4 Interface

IP and competition laws are both necessary for the efficient operation of the marketplace. IP laws provide property rights comparable to those for other kinds of private property, thereby providing incentives for owners to invest in creating and developing IP and encouraging the efficient use and dissemination of the property within the marketplace. Applying the Act to conduct associated with IP may prevent anti-competitive conduct that impedes the efficient production and diffusion of goods and technologies and the creation of new products. The promotion of a competitive marketplace through the application of competition laws is consistent with the objectives underlying IP laws.

4. Applying the Act to Conduct Involving IP

4.1 Overview of Competition Harm Analysis

In general, the Bureau's analysis for determining whether competitive harm would result[15] from a particular type of business conduct comprises five steps:

- Identifying the conduct;[16]
- Defining the relevant market(s);[17]

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[14] An example of conduct involving IP that could create market power is the assignment of patents. See *Apotex Inc. v. Eli Lilly and Co.,* [2005] F.C.J. No. 1818 (F. C.A.).

[15] For ease of discussion, unless otherwise indicated, the Guidelines focus on prospective competitive harm. Note, however, that in many cases, competitive harm may be occurring at the time the Bureau is conducting an investigation or may have occurred at some point in the past.

[16] Some examples of conduct that could involve IP include mergers, pooling of licences, setting standards for products, tied selling and exclusive dealing.

- Determining if the firm or firms under scrutiny possess market power[18] by examining the level of concentration and entry conditions in the relevant market(s), as well as other factors;

- Determining if the conduct would substantially lessen or prevent competition in the relevant market(s); and

- Considering, when appropriate, any relevant efficiency rationales or valid business justifications.

This analysis applies to all industries and all types of business conduct, and is sufficiently flexible to accommodate differences among the many forms of IP protection, as well as between IP and other types of property. For example, the Bureau takes differences among the various forms of IP protection into account when defining the relevant market and determining whether a firm has market power. In addition, although IP rights to a particular product or process are often created and protected by statute and are thus different from other forms of property rights, the right to exclude others from using the product or process does not necessarily grant the owner market power. After it has defined the relevant market and examined factors, such as concentration, entry barriers and technological change, the Bureau can determine whether an owner of a valid IP right possesses market power. The existence of a variety of effective substitutes for the IP and/or a high probability of entry by other players into the market (by "innovating around" or "leap-frogging over" any apparently entrenched position) would likely cause the Bureau to conclude that the IP has not conferred market power on its owner.

While the criminal offence provisions of the Act do not require a finding of market power, under many reviewable matters provisions an order can only be made if a firm has engaged in anti-competitive conduct that creates, enhances or maintains market power. Again, consistent with its approach with respect to all forms of property, the Bureau does not consider an owner of IP to have contravened the Act if it attained market power solely by possessing a superior-quality product or process, introducing an innovative business practice or otherwise through exceptional performance.

Licensing is the usual method by which the owner of IP authorizes others to use it. In the vast majority of cases, licensing is pro-competitive because it facilitates the broader use of a valuable IP right by additional parties.[19] In assessing

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[17] Defining relevant markets is a widely used and accepted tool for assessing competitive effects. While the Bureau seeks to define relevant markets as part of its analysis in most investigations, relevant market definition is not necessarily an initial step in the Bureau's analysis, and it may not be a required step in certain cases.

[18] Matters pursued under the criminal provisions or the deceptive marketing practices provisions do not require a finding of market power or an identification of competitive effects.

[19] Licensing is a means by which owners trade IP, and it signals the willingness of IP holders to participate in the marketplace. This ability of owners to exchange and transfer IP can enhance the IP's value and increase

whether a particular licensing arrangement raises a competition issue, the Bureau examines whether the terms of the licence serve to create, enhance or maintain the market power of either the licensor or the licensee.[20] The Bureau will not consider licensing agreements involving IP to be anti-competitive unless they reduce competition substantially relative to that which would have likely existed in the absence of the licence's potentially anti-competitive terms.

4.2 Enforcement Principles

Specific reference is made to IP rights in a number of provisions of the Act.[21] The circumstances in which the Bureau may apply the Act to anti-competitive conduct involving IP or IP rights fall into two broad categories: those involving anti-competitive conduct that is something more than the mere exercise of the IP right, and those involving the mere exercise of the IP right and nothing else. The general provisions of the Act address the former, while section 32 (special remedies) addresses the latter. The Bureau's approach is consistent with subsection 79(5), which acknowledges that the mere exercise of an IP right is not an anti-competitive act for the purposes of the abuse of dominance provision,[22] while acknowledging the possibility that under the very rare circumstances set out in section 32, the mere exercise of an IP right might raise a competition issue.[23]

4.2.1 General Provisions

The mere exercise of an IP right is not cause for concern under the general provisions of the Act. The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP. The Bureau views an IP owner's use or non-use of the IP also as being the mere exercise of an IP right.[24]

Unilaterally exercising the IP right to exclude does not violate the general provisions of the Act no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural, social and educational benefits created by them, and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary.

The Bureau applies the general provisions of the Act when IP rights form the basis of agreements or arrangements between independent entities, whether in

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the incentive for its creation and use. Licensing arrangements also promote the efficient use of IP by facilitating its integration with other components of production, such as manufacturing and distribution.

[20] This is the case when the Bureau is assessing a licensing arrangement outside the criminal provisions.

[21] Refer to sections 32, 76, 77, 79 and 86.

[22] Subsection 79(5) reads: "For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act."

[23] The remedies in section 32 are more extensive than those under the general provisions.

[24] However, as noted in Example 9A, there may be limited circumstances where non-use of an IP right may be seen as something more that the "mere exercise" of an IP right, and therefore could potentially raise issues under the general provisions of the Act.

the form of a transfer, licensing arrangement or agreement to use or enforce IP rights, and when the alleged competitive harm stems from such an agreement or arrangement and not just from the mere exercise of the IP right and nothing else.

Applying the Act in this way may limit to whom and how the IP owner may license, transfer or sell the IP, but it does not challenge the fundamental right of the IP holder to do so. If an IP owner licenses, transfers or sells the IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the Bureau may seek to challenge the arrangement under the appropriate section of the Act.[25] Part 7 of this document provides a series of hypothetical examples to illustrate how the Bureau would examine the licensing, transfer or sale of IP under the Act.

This approach is consistent with the Tribunal's decisions in both *Tele-Direct,*[26] and *Warner,*[27] in which the Tribunal held that the mere exercise of the IP right to refuse to license to a complainant did not contravene the general provisions of the Act.[28] In its decision in *Tele-Direct*, the Tribunal indicated that competitive harm must stem from something more than just the mere refusal to license.[29]

Underlying this enforcement approach is the view that market conditions and the differential advantages IP provides should largely determine commercial rewards flowing from the exploitation of an IP right in the market to which it relates. If a company uses IP protection to engage in conduct that creates, enhances or maintains market power as proscribed by the Act, then the Bureau may intervene.

When joint conduct of two or more firms lessens or prevents competition, the competitive harm generally flows from something more than the mere exercise of the IP right to refuse. To the extent that conduct, such as joint abuse of dominance or mergers, restricts competition among firms, the presence of IP should not be a mitigating factor. Similarly, the presence of IP should not be an exception or mitigating factor in matters involving criminal conduct, such as

[25] This analysis would use the concept of a relevant market as discussed in section 5.1. For an example where an assignment of patent rights may create market power, see *Apotex Inc. v. Eli Lilly and Co.*, *supra* note 14.
[26] *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) (hereinafter *Tele-Direct*).
[27] *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd*. (1997), 78 C.P.R. (3d) 321 (Comp. Trib.).
[28] It may be possible to review certain refusals to license under the Act's price maintenance provision (section 76). See *Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada et al.* (2015), CT-2015-009 (Comp. Trib.), where the Tribunal granted leave to an applicant to make an application under section 76 in respect of an alleged discriminatory refusal to license IP rights.
[29] In *Tele-Direct*, *supra* note 26, the Tribunal stated that, "[it] is in agreement with the Director that there may be instances where a trademark may be misused. However in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trademark."

conspiracy[30] or bid-rigging. All these types of conduct involving IP could be subject to review under the appropriate general provision of the Act.

A transfer of IP rights that lessens or prevents competition is a further example of a situation in which competitive harm results from something more than the mere exercise of the IP right to exclude. Two examples of this are when a licensor ties a non-proprietary product to a product covered by its IP right, and when a firm effectively extends its market power beyond the term of its patent through an exclusive contract. In either case, if the conduct leads to the creation, enhancement or maintenance of market power so as to substantially lessen or prevent competition, the Bureau may intervene.

Sometimes upon examination, what appears to be just a refusal to license or to grant others access to a firm's IP rights turns out to have included conduct that goes beyond such a refusal. Conduct that goes beyond the unilateral refusal to grant access to the IP could warrant enforcement action under the general provisions of the Act. For instance, if a firm acquires market power by systematically purchasing a controlling collection of IP rights and then refuses to license the rights to others, and it substantially lessens or prevents competition in markets associated with the IP rights, the Bureau could view the acquisition of such rights as anti-competitive. If the conduct met the definition of a merger as specified in section 91 of the Act, the Bureau would review the acquisitions under the merger provisions. If the conduct did not meet the definition of a merger, the Bureau would review the matter under either section 79 (abuse of dominance) or section 90.1 (agreements between competitors) of the Act.[31] Without the acquisitions, the owner's mere refusal to license the IP rights would have been unlikely to cause concern.

4.2.2 Matters Outside the General Provisions – Section 32[32]

Only section 32, in the special remedies part of the Act, contemplates the possibility that the mere exercise of an IP right may cause concern and result in the Bureau seeking to have the Attorney General bring an application for a special remedy to the Federal Court. Section 32 has rarely been used.[33]

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[30] The *Copyright Act* provides that section 45 of the Act does not apply to any royalties or related terms and conditions arising under certain collective society agreements filed with the Copyright Board.

[31] The Tribunal recognized in *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) (hereinafter *Laidlaw*), that the abuse of dominance provision could apply to situations involving a series of acquisitions.

[32] The special remedies provided for under section 32 include declaring any agreement or licence relating to the challenged right void, ordering licensing of the right (except in the case of trademarks), revoking a patent, expunging or amending a trademark, or directing that other such acts be done or omitted as deemed necessary to prevent the challenged use.

[33] Informations have only been laid in two cases under section 32 and in both cases the disputes were settled before proceeding to full hearings. See *R. v. Union Carbide of Canada Limited*, December 9, 1969 and *R. v. Union Carbide of Canada Limited*, June 19, 1971. Since these two cases the Bureau has never recommended that the Attorney General bring an application for a special remedy under section 32 and there has never been a remedial order granted pursuant to that section.

The Bureau will seek a remedy for the unilateral exercise of the IP right to exclude under section 32 only if the circumstances specified in that section are met and the alleged competitive harm stems directly from the refusal and nothing else. Such circumstances require the Federal Court to balance the interests of the system of protection for IP (and the incentives created by it) against the public interest in greater competition in the particular market under consideration. Generally, the Bureau would recommend to the Attorney General that an application be made to the Federal Court under section 32 when, in the Bureau's view, no appropriate remedy is available under the relevant IP statute.

Enforcement under section 32 requires proof that competition has been unduly restrained, prevented or lessened. The Bureau expects that such enforcement action would be required only in certain narrowly defined circumstances. The Bureau determines whether the exercise of an IP right meets this threshold by analyzing the situation in two steps.

In the first step, the Bureau would establish that the mere refusal (typically the refusal to license IP) has adversely affected competition to a degree that would be considered substantial in a relevant market that is different or significantly larger than the subject matter of the IP or the products or services that result directly from the exercise of the IP. This step is satisfied only by the combination of the following factors:

> i) The holder of the IP is dominant in the relevant market; and
>
> ii) The IP is an essential input or resource for firms participating in the relevant market – that is, the refusal to allow others to use the IP prevents other firms from effectively competing in the relevant market.

In the second step, the Bureau would establish that invoking a special remedy against the IP right holder would not materially alter the incentives of the right holder or others to engage or invest in research and development. As part of this analysis, the Bureau would consider whether the refusal to license the IP is stifling further innovation.

If factors i) and ii) are present and the second step condition is satisfied, then the Bureau would conclude that incentives to invest in research and development have been harmed by the refusal and a special remedy would help realign these incentives with the public interest in greater competition.

The Bureau recognizes that only in very rare circumstances would each of the factors be satisfied. In particular, the Bureau expects that in most cases a section 32 remedy is likely to undermine innovation incentives. Nonetheless, an example in which each of the factors could arise is in a network industry,[34] when the

[34] A network industry is an industry that exhibits network effects. These effects exist when the value or benefit derived from using a product increases with the number of other users. For example, particular types

combination of IP protection and substantial positive effects associated with the size of the network could create or entrench substantial market dominance so that the protected technology is necessary for a competitor's products to be viable alternatives. Under these narrow circumstances, IP protection can effectively exclude others from entering and producing in the market.[35] However, the Bureau still would have to be satisfied that invoking a special remedy against the IP right holder would not materially alter the incentives of the right holder or others to engage or invest in research and development before recommending that the Attorney General bring an application for a special remedy to the Federal Court (see Example 8).

4.2.3 Matters Possibly Resolved Outside the Act

An illegitimate extension of an IP right could include anti-competitive behaviour. This might involve a patent holder asserting its patent over products that are not within the scope of its patent or a distributor making false claims that it is an official licensee of a trademarked good. Alternatively, the Bureau may receive complaints that infringement of a legitimate IP right should be justified on competition grounds. In such disputes, the Bureau will use its enforcement discretion but in most cases it will choose to leave the matter to be resolved by the appropriate IP authority under the appropriate IP statute (see Example 1).

As outlined in section 4.1 above, the Bureau's analytical approach is sufficiently flexible to accommodate the specific characteristics of IP and the differences in the scope and length of protection extended to different IP rights. The following information highlights how the Bureau takes these factors into account when analyzing business conduct involving IP.

5. The Analytical Framework in the Context of IP

5.1 Relevant Markets

Relevant markets provide a practical tool for assessing market power.[36] When the anti-competitive concern is prospective (that is, the conduct is likely to have a future anti-competitive effect),[37] relevant markets are normally defined using the hypothetical monopolist test.[38]

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of software can exhibit network effects because the value of exchanging computer files with other individuals clearly depends on whether these individuals use compatible software.

[35] This does not suggest that markets subject to network effects will inevitably be monopolized. Often, firms form alliances and make a new technology "open" to gain acceptance and build an installed base. These activities tend to be pro-competitive if firms that participate in the process freely compete with each other in the market.

[36] The market definition exercise focuses on demand substitution factors (i.e., possible consumer responses). The Bureau considers the potential constraining influence of firms that can participate in the market through a supply response (i.e., a possible production response) after it has defined the relevant market.

[37] This is generally the case with mergers.

[38] See paragraphs 4.3, 4.4 and 4.5 of the Bureau's *Merger Enforcement Guidelines*, October 2011. Available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.

When the anti-competitive concern is retrospective[39] (that is, the conduct has already had an anti-competitive effect), applying the hypothetical monopolist test could lead to erroneous conclusions about the availability of substitutes and the presence of market power. Accordingly, the Bureau takes into account the impact of any alleged anti-competitive conduct that may have preceded the investigation when determining the relevant market. In this context, the Bureau analyzes market definition and competitive effects concurrently.

For conduct involving IP, the Bureau is likely to define the relevant market based on one of the following: the intangible knowledge or know-how that constitutes the IP, processes that are based on the IP rights, or the final or intermediate goods resulting from, or incorporating, the IP.

Defining a market around intangible knowledge or know-how is likely to be important when IP rights are separate from any technology or product in which the knowledge or know-how is used. For example, consider a merger between two firms that individually license similar patents to various independent firms that, in turn, use the patents to develop their own process technologies. Such a merger may reduce competition in the relevant market for the patented know-how if the two versions of that know-how are close substitutes for each other; if there are no (or very few) alternatives that are close substitutes for the know-how; and if there are barriers that would effectively deter the development of conceptual approaches that could replace the know-how of the merging firms. This last condition may be satisfied if the scope of the patents protecting the merging firms' know-how is sufficiently broad to prevent others from "innovating around" the patented technologies, or if the development of such know-how requires specialized knowledge or assets that potential competitors would be unlikely to develop or obtain in a timely manner sufficient to constrain a material price increase in the relevant market.

In cases involving the licensing of IP, the Bureau generally treats the licence as the terms of trade under which the licensee is entitled to use the IP. The Bureau does not define a relevant market around a licence, but rather focuses on what the legal rights granted to the licensee actually protect (i.e., intangible knowledge or know-how, processes, or final or intermediate goods).

The Bureau does not define markets based on research and development activity or innovation efforts alone. The Bureau usually concentrates on price or output effects. However, conduct that reduces the innovation effort of the firms under scrutiny or restricts or prevents the innovation efforts of others may be anti-competitive. The appropriate relevant market definition or definitions will depend specifically on the knowledge or know-how, process, or, final or intermediate good toward which the innovation effort is directed.

[39] This is generally the case with alleged abuse of dominant position.

5.2 Market Power

Whether conduct involving IP results in an increase in market power in the relevant market depends on a number of factors, including the level of concentration, entry conditions, the rate of technological change, the ability of firms to "leap-frog over" seemingly entrenched positions and the horizontal effects, if any, on the market.[40] The order in which the Bureau assesses these factors may vary depending on the section of the Act under which the Bureau is examining the conduct and on the circumstances of the relevant market.

5.2.1 Market Concentration

The Bureau examines the degree of market concentration to get a preliminary indication of the competitiveness of the relevant market. In general, the more firms in the relevant market, the less likely it is that any one firm acting unilaterally, or any group of firms acting cooperatively, could enhance or maintain market power through the conduct being examined. However, a high degree of concentration is not enough to justify the conclusion that the conduct will create, enhance or maintain market power. This is particularly true of industries with low barriers to entry, a high rate of technological change and a pattern of firms "innovating around” or "leap-frogging over" technologies that had previously controlled a dominant share of a market.

To measure concentration in markets for intermediate or final goods, the Bureau typically calculates the market shares of the firms identified as actual participants in the relevant market. These include the firms identified as currently offering products that are demand substitutes as well as those that represent potential supply sources of these products (i.e., firms that are likely to respond to a price increase in the relevant market with minimal investment).[41] Firms that are unable to respond quickly to a price increase or whose entry requires significant investment are not considered to be participants within the relevant market for purposes of assessing market concentration. That said, the potential competitive influence of such firms will be considered as part of the assessment of whether the conduct in question is likely to lessen or prevent competition substantially.

The Bureau generally does not challenge the conduct of a firm that possesses less than a 35 percent market share.[42] Market shares of more than 35 percent indicate circumstances that may warrant further review. Market share may be calculated based on the firms' entire actual output, total sales (dollars or units) or

[40] The *Merger Enforcement Guidelines*, *supra* note 38, discuss other factors the Bureau considers when it assesses market power. These include foreign competition, business failure and exit, the availability of acceptable substitutes, effective remaining competition, removal of a vigorous and effective competitor, and change and innovation.

[41] The following factors are relevant to determining when a firm will rapidly divert sales in response to a price increase: the cost of substituting production in the relevant market for current production (i.e., switching costs), the extent to which the firm is committed to producing other products or services, and the profitability of switching from current production.

[42] The Bureau generally does not challenge the conduct of a group of firms alleged to be jointly dominant that possess a combined market share of less than 65 percent.

total capacity (used and unused).[43, 44] However, some of these factors may be difficult to assess in cases involving IP. Accordingly, the Bureau's assessment of market power is likely to focus on qualitative factors, such as conditions of entry into the relevant market; whether IP development is resulting in a rapid pace of technological change; and the views of buyers and market participants, as well as industry and technology experts.

5.2.2 Ease of Entry

The Bureau also examines how easily firms can enter the relevant market to determine whether new entrants have the ability to restrain any creation, enhancement or maintenance of market power that may result from conduct involving IP. When assessing effects in markets involving IP, conditions of entry are often more important than market concentration. For instance, evidence of a rapid pace of technological change and of the prospect of firms being able to "innovate around" or "leap-frog over" an apparently entrenched position is an important consideration that may, in many cases, fully address potential competition concerns.

The Bureau also considers the extent to which the conduct itself erects or has erected barriers to entry or, alternatively, induces or has induced competitors to exit the market (see Examples 3B and 4).[45] Entry into markets in which IP is important may be difficult because of the sunk costs associated with developing assets that comprise specialized knowledge. Additionally, IP rights can serve to increase barriers to entry independent of any conduct.[46]

5.2.3 Horizontal Effects

In evaluating the competitive effects of conduct that involves an IP right, whether it is a merger transaction, licensing arrangement or other form of contractual arrangement, the Bureau focuses on whether the conduct will result in horizontal anti-competitive effects, in other words, consequences for firms producing substitutes or firms potentially producing substitutes (see Examples 3A and 3B).

Even though an arrangement may be vertical, such as the acquisition of a retail shoe outlet by a shoe manufacturer or the licensing of the right to use a particular food additive to a food producer, it can still have horizontal effects in a relevant market (see Example 4).

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[43] If the actual participants in the market include firms that represent potential sources of supply for the market, then market shares, even in terms of production capacities, may be difficult to accurately estimate. Accordingly, it must be recognized that the market shares attributed to firms whose products are actually sold within the relevant market will overstate the relative market position of these firms in such circumstances.

[44] The Tribunal stated in *Laidlaw*, *supra* note 31, that market share calculations based on sales may overstate market power when the market is characterized by excess capacity.

[45] The fact that anti-competitive conduct can create barriers to entry was recognized by the Tribunal in *Laidlaw*, *supra* note 31.

[46] Of course, the purpose of providing innovators with IP rights is to foster the development of new products. In this sense, IP rights may encourage firms to participate in environments in which technology changes very rapidly.

5.3 Anti-competitive Effects

Conduct must create horizontal effects for the Bureau to conclude that it is anti-competitive.[47] In this regard, the Bureau analyzes whether conduct facilitates a firm's ability to exercise market power, either unilaterally or in a coordinated manner, in areas such as pricing and output.[48]

Anti-competitive horizontal effects may arise if the conduct increases competitors' costs. For example, a transaction can prevent, or raise the cost of, competitors' access to important inputs. IP licensing arrangements that involve one firm selling the right to use IP to another are inherently vertical, but can have horizontal effects, particularly if the licensor and licensee would have been actual competitors in the absence of the licensing arrangement. In addition, conduct that reduces innovation activity could be anti-competitive if it prevents future competition in a prospective product or process market.

