PUBLIC

CT-2024-010

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

BOOK OF AUTHORITIES OF GOOGLE CANADA CORPORATION AND GOOGLE LLC
VOLUME 6 OF 20

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Competition Tribunal

Tribunal de la Concurrence

Please see in particular para. 454, 455

Affirmed on this point: 2017 FCA 236.
*****
Leave refused: 2018 CanLII 78753

PUBLIC VERSION

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

REASONS FOR ORDER AND ORDER

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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 "any restrictions, including 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 or other innovative business models, 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, solely and exclusively for the Purpose ("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 solely and exclusively for the Purpose.
>
> (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 competitor, as opposed to on competition. 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 or publication on the internet (including websites and social media sites). 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 Member, whether through a Member's 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. Sold data, unless the method of use of actual sales price of completed transactions is in compliance with RECO Rules and applicable privacy laws;

c. The compensation offered to other Members

d. The seller's name and contact information, unless otherwise directed by the seller to do so; 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 as a real estate brokerage, 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 not 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. Costs

[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