

**COMPETITION TRIBUNAL**

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

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

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

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

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b>  November 12, 2015 CT-2011-003  Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 359

**COMMISSIONER OF COMPETITION**

**Applicant**

**AND**

**THE TORONTO REAL ESTATE BOARD**

**Respondent**

**AND**

**THE CANADIAN REAL ESTATE ASSOCIATION**

**Intervenor**

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**CLOSING ARGUMENT OF THE TORONTO REAL ESTATE BOARD  
 (RECONSIDERATION HEARING – OCTOBER 28, 2015)**

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## TABLE OF CONTENTS

<b>Table of Contents .....</b>	<b>3</b>
<b>OVERVIEW .....</b>	<b>6</b>
<b>THE FACTUAL BACKGROUND.....</b>	<b>9</b>
<b>A.    The Toronto Real Estate Board.....</b>	<b>9</b>
<b>B.    The TREB MLS® System .....</b>	<b>10</b>
(i) TREB’s MLS® Database .....	11
(ii) Searching Listings on TREB’s MLS® Database.....	11
(iii) Ensuring the Security of MLS® Information .....	12
<b>C.    TREB has a history of developing technological tools for its Members... 14</b>	<b>14</b>
<b>D.    TREB’s VOW Task Force.....</b>	<b>16</b>
(i) VOWs Generally.....	16
(ii) History of TREB and VOWs .....	16
(iii) CREA’s Task Force .....	18
(iv) TREB’s 2010-2011 Task Force .....	18
(a) Meetings and Discussions of the Task Force.....	20
(b) Approval Process .....	27
(v) Further VOW Task Force Activities.....	30
<b>E.    TREB’s concerns about Privacy .....</b>	<b>31</b>
(i) TREB’s regime of consents .....	31
(ii) Home buyers and sellers in the GTA are not comfortable with the wide dissemination of their sold information .....	32
(iii) TREB’s efforts to encourage its Members to respect the private and confidential nature of the information in its MLS® database .....	34
<b>F.    The GTA Real Estate Market is Highly Competitive.....</b>	<b>36</b>
(i) Competition Generally.....	36
(ii) Commissions in the Real Estate Industry Vary Widely; there is no “Status Quo” .....	36
(iii) No evidence linking “full information VOWs” to lower commission rates	38
<b>G.    VOWs are merely one technological tool available to TREB’s Members</b>	<b>39</b>
(i) Innovation (and lead generation through the internet) is not limited to brokerages that use VOW feeds on their websites.....	39

(ii)	The value proposition of brokerage websites that incorporate a VOW feed is that those websites aggregate and analyze a multitude of third party data and tend to have an enhanced focus on customer service.....	40
(iii)	VOW technology has been popular with “brand name” affiliated brokerages, and also can be easily adopted by any TREB Member .....	42
<b>H.</b>	<b>Real Estate Voyeurs (or: The problem with low conversion rates).....</b>	<b>43</b>
<b>I.</b>	<b>Brokerage websites are a complement to the provision of real estate brokerage services.....</b>	<b>46</b>
(i)	The provision of real estate services requires a significant amount of time 47	
(ii)	Meager examples of alleged concrete time savings from a “full information VOW” .....	48
<b>J.</b>	<b>The American and Nova Scotian Experience with VOWs.....</b>	<b>49</b>
(i)	American Disclosure/Non-Disclosure States.....	49
(ii)	Pending solds, WESTs, and cooperating brokerage commission.....	50
(iii)	Privacy issues in Nova Scotia.....	51
(iv)	RedFin’s theoretical entry into Canada.....	52
<b>K.</b>	<b>Effective entry by the Commissioner’s GTA-based witnesses.....</b>	<b>52</b>
	<b>NO ABUSE OF DOMINANT POSITION.....</b>	<b>54</b>
	<b>THE COMMISSIONER’S APPLICATION .....</b>	<b>55</b>
	<b>THEORY OF HARM #1: REDUCTION IN DYNAMIC COMPETITION.....</b>	<b>56</b>
<b>A.</b>	<b>TREB Does Not Control the Relevant Markets .....</b>	<b>56</b>
(i)	Test for Market Control .....	57
(ii)	TREB cannot “profitably” influence any dimension of competition within the residential real estate brokerage market in the GTA.....	58
(iii)	The market at issue is the market for the Confidential Data, and TREB does not have market power in the market for the Confidential Data .....	61
(iv)	TREB does not exercise market power.....	65
<b>B.</b>	<b>TREB’S VOW Policy Is Not An Anti-Competitive Act.....</b>	<b>67</b>
(i)	The Test for an Anti-Competitive Act.....	68
(ii)	TREB’s VOW policy was not enacted with a predatory, exclusionary, or disciplinary purpose .....	68
(a)	<i>PIPEDA</i> .....	71
(b)	<i>RECO’s Code of Ethics</i> .....	76