5.4 Efficiency Considerations

A fundamental objective of competition law is to ensure the efficient use of resources through vigorous competition. However, there may be instances in which restrictions on competition can lead to a more efficient use of resources. This may be particularly true of agreements, arrangements and transactions involving IP that are inherently vertical and combine complementary factors. Moreover, there may be instances when creating or increasing market power is justified because of the efficiencies created. Indeed, this principle is consistent with the protection afforded by IP laws, which foster dynamic efficiency and competition by facilitating the creation of valuable works or processes that result in long-term increases in product selection, quality, output and productivity. In providing incentives for investment, IP laws grant exclusivity to the protected works that may result in temporary market power. Consequently, the Bureau considers both the short-term and long-term implications of conduct when analyzing efficiencies in cases involving IP. Efficiencies are explicitly recognized in sections 90.1 and 96 of the Act in the context of agreements or arrangements among competitors[49] and mergers.[50]

If the Bureau concludes that conduct is likely to substantially lessen or prevent competition in a relevant market under either section 90.1 or 92 of the Act, it will, when provided in a timely manner with the parties' evidence substantiating their case, make an assessment of whether the efficiency gains brought about or likely to be brought about by the conduct are greater than and offset the anti-competitive effects arising from the conduct. Part 12 of the *Merger Enforcement*

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[47] For investigations under provisions of the Act that do not require a showing that the conduct has an effect on competition, there is no need to consider anti-competitive effects (see Example 10).

[48] The term 'pricing' includes all aspects of firms' actions that affect the interest of buyers. These include a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value.

[49] Section 90.1 also applies to agreements between parties that are potential competitors.

[50] Section 95 provides a specific exemption under the merger provision for research and development joint ventures that satisfy certain criteria outlined in the provision.

Guidelines more fully describes the Bureau's approach to the analysis of efficiencies.

5.5 Business Justifications

In assessing whether conduct involving IP is for an anti-competitive purpose under section 79 of the Act, the Bureau considers any pro-competitive rationale for the conduct.[51] For example, a licensing arrangement between an IP owner and a distributor may restrict intra-brand competition, but at the same time further inter-brand competition. A licensing arrangement between two potential competitors also may result in a new product being developed that would not otherwise have been developed. In each case, the level of competition in the market may be enhanced.[52]

6. Competition Policy Advocacy

The Bureau may use its mandate to promote competition and the efficient allocation of resources to intervene in policy discussions and debates regarding the appropriate scope, definition, breadth or length of IP rights.[53] The Bureau may also seek leave to intervene in Federal Court and Superior Court cases when it believes it is important to bring a competition perspective to proceedings that will not be brought by the parties. In other proceedings, when the Bureau believes that IP rights could potentially be defined, strengthened or extended inappropriately, the Bureau may seek leave to intervene to make representations concerning the scope of the protection that should be accorded IP rights.

An example of Bureau advocacy occurred when it applied for and was granted leave to intervene by the Federal Court of Appeal ("FCA") in *Apotex Inc. v. Eli Lilly and Co*.[54] In this case, the Bureau argued that the assignment of a patent could constitute an agreement or arrangement to unduly lessen competition contrary to the former section 45 of the Act. This position meant that section 50 of the *Patent Act*, which gives patentees the right to assign their patents, does not preclude application of the Act to patent assignments. The Bureau's intervention served the purpose of protecting its ability to administer the Act in respect of patent rights. The FCA agreed with the Bureau's position and noted

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[51] In *Tele-Direct*, *supra* note 26, the Competition Tribunal stated that, "(w)hat the Tribunal must decide is whether, once all relevant factors have been taken into account and weighed, the act in question is, on balance, 'exclusionary, predatory or disciplinary'. Relevant factors include evidence of the effects of the act, of any business justification and of subjective intent which, while not necessary, may be informative in assessing the totality of the evidence. A 'business justification' must be a 'credible efficiency or pro-competitive' business justification for the act in issue. Further, the business justification must be weighed 'in light of any anti-competitive effects to establish the overriding purpose' of the challenged act..."

[52] In *Nielsen*, *supra* note 12, the Competition Tribunal held that even if there is some justification for the alleged anti-competitive conduct, this must be weighed against any anti-competitive effects.

[53] Section 125 of the Act provides that the Commissioner may make representations to and call evidence before any federal board, commission or other tribunal in respect of competition. Section 126 of the Act provides that the Commissioner may do the same for any provincial board, commission or other tribunal as long as the board, commission or tribunal consents.

[54] *Supra* note 14.

that “this interpretation is consistent with the Competition Bureau’s *Intellectual Property Enforcement Guidelines*”.

7. Application of Competition Law to IP

7.1 Hypothetical Examples Concerning General Business Conduct Involving IP

This subsection provides several hypothetical examples of general business conduct involving IP and outlines the Bureau’s approach to reviewing the conduct under the Act.

Example 1: Alleged Infringement of an IP Right

TAX is a software company that produces and distributes a sophisticated and complex tax management program to help households with their tax planning. TAX has been selling its product for a number of years and is now widely recognized as a leading producer of tax management software.

More than two years ago, a key member of TAX's software engineering team left the company to start her own software business, called UPSTART. Recently, UPSTART began to market its own tax management program. TAX has sued UPSTART claiming that UPSTART must have infringed TAX’s copyright because its software is very similar in appearance and functionality to TAX’s software. UPSTART has complained to the Bureau that TAX is abusing its dominant position by launching frivolous litigation.

Analysis

The Bureau would use its enforcement discretion and likely conclude that this matter would be best left up to the courts to be resolved under the *Copyright Act*. If TAX engages in a practice of launching frivolous litigation to exclude competitors, the Bureau may consider taking action under section 79 of the Act.

Example 2: Price-fixing

Three firms, each of which has developed and owns a patented technique, offer competing cosmetic surgical procedures to treat a particular condition. All three procedures involve several visits to a private clinic over six months, produce no side effects and have approximately equal success rates. The only existing alternative to the three procedures is an expensive medication that causes undesirable side effects in some patients. Each of the three firms has developed a business plan to market its procedure and industry analysts widely agree that competition among the procedures will be the most important factor limiting shareholder returns. Rather than proceed with their business plans in anticipated competition with one another, the three firms agree on a minimum price at which each will perform the procedure as well as a minimum fee to license each procedure to third parties.

Analysis

The Bureau would likely examine this agreement under the conspiracy provision in section 45 of the Act given that it involves fixing prices for the supply of a product. The Bureau would likely take the view that the three participants in the agreement are competitors based on the views of industry analysts and given the fact that each of them supplies treatments that are functionally interchangeable with and comparable to one another. For example, the duration, the success rate and the risk of side effects are approximately the same for each procedure. Moreover, section 45 applies to agreements between parties that are potential competitors. Accordingly, even if the parties had not been in competition when the agreement was concluded or during the term of the agreement, the parties would still be deemed to be competitors for purposes of section 45, as it would be reasonable to believe that they would likely compete with respect to a product in the absence of the conspiracy.

Given that the price-fixing agreement is not ancillary to a broader or separate agreement or arrangement, which itself does not offend section 45, the Bureau would refer the matter to the Director of Public Prosecutions (the “DPP”) for criminal prosecution.

Example 3A: Exclusive Licensing
SHIFT recently developed a new gear system for mountain bikes. Two other firms manufacture systems that compete with SHIFT's. All three of these firms manufacture several varieties of bicycle gear systems and are engaged in research and development to improve gear system technology. SHIFT grants licences for the use of its patented gear system technology to manufacturers of mountain bikes as it does not have the ability to manufacture mountain bikes itself. Three large firms account for 80 percent of the sales of mountain bikes with the balance being supplied by six smaller firms. SHIFT has just granted ADVENTURE, the largest mountain bike manufacturer (accounting for 30 percent of sales), an exclusive licence to use its new patented gear system technology on its mountain bikes. ADVENTURE does not own or have the ability to develop gear system technology. Although SHIFT's new gear system offers a number of features not available on other current products, the demand for mountain bikes with these new features is uncertain. In addition, ADVENTURE expects to incur significant expense developing and promoting mountain bikes that use SHIFT's new gear system technology. SHIFT has refused requests from other mountain bike manufacturers for a licence for this technology. As a result of ongoing research and development, alternative gear system technologies are likely to become available in the future.

Analysis
The Bureau would likely examine the conduct of both firms under the abuse of dominant position provision (section 79) of the Act.

SHIFT and ADVENTURE relate as supplier and customer, and are neither actual nor potential competitors in the markets for gear systems or mountain bikes. Since the firms do not compete, the exclusive licence would likely not lessen competition between the two firms. The Bureau would nonetheless examine the markets for gear systems and mountain bikes to determine if the exclusive licence lessened or prevented competition substantially in either or both of those markets.

Even though SHIFT's new technology is not available to ADVENTURE's rivals and the markets for gear systems and mountain bikes are concentrated, the other mountain bike manufacturers have access to other gear systems from SHIFT and to gear systems from other suppliers. The exclusive licence may have been granted in consideration for ADVENTURE's agreement to incur significant expense in the development and promotion of mountain bikes that use SHIFT's new technology. In addition, SHIFT's rivals in the gear system market may still sell to ADVENTURE.

In the course of its assessment, the Bureau would consider the competitiveness of the mountain bike market before and after the exclusive licence. SHIFT is not a mountain bike manufacturer and has no obligation to license its gear system to a mountain bike manufacturer. The technology licence mandated the development and promotion of mountain bikes using the technology, thereby enhancing competition without in any way limiting the ability of other mountain bike manufacturers to access or use competing technologies. Consequently, the Bureau would conclude, given the facts of this case, that the exclusive licence arrangement did not raise any competition issues.

Example 3B: Foreclosure by Purchaser

Consider a variation on the situation described in Example 3A, in which ADVENTURE's business has grown to represent approximately 70 percent of mountain bike sales. ADVENTURE has taken advantage of its increasing sales share to independently negotiate long-term exclusive licences and supply arrangements with the three competing suppliers of mountain bike gear systems. The inability of the competing manufacturers of mountain bikes to obtain suitable gear system technology has put a number of them out of business and has substantially cut into the sales of the remaining firms. ADVENTURE has raised the prices of its mountain bikes by 25 percent. Although alternative gear system technologies are under development, it appears unlikely that a viable technology will be tested and in production in less than 36 months.

Analysis

The Bureau would likely examine ADVENTURE's conduct under the abuse of dominant position provision (section 79) of the Act.

The Bureau would initially determine whether mountain bikes comprised a relevant market and assess whether ADVENTURE substantially or completely controlled the supply of product within that relevant market. The Bureau would likely view the apparent lack of effective substitutes and ADVENTURE's high sales share and ability to successfully impose a 25 percent price increase as evidence that ADVENTURE substantially controlled the mountain bike business and that mountain bikes comprise a relevant market.

The Bureau would then consider whether ADVENTURE's exclusive licence agreements, through which it precluded its competitors from obtaining an adequate supply of gear systems, constituted anti-competitive conduct. While an exclusive licence arrangement may enhance competition, as was apparent in Example 3A, the use of an exclusive licence arrangement to effectively control the supply of a competitively essential input may be anti-competitive. In the absence of a compelling business justification, the Bureau would likely view the execution of long-term exclusive licences with each of the suppliers as a practice of anti-competitive acts that prevented ADVENTURE's competitors from obtaining access to this vital input (gear systems).

The Bureau would then assess the impact of the exclusive licences on competition. It would likely conclude that the adverse impact on the ability of other mountain bike manufacturers to compete that resulted from ADVENTURE preventing them from gaining access to proven gear system technology and the manner in which ADVENTURE successfully imposed substantial price increases constituted evidence that ADVENTURE substantially lessened or prevented competition. Accordingly, the Bureau would likely seek to have the exclusive licences voluntarily terminated. Failing that, the Bureau would likely bring an application before the Tribunal seeking to terminate the exclusive terms of the licences.

Example 4: Exclusive Contracts

SPICE, by virtue of its international patents, is the sole supplier of Megasalt, a unique food additive that has effectively replaced salt in certain prepared foods in most countries. SPICE's Canadian patent recently expired; however, SPICE still has valid patent protection throughout much of the rest of the world. Shortly before its Canadian patent expired, SPICE signed five-year contracts, which included exclusive supply rights, with its two principal Canadian buyers. These contracts prevent the two buyers, which use Megasalt in specially prepared foods for hospitals and other health care institutions, from combining Megasalt with any other salt substitute on the same product line. SPICE does not have long-term exclusive supply contracts with other buyers of Megasalt in Canada or elsewhere. Recently, NUsalt, a firm that has developed a potential alternative to Megasalt, filed a complaint with the Bureau alleging that SPICE's contracts are preventing NUsalt from manufacturing and marketing its product in Canada. NUsalt claims that SPICE's contracts have "locked up" a substantial part of the market, thereby precluding NUsalt from profitably entering Canada.

Analysis

The NUsalt allegations suggest that SPICE, as a result of its contracts with its two largest buyers, is currently exploiting market power within the market for salt substitutes. The Bureau would likely investigate these allegations under the abuse of dominance provision (section 79) of the Act.[55]

The Bureau would initially determine whether salt substitutes comprise a relevant product market. This would entail determining whether salt substitutes are subject to effective competition from other substances (for example, salt) or whether salt substitutes have specific properties and functional characteristics that make other substances ineffective as substitutes. The Bureau would then seek to determine whether SPICE substantially controlled the market in which its salt substitute competed by assessing SPICE's share of sales and barriers to entry to this market. The Bureau would consider all of the factors currently preventing alternative suppliers of salt substitutes from offering their products to customers in Canada, including the effect of SPICE's exclusive supply contracts on the ability of alternative suppliers to obtain sales from a critical mass of customers. Assuming that the Bureau had determined that salt substitutes constitute a relevant market, it would likely conclude that SPICE substantially controlled that market.

The Bureau would then consider whether the exclusive supply contracts, through which SPICE had precluded its principal customers from obtaining salt substitutes from alternative suppliers, constituted a practice of anti-competitive acts. To make this assessment, the Bureau would examine the circumstances surrounding the negotiation and settlement of the exclusive contracts, and the extent to which they were exclusionary and intended to erect barriers to effective competition in the relevant market. As part of this analysis, the Bureau would consider whether there are compelling business justifications for SPICE's exclusive contracts. For example, SPICE may have signed these contracts to ensure that it would have sufficient sales to justify investing in enough productive capacity to realize economies of scale. Also, the restriction preventing buyers from combining Megasalt with other salt substitutes could have a safety or quality rationale. On the other hand, if the Bureau found that the contracts in this case were intended to hold back a sufficient amount of market demand from potential entrants so that the remaining demand would provide an insufficient volume of sales to cover the cost of effective entry and future operating costs in Canada, then the Bureau would likely view the execution of the long-term exclusive licences as a practice of anti-competitive acts.

The Bureau would then assess the impact of the exclusive contracts on competition. In this regard, the adverse impact on the ability of other suppliers of salt substitutes to compete in Canada would be assessed to determine whether the contracts had substantially lessened or prevented competition. If the relevant market is defined as salt substitutes and SPICE's contracts are significantly preventing the entry of potential salt substitute producers, the Bureau may conclude that the exclusive contracts have substantially lessened or prevented

[55] The Bureau may also choose to review the conduct under the exclusive dealing, tied selling and market restriction provision (section 77) of the Act.

competition. By deterring firms from attempting to supply alternative salt substitutes in Canada, the exclusive contracts may cause other buyers in Canada not under contract with SPICE to pay higher prices than they would if SPICE faced effective competition.

The magnitude of the decrease in competition would depend on the extent to which the contracts prevent entry and the expected degree of substitution that would exist between Megasalt and alternative salt substitutes, such as NUsalt, in the absence of the exclusive terms in the contracts. In general, if the contracts are determined to be the principal barrier to new entry and the new entrants' products are likely to be close substitutes for Megasalt, then the Bureau is likely to conclude that the contracts have substantially lessened or prevented competition and would likely seek to have SPICE’s exclusive contracts voluntarily terminated. Failing that, the Bureau would likely bring an application before the Tribunal seeking to terminate the exclusive terms in the contracts.

However, if the Bureau determines that the contracts do not block effective competitive entry in Canada, then SPICE's exclusive contracts would not be considered to have substantially lessened or prevented competition. In this case the Bureau would close its inquiry without seeking remedial measures. Throughout its investigation the Bureau would work collaboratively with competition agencies in other jurisdictions as necessary to determine facts and their analytical approach relevant to the resolution of the matter.

Example 5: Output Royalties

MEMEX currently holds a patent for the design of a memory component it manufactures for use in personal home computers. MEMEX does not manufacture personal computers, but instead sells its memory components and licenses the use of its technology to computer manufacturers. Historically, MEMEX's licensing contracts required that the licensee pay a fee for each MEMEX memory component it installed in a computer. Because of its patent, MEMEX currently faces no competition from other memory component producers wishing to use a similar design; however, MEMEX's patent is due to expire within a year and there is speculation that once it expires, other firms will begin manufacturing and selling memory components based on MEMEX's design. MEMEX has recently introduced a new licence agreement. Under the new agreement, MEMEX grants non-exclusive licences for the use of its technology and memory components to all personal computer manufacturers for a royalty on every computer shipped, regardless of whether any MEMEX memory components are installed. MEMEX claims that the previous licensing policy had the unintentional effect of encouraging computer manufacturers to install too few MEMEX memory components, which detracted from computer performance. MEMEX claims that the new licensing practice provides manufacturers an incentive to install a more appropriate quantity of memory in computers.

Analysis

The Bureau would likely investigate this case under the abuse of dominance provision (section 79) of the Act.

The Bureau would first determine whether memory components that employ MEMEX's technology comprise a relevant market and then assess whether MEMEX substantially or completely controls the supply of product within that market. In view of the rapid rate of technological development and intense competition in the production of integrated circuit devices, the Bureau may conclude that the MEMEX technology competes with other memory technologies, that barriers to entry are sufficiently low that the scope of the relevant market extends beyond the MEMEX technology, or that MEMEX is unable to substantially control the supply of products within the specified relevant market. If the Bureau determines that MEMEX faces effective competition from other suppliers of memory components then it would likely conclude that further investigation is not warranted. If, on the other hand, the Bureau concludes that the memory components supplied by the alternative suppliers are not considered effective substitutes and would not allow computer manufacturers to build computers that could compete with those using MEMEX's memory component, the Bureau might determine that further inquiry was warranted.

Assuming the Bureau determined that the MEMEX technology defines the relevant market and MEMEX substantially controls that market, the Bureau would then consider whether MEMEX's use of its new licensing arrangements constituted a practice of anti-competitive acts. This determination would depend on the specific terms of the contracts and the likely effect they would have on actual or potential competitors in the relevant market. While MEMEX's licensing contracts do not expressly prohibit computer manufacturers from using memory components based on technology other than MEMEX's, they effectively impose a tax on computer manufacturers who use memory components from another supplier.[56] The imposition by a dominant supplier of long-term licensing contracts containing such provisions could preclude competition and maintain the supplier's market power. Accordingly, the Bureau would determine whether these contracts are in widespread use and their duration, and consider MEMEX's business justification for charging the per-computer royalty. It would also consider whether the per-computer royalty deters computer manufacturers from buying memory components from alternative suppliers.

If the Bureau determined that the licensing contracts were a practice of anti-competitive acts, the Bureau would then assess the likely impact of MEMEX's new licensing practice on competition and the price of memory components. If the Bureau determined that this practice creates, enhances or preserves market power, it would likely seek to have the new licensing practice voluntarily terminated. Failing that, it would likely bring an application before the Tribunal seeking to terminate this practice.

[56] A manufacturer who wishes to use alternative memory products must pay twice, once for the alternative component and a second time for the per-computer royalty payable to MEMEX.

Example 6: A Patent Pooling Arrangement
Five firms hold patents on technologies required by producers to develop widgets that conform to an international standard. To facilitate the licensing of their patents, the five firms hire an independent expert to review the patents of each firm and determine those that are essential for implementing the standard based on the underlying technical characteristics of the technologies. Upon completion of the review, the five firms create a patent pool and each of them licenses its essential patents on a non-exclusive basis to the pool. The pool is organized as a separate corporate entity whose role is to grant a non-exclusive sub-licence to all the patents in the pool on a non-discriminatory basis to any party requesting one. The patent pool administrator collects royalties from licensees and re-distributes the revenue to pool members according to a formula that is partly based on the number of patents that each member has contributed to the pool. Each of the five members of the pool retains its right to license its own essential patents outside the pool to third parties to make widgets that conform to the standard or widgets that may compete with those that conform to the standard.

The patent pool agreement specifies that if a final court judgment declares a patent in the pool to be invalid, that patent will immediately be excluded from the pool. In addition, the agreement requires that an independent expert re-assesses the patents in the pool every four years to ensure that they are essential to developing widgets conforming to the international standard. Licensees also have the ability to hire an independent expert to review any patent that they feel is not essential for developing widgets conforming to the standard. If, in either case, the expert concludes that one or more patents are not essential to developing widgets that conform to the standard, those patents are excluded from the pool. The decisions of experts are final and are binding upon the pool members.

The patent pool agreement also includes provisions allowing each pool member to audit the books of the pool administrator, and provisions allowing the pool administrator to audit the books of each licensee to verify royalty amounts. In each case, provisions are put in place to guard against confidential business information being divulged to either pool members or licensees.

Analysis
The Bureau recognizes that patent pools can often serve a pro-competitive purpose by, among other things, integrating complementary technologies, reducing transaction costs and clearing blocking patents. Where patent pools may represent an agreement between competitors or potential competitors, the Bureau would likely review them under section 90.1 of the Act rather than section 45, unless the Bureau has evidence that the patent pool was simply used as a means to facilitate an agreement prohibited under subsection 45(1).[57]

[57] The Bureau's *Competitor Collaboration Guidelines*, December 2009, outline the Bureau's approach for determining whether to pursue an investigation under section 45 versus 90.1. Available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html.

Despite their potential benefits, patent pools may also raise competition concerns. If the patented technologies inside the pool are substitutes then the pool can be a mechanism for the pool members to restrict competition between themselves and increase royalty rates above levels that would have existed in a competitive market. Alternatively, if a patented technology inside the pool is a substitute for a technology outside the pool, the pool could be used as a bundling mechanism to effectively foreclose the outside technology. Other potential competition concerns are that a pool's members may discriminate among licensees or use the pool to share confidential business information so as to reduce competition in a downstream market.

To evaluate whether a patent pool would likely cause a competition issue, the Bureau would first seek to determine whether each patent placed inside the pool is essential for developing the product or service that is the basis behind the formation of the pool. In the case at hand, if each patent inside the pool is required to implement the widget standard, then the members of the pool cannot be viewed as horizontal competitors; a firm looking to buy technologies to develop widgets conforming to the standard would need permission to use each patented technology in the pool. A pool comprised of only non-competing essential patents would not have the potential to harm competition among suppliers of technology either inside or outside the pool.