(c)	Consumer attitudes in the GTA .....	77
(d)	Recent developments in privacy .....	79
(iii)	Efficiency justifications .....	81
(a)	MLS® Liquidity .....	82
(b)	Prevention of Unauthorized Commercial Use .....	83
(c)	Preservation of Incentives to Invest in the MLS®.....	83
<b>C.</b>	<b>TREB’s VOW Policy does not substantially lessen or prevent competition</b>	<b>84</b>
(i)	The Test for a Substantial Lessening or Prevention of Competition .....	85
(ii)	No Creation, Enhancement, or Maintenance of Market Power .....	86
(iii)	The Relevant Markets Would Not Be More Competitive in the Absence of TREB’s VOW Policy.....	90
(a)	The Relevant “But For” World.....	91
(b)	“Full information VOWs” will not have a substantial impact on consumer choice of brokerage.....	92
(c)	The competitive impact of “full information VOWs” could have been measured by looking at the United States and Nova Scotia .....	93
(d)	No substantial increase to website conversion rates .....	97
(e)	No substantial increase to quality of service.....	99
(f)	No evidence of costs savings (either passed on to consumers or retained to be re-invested).....	103
(g)	Pending Solds.....	107
(h)	WESTs .....	109
(iv)	General conclusion on SLC/SPC: Dr. Vistnes did not apply the correct test in determining substantiality.....	109
	<b>THEORY OF HARM #2: BUYER STEERING .....</b>	<b>111</b>
	<b>TREB’s VOW POLICY IS A MERE EXERCISE OF ITS INTELLECTUAL PROPERTY RIGHTS .....</b>	<b>112</b>
A.	<b>TREB owns the copyright in the TREB MLS® database .....</b>	<b>112</b>
B.	<b>The provisions of TREB’s VOW policy are a mere exercise of its intellectual property rights.....</b>	<b>116</b>
	<b>IF A REMEDY IS GRANTED - THE NEED FOR INFORMED CONSENT .....</b>	<b>120</b>
	<b>ORDER REQUESTED.....</b>	<b>120</b>

**OVERVIEW**

1. This Application by the Commissioner of Competition (“Commissioner”) concerns the Virtual Office Website (“VOW”) policy of The Toronto Real Estate Board (“TREB”).

2. The Commissioner is not satisfied with the current content of TREB’s VOW datafeed. The Commissioner is of the view that TREB should be forced to include in its VOW datafeed sensitive financial information of the home-buying and home-selling public, most particularly sold home prices. The Commissioner is of the view that TREB’s conduct is an abuse of dominant position pursuant to section 79 of the *Competition Act*.

3. TREB opted to exclude sold home prices from its VOW datafeed after careful consideration of privacy and consumer rights issues. These concerns are manifestly apparent from reviewing the history of TREB’s implementation of VOWs, and in particular the activities of the VOW Task Force.