In this example, the Bureau would look positively on the fact that pool members engaged an independent expert to determine which of their patents are essential to the widget standard. However, the Bureau would evaluate whether the expert is qualified to provide such an opinion, and whether he/she was provided with the incentive to work independently, without influence from pool members. The Bureau would take additional assurance from the fact that an expert would continue to periodically review the patents to ensure they remain essential, as well as from the ability of licensees to challenge patents by requiring a separate independent review. The fact that any patents found to be invalid would also be removed from the pool would also contribute to the Bureau's assurance that the pool has taken adequate measures to only include essential patents.

Given that the pool administrator issues licences on a non-discriminatory basis to all interested parties, the Bureau would likely conclude that the technologies inside the pool were not being used to distort competition in a downstream widget market. The fact that pool members remain free to license their patents independently to other widget producers provides more evidence that competition in the downstream widget market would not be distorted by the pool.

As a final step, the Bureau would review the pool agreement's provisions relating to the sharing of confidential information and ensure that such provisions provide adequate safeguards against the pool being used to facilitate coordination among pool members or licensees.

Absent any evidence that the patent pool is used to facilitate an agreement prohibited under subsection 45(1), based on the analysis above, the Bureau would likely conclude that the patent pool does not raise any issues under the Act.

Example 7: Agreement to Foreclose Complementary Products
There are five major record labels. The largest two, ROCKCO and POPCO, which together account for more than 65 percent of total sales and 70 percent of all major label artists, have formed a joint venture (DISCO) to develop, produce and market a new generation of digital playback devices. The DISCO technology provides a level of sound quality and other features far superior to those offered by existing technologies. DATCO has also developed a digital sound technology with similar high-fidelity qualities, but which is also portable and allows users to record. The costs of the two technologies are similar, but the technologies themselves are incompatible: music digitally encoded in DISCO format must be re-encoded for playback on DATCO's player. Under the terms of their joint venture agreement, ROCKCO and POPCO agree to not release, or license any other person to release, their copyrighted recordings in a digital format other than the DISCO format. Consistent with that agreement, ROCKCO and POPCO have declined DATCO's request for a licence to convert and release ROCKCO and POPCO recordings in the DATCO format. The other three record labels predict -- correctly -- that consumers will be reluctant to purchase the DATCO technology if they are unable to obtain music from either ROCKCO or POPCO in that format. The other record companies are willing to release their recordings in the DATCO format, but find that there is no market for it and are compelled by popular demand to license the DISCO technology to release their recordings in the DISCO format. As a result of the foregoing, DATCO's digital sound technology, which reviewers have generally viewed as superior to the DISCO technology, is being withdrawn and DISCO is substantially increasing both the price of the playback equipment that it sells and the royalties charged to the other record companies for the use of the DISCO technology to release recordings in the DISCO format. The Bureau has concluded that the joint venture would not meet the definition of a merger as specified in section 91 of the Act.

Analysis
The Bureau would likely examine this case under the agreements and arrangements provision (section 90.1) and/or the abuse of dominance provision (section 79) of the Act.

The matter would not be considered under section 45 because the ROCKCO and POPCO joint venture would not be viewed as an agreement between competitors to fix prices, allocate markets or customers, or restrict output. Even if the refusal to release recordings in another format or grant a licence are considered output restrictions, the ancillary restraints defence would likely apply because they are ancillary and directly related to the broader joint venture agreement to develop the DISCO technology. As well, these restraints appear reasonably necessary to attract a sufficient number of customers to the DISCO technology to make the joint venture viable.

As a first step, the Bureau would consider whether the alleged anti-competitive conduct, namely the refusal of ROCKCO and POPCO to license the reproduction of their copyrighted recordings in the DATCO format, was a mere exercise of their IP rights or involved something more. In this case, the Bureau would likely determine that the terms of the DISCO joint venture agreement and the refusal to license constituted joint conduct and hence would be considered conduct that was beyond the mere exercise of an IP right.

The Bureau may elect to review the agreement under section 90.1 of the Act if ROCKCO and POPCO could be considered competitors in a relevant market. In this example, the important consideration in determining if the firms are competitors is determining if ROCKCO and POPCO would have likely developed the DISCO, or similar, technology independently in the absence of the agreement. If the Bureau were to determine that this would be the case, then ROCKCO and POPCO could have been expected to compete in the market for digital playback devices in the absence of their joint venture and the agreement would be reviewed under section 90.1.

If, on the other hand, ROCKCO and POPCO were determined not to be competitors, the Bureau would elect to review the joint venture agreement under the abuse of dominance provision, on the basis that the joint venture agreement established and provided for the joint abuse of a dominant position. The review would be carried out in accordance with the framework and criteria for abuse of dominance outlined in the previous examples. Whichever provision of the Act would apply, the Bureau would need to establish the affected relevant market or markets, consider barriers to entry and evidence of market power or dominance, demonstrate a substantial lessening or prevention of competition and assess any business justifications or efficiencies.

If the Bureau were to proceed under sections 79 or 90.1, it would need to establish that the DISCO joint venture has substantial market power in either the market for digital sound technology or digital playback equipment. In addition, it would need to find that the DISCO joint venture had engaged in anti-competitive conduct that substantially lessens or prevents competition. The anti-competitive acts in this case would relate to the acquisition and foreclosure by the DISCO joint venture of access by its competitors to the music in the ROCKCO and POPCO music libraries. Foreclosure of access to these materials could prevent alternative sound recording technologies from acquiring the critical mass of desirable music content required for them to achieve viability. This conduct could substantially prevent or lessen competition and lead to the monopolization or the creation of dominance in the markets for digital sound technology and/or digital playback equipment sound reproduction. The foreclosure of other technologies likely would create market power for DISCO in these markets and would be inefficient, as it would reduce consumer choice, lead to increases in the royalties paid by the record companies to use this type of technology and increase the price of playback devices. Given such a finding, the Bureau would likely seek an order requiring that ROCKCO and POPCO divest themselves of DISCO or that ROCKCO and POPCO license their works for release in alternative formats.

Example 8: Refusal to License Intellectual Property

ABACUS and two other firms were the first to market a spreadsheet for personal computers. Electronic spreadsheet software was one of the applications that established personal computers as an essential tool for business. In the first five years, ABACUS out-sold its nearest competitor nearly two to one and its installed base (cumulative sales) grew to 50 percent. In the next two years, its annual market share grew to more than 75 percent and one of the other original firms left the market. At about the same time and after three years of programming, CALCULATOR introduced spreadsheet software that had a number of innovative features not found in ABACUS. However, CALCULATOR soon ran into financial difficulties despite the innovative features and a lower price. CALCULATOR approached ABACUS and requested a licence to copy the words and layout of its menu command hierarchy (for the purpose of this example, assume that permission was required since ABACUS had valid copyright rights in these works). With permission, CALCULATOR could have relaunched its product with a menu command hierarchy identical to that of ABACUS, which would have given CALCULATOR the ability to read ABACUS files and ensured compatibility between the two products. ABACUS refused to grant a licence and publicly announced that it would enforce its IP rights against CALCULATOR if it copied the ABACUS hierarchy. In light of this, several other prominent software makers announced that they were discontinuing their spreadsheet development programs.

An important characteristic of spreadsheets that affects their benefits to a purchaser is network effects. Network effects exist if the value of a product increases with the number of buyers who purchase compatible products. Network effects for spreadsheets arise since the greater the size of the network (the installed base of compatible spreadsheets), the greater the number of individuals with whom files can be shared, the greater the variety of complementary products (utilities, software enhancements and macros), the more prevalent are consulting and training services, and the greater the number of compatible data files.

Analysis

ABACUS's refusal to license its copyrighted works would constitute a "mere exercise" of its IP rights and would, therefore, be subject to review only under section 32 of the Act.

To establish whether ABACUS's refusal created an undue restraint of trade or unduly lessened competition, the Bureau would first determine whether the refusal adversely affected competition in a relevant market that was different or significantly larger than the subject matter of ABACUS's IP rights or the products or services that result directly from the exercise of such IP rights. In this case, competitive harm is alleged in the market for ABACUS-compatible spreadsheets.

Whether the relevant market is determined to be ABACUS-compatible spreadsheets depends on the extent and importance of network effects and switching costs. If network effects are important, consumers that have never purchased a spreadsheet may still purchase the more expensive ABACUS product. Consumers who are already using ABACUS may face significant costs to switch to a new spreadsheet (resulting from, for example, customers' need to re-train personnel, convert existing spreadsheet files to a new format, or purchase new complementary products) and they also would lose the network benefits associated with ABACUS. If network effects and switching costs are material, then existing ABACUS consumers are unlikely to switch and new consumers are likely to choose ABACUS even if it is priced above competitive levels.

If the relevant market is determined to be ABACUS-compatible spreadsheets, then ABACUS would be the only producer and thus have 100 percent control of this market. If, in addition, entry barriers were found to be high, which is likely in an industry experiencing network effects, the Bureau would conclude that ABACUS is dominant. In determining whether the installed base of ABACUS contributes materially to entry barriers, the Bureau would consider the pace of innovation and the potential for a new technology to "leap-frog over" ABACUS despite its advantages (that is, its installed base and the switching costs). The Bureau would also endeavour to determine whether there are other efficient avenues for creating compatibility that would not infringe the IP rights of ABACUS.

If the relevant market is determined to be ABACUS-compatible spreadsheets and the Bureau concluded that this market was significantly larger than the subject matter of ABACUS's IP and the products that result directly from the exercise of such IP rights, then the Bureau would likely conclude that the IP is an essential input for firms participating in the relevant market. On this basis, ABACUS's refusal would satisfy the first step of the Bureau's two-step analysis to determine whether it would seek to have an application brought under section 32.

In the second step, the Bureau would determine whether ABACUS's refusal to license its IP would adversely alter firms' incentives to invest in research and development in the economy. For this analysis, the Bureau would investigate whether ABACUS's ability to prevent compatibility may have a chilling effect on the development of more advanced spreadsheets. In addition, the Bureau would determine whether the choice by ABACUS of the words and layout of its menu hierarchy was likely arbitrary, involved little innovative effort and had little value relative to other substitutes. Related to this analysis, the Bureau would determine whether in the absence of an installed base and switching costs, ABACUS's terms and menu hierarchy would be no better or worse than CALCULATOR's (or any other). If the Bureau concluded that the presence of an installed base and switching costs were the reasons that ABACUS-compatible spreadsheets are a market and that ABACUS had market power, it would consider enforcement action under section 32. In this circumstance a special remedy invoked under section 32 may restore incentives for other firms to engage in research and the development of competing compatible spreadsheet programs.

If the facts of the case suggest potential enforcement under section 32, the Bureau would recommend that the Attorney General seek a special remedy that would allow other spreadsheet firms to gain access to the words and layout of ABACUS's menu hierarchy.

Example 9A: Product Switching[58] ("Hard" Switch)
BRAND is a brand-name pharmaceutical company that sells innovative pharmaceutical drugs. One of its top sellers in terms of revenue, Product A, has been sold in Canada for many years, and continues to be sold, but will lose patent protection in six months. Two years ago BRAND introduced another product, Product B, which takes a slightly different form from and alleviates the same affliction as that treated by Product A. The number of prescriptions for Product B remains low. Product B will remain under patent protection for the next 10 years.

GENERIC, a pharmaceutical company that produces generic drugs, is set to launch a generic version of Product A ("Generic A") as soon as Product A's patent protection expires. Before its patent expires, BRAND withdraws Product A from the market by ceasing to manufacture it and by buying back inventories from wholesalers and pharmacies. BRAND notifies health care professionals that Product A is no longer available. In response to this development, physicians prescribe Product B to patients in place of Product A and a large number of prescriptions for Product A are replaced by prescriptions for Product B. Because Product A is the reference product for (or bioequivalent to) Generic A, pharmacies are prohibited from automatically substituting Generic A for the prescribed Product B. As a result, there is a competition concern that GENERIC's entry may be sufficiently impeded and that through an anti-competitive act, BRAND will successfully maintain its market power.

Analysis
If the Bureau was of the view that BRAND's conduct could be for the purpose of forcing the replacement of sales of Product A with those of Product B to exclude or impede entry by GENERIC and Generic A, the Bureau would not view the withdrawal of Product A by BRAND as a mere exercise of its patent right and thereby conduct exempt under subsection 79(5). The Bureau would also not view the conduct as reviewable under section 32. Accordingly, the Bureau would likely

[58] For an example of a Bureau enforcement matter involving conduct similar to that in this Example, see *Competition Bureau Statement Regarding the Inquiry into Alleged Anti-Competitive Conduct by Alcon Canada Inc.* Available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03686.html.

examine the conduct of BRAND under the abuse of dominant position provision (section 79) of the Act.

The Bureau would first seek to define a relevant market that encompasses Product A. Given that Generic A is bioequivalent to Product A, the Bureau would likely conclude that both drugs are in the same relevant market. The Bureau would also consider whether other drugs, such as Product B, are sufficiently close substitutes to Product A to be considered in the relevant market. Important evidence as to what drugs may be in the relevant market would come from the evidence of physician/patient switching behaviour when BRAND withdrew Product A from the marketplace.

If the Bureau determined that BRAND was dominant in a relevant market that included Generic A and Product A, it would then proceed to determine whether BRAND’s conduct, including that of withdrawing Product A from the marketplace, constituted a practice of anti-competitive acts. In making this determination, the Bureau would examine the likely effect of BRAND’s conduct on the ability of GENERIC to enter and compete in the relevant market. For example, the Bureau would examine the possibility of GENERIC marketing Generic A directly to physicians. Ultimately, the Bureau would seek to determine whether BRAND’s conduct would either significantly foreclose the entry of GENERIC or delay that entry for a significant period.

The Bureau would also examine whether the purpose of BRAND’s conduct was to delay or foreclose the supply of Generic A by GENERIC, or whether there was some other legitimate business justification. For example, if BRAND removed Product A from the market because it was not profitable, that may be viewed as a legitimate business justification. The Bureau would also consult with persons with relevant expert medical knowledge concerning the products at issue. If the Bureau determined that physicians viewed Product B as providing no or trivial medical benefit over Product A, it would doubt any argument advanced that Product B is superior to Product A and the purpose of the withdrawal of Product A was to transition patients to a higher-quality treatment.

If the Bureau concluded that BRAND was dominant in a relevant market and that it had engaged in a practice of anti-competitive acts, it would also assess whether BRAND’s conduct had caused a substantial lessening or prevention of competition. As part of this analysis, the Bureau would likely examine the difference between the price of Product B and the price at which Generic A would have been expected to be sold if it had not been delayed or foreclosed by BRAND’s conduct. As other evidence of harm resulting from BRAND’s conduct, the Bureau would likely cite the negative effect of Product A’s withdrawal on limiting physician/patient choice for prescription drugs.

If the Bureau concluded that the constituent elements of subsection 79(1) were met, it would likely seek to negotiate a remedy[59] with BRAND and failing that, bring an application before the Tribunal.

Example 9B: Product Switching ("Soft" Switch)
Consider the same set of circumstances as in Example 9A but where BRAND does not withdraw Product A from the market. Instead, BRAND continues to sell Product A but it stops promoting the drug to physicians.

Analysis
In this circumstance, BRAND's conduct would not likely raise an issue under the Act provided that it did not anti-competitively undermine the prescription base of Product A (e.g., making false or misleading statements about Product A).

7.2 Conduct Involving Patent Assertion Entities

A patent assertion entity ("PAE") can generally be described as a business that acquires or otherwise obtains the legal rights to patents from innovating companies for the purpose of asserting them against potential infringers who are using the patented technologies. Importantly, a PAE does not use or manufacture products based on the patented technologies it acquires.

Some have argued that competitive concerns arise with PAEs asserting that their patents have been infringed and using aggressive tactics in order to extract a settlement payment or licensing royalties. This may result in increased royalties in settlements, relative to the situation if the infringement suits had been brought by the original patentees, as PAEs face different incentives and are not open to infringement counterclaims. PAEs however may also be viewed as beneficial for innovation because the legitimate assertion of patent rights can assist innovators in maximizing their returns from their research efforts, which in turn would provide stimulus for further research. The role of competition law enforcement with respect to PAEs is a rapidly evolving area of thought and, as developments occur, the Bureau will continue to refine its enforcement approach and may revisit its guidance in this area.

There is also a concern that PAEs (among others) may use false and misleading claims in order to extract license fees from small and medium-sized enterprises that pay the fees in order to avoid a possible patent infringement lawsuit.

Example 10: Representations Made in the Context of Asserting Patents
Firm A acquired patents from innovating companies for the purpose of earning revenue by asserting them against firms that are infringing the patented technologies. Following the acquisition, Firm A identified a significant number of

[59] The remedy that the Bureau may seek will depend on the particular facts of the case. In some cases, simply ordering the patentee to make its former product available again for sale may not adequately overcome the anti-competitive conduct. For example, the Bureau may seek an order requiring the brand firm to notify physicians informing them that its former product has been re-supplied.

businesses that it had evidence were infringing the patents, and sent notices by registered mail to all of the businesses. The notices indicated that firm A had acquired the patents, and that it believed that the recipient of the letter had infringed one or more of the patents.

The notice further indicated that if the recipient was indeed infringing one or more of the patents, the recipient would need to pay a significant licensing fee in order to avoid litigation. In its notices, Firm A claimed that many businesses had already paid the licensing fee, and that it would commence legal proceedings against the recipient within two weeks if the licensing fee was not paid immediately. A number of businesses that received these letters complained to the Bureau.

Analysis

Like all businesses in Canada, PAEs must abide by the misleading advertising and deceptive marketing practices provisions of the Act. The Act prohibits making a representation to the public that is false or misleading in a material respect, where the representation is made to promote a product or business interest. Such matters are reviewable pursuant to paragraph 74.01(1)(a) of the Act.

Based on the facts, it is clear that the purpose of the notices in this case was to promote Firm A’s business interests by getting recipients to pay and that the notices, which were sent to a significant number of businesses, were sent to members of the public. The Bureau’s examination, therefore, would focus on whether the notices included representations that were false or misleading in a material respect.

In determining whether the representations were false or misleading, the Bureau would consider both the general impression created by the notice, as well as its literal meaning. In the example, the representations created the general impression that many businesses had already paid Firm A the licensing fee, and that the firm would commence legal proceedings against the recipient if the licensing fee was not paid immediately.

If the Bureau’s examination in this example revealed that both representations were true, then they would not raise any concerns under the misleading advertising and deceptive marketing provisions of the Act.

Conversely, if the examination revealed that either of Firm A’s claims were not true, in that other businesses had not already paid Firm A the licensing fee, or that Firm A had no intention of commencing legal proceedings against the recipients, then this would raise concerns that the representations were false or misleading. If the Bureau concluded that the representations would affect the likelihood of the recipients taking some significant action in response to the claims, up to and including acceding to the demand, then the representations would also be considered material. In such event, the Bureau would have grounds to file a notice of application with the Tribunal or a court alleging that Firm A had engaged in reviewable conduct contrary to section 74.01(1)(a) of the Act.

If the Tribunal or court found that reviewable conduct did indeed occur, and that Firm A failed to exercise due diligence to prevent the conduct from occurring, it could order the firm not to further engage in the conduct, to pay an administrative monetary penalty, to pay restitution, and to publish a corrective notice.

In addition, the Act provides that if a false or misleading representation is made knowingly or recklessly, then it may contravene the criminal provisions found in section 52 of the Act. In this regard, the Bureau's bulletin on choice of track indicates that in most instances of misleading advertising, the civil track will be pursued, unless certain criteria are satisfied.[60] Cases which meet these criteria can be referred to the DPP for prosecution. Convictions under the criminal provisions can result in fines at the discretion of the court, as well as imprisonment for individuals of up to a maximum of 14 years.

Example 11: Assignment of Patents for Enforcement

OPCO1 is a firm that produces gadgets and has a number of patents related to gadget technology. Historically OPCO1 has enforced its patents itself with limited success – however, recently OPCO1 assigned its patents to PAE, a firm that exclusively enforces IP. Under their arrangement OPCO1 and PAE will split any revenues that result from enforcing the patents. PAE does not have the ability to enforce any other IP pertaining to gadgets.

Subsequently, PAE sues a rival gadget manufacturer, OPCO2, alleging that many of OPCO2's gadget designs infringe the patents assigned to PAE by OPCO1.

Analysis

Because the Bureau considers the assignment of a patent as something more than the mere exercise of an IP right, this conduct would potentially be subject to review under the general provisions of the Act.

[60] In order to proceed on a criminal track both of the following criteria must be satisfied:

a. There must be clear and compelling evidence suggesting that the accused knowingly or recklessly made a false or misleading representation to the public. An example of such evidence is the continuation of a practice by the accused after complaints have been made by consumers directly to the accused; and

b. If there is clear and compelling evidence that the accused knowingly or recklessly made a false or misleading representation to the public, and this evidence is available, the Bureau must also be satisfied that criminal prosecution would be in the public interest. The factors to be taken into account in making this public interest determination will vary from case to case, and may include the seriousness of the alleged offence and mitigating factors. For more information see the *Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act Bulletin*; http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01223.html.

As noted in subsection 4.2.1, although the Act may prescribe limits on to whom and how an IP owner may license, transfer, or sell their IP, it does not challenge the fundamental right to do so. The Bureau is of the view that, in general, IP holders arranging their affairs so as to more effectively enforce their IP rights do not raise issues under the Act. This may include engaging the services of firms that specialize in the enforcement of IP rights.[61]

In this case, the Bureau would likely conclude the assignment of OPCO1's patents to PAE simply for the purpose of more effective enforcement does not raise issues under the Act.

7.3 Settlements of Proceedings under the Patented Medicines Notice of Compliance Regulations

The discussion and hypothetical examples in this subsection are designed to illustrate the analytical framework that would be applied by the Bureau in conducting its review of settlements between brand and generic pharmaceutical companies of proceedings under the Patented Medicines Notice of Compliance ("PMNOC") regulations. For details on these regulations the reader may wish to consult Health Canada's publication, Guidance Document: Patented Medicines (Notice of Compliance) Regulations available at: http://www.hc-sc.gc.ca/dhp-mps/prodpharma/applic-demande/guide-ld/patmedbrev/pmreg3_mbreg3-eng.php, or the regulations themselves at: http://laws-lois.justice.gc.ca/eng/regulations/sor-93-133/FullText.html.

The Bureau's enforcement approach to settlements can be summarized as follows:

(i) An entry-split settlement (defined below) pursuant to which the generic firm enters the market on or before patent expiry will not pose an issue under the Act (see Example 12);

(ii) A settlement with a payment (defined below) to the generic firm pursuant to which the generic firm enters the market on or before patent expiry may be reviewed under section 90.1 (see Example 13), or possibly section 79;[62]

(iii) The Bureau will not review a settlement under section 45 unless (a) the settlement extends beyond the exclusionary potential of the patent by delaying generic entry past the date of patent expiry (see Example 14A), (b) the

[61] However, as noted in Example 6 on Patent Pooling Arrangements, issues can arise when a transfer of IP rights results in the combination of IP rights within a single entity, resulting in a substantial lessening or prevention of competition. For instance, transfers that result in patents covering substitutable technologies becoming concentrated within a single entity who can then reduce competition to a degree greater than inherent in the patents individually may raise issues under the Act. As PAE does not hold any other IP rights pertaining to gadgets, the Bureau would not have concerns in this regard based on the facts of this example.