4. TREB has historically acted as a good steward of the confidential information that is entrusted to its Members, which has included (among many other things) enacting measures to prevent data-scraping of its MLS database. Concerns about privacy and consumer rights were not an after-the-fact justification – these are concerns that have guided TREB’s conduct throughout.

5. The Commissioner wants to force every home buyer and home seller in the GTA to make their home price available for search and display in perpetuity on the internet to anyone with an internet connection and an email address without giving them a chance to say no. In the Commissioner’s world, if someone uses TREB’s MLS to buy or sell a property, that

would be consent enough. The Commissioner's proposed remedy is inconsistent with federal privacy law (*PIPEDA*), the Real Estate Council of Ontario's *Code of Ethics*, and prevailing consumer attitudes in the GTA about the privacy of their sold data.

6. The Commissioner's proposed remedy is even more problematic when one considers the prevalence of "real estate voyeurs" – individuals who have a general interest in keeping tabs on the real estate market, but have no actual interest in buying or selling property. Sold prices are just a curiosity to them.

7. Matters are only slightly less alarming when one considers the actual use to which brokerages with VOWs use their websites: as lead generation tools. The Commissioner would have everyone's sold information available on the internet for the world to see so that brokerages could entice some consumers in the virtual door.

8. Privacy issues, including federal privacy law, are manifest with the disclosure of sold information through a VOW datafeed.

9. TREB acted reasonably and prudently by withholding sold information from the VOW datafeed. TREB was not acting with an anticompetitive intent.

10. Furthermore, the competitive impact of "full information VOWs" remains completely unproven by the Commissioner.

11. VOWs are but one technological tool available to TREB's Members in providing services to home-buyers and home-sellers. VOWs are an incidental complement to the core service that Realtors provide their clients. They are but one method of communicating

information. Applied to the facts of this case, and compared to the “but for” world, the Commissioner’s “full information VOWs” are but one method of communicating a specific type of data (primarily sold prices), which in the current world those brokers can already otherwise communicate to clients through a variety of other communication methods.

12. If “full information VOWs” were a disruptive mode of business, then we would see the impact in the American market. While the Commissioner’s expert claims that full information VOWs will result in an increase in quality, and that quality is difficult to measure, it is important to bear in mind that those increases in quality are only competitively significant if they result in more business (as he admitted at the initial hearing).

13. The Commissioner’s expert economist failed to consider the impact of VOWs in the broader American market, and failed to conduct comparative analyses of how (if at all) RedFin (one of the Commissioner’s witnesses) is impacted in American jurisdictions where they are permitted to display sold information on a VOW, and those where they are not.

14. The Commissioner has put forward no empirical evidence to support his theoretical case for substantiality. To the contrary, it appears that full information VOWs are having no appreciable impact in the residential real estate markets in the United States, and other empirical evidence that is before the Tribunal (such as concerning conversion rates) is inconsistent with the Commissioner’s theory of the case.

15. TREB’s VOW policy does not substantially lessen or prevent competition.



16. There are additional ways in which the Commissioner's Application fails the test under section 79 of the *Competition Act*. These will be canvassed in detail in the pages that follow.

17. The Commissioner has not proven his case. TREB submits that his Application should be dismissed.

## **THE FACTUAL BACKGROUND**

### **A. The Toronto Real Estate Board**

18. TREB is a member-based, not-for-profit corporation. TREB is the largest real estate board in Canada, with some 42,500 real estate broker and salesperson members ("Members").<sup>1</sup> TREB is governed by a 16 member Board of Directors. Directors are elected by TREB's Members during regularly scheduled elections. All of TREB's Directors are licensed and practising Realtors, and undertake their directorial duties on a volunteer basis.<sup>2</sup>

19. TREB's mandate is to assist its Members in the provision of real estate brokerage services to the public, and to advance and promote the interests of those engaged in the real estate industry. To this end, TREB provides a variety of services to its Members, with one of the most important services being the administration of TREB's MLS® System, which permits TREB's Members to access to real estate data, listings, and information.<sup>3</sup>

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<sup>1</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 3; TREB Compendium ("TC") at **Tab 1**; Richardson Evidence, October 5, 2015, p 623 at lines 21–25; TC at **Tab 2**.