[62] In general, agreements between competitors that may be examined under section 79 include situations where one or more party is dominant, or jointly dominant, and the agreement results in or facilitates conduct that has a negative effect on a competitor that is exclusionary, predatory or disciplinary, such that it has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

settlement extends beyond the exclusionary potential of the patent by restricting competition for products unrelated to the patent subject to the PMNOC proceeding (see Example 14B), or (c) the settlement is a “sham” (see Example 14C).[63]

The Bureau recognizes that there are significant differences in the regulatory regimes governing pharmaceuticals in Canada relative to other jurisdictions and that these may have implications for both the incentives of parties to reach settlements and the terms of settlements that may occur in Canada. For example, three unique features of Canada’s PMNOC regulations that govern generic entry prior to patent expiry are the following:

- *Exclusivity for the first generic filer*: In Canada there is no six-month exclusivity period available to the generic firm who is the first to challenge a brand firm’s patent with respect to a particular pharmaceutical formulation. This may limit the ability of settlements in Canada involving the first generic challenger to delay the entry of subsequent generic firms. This in turn may impact the incentives of the brand and the first generic filer to enter into settlements with payments to delay generic entry.

- *Section 8 damages*: Generic firms in Canada who are engaged in litigation under the PMNOC regulations have a contingent claim to damages against the patentee pursuant to section 8 of the PMNOC regulations. The prospect of a brand being liable for these damages is a relevant consideration when evaluating the magnitude of a brand firm’s payment to the generic firm in a settlement agreement.

- *Dual Litigation*: Brand and generic firms in Canada must cope with a system of legal double jeopardy created by the PMNOC regulations. Even after having succeeded in defending a prohibition proceeding brought under the PMNOC proceedings, a generic firm faces the possibility of an infringement action by the brand firm if the generic chooses to launch prior to patent expiry. Similarly, a brand firm whose prohibition application was successful still faces the possibility of proceedings for impeachment of its patent(s). The potential follow-on litigation is a relevant consideration when evaluating the magnitude of a brand firm’s payment to the generic firm in a settlement agreement.

In addition, brand and generic firms in Canada typically face significant restrictions on the prices they are permitted to charge for their products in order to be listed on provincial formularies. The Bureau recognizes such restrictions

[63] In this context, the Bureau considers a “sham” to be a case where the parties recognize that the patent is invalid and/or not infringed and use a purported settlement of the PMNOC proceedings to engage in conduct contrary to Section 45 as opposed to addressing patent-protected rights. That is, the PMNOC regulations and the settlement are used as a disguise for an otherwise naked conspiracy.

may impact the incentives of generic firms to challenge patents and the terms of settlements to PMNOC proceedings.

7.3.1 Introduction

The Bureau recognizes that in many cases parties may wish to settle PMNOC proceedings privately rather than fully litigate a matter and risk an adverse judgement from the court. Settlements also provide a benefit to society at large by easing the burden on the court system and saving limited public resources. However, litigation settlements may pose competition risks if the agreement of the parties goes beyond what is reasonably necessary to reach a settlement, for example including a payment to delay generic competition.

If a settlement does not involve the brand firm providing any consideration to the generic firm other than allowing the generic to enter the market on or before patent expiry (an “entry-split” settlement), the Bureau would not review the settlement under the Act.[64] The Bureau would view the agreed entry date as reflecting a compromise between the parties based on each party’s underlying expectation of succeeding in the PMNOC proceedings. The greater the likelihood that the patent is valid and infringed, the later in the patent term generic entry would be expected. Furthermore, agreements where the only consideration provided by the brand is early generic entry are marked by opposing incentives, with brands seeking later entry and generics seeking earlier entry. If there is no other consideration flowing from the brand to the generic firm there would be no reason to believe that the terms of the settlement were for anything other than a compromise on the patent merits.

In contrast to entry-split settlements, if a settlement involves the brand firm providing compensation to the generic firm in addition to allowing generic market entry (a “payment”), the Bureau may review the settlement under the Act. In this circumstance the payment could create competitive harm if it serves as compensation to the generic firm in return for delaying its entry into the market. Because the brand firm would typically make more profit by keeping the generic out of the market than the brand firm and the generic firm would receive in total by competing in the market (because generics are typically sold at a much lower price than branded drugs, with the difference being savings that would accrue to drug buyers), the parties have an aligned incentive to cede the market to the brand firm and split the profits from preventing competition. The competition concern with the settlement is that the payment obtained by the generic firm may arise from the sharing of the brand firm’s (now guaranteed) supra-competitive profits. Drug buyers may be impacted by this type of settlement through higher prices, and patients may experience delayed access to affordable medicines.

Since a settlement involves more than one party it is not unilateral conduct and the Bureau would view it as potentially something more than the mere exercise of

[64] When reviewing a settlement, the Bureau will also look at other agreements that the settling parties may have made during the same period of time when the settlement was reached.

the patent right. Accordingly, the Bureau would review settlements under the general provisions of the Act (generally section 90.1) rather than section 32. Likewise, the Bureau would not assume that a valid patent of the brand firm was infringed.

The Bureau's approach to assessing competitor collaborations, including settlements that may delay generic entry, is reflected in the *Competitor Collaboration Guidelines* ("CCGs").[65] Accordingly, other than in the narrow circumstances described below, the Bureau would review such a settlement under section 90.1 of the Act because it would not be viewed as an agreement between competitors to fix prices, allocate markets or restrict output (i.e., a "naked restraint" on competition).

However, the Bureau is aware that settlement practices are dynamic and continue to evolve, and circumstances may arise where the Bureau elects to review a settlement with a payment under section 79 if the elements of section 79 are present.

A settlement may be reviewed under section 45 only where it extends beyond the exclusionary potential of the patent or is a "sham". The Bureau anticipates that such circumstances would rarely occur.

7.3.2 Review Under Sections 90.1 and 79 of the Act

Section 90.1 applies to agreements between parties that are competitors or potential competitors. Subsection 90.1(11) defines competitors to include not just actual competitors, but also "a person who it is reasonable to believe would be likely to compete" with respect to the relevant product "in the absence of the agreement or arrangement". Accordingly, the fact that a brand firm and a generic firm did not compete with respect to the relevant pharmaceutical drug when the settlement was concluded or during the term of the settlement would not prevent the Bureau from reviewing the settlement under section 90.1. The Bureau would determine whether the brand firm and the generic firm are potential competitors as part of its analysis of the nature and extent of the relevant market.

Both sections 90.1 and 79 of the Act require the Bureau to establish that a settlement has the effect of causing a likely substantial prevention or lessening of competition. Guided by jurisprudence, the Bureau would likely determine whether a settlement caused harm to competition by adopting a "but-for" test. This test requires determining what would likely have occurred but for the settlement, including whether the brand firm and the generic firm would have been likely to compete earlier than the generic entry date specified in the settlement, and whether entry would have resulted in the discipline of the brand firm's market power through the introduction of a lower cost alternative for drug buyers. This analysis would require determining whether the magnitude of the payment was

[65] *Supra* note 57.

so large that it likely had the effect of delaying generic entry. Importantly, the alternative scenario “but for” a settlement that includes a payment is not necessarily the fully litigated outcome. It is possible that the parties may have reached an alternative settlement that was less restrictive to generic entry.

The form of the payment from the brand firm to the generic firm does not change the Bureau’s fundamental analysis as to whether its effect was to delay generic entry. The payment may involve a simple monetary transfer from the brand firm to the generic firm. Alternatively, the payment could involve a monetary transfer with an agreement by the generic firm to provide the brand firm with particular services such as to market or co-promote products; to provide inventory or backup manufacturing services; to supply raw material or finished drug products; or to enter into development agreements in the form of up-front payments, milestones, sales percentages, or development fees for unrelated products. In these circumstances, the Bureau would consider evidence to determine whether the payment was commensurate with the services provided, rather than a disguised payment to the generic firm for delaying its entry. In making such a determination, the Bureau would consider factors such as (i) a history of collaboration between the brand firm and the generic firm; (ii) whether the brand firm (or similarly-situated firms) typically enters into arrangements for such services; (iii) previous attempts by the brand firm to contract for the service; (iv) any documents reflecting the need for the transaction; (v) any documents reflecting the valuation of services; and (vi) the typical payments for such services in the industry.

In determining if a payment likely had the effect of delaying a generic firm’s entry, the Bureau would consider factors such as (i) the fair market value of any goods or services provided by the generic firm; (ii) the magnitude of the brand firm’s section 8 damages exposure under the PMNOC regulations; and (iii) the brand firm’s expected remaining litigation costs absent settlement. With respect to (iii), expected remaining litigation costs absent settlement may include the expected costs of a subsequent patent infringement action and impeachment counterclaim, and potential adverse cost awards at the prohibition application stage and in an infringement/impeachment proceeding. If a payment was within a reasonable estimate of these factors based on information known at the time the settlement was reached, the Bureau would conclude that the settlement does not raise issues under the Act. The Bureau would also consider other justifications and evidence proffered by the parties.

When reviewing a settlement under section 90.1 of the Act, the Bureau would consider possible efficiencies that could be realized through the settlement. When assessing potential efficiencies, the Bureau would consider factors such as the credibility of the claims, the link to the settlement, the likelihood of the benefits being achieved, and whether the benefits would or could not be obtained in the absence of the settlement. If the Bureau determines that the efficiency exception is not satisfied or cannot determine whether it is satisfied due to insufficient information, it may seek a remedy from the Tribunal to prohibit the settlement. Under section 90.1, the Tribunal may make an order prohibiting any person from doing anything under the settlement, or requiring any person (with the consent of that person and the Bureau) to take any other action.

If reviewing the settlement under section 79 of the Act, the Bureau would consider possible business justifications in its determination of whether the settlement was or was part of a practice of anti-competitive acts. In making its determination, the Bureau would consider a number of factors, including the credibility of the justifications and the link to the settlement. If the Bureau determines that the constituent elements of section 79 of the Act are met, it may seek a remedy from the Tribunal to prohibit the settlement. The remedy sought under section 79 would likely include an order from the Tribunal prohibiting the settlement or the anti-competitive terms of the settlement. The Bureau may also seek an administrative monetary penalty from the parties. In addition, the Tribunal is empowered to make an order directing any or all persons against whom an order is sought to take such actions as are reasonable to overcome the effects of the practice of anti-competitive acts in that market.

7.3.3 Review Under Section 45 of the Act

In very limited circumstances like those in Examples 14A, 14B and 14C, a settlement may reach beyond the exclusionary potential of the patent or be a sham. For example, a settlement could restrict entry beyond the end of the patent term, restrict competition among products not at issue in the PMNOC proceeding, or be entered into even though the settling parties recognize that the patent is invalid and/or not infringed.

While the Bureau will review conduct within the exclusionary potential of the patent (for example when there is a payment for delayed entry before the patent expires) under section 90.1 or 79 of the Act, section 45 focuses on settlements that clearly restrict competition beyond the exclusionary potential of the patent or are shams. In the limited circumstances where the Bureau may review a settlement under section 45 of the Act and where the constituent elements of an offence under that section are satisfied, the Bureau will consider whether the ancillary restraints defence under subsection 45(4) of the Act, or another defence set out in section 45 of the Act, may apply.[66]

Where the Bureau determines that there is sufficient evidence to establish that an agreement satisfies the ancillary restraints defence, it will not refer the matter to the DPP with a recommendation to commence a prosecution under section 45 of the Act. However, the Bureau may seek a remedy in respect of the agreement under section 90.1 of the Act if it is of the view that the settlement is likely to prevent or lessen competition substantially.

[66] As described more generally in the Bureau's CCGs, *supra* note 57, agreements that are directly related to, and reasonably necessary for giving effect to, a broader agreement may be subject to an ancillary restraints defence.

As is the case in general, parties may approach the Bureau at any time to resolve a criminal matter prior to referral to the DPP for prosecution. The Bureau's Immunity and Leniency Programs provide a clear framework for cooperation and the provision of information by cooperating parties during investigations related to Part VI of the Act.[67] However, the DPP has the sole authority to engage in plea and sentencing discussions with counsel for an accused.

While the Bureau may, where appropriate, initially elect to evaluate a settlement under the criminal conspiracy provision of the Act, the Bureau may subsequently decide that circumstances warrant pursuing a remedy under the reviewable matters provisions of the Act at any time prior to referral of the matter to the DPP for prosecution. In cases where the matter is referred, but the DPP elects not to pursue prosecution, the Bureau may choose to re-evaluate whether the settlement should be subject to a remedy under the reviewable matters provisions of the Act.

Example 12: An Entry-Split Settlement

BRAND sells innovative pharmaceutical drugs. One of its top sellers in terms of revenue, product A, will lose patent protection in ten years. GENERIC plans to launch a generic version of product A before BRAND's patent protection for product A expires. There are currently no other generics of product A on the market. Pursuant to the PMNOC regulations, GENERIC serves BRAND with a Notice of Allegation ("NOA") stating that its generic drug does not infringe BRAND's patent and that BRAND's patent is also invalid. BRAND challenges both claims in GENERIC's NOA in court.[68] Rather than have the court reach a decision in the PMNOC proceeding, BRAND and GENERIC enter into a settlement where GENERIC agrees not to market its generic version of product A until five years before patent expiry. As part of the settlement, BRAND agrees not to sue GENERIC for patent infringement when GENERIC enters the market and GENERIC agrees not to take action against BRAND to recover damages that it may be entitled to under section 8 of the PMNOC Regulations. The evidence reveals no other form of consideration, either in the settlement agreement or otherwise. At the time of reaching the settlement, GENERIC had successfully met all regulatory requirements for proving safety and efficacy of its drug.

Analysis

Given that the terms of the settlement specify a market entry date for GENERIC that is on or before the expiry date of the patent and that GENERIC is not receiving any other consideration from BRAND, the Bureau would not take action

[67] For more information, please consult the *Immunity Program under the Competition Act* (available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html) and the *Leniency Program* (available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html), as well as their respective FAQs.

[68] For ease of exposition, details of the process under the PMNOC Regulations are deliberately avoided. The reader is advised to consult the documents available through the links provided above for more information about the PMNOC regulations.

against the settlement under the Act. If there were no consideration other than allowing early entry flowing from BRAND to GENERIC there would be no reason to believe that the terms of the settlement were for anything other than resolving the litigation based on the merits of the case.

Example 13: A Settlement with a "Payment"

Consider the same set of circumstances as Example 12, but in this case BRAND provides a monetary payment to GENERIC in addition to allowing GENERIC to enter the market five years before patent expiry.

Analysis

This settlement could pose a competition concern for the Bureau because its terms include a payment from BRAND to GENERIC. If the Bureau were to review the settlement, it would follow its general approach to assessing competitor collaborations as outlined in the CCGs. Because the settlement did not extend beyond the exclusionary potential of the patent and was not a sham, the Bureau would likely review the settlement under section 90.1 of the Act.

For purposes of review under section 90.1 of the Act, the Bureau would typically, as an initial step, define relevant product and geographic markets that include BRAND's product A. If the generic drug is bioequivalent to product A, the Bureau would likely conclude that both drugs are in the same relevant product market.[69] The Bureau would also consider whether other drugs are sufficiently close therapeutic substitutes to product A to be included in the relevant product market. For the determination of the geographic market, the Bureau would consider all regions in Canada where product A was sold.

Section 90.1 of the Act requires the Bureau to establish that a settlement has the effect of causing a substantial prevention or lessening of competition. In determining whether "but for" the settlement BRAND and GENERIC would have been likely to compete earlier than the generic entry date specified in the settlement, the Bureau would examine the size of the payment to determine whether it was likely that the settlement had the effect of delaying GENERIC's entry. In making this determination the Bureau would consider factors such as (i) the fair market value of any goods or services provided by GENERIC; (ii) the magnitude of BRAND's section 8 damages exposure under the PMNOC regulations; and (iii) BRAND's expected remaining litigation costs absent settlement. With respect to (iii), expected remaining litigation costs absent settlement may include the expected costs of a subsequent patent infringement action and impeachment counterclaim, and potential adverse cost awards at the prohibition application stage and in an infringement/impeachment proceeding. If a payment was within a reasonable estimate of these factors, the Bureau would

[69] Mandatory generic substitution rules for drugs on provincial formularies are one of the main reasons that the introduction of generics largely supplants brand-name drugs and are a factor considered when defining relevant markets.

conclude that the settlement does not raise issues under the Act. The Bureau would also consider other justifications and evidence proffered by the parties.

As part of its analysis of whether the settlement substantially prevented or lessened competition, the Bureau would also determine whether earlier entry by GENERIC would have lowered prices paid by drug buyers. This would involve determining the likely price difference that would have prevailed between the BRAND's price of product A and GENERIC's price of product A. In addition, the Bureau would consider if other prospective suppliers of generics of product A had delivered NOAs or were likely to deliver NOAs in the near future and, if so, when they would likely enter the market. If there were other generic suppliers who had delivered NOAs and were involved in PMNOC litigation with BRAND, the Bureau would seek to determine whether BRAND was in the process of negotiating settlements with those generic suppliers and, if so, what terms and conditions were being considered.[70]

If the Bureau determined that the magnitude of the payment was so large that it likely had the effect of delaying entry, the competitive effects from GENERIC's delay were significant, and timely entry from other generic suppliers was not likely to occur on a scale and magnitude to sufficiently constrain the ability of BRAND and GENERIC to exercise market power in the relevant market, it would conclude that the settlement substantially prevented or lessened competition.

For the purpose of an analysis under section 90.1 of the Act, the Bureau will consider possible efficiency gains that may be realized through the settlement. When assessing potential efficiencies, the Bureau will consider factors such as the credibility of the claim, the link to the settlement, the likelihood of the benefits being achieved, and whether the benefits would or could not be obtained in the absence of the settlement.

Where the constituent elements of section 90.1 of the Act are met and where the efficiency exception is not satisfied, the Bureau may seek a remedy from the Tribunal to prohibit the settlement. Under section 90.1, the Tribunal may make an order prohibiting any person from doing anything under the settlement or requiring any person (with the consent of that person and the Bureau) to take any other action.

Example 14A: A Settlement beyond the Expiry Date of the Patent
Consider the same set of circumstances as in Example 13, but with the difference that GENERIC agrees to enter the market no earlier than two years after patent expiry.

Analysis

[70] The Bureau recognizes that in certain instances some documents will be covered by one or more claims of privilege.

In this case the settlement clearly goes beyond the expiry date of BRAND's patent rights. BRAND's patent expires in 10 years and the settlement prevents GENERIC entry within the next 12 years. The settlement provides BRAND with two more years of protection from competition from GENERIC than what BRAND's patent provides (assuming it is valid and infringed). In the absence of a legitimate justification, the Bureau would likely view the settlement as contravening subsection 45(1) of the Act as it reaches beyond the exclusionary potential of the patent and is a market allocation agreement where BRAND is providing a payment to GENERIC as compensation to stay out of a market after the patent expires.[71]

The Bureau would consider any evidence related to an ancillary restraints defence. In considering the defence under subsection 45(4) of the Act, the Bureau would examine whether (i) the restraint, in this case the payment from BRAND to GENERIC in return for the entry date, is ancillary to a broader or separate agreement that includes the same parties; (ii) the restraint is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement; and (iii) the broader or separate agreement, when considered in the absence of the restraint, does not contravene subsection 45(1). Without evidence that the restraint is reasonably necessary for giving effect to the broader settlement between BRAND and GENERIC, however, the ancillary restraints defence would not apply to the parties' settlement and the Bureau would refer the matter to the DPP for prosecution. If the DPP elected not to pursue prosecution, the Bureau could choose to re-evaluate whether the settlement should be subject to a remedy under the reviewable matters provisions of the Act.

Example 14B: A Settlement beyond the Product Scope of the Patent
Consider the same set of circumstances as in Example 13, but with the difference that, instead of offering a monetary payment, BRAND agrees to withdraw its product from another market where it is currently competing with a product supplied by GENERIC. The product that BRAND agrees to withdraw is not one that is subject to the PMNOC proceeding where the parties reached the settlement.

Analysis
This settlement would be viewed as extending beyond the product scope of BRAND's patent rights. The agreement allows BRAND to settle the PMNOC proceeding by agreeing to limit its competition with GENERIC in a pharmaceutical market that is unrelated to its patent at issue in the proceeding. In the absence of a legitimate justification, the Bureau would view the settlement as a market allocation agreement that may contravene subsection 45(1) of the Act and thus would investigate the settlement under section 45. The Bureau

[71] As mentioned in section 7.3.2 above, the Bureau may review conduct within the exclusionary potential of the patent (for example when there is a payment for delayed entry before the patent expires) under sections 90.1 or 79 of the Act.

would consider any evidence related to an ancillary restraints defence as described in example 14A.

Example 14C: "Sham" Agreement
Consider the same set of circumstances as in Example 13, but with the difference that, during the course of its investigation, the Bureau had reason to believe that both parties recognized that the patent was not valid but that BRAND nonetheless challenged GENERIC's NOA and the parties reached an agreement where BRAND provided a payment to GENERIC as compensation for it agreeing to delay its entry into the market.

Analysis
In this case, if the Bureau had initiated an investigation under section 90.1 of the Act, once it had reason to believe that the parties recognized that the patent was not valid and/or not infringed, it could proceed under section 45 of the Act. The Bureau would investigate whether the parties reached an agreement in contravention of subsection 45(1). An ancillary restraints defence would not be applicable because the settlement was not necessary for any broader or separate agreement. Accordingly, if the Bureau believed that there was a contravention of 45(1) it would likely refer the matter to the DPP for prosecution.

7.4 Collaborative Standard Setting and Standard Essential Patents
The following discussion and hypothetical examples in this subsection are designed to illustrate the analytical framework that would be applied by the Bureau in conducting its review of business conduct involving patents that are essential to collaboratively determined industry standards. The Bureau recognizes that competition enforcement policy in this area is undergoing rapid development. Given this, the Bureau may revisit certain aspects of the guidance in this subsection in the future in light of experience, changing circumstances and court decisions.

The two primary types of industry standards are interoperability standards, which ensure that products made by different manufacturers can interoperate, and performance standards, which set minimal requirements (e.g., performance or safety) for products in an industry. The Bureau recognizes that the development of standards through formal Standards Development Organizations ("SDOs") can provide many procompetitive benefits, such as lowering production costs, increasing efficiency and consumer choice, reducing barriers to entry, and fostering interoperability and innovation. However, the Bureau also recognizes that standards development can pose competition concerns, such as reducing price and/or non-price competition, foreclosing innovative technologies and restricting firms' ability to compete by denying access to the standard or providing access on discriminatory terms.

When patented technologies are incorporated into a standard, one particular competition concern is patent "hold-up". There may be many alternative technologies that could be chosen as a standard so that any given patentee may have limited market power before a standard is chosen. Once a standard is selected, however, irreversible investments may lock firms into the standard, making switching prohibitively costly or impractical. High switching costs may create market power for the owners of patents that cover the standard due to the inability of firms using the standard to easily substitute other technologies to avoid high royalties. One way that patent hold-up can occur is when the owner of a patented technology participating in the standardization process, in violation of SDO rules, fails to disclose its patent to an SDO and then later asserts that patent when access to its patented technology is required to implement the standard ("patent ambush"). This conduct may provide the patent owner with market power that is derived from its technology being necessary to access the standard rather than its *ex ante* value to buyers or licensees.

To reduce the potential for patent hold-up, some SDOs may adopt an IP policy that requires participants to disclose their patents that are essential to the standard that the SDO selects.[72] SDOs may also ask participants to identify their most restrictive licensing terms and conditions, including the maximum royalty rate that they would demand if access to their patents becomes necessary to implement the standard. The Bureau recognizes that SDO participants may rely on such commitments to facilitate bilateral licensing negotiations necessary for the successful adoption of the standard and to provide assurances to firms who wish to use the standard that they will be able to obtain access to the necessary patented technologies. The Bureau also recognizes that before a standard is chosen, SDOs may facilitate negotiations between participants who are potential licensees of the standard and IP owners of rival technologies. Such negotiations provide SDO participants important information that allows them to choose a standard based not only on technical merit, but also on the cost of accessing the IP needed to implement that standard.

In the circumstance that the Bureau were to review joint conduct involving SDO participants, if the Bureau determined that the arrangement was for the purpose of setting an industry standard and there was no evidence that it was for the purpose of facilitating an agreement prohibited under subsection 45(1), the Bureau review would proceed under section 90.1 according to the analytical framework described in the CCGs.

Even when an SDO promotes IP disclosure, patent hold-up can still arise if an owner of a patented technology makes an *ex ante* licensing commitment, such as an explicit maximum royalty rate, to encourage its technology to be incorporated into a standard and then later, if successful, abandons that commitment by charging a royalty higher than the maximum royalty it promised to charge ("reneging on a licensing commitment").[73] The concern in this

[72] References in the Guidelines to SDO "participants" is meant to also include SDO members.

[73] Often participants in SDOs make a commitment to license on fair, reasonable and non-discriminatory terms to all prospective licensees.

circumstance is that the patentee's licensing commitment may serve to provide assurance to the SDO and firms wishing to manufacture standard-compliant products that they would have access to the patentee's technology if it was incorporated into the standard. This assurance, in part, may motivate the SDO to include the patentee's technology in the standard, and/or encourage firms to make irreversible investments to develop standard-compliant products. These investments, together with high switching costs, create a setting in which a SDO participant can gain market power because its patent is necessary to access the standard rather than from its inherent *ex ante* value to buyers or licensees.[74]

Importantly, the Bureau is not a price regulator and will leave the determination of royalty rates to negotiations between parties or the courts. Absent a clear breach of a licensing commitment (e.g., demanding a royalty exceeding an *ex ante* commitment), it will not take enforcement action against a patentee solely based on the magnitude of the royalty that it charges. Similarly, the Bureau will not regulate the specific terms and conditions that a standard essential patentee may impose when seeking to license its patents. Such terms and conditions, however, may be reviewed under the general provisions of the Act if they have the potential to cause competitive harm (e.g., bundling non-essential with essential patents or imposing no-challenge clauses).

Another way that patent hold-up can arise in the context of standard setting is when a patentee makes a licensing commitment before its technology is adopted in a standard and then later seeks injunction orders against firms that are willing to license the technology on terms and conditions meeting the commitment. By seeking an injunction against firms that are "locked-in" to the standard and that face prohibitive costs to switch to alternative technologies, the patentee can "hold up" potential licensees and demand higher royalties than if it did not seek the injunction. The use of injunctions can be particularly problematic when the patentee's patented technologies comprise only a small part of the standard, but can nonetheless block a prospective licensee's ability to manufacture and sell standard-compliant products. Given the significant risk to its business, a prospective licensee that is threatened by an injunction may be compelled to pay a royalty rate greater than the patentee's *ex ante* commitment. Similar to the other cases involving patent hold-up described above, the Bureau's concern with the patentee's conduct is that it could increase the cost of accessing the standard for firms that wish to develop products that incorporate the standard and thereby reduce their incentive to innovate or otherwise produce products that use the standard. The patentee's conduct may result in foreclosure of companies making standard-compliant products. There is also concern that the increased cost of access will result in increased prices to consumers of standard-compliant products or that the conduct excludes alternative technologies that would have been considered for the standard. Finally, the Bureau would also have concerns

[74] The Bureau's competition concerns would be the same regardless of whether the firm reneging on the licensing commitment made the commitment itself or accepted the commitment when it acquired the patent.

that the conduct may weaken incentives for firms to participate in procompetitive standard-setting activity generally.

The Bureau recognizes that a firm's commitment to license on fair, reasonable and non-discriminatory ("FRAND") terms does not mean that it is committing to license on a royalty-free basis. Firms may make large investments in research and development and are entitled to seek royalties to recover the value of their investment. Potential licensees may seek to take advantage of FRAND commitments by "holding out" for a particular royalty or simply by not undertaking licensing negotiations in good faith. Because of this potential problem, in its inquiry to determine the underlying purpose for a patentee seeking an injunction (whether seeking the injunction was, or was part of, a practice of anti-competitive acts under paragraph 79(1)(b)), the Bureau would look for evidence to determine whether the potential licensee was willing to enter into negotiations and pay a FRAND rate. The Bureau accepts that in certain circumstances it may be appropriate for a firm that has made a FRAND licensing commitment to seek an injunction against an infringing party. Circumstances where the Bureau would conclude that the seeking of an injunction could be appropriate include: (i) when a prospective licensee refuses to pay a royalty that is determined to be FRAND by a court or arbitrator; (ii) when a prospective licensee refuses to engage in licensing negotiations; (iii) when a prospective licensee constructively refuses to negotiate (for example, by insisting on terms clearly outside the bounds of what could be considered to be FRAND terms) or (iv) when a prospective licensee has no ability to pay damages (for example, a firm that is in bankruptcy).

The Bureau would likely review conduct that could result in patent hold-up under section 79 of the Act. The Bureau is of the view that conduct such as patent ambush, reneging on a license commitment or seeking an injunction against willing licensees after making a licensing commitment is "something more" than the mere exercise of patent rights. Accordingly, the Bureau would not consider the exception in subsection 79(5) to apply, nor would it review the conduct under section 32 of the Act. The Bureau also recognizes that conduct that may result in patent hold-up could be addressed as a matter of contract law and will consider this possibility when exercising its enforcement discretion in a given case. In some situations, the competitive effects caused by the conduct may not be able to be sufficiently addressed by means other than competition law remedies. For example, parties that were not participants in the SDO may be foreclosed from the market.

In determining whether a patentee undertaking conduct that could result in patent hold-up is in a dominant position as required by section 79, the Bureau would seek to determine whether the patentee had market power in markets that include the standardized technology or markets that include products that implement the standard. In considering dominance, the Bureau would consider not only a patentee's pre-existing market power (i.e., any market power held by the patentee before the conduct), but also market power derived from the conduct.

In determining whether conduct that could result in patent hold-up has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Bureau would look to identify whether, but for the patentee's conduct, there would likely be substantially greater competition in the markets where it has a competitive concern. The Bureau would make these determinations while considering the standard-setting context, which may be characterized by irreversible investments and high switching costs. In particular, the Bureau would examine whether the patentee's conduct created, preserved or enhanced its market power in a market that uses the standardized technology. Central to this examination, the Bureau would look to identify any alternative technologies that the SDO could have turned to at the time the standard was being chosen. The Bureau would also look to identify any alternative technical standards or technologies that firms could turn to as a substitute for the SDO standard after it was chosen. If such alternatives exist, the Bureau would seek evidence on the magnitude of the switching costs that firms would face to switch to these alternatives. If alternative technologies would likely have been chosen as the SDO standard but for the patentee's conduct and if alternatives to the SDO standard did not exist, or if switching costs were prohibitively high, the Bureau would likely conclude that the patentee increased its market power in the market that includes the standardized technology.

The Bureau would also look to determine whether competition would be harmed in markets for products that implement the SDO standard. This analysis would determine whether consumers of standard-compliant products would likely pay higher prices due to manufacturers of these products facing increased costs of accessing the standard. The Bureau would seek evidence as to the effect that royalties had on standard-compliant product prices and the options that consumers could turn to if faced with an increase in these prices.

Example 15: Standards Development Organization with IP Disclosure Policy

A private SDO is selecting a technical standard to allow the interoperability of gizmos. Many of the alternative technologies that could be selected as the standard are proprietary and are patented by firms in the industry who are also participants in the SDO. Given this, the SDO has adopted an IP disclosure policy that requires all participants to disclose any patent rights, or pending patent rights, that they have that are essential to any of the technologies that the SDO is considering as a possible standard. Furthermore, in order for SDO participants to have assurance that patent rights do not block access to the standard, the SDO requires that participants also agree to license their patents on FRAND terms to all prospective licensees if access to their proprietary technology becomes necessary to implement the standard. For added certainty, SDO participants are encouraged to specify the most restrictive licensing terms and conditions they would demand, including the maximum royalty to license their technology. Identification of maximum royalties could aid the SDO in selecting a standard as it allows an assessment of the relative costs of the various technology options in addition to their technical merits.

Analysis

Given the situation described above, the Bureau would not view the SDO's IP policy as raising any issue under the Act.

In general, if the Bureau were to investigate SDO participants for conduct such as the exercise of buyer power among potential licensees, the foreclosure of innovative technologies or the restriction of access to the standard, it would proceed according to the process outlined in its CCGs. Accordingly, if the Bureau determined that a SDO arrangement was to set an industry standard and there was no evidence that the SDO was facilitating an agreement prohibited under subsection 45(1) (e.g., price fixing among IP owners or makers of products compliant to the standard), it would not investigate SDO participants under section 45. Rather, it would proceed, if at all, under section 90.1 according to the analytical framework described in the CCGs.

Example 16: Patent "Ambush"

Firm A is a manufacturer and seller of gizmos and is also a participant in the SDO described in Example 15. After the SDO selects a standard for gizmo interoperability and firms make investments to develop gizmos that conform to the standard, Firm A launches a series of patent infringement suits against gizmo manufacturers that have developed products incorporating the standard by asserting patents that it had not disclosed to the SDO but that it claims cover the gizmo interoperability standard. Firm A was aware of patents implicated by the standard that it was required to disclose pursuant to the SDO's policy, but it did not include the patents in its IP disclosure to the SDO. Nevertheless, Firm A wishes to be compensated for its research efforts and is seeking damages from firms who are using the standard without licensing the patents that it did not disclose. Gizmo manufacturers who have been targeted by Firm A have complained to the Bureau that Firm A's failure to disclose and subsequent infringement actions constitute anti-competitive behaviour.

Analysis

The Bureau would likely review Firm A's conduct under section 79 of the Act.

Given the scenario described, the Bureau's competitive concern would be that Firm A's conduct enhanced its market power beyond that which was inherent in its patents. The purpose of the IP disclosure policy was to provide the SDO with information so that a standard could be chosen, from the various technologies that were being considered, based on technical characteristics as well as cost. By not having full information on relevant patents, the SDO was prevented from undertaking a complete assessment of the potential relevant costs when it chose the standard. Once firms have made irreversible investments in products incorporating the standard, Firm A may have increased market power to charge supra-competitive royalties for its technology if it is costly for firms to abandon the standard and switch to alternative technologies. One concern with Firm A's conduct is that it will increase the cost of accessing the standard for rival firms who wish to develop gizmos that incorporate the standard and thereby reduce their incentive to innovate or produce products that use the standard. Firm A's conduct may result in foreclosure of rival gizmo manufacturers. There is also concern that the increased cost of access will result in increased prices to consumers of gizmos that incorporate the standard or that the conduct excludes alternative technologies that would have been considered for the standard. Finally, the Bureau would also have concerns that the conduct may weaken incentives for firms to participate in procompetitive standard-setting activity generally.

In identifying evidence to support the elements of section 79, the Bureau would look to define relevant product and geographic markets. Given the competitive concerns outlined above, the Bureau would define potentially relevant markets that include the technology designated as the standard as well as gizmos and any other products that use the standard.

In determining whether Firm A's conduct was an anti-competitive act, the Bureau would consider any legitimate business justification that Firm A may advance for its conduct. Absent a legitimate business justification, the Bureau would likely infer from the reasonable, foreseeable consequence of Firm A's conduct that it was for the purpose of having an intended negative effect on competitors (firms with technologies that are substitutes for Firm A patented technologies or rivals of Firm A that develop gizmos incorporating the standard) that was predatory, disciplinary or exclusionary.

The Bureau would take the view that Firm A's conduct of not disclosing certain patents in accordance with the SDO IP disclosure policy and then asserting them against firms developing products incorporating the standard is "something more" than the mere exercise of its patent rights. Accordingly, the Bureau would not consider the exception in subsection 79(5) to apply, nor would it review the matter under section 32 of the Act.

In determining whether Firm A's conduct has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Bureau would look to identify whether, but for Firm A's conduct, there would likely be substantially greater competition in the markets where it has a competitive concern. The Bureau would make these determinations while considering the standard-setting context, which may be characterized by irreversible investments and high switching costs. In particular, the Bureau would examine whether Firm A's conduct created, preserved or enhanced its market power in a market that uses the standardized technology. Central to this examination, the Bureau would look to identify any alternative technologies that the SDO could have turned to at the time the standard was being chosen. The Bureau would also look to identify any alternative technical standards or technologies that gizmo producers could turn to as a substitute for the SDO standard after it was chosen. If such alternatives existed, the Bureau would seek evidence on the magnitude of the switching costs that gizmo producers would face to switch to these alternatives. If alternative technologies would likely have been chosen as the SDO standard but for the patentee's conduct and if alternatives to the SDO standard did not exist, or if switching costs were prohibitively high, the Bureau would likely conclude that Firm A increased its market power in the market that includes the standardized technology.

The Bureau would also look to determine whether competition would be harmed in the market for gizmos that implement the standard. This analysis would determine whether consumers of gizmos would likely pay higher prices due to manufacturers of standard-compliant gizmos facing increased costs of accessing the standard. The Bureau would seek evidence as to the effect that royalties had on gizmo prices and the options that consumers could turn to if faced with an increase in gizmo prices.

If the Bureau concluded that the constituent elements of subsection 79(1) of the Act were met, it would likely seek to negotiate a remedy with Firm A, and failing that, bring an application to the Tribunal.

Example 17: Reneging on a Licensing Commitment
Firm B is a manufacturer and seller of gizmos and is also a participant in the SDO described in Example 15. Firm B has disclosed its relevant patents to the SDO as well as its most restrictive licensing terms, including a commitment to a maximum royalty rate it will seek from prospective licensees if its technology is incorporated into the standard. Given participants' IP disclosures, the SDO chooses a standard that incorporates Firm B's technology and gizmo manufacturers make irreversible investments to develop gizmos conforming to the standard. Subsequently, gizmo producers who have developed products conforming to the standard complain to the Bureau that Firm B is abusing its dominant position by demanding a royalty rate in excess of the maximum it committed to in its promise to the SDO.

Analysis
The Bureau would likely review Firm B's conduct under section 79 of the Act.

As in Example 16, the Bureau's competitive concern would be that Firm B's conduct enhanced its market power beyond that which was inherent in its patents. By misleading the SDO in regard to the maximum royalty it would charge to license its patents, Firm B led the SDO to select a standard with inaccurate information as to the cost that firms would face to access that standard, which may have impacted the SDO's decision as to the technology to adopt as the standard and/or firms' decisions to invest in developing products incorporating the standard. Once implementers of the standard made irreversible investments to develop products incorporating the standard, Firm B gained increased market power and is able to charge supra-competitive royalties for its technology provided that it is costly for firms to abandon the standard and switch to alternative technologies.

The analysis of the elements of section 79 would be similar to that described in Example 16. In particular, in evaluating the purpose of Firm B's conduct to determine whether it constituted a practice of anti-competitive acts, the Bureau would consider whether there was a legitimate business justification for Firm B's seeking a royalty exceeding its maximum commitment. Importantly, as noted in the Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions*,[75] proof of the existence of some legitimate business purpose underlying the conduct, such as an increased incentive for innovation, is not sufficient. The Bureau would consider a legitimate business justification as a credible efficiency or pro-competitive rationale for the conduct, attributable to Firm B, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts. When assessing the overriding purpose of Firm B's reneging on its licensing commitment, the Bureau would examine the credibility of any efficiency or pro-competitive claims raised by Firm B, their link to the abandonment of its licensing commitment, and the likelihood of these claims being achieved.

The Bureau would view Firm B's conduct of committing to a maximum royalty and then subsequently reneging on that commitment as "something more" than the mere exercise of its patent rights. Accordingly, the Bureau would not consider the exception in subsection 79(5) to apply, nor would it review the matter under section 32.

If the Bureau concluded that the constituent elements of subsection 79(1) of the Act were met, it could seek to negotiate a remedy with Firm B and failing that, bring an application to the Tribunal. If there was private litigation involving Firm B and participants from the SDO due to Firm B's reneging on its royalty commitment, the Bureau would use its enforcement discretion and may forbear from bringing an application to the Tribunal if it determined that the remedies from the private litigation would adequately resolve its competition concerns.

Example 18: Seeking an Injunction after Making a Licensing Commitment
Consider a scenario similar to Example 17, but where Firm C (a manufacturer and seller of gizmos) makes a FRAND licensing commitment according to the SDO policy and the SDO ultimately adopts a standard for which Firm C's patented technology is essential. Subsequently, however, Firm C faces difficulties in reaching agreement with willing licensees on terms and conditions for licensing, including acceptable royalties. To protect the patents that it views

[75] *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, September 2012. Available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html.

as being used without adequate compensation, Firm C seeks injunction orders against several firms that have made investments to develop and sell competing gizmos that implement the standard. The Bureau receives complaints that Firm C is abusing its dominant position by seeking injunctions when it had committed to license its patents on FRAND terms.

Analysis

The Bureau would likely review Firm C's conduct under section 79 of the Act.

The Bureau's competitive concern would be that Firm C's licensing commitment served to provide assurance to the SDO and other gizmo manufacturers that they would have access to the standard if they incorporated Firm C's technology. This commitment, in part, motivated the SDO to include Firm C's technology in the standard, and/or encourage firms to make irreversible investments to develop gizmos based on the standard. By seeking an injunction against firms that are "locked in" to the standard and that face prohibitive costs to switch to alternative technologies, Firm C can "hold up" potential licensees and demand higher royalties than if it did not seek the injunction. The use of injunctions can be particularly problematic when Firm C's patented technologies comprise only a small part of the standard but can nonetheless block a prospective licensee's ability to manufacture and sell gizmos. Given the significant risk to its business, a prospective licensee that is threatened by an injunction may be compelled to pay a non-FRAND royalty rate. The Bureau's concern with Firm C's conduct is similar to the concern with Firm A's conduct in Example 16.

The Bureau would take the view that by making a FRAND licensing commitment and then seeking an injunction against willing licensees of its technology, Firm C is engaging in "something more" than the mere exercise of its patent rights. Accordingly, the Bureau would not consider the exception in subsection 79(5) to apply, nor would it review the matter under section 32 of the Act.

The Bureau recognizes that a firm's commitment to license on FRAND terms does not mean that it is committing to license on a royalty-free basis. Firms may make large investments in research and development and are entitled to seek royalties to recover the value of their investment. Potential licensees may seek to take advantage of FRAND commitments by "holding out" for a particular royalty or simply by not undertaking licensing negotiations in good faith. Because of this potential problem, in its inquiry to determine the underlying purpose for Firm C seeking the injunction (whether seeking the injunction was, or was part of, a practice of anti-competitive acts under paragraph 79(1)(b)), the Bureau would examine any legitimate business justification and look for evidence to determine whether the potential licensee was willing to enter into negotiations and pay a FRAND rate. The Bureau accepts that in certain circumstances it may be appropriate for a firm that has made a FRAND licensing commitment to seek an injunction against an infringing party. Circumstances where the Bureau would conclude that the seeking of an injunction could be appropriate include: (i) when a prospective licensee refuses to pay a royalty that is determined to be FRAND by a court or arbitrator; (ii) when a prospective licensee refuses to engage in licensing negotiations; (iii) when a prospective licensee constructively refuses to negotiate (for example, by insisting on terms clearly outside the bounds of what could be considered to be FRAND terms) or (iv) when a prospective licensee has no ability to pay damages (for example, a firm that is in bankruptcy).

In determining whether Firm C's conduct of making a licensing commitment and seeking an injunction has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Bureau would look to identify whether, but for Firm C's conduct, there would likely be substantially greater competition in the markets where it has a competitive concern. This analysis would be similar to that described in Example 16.

If the Bureau concluded that the constituent elements of section 79(1) of the Act were met, it would likely seek to negotiate a remedy with Firm C and failing that, bring an application to the Tribunal.

How to Contact the Bureau

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, the *Precious Metals Marking Act* or the Bureau's program of written opinions, or to file a complaint under any of these Acts should contact the Bureau's Information Centre:

Website
www.competitionbureau.gc.ca

Address
Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec
K1A 0C9

Telephone
Toll free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired): 1-800-642-3844

Facsimile
819-997-0324

Tab 9

Antitrust Guidelines for the Licensing of Intellectual Property

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Issued by the
U.S. Department of Justice[*]
and the
Federal Trade Commission

April 6, 1995

[*] These Guidelines supersede section 3.6 in Part I, "Intellectual Property Licensing Arrangements," and cases 6, 10, 11, and 12 in Part II of the U.S. Department of Justice 1988 Antitrust Enforcement Guidelines for International Operations.

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1. Intellectual property protection and the antitrust laws

1.0 These Guidelines state the antitrust enforcement policy of the U.S. Department of Justice and the Federal Trade Commission (individually, "the Agency," and collectively, "the Agencies") with respect to the licensing of intellectual property protected by patent, copyright, and trade secret law, and of know-how.[1] By stating their general policy, the Agencies hope to assist those who need to predict whether the Agencies will challenge a practice as anticompetitive. However, these Guidelines cannot remove judgment and discretion in antitrust law enforcement. Moreover, the standards set forth in these Guidelines must be applied in unforeseeable circumstances. Each case will be evaluated in light of its own facts, and these Guidelines will be applied reasonably and flexibly.[2]

In the United States, patents confer rights to exclude others from making, using, or selling in the United States the invention claimed by the patent for a period of seventeen years from the date of issue.[3] To gain patent protection, an invention (which may be a product, process, machine, or composition of matter) must be novel, nonobvious, and useful. Copyright protection applies to original works of authorship embodied in a tangible medium of expression.[4] A copyright protects only the expression, not the underlying

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[1] These Guidelines do not cover the antitrust treatment of trademarks. Although the same general antitrust principles that apply to other forms of intellectual property apply to trademarks as well, these Guidelines deal with technology transfer and innovation-related issues that typically arise with respect to patents, copyrights, trade secrets, and know-how agreements, rather than with product-differentiation issues that typically arise with respect to trademarks.