<sup>2</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 18; TC at **Tab 1**.

<sup>3</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 4, 5, 15; TC at **Tab 1**; Richardson Evidence, October 5, 2015, p 624 at line 1 – p 626 at line 17; TC at **Tab 2**.

20. TREB is not a participant in the markets for residential real estate brokerage services in the GTA (buy side or sell side). TREB is not licensed to trade in real estate and it does not trade in real estate.<sup>4</sup> TREB has no interest, financial or otherwise, in how competition occurs among its Members. TREB accords equal rights of membership and equivalent levels of service to all of its Members, regardless of their business model.<sup>5</sup>

**B. The TREB MLS® System**

21. The TREB MLS® System is a computerized system consisting of network links, information, and resources available to Members. The TREB MLS® System is provided through a platform called Stratus, but the content of the system is inputted, maintained and operated by TREB. The MLS® Database (i.e. where the property and listing information is stored, compiled and made searchable to the Members) is a significant and important component of the TREB MLS® System.<sup>6</sup> The content of the TREB MLS® Database is proprietary to TREB, and TREB owns the copyright in this database.<sup>7</sup>

22. The TREB MLS® System is TREB's most costly undertaking; for the fiscal year ending June 30, 2014, TREB spent [REDACTED] in direct costs and [REDACTED] in total costs (including indirect cost) in the operation and maintenance of this system.<sup>8</sup>

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<sup>4</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 22; TC at **Tab 1**.

<sup>5</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 14, 25; TC at **Tab 1**.

<sup>6</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 29, 31; TC at **Tab 1**; Richardson Evidence, September 24, 2012, p 1171 at line 21 – p 1172 at line 5, p 1177 at lines 18–25; TC at **Tab 3**.

<sup>7</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit P.1, “Software Licence Agreement” at cls 1.12 “Intellectual Property”, 1.18 “MLS Data”, 1.38 “TREB Data”, 2.6 “Scope of the License Grant”; TC at **Tab 4**.

<sup>8</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 29; TC at **Tab 1**; Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit C, “Estimated Cost to Provide Toronto MLS® Service” at p 144; TC at **Tab 5**.

(i) **TREB's MLS® Database**

23. TREB's MLS® Database is a searchable compilation of real estate listings that have been provided to the TREB MLS® by its Members. The database includes both current active listings and an archive of inactive listings (expired, withdrawn, suspended or terminated listings, as well as solds and pending solds).<sup>9</sup>

24. Individual listings inputted to TREB's MLS® Database are proprietary to the brokerage that uploads the listing. This means that in order for any other Member to advertise that listing, he or she needs to obtain consent of the Member or brokerage who "owns" the listing. It also means that the Member who uploads the listing is responsible for the accuracy of the information provided in the listing.<sup>10</sup>

25. The seller has to expressly consent to the posting of the listing into the MLS® Database. As part of the uploading process, the seller can decide whether the listing will go on the internet (e.g. to realtor.ca, or as part of a Virtual Office Website ("VOW") feed), or whether it will remain internal to the TREB MLS® system. The seller can also grant permission to the listing brokerage to allow other brokerages to advertise the property (e.g., form part of TREB's Internet Data Exchange ("IDX") feed).<sup>11</sup>

(ii) **Searching Listings on TREB's MLS® Database**

26. Members are able to conduct searches on the TREB MLS® Database using specific search parameters (such as price range, neighbourhood, number of rooms, etc.) that match the

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<sup>9</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 30, 44; TC at **Tab 1**.

<sup>10</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 30, 40, 44; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit D, "MLS® Rules", R-301 at p 147; TC at **Tab 6**.