[2] As is the case with all guidelines, users should rely on qualified counsel to assist them in evaluating the antitrust risk associated with any contemplated transaction or activity. No set of guidelines can possibly indicate how the Agencies will assess the particular facts of every case. Parties who wish to know the Agencies' specific enforcement intentions with respect to any particular transaction should consider seeking a Department of Justice business review letter pursuant to 28 C.F.R. § 50.6 or a Federal Trade Commission Advisory Opinion pursuant to 16 C.F.R. §§ 1.1–1.4.

[3] *See* 35 U.S.C. § 154 (1988). Section 532(a) of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4983 (1994) would change the length of patent protection to a term beginning on the date at which the patent issues and ending twenty years from the date on which the application for the patent was filed.

[4] *See* 17 U.S.C. § 102 (1988 & Supp. V 1993). Copyright protection lasts for the author's life plus 50 years, or 75 years from first publication (or 100 years from creation, whichever expires first) for works made for hire. *See* 17 U.S.C. § 302 (1988). The principles stated in these Guidelines also apply to protection of mask works fixed in a semiconductor chip product (*see* 17 U.S.C. § 901 *et seq.* (1988)), which is analogous to copyright protection for works of authorship.

ideas.[5] Unlike a patent, which protects an invention not only from copying but also from independent creation, a copyright does not preclude others from independently creating similar expression. Trade secret protection applies to information whose economic value depends on its not being generally known.[6] Trade secret protection is conditioned upon efforts to maintain secrecy and has no fixed term. As with copyright protection, trade secret protection does not preclude independent creation by others.

The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.[7] The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.

2. General principles

2.0 These Guidelines embody three general principles: (a) for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property; (b) the Agencies do not presume that intellectual property creates market power in the antitrust context; and (c) the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive.

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[5] *See* 17 U.S.C. § 102(b) (1988).

[6] Trade secret protection derives from state law. *See generally Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

[7] "[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition." *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990).

2.1 Standard antitrust analysis applies to intellectual property

The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property. That is not to say that intellectual property is in all respects the same as any other form of property. Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles.[8]

Although there are clear and important differences in the purpose, extent, and duration of protection provided under the intellectual property regimes of patent, copyright, and trade secret, the governing antitrust principles are the same. Antitrust analysis takes differences among these forms of intellectual property into account in evaluating the specific market circumstances in which transactions occur, just as it does with other particular market circumstances.

Intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. An intellectual property owner's rights to exclude are similar to the rights enjoyed by owners of other forms of private property. As with other forms of private property, certain types of conduct with respect to intellectual property may have anticompetitive effects against which the antitrust laws can and do protect. Intellectual property is thus neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them.

The Agencies recognize that the licensing of intellectual property is often international. The principles of antitrust analysis described in these Guidelines apply equally to domestic and international licensing arrangements. However, as described in the 1995 Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations, considerations particular to international operations, such as jurisdiction and comity, may affect enforcement decisions when the arrangement is in an international context.

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[8] As with other forms of property, the power to exclude others from the use of intellectual property may vary substantially, depending on the nature of the property and its status under federal or state law. The greater or lesser legal power of an owner to exclude others is also taken into account by standard antitrust analysis.

2.2 Intellectual property and market power

Market power is the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time.[9] The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the *specific* product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.[10] If a patent or other form of intellectual property does confer market power, that market power does not by itself offend the antitrust laws. As with any other tangible or intangible asset that enables its owner to obtain significant supracompetitive profits, market power (or even a monopoly) that is solely "a consequence of a superior product, business acumen, or historic accident" does not violate the antitrust laws.[11] Nor does such market power impose on the intellectual property owner an obligation to license the use of that property to others. As in other antitrust contexts, however, market power could be illegally acquired or maintained, or, even if lawfully acquired and maintained, would be relevant to the ability of an intellectual property owner to harm competition through unreasonable conduct in connection with such property.

2.3 Procompetitive benefits of licensing

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[9] Market power can be exercised in other economic dimensions, such as quality, service, and the development of new or improved goods and processes. It is assumed in this definition that all competitive dimensions are held constant except the ones in which market power is being exercised; that a seller is able to charge higher prices for a higher-quality product does not alone indicate market power. The definition in the text is stated in terms of a seller with market power. A buyer could also exercise market power (e.g., by maintaining the price below the competitive level, thereby depressing output).

[10] The Agencies note that the law is unclear on this issue. *Compare Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (expressing the view in dictum that if a product is protected by a patent, "it is fair to presume that the inability to buy the product elsewhere gives the seller market power") *with id.* at 37 n.7 (O'Connor, J., concurring) ("[A] patent holder has no market power in any relevant sense if there are close substitutes for the patented product."). *Compare also Abbott Laboratories v. Brennan*, 952 F.2d 1346, 1354–55 (Fed. Cir. 1991) (no presumption of market power from intellectual property right), *cert. denied*, 112 S. Ct. 2993 (1992) *with Digidyne Corp. v. Data General Corp.,* 734 F.2d 1336, 1341–42 (9th Cir. 1984) (requisite economic power is presumed from copyright), *cert. denied,* 473 U.S. 908 (1985).

[11] *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *see also United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (Sherman Act is not violated by the attainment of market power solely through "superior skill, foresight and industry").

Intellectual property typically is one component among many in a production process and derives value from its combination with complementary factors. Complementary factors of production include manufacturing and distribution facilities, workforces, and other items of intellectual property. The owner of intellectual property has to arrange for its combination with other necessary factors to realize its commercial value. Often, the owner finds it most efficient to contract with others for these factors, to sell rights to the intellectual property, or to enter into a joint venture arrangement for its development, rather than supplying these complementary factors itself.

Licensing, cross-licensing, or otherwise transferring intellectual property (hereinafter "licensing") can facilitate integration of the licensed property with complementary factors of production. This integration can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. Such arrangements increase the value of intellectual property to consumers and to the developers of the technology. By potentially increasing the expected returns from intellectual property, licensing also can increase the incentive for its creation and thus promote greater investment in research and development.

Sometimes the use of one item of intellectual property requires access to another. An item of intellectual property "blocks" another when the second cannot be practiced without using the first. For example, an improvement on a patented machine can be blocked by the patent on the machine. Licensing may promote the coordinated development of technologies that are in a blocking relationship.

Field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free-riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example, by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself. These benefits of licensing restrictions apply to patent, copyright, and trade secret licenses, and to know-how agreements.

Example 1[12]

Situation: ComputerCo develops a new, copyrighted software program for inventory management. The program has wide application in the health field. ComputerCo licenses the program in an arrangement that imposes both field of use and territorial limitations. Some of ComputerCo's licenses permit use only in hospitals; others permit use only in group medical practices. ComputerCo charges different royalties for the different uses. All of ComputerCo's licenses permit use only in specified portions of the United States and in specified foreign countries.[13] The licenses contain no provisions that would prevent or discourage licensees from developing, using, or selling any other program, or from competing in any other good or service other than in the use of the licensed program. None of the licensees are actual or likely potential competitors of ComputerCo in the sale of inventory management programs.

Discussion: The key competitive issue raised by the licensing arrangement is whether it harms competition among entities that would have been actual or likely potential competitors in the absence of the arrangement. Such harm could occur if, for example, the licenses anticompetitively foreclose access to competing technologies (in this case, most likely competing computer programs), prevent licensees from developing their own competing technologies (again, in this case, most likely computer programs), or facilitate market allocation or price-fixing for any product or service supplied by the licensees. (*See* section 3.1.) If the license agreements contained such provisions, the Agency evaluating the arrangement would analyze its likely competitive effects as described in parts 3–5 of these Guidelines. In this hypothetical, there are no such provisions and thus the arrangement is merely a subdivision of the licensor's intellectual property among different fields of use and territories. The licensing arrangement does not appear likely to harm competition among entities that would have been actual or likely potential competitors if ComputerCo had chosen not to license the software program. The Agency therefore would be unlikely to object to this arrangement. Based on these facts, the result of the antitrust analysis would be the same whether the technology was protected by patent, copyright, or trade secret. The Agency's conclusion as to likely competitive effects could differ if, for example, the license barred licensees from using any other inventory management program.

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[12] The examples in these Guidelines are hypothetical and do not represent judgments about, or analysis of, any actual market circumstances of the named industries.

[13] These Guidelines do not address the possible application of the antitrust laws of other countries to restraints such as territorial restrictions in international licensing arrangements.

3. Antitrust concerns and modes of analysis

3.1 Nature of the concerns

While intellectual property licensing arrangements are typically welfare-enhancing and procompetitive, antitrust concerns may nonetheless arise. For example, a licensing arrangement could include restraints that adversely affect competition in goods markets by dividing the markets among firms that would have competed using different technologies. *See, e.g.*, Example 7. An arrangement that effectively merges the research and development activities of two of only a few entities that could plausibly engage in research and development in the relevant field might harm competition for development of new goods and services. *See* section 3.2.3. An acquisition of intellectual property may lessen competition in a relevant antitrust market. *See* section 5.7. The Agencies will focus on the actual effects of an arrangement, not on its formal terms.

The Agencies will not require the owner of intellectual property to create competition in its own technology. However, antitrust concerns may arise when a licensing arrangement harms competition among entities that would have been actual or likely potential competitors[14] in a relevant market in the absence of the license (entities in a "horizontal relationship"). A restraint in a licensing arrangement may harm such competition, for example, if it facilitates market division or price-fixing. In addition, license restrictions with respect to one market may harm such competition in another market by anticompetitively foreclosing access to, or significantly raising the price of, an important input,[15] or by facilitating coordination to increase price or reduce output. When it appears that such competition may be adversely affected, the Agencies will follow the analysis set forth below. *See generally* sections 3.4 and 4.2.

3.2 Markets affected by licensing arrangements

Licensing arrangements raise concerns under the antitrust laws if they are likely to affect adversely the prices, quantities, qualities, or varieties of goods and services[16] either currently or potentially available. The competitive effects of licensing arrangements often can be

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[14] A firm will be treated as a likely potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the licensing arrangement.

[15] As used herein, "input" includes outlets for distribution and sales, as well as factors of production. *See, e.g.*, sections 4.1.1 and 5.3–5.5 for further discussion of conditions under which foreclosing access to, or raising the price of, an input may harm competition in a relevant market.

[16] Hereinafter, the term "goods" also includes services.

adequately assessed within the relevant markets for the goods affected by the arrangements. In such instances, the Agencies will delineate and analyze only goods markets. In other cases, however, the analysis may require the delineation of markets for technology or markets for research and development (innovation markets).

3.2.1 Goods markets

A number of different goods markets may be relevant to evaluating the effects of a licensing arrangement. A restraint in a licensing arrangement may have competitive effects in markets for final or intermediate goods made using the intellectual property, or it may have effects upstream, in markets for goods that are used as inputs, along with the intellectual property, to the production of other goods. In general, for goods markets affected by a licensing arrangement, the Agencies will approach the delineation of relevant market and the measurement of market share in the intellectual property area as in section 1 of the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines.[17]

3.2.2 Technology markets

Technology markets consist of the intellectual property that is licensed (the "licensed technology") and its close substitutes—that is, the technologies or goods that are close enough substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed.[18] When rights to intellectual property are marketed separately from the products in which they are used,[19] the Agencies may rely on technology markets to analyze the competitive effects of a licensing arrangement.

Example 2

Situation: Firms Alpha and Beta independently develop different patented process technologies

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[17] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (April 2, 1992) (hereinafter "1992 Horizontal Merger Guidelines"). As stated in section 1.41 of the 1992 Horizontal Merger Guidelines, market shares for goods markets "can be expressed either in dollar terms through measurement of sales, shipments, or production, or in physical terms through measurement of sales, shipments, production, capacity or reserves."

[18] For example, the owner of a process for producing a particular good may be constrained in its conduct with respect to that process not only by other processes for making that good, but also by other goods that compete with the downstream good and by the processes used to produce those other goods.

[19] Intellectual property is often licensed, sold, or transferred as an integral part of a marketed good. An example is a patented product marketed with an implied license permitting its use. In such circumstances, there is no need for a separate analysis of technology markets to capture relevant competitive effects.

to manufacture the same off-patent drug for the treatment of a particular disease. Before the firms use their technologies internally or license them to third parties, they announce plans jointly to manufacture the drug, and to assign their manufacturing processes to the new manufacturing venture. Many firms are capable of using and have the incentive to use the licensed technologies to manufacture and distribute the drug; thus, the market for drug manufacturing and distribution is competitive. One of the Agencies is evaluating the likely competitive effects of the planned venture.

Discussion: The Agency would analyze the competitive effects of the proposed joint venture by first defining the relevant markets in which competition may be affected and then evaluating the likely competitive effects of the joint venture in the identified markets. (*See* Example 4 for a discussion of the Agencies' approach to joint venture analysis.) In this example, the structural effect of the joint venture in the relevant goods market for the manufacture and distribution of the drug is unlikely to be significant, because many firms in addition to the joint venture compete in that market. The joint venture might, however, increase the prices of the drug produced using Alpha's or Beta's technology by reducing competition in the relevant market for technology to manufacture the drug.

The Agency would delineate a technology market in which to evaluate likely competitive effects of the proposed joint venture. The Agency would identify other technologies that can be used to make the drug with levels of effectiveness and cost per dose comparable to that of the technologies owned by Alpha and Beta. In addition, the Agency would consider the extent to which competition from other drugs that are substitutes for the drug produced using Alpha's or Beta's technology would limit the ability of a hypothetical monopolist that owned both Alpha's and Beta's technology to raise its price.

To identify a technology's close substitutes and thus to delineate the relevant technology market, the Agencies will, if the data permit, identify the smallest group of technologies and goods over which a hypothetical monopolist of those technologies and goods likely would exercise market power—for example, by imposing a small but significant and nontransitory price increase.[20] The Agencies recognize that technology often is licensed in ways that are not readily quantifiable in monetary terms.[21] In such

[20] This is conceptually analogous to the analytical approach to goods markets under the 1992 Horizontal Merger Guidelines. *Cf.* § 1.11. Of course, market power also can be exercised in other dimensions, such as quality, and these dimensions also may be relevant to the definition and analysis of technology markets.

[21] For example, technology may be licensed royalty-free in exchange for the right to use other technology, or it may be licensed as part of a package license.

circumstances, the Agencies will delineate the relevant market by identifying other technologies and goods which buyers would substitute at a cost comparable to that of using the licensed technology.

In assessing the competitive significance of current and likely potential participants in a technology market, the Agencies will take into account all relevant evidence. When market share data are available and accurately reflect the competitive significance of market participants, the Agencies will include market share data in this assessment. The Agencies also will seek evidence of buyers' and market participants' assessments of the competitive significance of technology market participants. Such evidence is particularly important when market share data are unavailable, or do not accurately represent the competitive significance of market participants. When market share data or other indicia of market power are not available, and it appears that competing technologies are comparably efficient,[22] the Agencies will assign each technology the same market share. For new technologies, the Agencies generally will use the best available information to estimate market acceptance over a two-year period, beginning with commercial introduction.

3.2.3 Research and development: innovation markets

If a licensing arrangement may adversely affect competition to develop new or improved goods or processes, the Agencies will analyze such an impact either as a separate competitive effect in relevant goods or technology markets, or as a competitive effect in a separate innovation market. A licensing arrangement may have competitive effects on innovation that cannot be adequately addressed through the analysis of goods or technology markets. For example, the arrangement may affect the development of goods that do not yet exist.[23] Alternatively, the arrangement may affect the development of new or improved

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[22] The Agencies will regard two technologies as "comparably efficient" if they can be used to produce close substitutes at comparable costs.

[23] *E.g.*, *Sensormatic*, FTC Inv. No. 941-0126, 60 Fed. Reg. 5428 (accepted for comment Dec. 28, 1994); *Wright Medical Technology, Inc.*, FTC Inv. No. 951-0015, 60 Fed. Reg. 460 (accepted for comment Dec. 8, 1994); *American Home Products*, FTC Inv. No. 941-0116, 59 Fed. Reg. 60,807 (accepted for comment Nov. 28, 1994); *Roche Holdings Ltd.*, 113 F.T.C. 1086 (1990); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *appeal dismissed sub nom. City of New York v. United States,* 397 U.S. 248 (1970), *modified sub nom. United States v. Motor Vehicles Mfrs. Ass'n*, 1982–83 Trade Cas. (CCH) ¶ 65,088 (C.D. Cal. 1982).

goods or processes in geographic markets where there is no actual or likely potential competition in the relevant goods.[24]

An innovation market consists of the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development. The close substitutes are research and development efforts, technologies, and goods[25] that significantly constrain the exercise of market power with respect to the relevant research and development, for example by limiting the ability and incentive of a hypothetical monopolist to retard the pace of research and development. The Agencies will delineate an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.

In assessing the competitive significance of current and likely potential participants in an innovation market, the Agencies will take into account all relevant evidence. When market share data are available and accurately reflect the competitive significance of market participants, the Agencies will include market share data in this assessment. The Agencies also will seek evidence of buyers' and market participants' assessments of the competitive significance of innovation market participants. Such evidence is particularly important when market share data are unavailable or do not accurately represent the competitive significance of market participants. The Agencies may base the market shares of participants in an innovation market on their shares of identifiable assets or characteristics upon which innovation depends, on shares of research and development expenditures, or on shares of a related product. When entities have comparable capabilities and incentives to pursue research and development that is a close substitute for the research and development activities of the parties to a licensing arrangement, the Agencies may assign equal market shares to such entities.

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[24] *See* Complaint, *United States v. General Motors Corp.*, Civ. No. 93-530 (D. Del., filed Nov. 16, 1993).

[25] For example, the licensor of research and development may be constrained in its conduct not only by competing research and development efforts but also by other existing goods that would compete with the goods under development.

Example 3

Situation: Two companies that specialize in advanced metallurgy agree to cross-license future patents relating to the development of a new component for aircraft jet turbines. Innovation in the development of the component requires the capability to work with very high tensile strength materials for jet turbines. Aspects of the licensing arrangement raise the possibility that competition in research and development of this and related components will be lessened. One of the Agencies is considering whether to define an innovation market in which to evaluate the competitive effects of the arrangement.

Discussion: If the firms that have the capability and incentive to work with very high tensile strength materials for jet turbines can be reasonably identified, the Agency will consider defining a relevant innovation market for development of the new component. If the number of firms with the required capability and incentive to engage in research and development of very high tensile strength materials for aircraft jet turbines is small, the Agency may employ the concept of an innovation market to analyze the likely competitive effects of the arrangement in that market, or as an aid in analyzing competitive effects in technology or goods markets. The Agency would perform its analysis as described in parts 3–5.

If the number of firms with the required capability and incentive is large (either because there are a large number of such firms in the jet turbine industry, or because there are many firms in other industries with the required capability and incentive), then the Agency will conclude that the innovation market is competitive. Under these circumstances, it is unlikely that any single firm or plausible aggregation of firms could acquire a large enough share of the assets necessary for innovation to have an adverse impact on competition.

If the Agency cannot reasonably identify the firms with the required capability and incentive, it will not attempt to define an innovation market.

Example 4

Situation: Three of the largest producers of a plastic used in disposable bottles plan to engage in joint research and development to produce a new type of plastic that is rapidly biodegradable. The joint venture will grant to its partners (but to no one else) licenses to all patent rights and use of know-how. One of the Agencies is evaluating the likely competitive effects of the proposed joint venture.

Discussion: The Agency would analyze the proposed research and development joint venture using an analysis similar to that applied to other joint ventures.[26] The Agency would begin by defining the relevant markets in which to analyze the joint venture's likely competitive effects.

[26] *See, e.g.*, U.S. Department of Justice and Federal Trade Commission, Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust 20–23, 37–40, 72–74 (September 27, 1994). This type of transaction may qualify for treatment under the National Cooperative Research and Production Act of 1993, 15 U.S.C.A §§ 4301–05.

In this case, a relevant market is an innovation market—research and development for biodegradable (and other environmentally friendly) containers. The Agency would seek to identify any other entities that would be actual or likely potential competitors with the joint venture in that relevant market. This would include those firms that have the capability and incentive to undertake research and development closely substitutable for the research and development proposed to be undertaken by the joint venture, taking into account such firms' existing technologies and technologies under development, R&D facilities, and other relevant assets and business circumstances. Firms possessing such capabilities and incentives would be included in the research and development market even if they are not competitors in relevant markets for related goods, such as the plastics currently produced by the joint venturers, although competitors in existing goods markets may often also compete in related innovation markets.

Having defined a relevant innovation market, the Agency would assess whether the joint venture is likely to have anticompetitive effects in that market. A starting point in this analysis is the degree of concentration in the relevant market and the market shares of the parties to the joint venture. If, in addition to the parties to the joint venture (taken collectively), there are at least four other independently controlled entities that possess comparable capabilities and incentives to undertake research and development of biodegradable plastics, or other products that would be close substitutes for such new plastics, the joint venture ordinarily would be unlikely to adversely affect competition in the relevant innovation market (*cf.* section 4.3). If there are fewer than four other independently controlled entities with similar capabilities and incentives, the Agency would consider whether the joint venture would give the parties to the joint venture an incentive and ability collectively to reduce investment in, or otherwise to retard the pace or scope of, research and development efforts. If the joint venture creates a significant risk of anticompetitive effects in the innovation market, the Agency would proceed to consider efficiency justifications for the venture, such as the potential for combining complementary R&D assets in such a way as to make successful innovation more likely, or to bring it about sooner, or to achieve cost reductions in research and development.

The Agency would also assess the likelihood that the joint venture would adversely affect competition in other relevant markets, including markets for products produced by the parties to the joint venture. The risk of such adverse competitive effects would be increased to the extent that, for example, the joint venture facilitates the exchange among the parties of competitively sensitive information relating to goods markets in which the parties currently compete or facilitates the coordination of competitive activities in such markets. The Agency would examine whether the joint venture imposes collateral restraints that might significantly restrict competition among the joint venturers in goods markets, and would examine whether such collateral restraints were reasonably necessary to achieve any efficiencies that are likely to be attained by the venture.

3.3 Horizontal and vertical relationships

As with other property transfers, antitrust analysis of intellectual property licensing arrangements examines whether the relationship among the parties to the arrangement is primarily horizontal or vertical in nature, or whether it has substantial aspects of both. A licensing arrangement has a vertical component when it affects activities that are in a complementary relationship, as is typically the case in a licensing arrangement. For example, the licensor's primary line of business may be in research and development, and the licensees, as manufacturers, may be buying the rights to use technology developed by the licensor. Alternatively, the licensor may be a component manufacturer owning intellectual property rights in a product that the licensee manufactures by combining the component with other inputs, or the licensor may manufacture the product, and the licensees may operate primarily in distribution and marketing.

In addition to this vertical component, the licensor and its licensees may also have a horizontal relationship. For analytical purposes, the Agencies ordinarily will treat a relationship between a licensor and its licensees, or between licensees, as horizontal when they would have been actual or likely potential competitors in a relevant market in the absence of the license.

The existence of a horizontal relationship between a licensor and its licensees does not, in itself, indicate that the arrangement is anticompetitive. Identification of such relationships is merely an aid in determining whether there may be anticompetitive effects arising from a licensing arrangement. Such a relationship need not give rise to an anticompetitive effect, nor does a purely vertical relationship assure that there are no anticompetitive effects.

The following examples illustrate different competitive relationships among a licensor and its licensees.

Example 5

Situation: AgCo, a manufacturer of farm equipment, develops a new, patented emission control technology for its tractor engines and licenses it to FarmCo, another farm equipment manufacturer. AgCo's emission control technology is far superior to the technology currently owned and used by FarmCo, so much so that FarmCo's technology does not significantly constrain the prices that AgCo could charge for its technology. AgCo's emission control patent has a broad scope. It is likely that any improved emissions control technology that FarmCo could develop in the foreseeable future would infringe AgCo's patent.

Discussion: Because FarmCo's emission control technology does not significantly constrain AgCo's competitive conduct with respect to its emission control technology, AgCo's and FarmCo's emission control technologies are not close substitutes for each other. FarmCo is a consumer of AgCo's technology and is not an actual competitor of AgCo in the relevant market for superior emission control technology of the kind licensed by AgCo. Furthermore, FarmCo is not a likely potential competitor of AgCo in the relevant market because, even if FarmCo could develop an improved emission control technology, it is likely that it would infringe AgCo's patent. This means that the relationship between AgCo and FarmCo with regard to the supply and use of emissions control technology is vertical. Assuming that AgCo and FarmCo are actual or likely potential competitors in sales of farm equipment products, their relationship is horizontal in the relevant markets for farm equipment.

Example 6

Situation: FarmCo develops a new valve technology for its engines and enters into a cross-licensing arrangement with AgCo, whereby AgCo licenses its emission control technology to FarmCo and FarmCo licenses its valve technology to AgCo. AgCo already owns an alternative valve technology that can be used to achieve engine performance similar to that using FarmCo's valve technology and at a comparable cost to consumers. Before adopting FarmCo's technology, AgCo was using its own valve technology in its production of engines and was licensing (and continues to license) that technology for use by others. As in Example 5, FarmCo does not own or control an emission control technology that is a close substitute for the technology licensed from AgCo. Furthermore, as in Example 5, FarmCo is not likely to develop an improved emission control technology that would be a close substitute for AgCo's technology, because of AgCo's blocking patent.

Discussion: FarmCo is a consumer and not a competitor of AgCo's emission control technology. As in Example 5, their relationship is vertical with regard to this technology. The relationship between AgCo and FarmCo in the relevant market that includes engine valve technology is vertical in part and horizontal in part. It is vertical in part because AgCo and FarmCo stand in a complementary relationship, in which AgCo is a consumer of a technology supplied by FarmCo. However, the relationship between AgCo and FarmCo in the relevant market that includes engine valve technology is also horizontal in part, because FarmCo and AgCo are actual competitors in the licensing of valve technology that can be used to achieve similar engine performance at a comparable cost. Whether the firms license their valve technologies to others is not important for the conclusion that the firms have a horizontal relationship in this relevant market. Even if AgCo's use of its valve technology were solely captive to its own production, the fact that the two valve technologies are substitutable at comparable cost means that the two firms have a horizontal relationship.

As in Example 5, the relationship between AgCo and FarmCo is horizontal in the relevant markets for farm equipment.

3.4 Framework for evaluating licensing restraints

In the vast majority of cases, restraints in intellectual property licensing arrangements are evaluated under the rule of reason. The Agencies' general approach in analyzing a licensing restraint under the rule of reason is to inquire whether the restraint is likely to have anticompetitive effects and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects. *See Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979); 7 Phillip E. Areeda, *Antitrust Law* § 1502 (1986). *See also* part 4.

In some cases, however, the courts conclude that a restraint's "nature and necessary effect are so plainly anticompetitive" that it should be treated as unlawful per se, without an elaborate inquiry into the restraint's likely competitive effect. *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 433 (1990); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Among the restraints that have been held per se unlawful are naked price-fixing, output restraints, and market division among horizontal competitors, as well as certain group boycotts and resale price maintenance.

To determine whether a particular restraint in a licensing arrangement is given per se or rule of reason treatment, the Agencies will assess whether the restraint in question can be expected to contribute to an efficiency-enhancing integration of economic activity. *See Broadcast Music*, 441 U.S. at 16–24. In general, licensing arrangements promote such integration because they facilitate the combination of the licensor's intellectual property with complementary factors of production owned by the licensee. A restraint in a licensing arrangement may further such integration by, for example, aligning the incentives of the licensor and the licensees to promote the development and marketing of the licensed technology, or by substantially reducing transactions costs. If there is no efficiency-enhancing integration of economic activity and if the type of restraint is one that has been accorded per se treatment, the Agencies will challenge the restraint under the per se rule. Otherwise, the Agencies will apply a rule of reason analysis.

Application of the rule of reason generally requires a comprehensive inquiry into market conditions. (*See* sections 4.1–4.3.) However, that inquiry may be truncated in certain circumstances. If the Agencies conclude that a restraint has no likely anticompetitive effects, they will treat it as reasonable, without an elaborate analysis of market power or the justifications for the restraint. Similarly, if a restraint facially appears to be of a kind that would always or almost always tend to reduce output or increase prices,[27] and the restraint is not reasonably related to efficiencies, the Agencies will likely challenge the restraint without an elaborate analysis of particular industry circumstances.[28] *See Indiana Federation of Dentists*, 476 U.S. at 459–60; *NCAA*, 468 U.S. at 109.

Example 7

Situation: Gamma, which manufactures Product X using its patented process, offers a license for its process technology to every other manufacturer of Product X, each of which competes world-wide with Gamma in the manufacture and sale of X. The process technology does not represent an economic improvement over the available existing technologies. Indeed, although most manufacturers accept licenses from Gamma, none of the licensees actually uses the licensed technology. The licenses provide that each manufacturer has an exclusive right to sell Product X manufactured using the licensed technology in a designated geographic area and that no manufacturer may sell Product X, however manufactured, outside the designated territory.

Discussion: The manufacturers of Product X are in a horizontal relationship in the goods market for Product X. Any manufacturers of Product X that control technologies that are substitutable at comparable cost for Gamma's process are also horizontal competitors of Gamma in the relevant technology market. The licensees of Gamma's process technology are technically in a vertical relationship, although that is not significant in this example because they do not actually use Gamma's technology.

The licensing arrangement restricts competition in the relevant goods market among manufacturers of Product X by requiring each manufacturer to limit its sales to an exclusive territory. Thus, competition among entities that would be actual competitors in the absence of the licensing arrangement is restricted. Based on the facts set forth above, the licensing arrangement does not involve a useful transfer of technology, and thus it is unlikely that the restraint on sales outside the designated territories contributes to an efficiency-enhancing integration of economic activity. Consequently, the evaluating Agency would be likely to challenge the arrangement under the per se rule as a horizontal territorial market allocation scheme and to view the intellectual property aspects of the arrangement as a sham intended to cloak its true nature.

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[27] Details about the Federal Trade Commission's approach are set forth in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 604 (1988). In applying its truncated rule of reason inquiry, the FTC uses the analytical category of “inherently suspect” restraints to denote facially anticompetitive restraints that would always or almost always tend to decrease output or increase prices, but that may be relatively unfamiliar or may not fit neatly into traditional per se categories.

[28] Under the FTC's *Mass. Board* approach, asserted efficiency justifications for inherently suspect restraints are examined to determine whether they are plausible and, if so, whether they are valid in the context of the market at issue. *Mass. Board*, 110 F.T.C. at 604.

If the licensing arrangement could be expected to contribute to an efficiency-enhancing integration of economic activity, as might be the case if the licensed technology were an advance over existing processes and used by the licensees, the Agency would analyze the arrangement under the rule of reason applying the analytical framework described in this section.

In this example, the competitive implications do not generally depend on whether the licensed technology is protected by patent, is a trade secret or other know-how, or is a computer program protected by copyright; nor do the competitive implications generally depend on whether the allocation of markets is territorial, as in this example, or functional, based on fields of use.

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4. General principles concerning the Agencies' evaluation of licensing arrangements under the rule of reason

4.1 Analysis of anticompetitive effects

The existence of anticompetitive effects resulting from a restraint in a licensing arrangement will be evaluated on the basis of the analysis described in this section.

4.1.1 Market structure, coordination, and foreclosure

When a licensing arrangement affects parties in a horizontal relationship, a restraint in that arrangement may increase the risk of coordinated pricing, output restrictions, or the acquisition or maintenance of market power. Harm to competition also may occur if the arrangement poses a significant risk of retarding or restricting the development of new or improved goods or processes. The potential for competitive harm depends in part on the degree of concentration in, the difficulty of entry into, and the responsiveness of supply and demand to changes in price in the relevant markets. *Cf.* 1992 Horizontal Merger Guidelines §§ 1.5, 3.

When the licensor and licensees are in a vertical relationship, the Agencies will analyze whether the licensing arrangement may harm competition among entities in a horizontal relationship at either the level of the licensor or the licensees, or possibly in another relevant market. Harm to competition from a restraint may occur if it anticompetitively forecloses access to, or increases competitors' costs of obtaining, important inputs, or facilitates coordination to raise price or restrict output. The risk of anticompetitively foreclosing access or increasing competitors' costs is related to the proportion of the markets affected by the licensing restraint; other characteristics of the relevant markets, such as concentration, difficulty of entry, and the responsiveness of supply and demand to changes in price in the relevant markets; and the duration of the restraint. A licensing arrangement does not foreclose competition merely because some or all of the potential licensees in an industry choose to use the licensed technology to the exclusion of other technologies. Exclusive use may be an efficient consequence of the licensed technology having the lowest cost or highest value.

Harm to competition from a restraint in a vertical licensing arrangement also may occur if a licensing restraint facilitates coordination among entities in a horizontal relationship to raise prices or reduce output in a relevant market. For example, if owners of competing technologies impose similar restraints on their licensees, the licensors may find it easier to coordinate their pricing. Similarly, licensees that are competitors may find it easier to coordinate their pricing if they are subject to common restraints in licenses with a common licensor or competing licensors. The risk of anticompetitive coordination is increased when the relevant markets are concentrated and difficult to enter. The use of similar restraints may be common and procompetitive in an industry, however, because they contribute to efficient exploitation of the licensed property.

4.1.2 Licensing arrangements involving exclusivity

A licensing arrangement may involve exclusivity in two distinct respects. First, the licensor may grant one or more *exclusive licenses*, which restrict the right of the licensor to license others and possibly also to use the technology itself. Generally, an exclusive license may raise antitrust concerns only if the licensees themselves, or the licensor and its licensees, are in a horizontal relationship. Examples of arrangements involving exclusive licensing that may give rise to antitrust concerns include cross-licensing by parties collectively possessing market power (*see* section 5.5), grantbacks (*see* section 5.6), and acquisitions of intellectual property rights (*see* section 5.7).

A non-exclusive license of intellectual property that does not contain any restraints on the competitive conduct of the licensor or the licensee generally does not present antitrust concerns even if the parties to the license are in a horizontal relationship, because the non-exclusive license normally does not diminish competition that would occur in its absence.

A second form of exclusivity, *exclusive dealing*, arises when a license prevents or restrains the licensee from licensing, selling, distributing, or using competing technologies. *See* section 5.4. Exclusivity may be achieved by an explicit exclusive dealing term in the license or by other provisions such as compensation terms or other economic incentives. Such restraints may anticompetitively foreclose access to, or increase competitors' costs of obtaining, important inputs, or facilitate coordination to raise price or reduce output, but they also may have procompetitive effects. For example, a licensing arrangement that prevents the licensee from dealing in other technologies may encourage the licensee to develop and market the licensed technology or specialized applications of that technology. *See, e.g.*, Example 8. The Agencies will take into account such procompetitive effects in evaluating the reasonableness of the arrangement. *See* section 4.2.

The antitrust principles that apply to a licensor's grant of various forms of exclusivity to and among its licensees are similar to those that apply to comparable vertical restraints outside the licensing context, such as exclusive territories and exclusive dealing. However, the fact that intellectual property may in some cases be misappropriated more easily than other forms of property may justify the use of some restrictions that might be anticompetitive in other contexts.

As noted earlier, the Agencies will focus on the actual practice and its effects, not on the formal terms of the arrangement. A license denominated as non-exclusive (either in the sense of exclusive licensing or in the sense of exclusive dealing) may nonetheless give rise to the same concerns posed by formal exclusivity. A non-exclusive license may have the effect of exclusive licensing if it is structured so that the licensor is unlikely to license others or to practice the technology itself. A license that does not explicitly require exclusive dealing may have the effect of exclusive dealing if it is structured to increase significantly a licensee's cost when it uses competing technologies. However, a licensing arrangement will not automatically raise these concerns merely because a party chooses to deal with a single licensee or licensor, or confines his activity to a single field of use or location, or because only a single licensee has chosen to take a license.

Example 8

Situation: NewCo, the inventor and manufacturer of a new flat panel display technology, lacking the capability to bring a flat panel display product to market, grants BigCo an exclusive license to sell a product embodying NewCo's technology. BigCo does not currently sell, and is not developing (or likely to develop), a product that would compete with the product embodying the new technology and does not control rights to another display technology. Several firms offer competing displays, BigCo accounts for only a small proportion of the outlets for distribution of display products, and entry into the manufacture and distribution of display products is relatively easy. Demand for the new technology is uncertain and successful market penetration will require considerable promotional effort. The license contains an exclusive dealing restriction preventing BigCo from selling products that compete with the product embodying the licensed technology.

Discussion: This example illustrates both types of exclusivity in a licensing arrangement. The license is exclusive in that it restricts the right of the licensor to grant other licenses. In addition, the license has an exclusive dealing component in that it restricts the licensee from selling competing products.

The inventor of the display technology and its licensee are in a vertical relationship and are not actual or likely potential competitors in the manufacture or sale of display products or in the sale or development of technology. Hence, the grant of an exclusive license does not affect competition between the licensor and the licensee. The exclusive license may promote competition in the manufacturing and sale of display products by encouraging BigCo to develop and promote the new product in the face of uncertain demand by rewarding BigCo for its efforts if they lead to large sales. Although the license bars the licensee from selling competing products, this exclusive dealing aspect is unlikely in this example to harm competition by anticompetitively foreclosing access, raising competitors' costs of inputs, or facilitating anticompetitive pricing because the relevant product market is unconcentrated, the exclusive dealing restraint affects only a small proportion of the outlets for distribution of display products, and entry is easy. On these facts, the evaluating Agency would be unlikely to challenge the arrangement.

4.2 Efficiencies and justifications

If the Agencies conclude, upon an evaluation of the market factors described in section 4.1, that a restraint in a licensing arrangement is unlikely to have an anticompetitive effect, they will not challenge the restraint. If the Agencies conclude that the restraint has, or is likely to have, an anticompetitive effect, they will consider whether the restraint is reasonably necessary to achieve procompetitive efficiencies. If the restraint is reasonably necessary, the Agencies will balance the procompetitive efficiencies and the anticompetitive effects to determine the probable net effect on competition in each relevant market.

The Agencies' comparison of anticompetitive harms and procompetitive efficiencies is necessarily a qualitative one. The risk of anticompetitive effects in a particular case may be insignificant compared to the expected efficiencies, or vice versa. As the expected anticompetitive effects in a particular licensing arrangement increase, the Agencies will require evidence establishing a greater level of expected efficiencies.

The existence of practical and significantly less restrictive alternatives is relevant to a determination of whether a restraint is reasonably necessary. If it is clear that the parties could have achieved similar efficiencies by means that are significantly less restrictive, then the Agencies will not give weight to the parties' efficiency claim. In making this assessment, however, the Agencies will not engage in a search for a theoretically least restrictive alternative that is not realistic in the practical prospective business situation faced by the parties.

When a restraint has, or is likely to have, an anticompetitive effect, the duration of that restraint can be an important factor in determining whether it is reasonably necessary to achieve the putative procompetitive efficiency. The effective duration of a restraint may depend on a number of factors, including the option of the affected party to terminate the arrangement unilaterally and the presence of contract terms (e.g., unpaid balances on minimum purchase commitments) that encourage the licensee to renew a license arrangement. Consistent with their approach to less restrictive alternative analysis generally, the Agencies will not attempt to draw fine distinctions regarding duration; rather, their focus will be on situations in which the duration clearly exceeds the period needed to achieve the procompetitive efficiency.

The evaluation of procompetitive efficiencies, of the reasonable necessity of a restraint to achieve them, and of the duration of the restraint, may depend on the market context. A restraint that may be justified by the needs of a new entrant, for example, may not have a procompetitive efficiency justification in different market circumstances. *Cf. United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

4.3 Antitrust "safety zone"

Because licensing arrangements often promote innovation and enhance competition, the Agencies believe that an antitrust "safety zone" is useful in order to provide some degree of certainty and thus to encourage such activity.[29] Absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement if (1) the restraint is not facially anticompetitive[30] and (2) the licensor and its licensees collectively account for no more than twenty percent of each relevant market significantly affected by the restraint. This "safety zone" does not apply to those transfers of intellectual property rights to which a merger analysis is applied. *See* section 5.7.

Whether a restraint falls within the safety zone will be determined by reference only to goods markets unless the analysis of goods markets alone would inadequately address the effects of the licensing arrangement on competition among technologies or in research and development.

[29] The antitrust "safety zone" does not apply to restraints that are not in a licensing arrangement, or to restraints that are in a licensing arrangement but are unrelated to the use of the licensed intellectual property.

[30] "Facially anticompetitive" refers to restraints that normally warrant per se treatment, as well as other restraints of a kind that would always or almost always tend to reduce output or increase prices. *See* section 3.4.

If an examination of the effects on competition among technologies or in research development is required, and if market share data are unavailable or do not accurately represent competitive significance, the following safety zone criteria will apply. Absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement that may affect competition in a technology market if (1) the restraint is not facially anticompetitive and (2) there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the licensing arrangement that may be substitutable for the licensed technology at a comparable cost to the user. Absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement that may affect competition in an innovation market if (1) the restraint is not facially anticompetitive and (2) four or more independently controlled entities in addition to the parties to the licensing arrangement possess the required specialized assets or characteristics and the incentive to engage in research and development that is a close substitute of the research and development activities of the parties to the licensing agreement.[31]

The Agencies emphasize that licensing arrangements are not anticompetitive merely because they do not fall within the scope of the safety zone. Indeed, it is likely that the great majority of licenses falling outside the safety zone are lawful and procompetitive. The safety zone is designed to provide owners of intellectual property with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the arrangements may be presumed not to be anticompetitive without an inquiry into particular industry circumstances. It is not intended to suggest that parties should conform to the safety zone or to discourage parties falling outside the safety zone from adopting restrictions in their license arrangements that are reasonably necessary to achieve an efficiency-enhancing integration of economic activity. The Agencies will analyze arrangements falling outside the safety zone based on the considerations outlined in parts 3–5.

The status of a licensing arrangement with respect to the safety zone may change over time. A determination by the Agencies that a restraint in a licensing arrangement qualifies for inclusion in the safety zone is based on the factual circumstances prevailing at the time of the conduct at issue.[32]

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[31] This is consistent with congressional intent in enacting the National Cooperative Research Act. *See* H.R. Conf. Rpt. No. 1044, 98th Cong., 2d Sess., 10, *reprinted in* 1984 U.S.C.C.A.N. 3105, 3134–35.

[32] The conduct at issue may be the transaction giving rise to the restraint or the subsequent implementation of the restraint.

5. Application of general principles

5.0 This section illustrates the application of the general principles discussed above to particular licensing restraints and to arrangements that involve the cross-licensing, pooling, or acquisition of intellectual property. The restraints and arrangements identified are typical of those that are likely to receive antitrust scrutiny; however, they are not intended as an exhaustive list of practices that could raise competitive concerns.

5.1 Horizontal restraints

The existence of a restraint in a licensing arrangement that affects parties in a horizontal relationship (a "horizontal restraint") does not necessarily cause the arrangement to be anticompetitive. As in the case of joint ventures among horizontal competitors, licensing arrangements among such competitors may promote rather than hinder competition if they result in integrative efficiencies. Such efficiencies may arise, for example, from the realization of economies of scale and the integration of complementary research and development, production, and marketing capabilities.

Following the general principles outlined in section 3.4, horizontal restraints often will be evaluated under the rule of reason. In some circumstances, however, that analysis may be truncated; additionally, some restraints may merit per se treatment, including price fixing, allocation of markets or customers, agreements to reduce output, and certain group boycotts.

Example 9

Situation: Two of the leading manufacturers of a consumer electronic product hold patents that cover alternative circuit designs for the product. The manufacturers assign their patents to a separate corporation wholly owned by the two firms. That corporation licenses the right to use the circuit designs to other consumer product manufacturers and establishes the license royalties. None of the patents is blocking; that is, each of the patents can be used without infringing a patent owned by the other firm. The different circuit designs are substitutable in that each permits the manufacture at comparable cost to consumers of products that consumers consider to be interchangeable. One of the Agencies is analyzing the licensing arrangement.

Discussion: In this example, the manufacturers are horizontal competitors in the goods market for the consumer product and in the related technology markets. The competitive issue with regard to a joint assignment of patent rights is whether the assignment has an adverse impact on competition in technology and goods markets that is not outweighed by procompetitive efficiencies, such as benefits in the use or dissemination of the technology. Each of the patent owners has a right to exclude others from using its patent. That right does not extend, however, to the agreement to assign rights jointly. To the extent that the patent rights cover technologies that are close substitutes, the joint determination of royalties likely would result in higher royalties and higher goods prices than would result if the owners licensed or used their technologies independently. In the absence of evidence establishing efficiency-enhancing integration from the joint assignment of patent rights, the Agency may conclude that the joint marketing of competing patent rights constitutes horizontal price fixing and could be challenged as a per se unlawful horizontal restraint of trade. If the joint marketing arrangement results in an efficiency-enhancing integration, the Agency would evaluate the arrangement under the rule of reason. However, the Agency may conclude that the anticompetitive effects are sufficiently apparent, and the claimed integrative efficiencies are sufficiently weak or not reasonably related to the restraints, to warrant challenge of the arrangement without an elaborate analysis of particular industry circumstances (*see* section 3.4).

5.2 Resale price maintenance

Resale price maintenance is illegal when "commodities have passed into the channels of trade and are owned by dealers." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911). It has been held per se illegal for a licensor of an intellectual property right in a product to fix a licensee's *resale* price of that product. *United States v. Univis Lens Co.,* 316 U.S. 241 (1942); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940).[33]

[33] *But cf. United States v. General Electric Co.*, 272 U.S. 476 (1926) (holding that an owner of a product patent may condition a license to manufacture the product on the fixing of the *first* sale price

Consistent with the principles set forth in section 3.4, the Agencies will enforce the per se rule against resale price maintenance in the intellectual property context.

5.3 Tying arrangements

A "tying" or "tie-in" or "tied sale" arrangement has been defined as "an agreement by a party to sell one product . . . on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that [tied] product from any other supplier." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2079 (1992). Conditioning the ability of a licensee to license one or more items of intellectual property on the licensee's purchase of another item of intellectual property or a good or a service has been held in some cases to constitute illegal tying.[34] Although tying arrangements may result in anticompetitive effects, such arrangements can also result in significant efficiencies and procompetitive benefits. In the exercise of their prosecutorial discretion, the Agencies will consider both the anticompetitive effects and the efficiencies attributable to a tie-in. The Agencies would be likely to challenge a tying arrangement if: (1) the seller has market power in the tying product,[35] (2) the arrangement has an adverse effect on competition in the relevant market for the tied product, and (3) efficiency justifications for the arrangement do not outweigh the anticompetitive effects.[36] The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.

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of the patented product). Subsequent lower court decisions have distinguished the *GE* decision in various contexts. *See, e.g., Royal Indus. v. St. Regis Paper Co*., 420 F.2d 449, 452 (9th Cir. 1969) (observing that *GE* involved a restriction by a patentee who also manufactured the patented product and leaving open the question whether a nonmanufacturing patentee may fix the price of the patented product); *Newburgh Moire Co. v. Superior Moire Co*., 237 F.2d 283, 293–94 (3rd Cir. 1956) (grant of multiple licenses each containing price restrictions does not come within the *GE* doctrine); *Cummer-Graham Co. v. Straight Side Basket Corp.*, 142 F.2d 646, 647 (5th Cir.) (owner of an intellectual property right in a process to manufacture an unpatented product may not fix the sale price of that product), *cert. denied*, 323 U.S. 726 (1944); *Barber-Colman Co. v. National Tool Co.*, 136 F.2d 339, 343–44 (6th Cir. 1943) (same).

[34] *See, e.g., United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 156–58 (1948) (copyrights); *International Salt Co. v. United States,* 332 U.S. 392 (1947) (patent and related product).

[35] *Cf.* 35 U.S.C. § 271(d) (1988 & Supp. V 1993) (requirement of market power in patent misuse cases involving tying).

[36] As is true throughout these Guidelines, the factors listed are those that guide the Agencies' internal analysis in exercising their prosecutorial discretion. They are not intended to circumscribe how the Agencies will conduct the litigation of cases that they decide to bring.

Package licensing—the licensing of multiple items of intellectual property in a single license or in a group of related licenses—may be a form of tying arrangement if the licensing of one product is conditioned upon the acceptance of a license of another, separate product. Package licensing can be efficiency enhancing under some circumstances. When multiple licenses are needed to use any single item of intellectual property, for example, a package license may promote such efficiencies. If a package license constitutes a tying arrangement, the Agencies will evaluate its competitive effects under the same principles they apply to other tying arrangements.

5.4 Exclusive dealing

In the intellectual property context, exclusive dealing occurs when a license prevents the licensee from licensing, selling, distributing, or using competing technologies. Exclusive dealing arrangements are evaluated under the rule of reason. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (evaluating legality of exclusive dealing under section 1 of the Sherman Act and section 3 of the Clayton Act); *Beltone Electronics Corp.*, 100 F.T.C. 68 (1982) (evaluating legality of exclusive dealing under section 5 of the Federal Trade Commission Act). In determining whether an exclusive dealing arrangement is likely to reduce competition in a relevant market, the Agencies will take into account the extent to which the arrangement (1) promotes the exploitation and development of the licensor's technology and (2) anticompetitively forecloses the exploitation and development of, or otherwise constrains competition among, competing technologies.

The likelihood that exclusive dealing may have anticompetitive effects is related, inter alia, to the degree of foreclosure in the relevant market, the duration of the exclusive dealing arrangement, and other characteristics of the input and output markets, such as concentration, difficulty of entry, and the responsiveness of supply and demand to changes in price in the relevant markets. (*See* sections 4.1.1 and 4.1.2.) If the Agencies determine that a particular exclusive dealing arrangement may have an anticompetitive effect, they will evaluate the extent to which the restraint encourages licensees to develop and market the licensed technology (or specialized applications of that technology), increases licensors' incentives to develop or refine the licensed technology, or otherwise increases competition and enhances output in a relevant market. (*See* section 4.2 and Example 8.)

5.5 Cross-licensing and pooling arrangements

Cross-licensing and pooling arrangements are agreements of two or more owners of different items of intellectual property to license one another or third parties. These arrangements may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. By promoting the dissemination of technology, cross-licensing and pooling arrangements are often procompetitive.

Cross-licensing and pooling arrangements can have anticompetitive effects in certain circumstances. For example, collective price or output restraints in pooling arrangements, such as the joint marketing of pooled intellectual property rights with collective price setting or coordinated output restrictions, may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants. *Compare NCAA* 468 U.S. at 114 (output restriction on college football broadcasting held unlawful because it was not reasonably related to any purported justification) *with Broadcast Music*, 441 U.S. at 23 (blanket license for music copyrights found not per se illegal because the cooperative price was necessary to the creation of a new product). When cross-licensing or pooling arrangements are mechanisms to accomplish naked price fixing or market division, they are subject to challenge under the per se rule. *See United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952) (price fixing).

Settlements involving the cross-licensing of intellectual property rights can be an efficient means to avoid litigation and, in general, courts favor such settlements. When such cross-licensing involves horizontal competitors, however, the Agencies will consider whether the effect of the settlement is to diminish competition among entities that would have been actual or likely potential competitors in a relevant market in the absence of the cross-license. In the absence of offsetting efficiencies, such settlements may be challenged as unlawful restraints of trade. *Cf. United States v. Singer Manufacturing Co.,* 374 U.S. 174 (1963) (cross-license agreement was part of broader combination to exclude competitors).

Pooling arrangements generally need not be open to all who would like to join. However, exclusion from cross-licensing and pooling arrangements among parties that collectively possess market power may, under some circumstances, harm competition. *Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (exclusion of a competitor from a purchasing cooperative not per se unlawful absent a showing of market power). In general, exclusion from a pooling or cross-licensing arrangement among competing technologies is unlikely to have anticompetitive effects unless (1) excluded firms cannot effectively compete in the relevant market for the good incorporating the licensed technologies and (2) the pool participants collectively possess market power in the relevant market. If these circumstances exist, the Agencies will evaluate whether the arrangement's limitations on participation are reasonably related to the efficient development and exploitation of the pooled technologies and will assess the net effect of those limitations in the relevant market. *See* section 4.2.

Another possible anticompetitive effect of pooling arrangements may occur if the arrangement deters or discourages participants from engaging in research and development, thus retarding innovation. For example, a pooling arrangement that requires members to grant licenses to each other for current and future technology at minimal cost may reduce the incentives of its members to engage in research and development because members of the pool have to share their successful research and development and each of the members can free ride on the accomplishments of other pool members. *See generally United States v. Mfrs. Aircraft Ass'n, Inc.*, 1976-1 Trade Cas. (CCH) ¶ 60,810 (S.D.N.Y. 1975); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal 1969), *appeal dismissed sub nom. City of New York v. United States,* 397 U.S. 248 (1970), *modified sub nom. United States v. Motor Vehicle Mfrs. Ass'n*, 1982–83 Trade Cas. (CCH) ¶ 65,088 (C.D. Cal. 1982). However, such an arrangement can have procompetitive benefits, for example, by exploiting economies of scale and integrating complementary capabilities of the pool members, (including the clearing of blocking positions), and is likely to cause competitive problems only when the arrangement includes a large fraction of the potential research and development in an innovation market. *See* section 3.2.3 and Example 4.

Example 10

Situation: As in Example 9, two of the leading manufacturers of a consumer electronic product hold patents that cover alternative circuit designs for the product. The manufacturers assign several of their patents to a separate corporation wholly owned by the two firms. That corporation licenses the right to use the circuit designs to other consumer product manufacturers and establishes the license royalties. In this example, however, the manufacturers assign to the separate corporation only patents that are blocking. None of the patents assigned to the corporation can be used without infringing a patent owned by the other firm.

Discussion: Unlike the previous example, the joint assignment of patent rights to the wholly owned corporation in this example does not adversely affect competition in the licensed technology among entities that would have been actual or likely potential competitors in the absence of the licensing arrangement. Moreover, the licensing arrangement is likely to have procompetitive benefits in the use of the technology. Because the manufacturers' patents are blocking, the manufacturers are not in a horizontal relationship with respect to those patents. None of the patents can be used without the right to a patent owned by the other firm, so the patents are not substitutable. As in Example 9, the firms are horizontal competitors in the relevant goods market. In the absence of collateral restraints that would likely raise price or reduce output in the relevant goods market or in any other relevant antitrust market and that are not reasonably related to an efficiency-enhancing integration of economic activity, the evaluating Agency would be unlikely to challenge this arrangement.

5.6 Grantbacks

A grantback is an arrangement under which a licensee agrees to extend to the licensor of intellectual property the right to use the licensee's improvements to the licensed technology. Grantbacks can have procompetitive effects, especially if they are nonexclusive. Such arrangements provide a means for the licensee and the licensor to share risks and reward the licensor for making possible further innovation based on or informed by the licensed technology, and both promote innovation in the first place and promote the subsequent licensing of the results of the innovation. Grantbacks may adversely affect competition, however, if they substantially reduce the licensee's incentives to engage in research and development and thereby limit rivalry in innovation markets.

A non-exclusive grantback allows the licensee to practice its technology and license it to others. Such a grantback provision may be necessary to ensure that the licensor is not prevented from effectively competing because it is denied access to improvements developed with the aid of its own technology. Compared with an exclusive grantback, a non-exclusive grantback, which leaves the licensee free to license improvements technology to others, is less likely to have anticompetitive effects.

The Agencies will evaluate a grantback provision under the rule of reason, *see generally Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637, 645–48 (1947) (grantback provision in technology license is not per se unlawful), considering its likely effects in light of the overall structure of the licensing arrangement and conditions in the relevant markets. An important factor in the Agencies' analysis of a grantback will be whether the licensor has market power in a relevant technology or innovation market. If the Agencies determine that a particular grantback provision is likely to reduce significantly licensees' incentives to invest in improving the licensed technology, the Agencies will consider the extent to which the grantback provision has offsetting procompetitive effects, such as (1) promoting dissemination of licensees' improvements to the licensed technology, (2) increasing the licensors' incentives to disseminate the licensed technology, or (3) otherwise increasing competition and output in a relevant technology or innovation market. *See* section 4.2. In addition, the Agencies will consider the extent to which grantback provisions in the relevant markets generally increase licensors' incentives to innovate in the first place.

5.7 Acquisition of intellectual property rights

Certain transfers of intellectual property rights are most appropriately analyzed by applying the principles and standards used to analyze mergers, particularly those in the 1992 Horizontal Merger Guidelines. The Agencies will apply a merger analysis to an outright sale by an intellectual property owner of all of its rights to that intellectual property and to a transaction in which a person obtains through grant, sale, or other transfer an exclusive license for intellectual property (i.e., a license that precludes all other persons, including the licensor, from using the licensed intellectual property).[37] Such transactions may be assessed under section 7 of the Clayton Act, sections 1 and 2 of the Sherman Act, and section 5 of the Federal Trade Commission Act.

Example 11

Situation: Omega develops a new, patented pharmaceutical for the treatment of a particular disease. The only drug on the market approved for the treatment of this disease is sold by Delta. Omega's patented drug has almost completed regulatory approval by the Food and Drug Administration. Omega has invested considerable sums in product development and market testing, and initial results show that Omega's drug would be a significant competitor to Delta's. However, rather than enter the market as a direct competitor of Delta, Omega licenses to Delta the right to manufacture and sell Omega's patented drug. The license agreement with Delta is nominally nonexclusive. However, Omega has rejected all requests by other firms to obtain a license to manufacture and sell Omega's patented drug, despite offers by those firms of terms that are reasonable in relation to those in Delta's license.

Discussion: Although Omega's license to Delta is nominally nonexclusive, the circumstances indicate that it is exclusive in fact because Omega has rejected all reasonable offers by other firms for licenses to manufacture and sell Omega's patented drug. The facts of this example indicate that Omega would be a likely potential competitor of Delta in the absence of the licensing arrangement, and thus they are in a horizontal relationship in the relevant goods market that includes drugs for the treatment of this particular disease. The evaluating Agency would apply a merger analysis to this transaction, since it involves an acquisition of a likely potential competitor.

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[37] The safety zone of section 4.3 does not apply to transfers of intellectual property such as those described in this section.

6. Enforcement of invalid intellectual property rights

The Agencies may challenge the enforcement of invalid intellectual property rights as antitrust violations. Enforcement or attempted enforcement of a patent obtained by fraud on the Patent and Trademark Office or the Copyright Office may violate section 2 of the Sherman Act, if all the elements otherwise necessary to establish a section 2 charge are proved, or section 5 of the Federal Trade Commission Act. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) (patents); *American Cyanamid Co.*, 72 F.T.C. 623, 684–85 (1967), *aff'd sub. nom. Charles Pfizer & Co.*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969) (patents); *Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc.*, 795 F. Supp. 639, 647 (S.D.N.Y. 1992) (copyrights). Inequitable conduct before the Patent and Trademark Office will not be the basis of a section 2 claim unless the conduct also involves knowing and willful fraud and the other elements of a section 2 claim are present. *Argus Chemical Corp. v. Fibre Glass-Evercoat, Inc.,* 812 F.2d 1381, 1384–85 (Fed. Cir. 1987). Actual or attempted enforcement of patents obtained by inequitable conduct that falls short of fraud under some circumstances may violate section 5 of the Federal Trade Commission Act, *American Cyanamid Co., supra.* Objectively baseless litigation to enforce invalid intellectual property rights may also constitute an element of a violation of the Sherman Act. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1928 (1993) (copyrights); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1289 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) (patents); *Handgards, Inc. v. Ethicon, Inc.,* 601 F.2d 986, 992–96 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) (patents); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985) (trade secrets), *cert. denied*, 475 U.S. 1016 (1986).

Tab 10

Canada

Competition, Innovation and Infrastructure

Remarks by John Pecman, Commissioner of Competition

McCarthy Tétrault LLP

Toronto, Ontario

May 25, 2016

(As prepared for delivery)

Introduction

Good afternoon, everyone. I'm pleased to be here and I'm looking forward to our upcoming question and answer session. I'd like to spend most of our time today in discussion, so I'll try to keep my remarks relatively short.

I will touch on just two topics—but two topics that are “hot” right now on Canada's competition landscape: innovation and infrastructure.

Competition Drives Innovation

Let's begin with innovation. I've said this before, but I can't emphasize it enough. Innovation is a key element of a healthy, sustainable economy. Strong competition drives innovation, which in turn drives productivity, efficiency and economic growth. And for consumers, innovation brings more choices and higher quality products and services in a dynamic marketplace.

We are experiencing a rapidly changing global economy in which innovative technologies are disrupting traditional markets and long-standing business models. In this new environment, it's incumbent on the Bureau to do all it can to foster competition and innovation in the marketplace in order to maximize the potential benefits for Canadians and Canadian businesses.

That means advocating for regulatory frameworks that allow competition and innovation to thrive.

That means supporting innovation in the digital economy by targeting and deterring anti-competitive practices that impede new entrants.

That means regularly reviewing our enforcement approach to keep pace with change, and—as that approach evolves—consulting with stakeholders to ensure we are providing effective guidance for businesses and competition law practitioners.

And finally, that means encouraging innovation within the Bureau itself, in the spirit of continuous improvement, as we strive to be an agency that is nimble, creative, and ahead of the curve.

Pro-competitive Regulation

With respect to advocacy, the Bureau will continue to provide pro-competitive policy advice to regulators and legislators, particularly those grappling with challenges brought by disruptive technologies in the digital economy.

For example, our recent white paper (04006.html) on the modernization of taxi regulations made a significant contribution to ongoing regulatory reviews. Our recommendations have been reflected and referred to in numerous recent regulatory changes in municipalities across the country. This is where our advocacy stands to have the greatest impact—during policy development and regulatory review, before rules are created that unnecessarily stifle competition and innovation.

We are now turning our sights on "Fintech", as we undertake a market study into technology-led innovation in the Canadian financial services sector. We will focus on innovations that impact how consumers and small and medium-sized businesses interact with financial services and products. These will include areas like peer-to-peer banking, mobile wallets and payments, crowd-funding, and online-based financial advisory services (or "robo-advisors"). The Bureau will look at the impact of technology led-innovation on the competitive landscape, examining the barriers to entry or expansion of FinTech companies, factors influencing adoption of these products and services, as well as the state of current regulatory frameworks.

We understand that innovative business models—whether they emerge in the taxi industry, FinTech or other sectors— often challenge the status quo. This market study will provide guidance to the Bureau and regulators, to ensure that Canada nurtures an environment that provides support and opportunities for FinTech companies to innovate, grow and compete in global markets.

Innovation in Enforcement

With respect to enforcement, we will continue to support the emergence of innovative business models in the digital economy by deterring anti-competitive practices that impede new entrants. And equally important, through the course of our reviews and investigations, the Bureau will continue to consider the effects of firms' behaviour on non-price factors such as quality, convenience, and, in particular, innovation in this rapidly-evolving space.

The Bureau took these factors into account, for example, during its extensive investigation (04068.html) into a number of allegations of anti-competitive conduct on the part of Google in relation to its online search, search advertising and display advertising services in Canada.

While that investigation has concluded, the Bureau recognizes that data-driven companies play an important and growing role in Canada's economy. The emergence of "Big Data" and its effects on competition is also a prevalent concern on the international stage. As the OECD Competition Committee recently observed, some are referring to data as the "new oil", or the currency of the digital economy. On May 10th, the German and French competition authorities released a joint study on "Competition Law and Data" to further feed the debate on assessing data as a factor to establishing market power.

As the collection, analysis, and use of data is increasingly becoming an important source of competitive advantage, driving innovation and product improvement, the Bureau will continue to actively monitor developments in this area.

In another case related to the control of data—I was encouraged by the recent ruling from the Competition Tribunal (http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20for%20Order%20and%20Order_385_38_4-27-2016_8854.pdf) in the Bureau's case against the Toronto Real Estate Board (TREB). The Tribunal supported the Bureau's view that TREB was abusing its market power by preventing brokerages from offering innovative products and services to consumers over the internet. The Tribunal not only ruled that the restrictions TREB imposes on its members' use and display of the data in the Toronto Multiple Listing Service system are anti-competitive, but found them to have had "a considerable adverse impact on innovation, quality, and the range of residential real estate brokerage services" available in the Greater Toronto Area.

The Tribunal's message about the role of competition in spurring innovation is an important one, and can be applied more broadly across the Canadian economy. The Bureau will continue to take action to foster open and competitive markets in which innovation can thrive.

Ahead of the Curve

And as we do so, we will be paying close attention to emerging issues in the rapidly changing marketplace, and updating our enforcement approach to ensure that we are staying ahead of the curve.

Just as we did with our recent update of the Bureau's *Intellectual Property Enforcement Guidelines* (04056.html), or IPEGs, we will focus on emerging competition issues and adapt our approach in consultation with our stakeholders. Intellectual property is a perfect example of a rapidly evolving area that has an important intersection with competition law. The Bureau will continue to review the IPEGs on an annual basis to ensure our enforcement guidelines keep pace with changes in the market and guidance received from the courts.

This process of regular policy review and evolution matches what we are recommending to regulators and legislators who are seeking to cope with the changes and pressures introduced by a shift to a rapidly changing digital economy. Once again, it is imperative we do not restrict the benefits that competition and innovation bring to consumers, to businesses, and to the Canadian economy. We must adapt to changing times in order to allow competition and innovation to thrive.

Safeguarding Infrastructure Investments

Now I'd like to move on to my second subject—infrastructure—and I promise to be brief.

In March, the Government of Canada announced the largest infrastructure investment in the history of our country—creating an opportunity for the Bureau to contribute its expertise to safeguarding the government spending that will fuel municipal and provincial infrastructure projects across the country.

The Organization for Economic Cooperation and Development (OECD) notes that the distinctive nature of public procurement and its context make it particularly vulnerable to collusion and corruption, particularly in the construction sector. The presence of bid-rigging and other collusive agreements can increase prices paid by public procurers by over 30 percent, and result in inferior quality and project range. Distortion of the public procurement process also inhibits investment, innovation and economic development.

As a result, the Bureau is taking action to heighten awareness about bid-rigging and to equip the procurement community with tools to prevent, detect, and deter this damaging and illegal behaviour. We will be holding workshops with key players, including procurement officials at all levels of government, as well as representatives from private industry. To advance these initiatives, we have been reaching out to other government departments involved in this process and we have received a high degree of interest.

While we are amping up our efforts on the prevention front, we are not downing tools on the enforcement front. A number of recent Bureau investigations have led to numerous bid-rigging charges laid against companies and individuals involved in the procurement process for infrastructure projects.

Cracking down on cartels remains a priority for the Bureau. Bid-rigging conspiracies are a fraud on the consumer, and rigging bids for public contracts is a fraud on tax payers and on all Canadians. We look forward to collaborating with all our partners to prevent, detect, and deter anti-competitive conduct, and protect Canada's historic investment.

Conclusion

Just last week, the Bureau published its draft Annual Plan (04075.html) for the year ahead. As you'll see, the themes of innovation and infrastructure are key points of focus for the Bureau as we continue to preserve and protect competition for the benefit of consumers, businesses, and the Canadian economy. We invite your submissions on our plans for the coming year—on these topics and others.

Thank you again for the opportunity to speak with you today. I look forward to our discussion.

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Date modified:

2016-05-26

File No. CT-2016-003

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C-34 (the "**Act**");

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

BETWEEN:

CARGURUS, INC.

Applicant

- and -

TRADER CORPORATION

Respondent

BOOK OF AUTHORITIES OF THE APPLICANT
(Application for Leave Pursuant to Section 103.1 of the *Competition Act*)

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