<sup>11</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 40; TC at **Tab 1**.

needs of their clients. From the search results, which are displayed in a list, Members are able to generate more comprehensive reports about properties of interest to the client.<sup>12</sup>

27. TREB's MLS® Database also allows Members to conduct a "map search", with the aid of search tools called "radius search" or "polygon search". These tools allow users to customize their search by drawing or defining boundaries of their choosing around the area or neighbourhood of interest. Members can then view listing and statistical information associated with the selected region, and can generate the same variety of reports as with the list search.<sup>13</sup>

28. Members can also conduct a Comparative Market Analysis ("CMA") using the MLS® System. The function of a CMA is to compare one property to another (or compare multiple properties) based on the MLS® data available for the comparable properties.<sup>14</sup>

### (iii) Ensuring the Security of MLS® Information

29. The MLS® System is accessed by way of a secure log in (a three-stage identification process) and is not accessible to members of the general public.<sup>15</sup>

30. Because the information contained in the MLS® Database is stored and accessed electronically, data scraping is of serious concern to TREB. Data scraping refers to the unauthorized taking and misuse of the proprietary information contained in TREB's MLS®

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<sup>12</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 49–51; TC at **Tab 1**; Exhibit R-041, STRATUS Screenshots, slides 7–9, 11–12; TC at **Tab 7**; Richardson Evidence, September 24, 2012, p 1206 at line 7 – p 1209 at line 9; TC at **Tab 8**.

<sup>13</sup> Richardson Evidence, September 24, 2012, p 1207 at lines 7–11, p 1234 at line 4 – p 1235 at line 20; TC at **Tab 9**; Exhibit R-041, STRATUS Screenshots, slides 10, 15–16; TC at **Tab 7**.

<sup>14</sup> Exhibit CR-142, Witness Statement of Donald Richardson at para 54; TC at **Tab 1**; Richardson Evidence, September 24, 2012, p 1198 at lines 6–25; TC at **Tab 10**.

<sup>15</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 32; TC at **Tab 1**; Richardson Evidence, September 24, 2012, p 1179 at line 9 – p 1180 at line 17; TC at **Tab 11**.

Database.<sup>16</sup> TREB has experienced problems with data scraping both in the past and in the present day.

31. TREB used to offer a “bulk download” function which enabled a user of the MLS® System to copy a large volume of the contents of the MLS® Database onto his or her own computer.<sup>17</sup> In 2007, Fraser Beach and Bell New Ventures took advantage of the bulk data offering and scraped the database, which Mr. Beach then used to create his own online listing database. Several months later, Stephen Moranis and Realtysellers did the same thing to create a Realtysellers database. As a result, TREB disabled the bulk download feature and has made changes to the way in which it provides data electronically to its Members. TREB also monitors the MLS® activity of individuals with higher than normal use patterns in order to detect possible misuse.<sup>18</sup>

32. A more recent example of data scraping since the initial hearing involves the bulk dissemination of sold home price information to the public by a very small number of Members through email or websites. Many of the Members who were disseminating sold information in such a way ceased the practice in response to TREB’s direction to them to stop. TREB is still in the fact-finding stage as it considers action against certain other Members who have not acceded to TREB’s requests.<sup>19</sup>

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<sup>16</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 98–100; TC at **Tab 1**.

<sup>17</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 101; TC at **Tab 1**.

<sup>18</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 102–104, 107; TC at **Tab 1**.

<sup>19</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 108.1–108.2; TC at **Tab 1**; Richardson Evidence, October 6, 2015, p 759 at line 13 – p 760 at line 3; TC at **Tab 12**.

33. TREB is not the only entity in the real estate industry to be a victim of data scraping. Mr. Simonsen gave evidence that CREA's website Realtor.ca has been subject of attempts at scraping in the past.<sup>20</sup>

**C. TREB has a history of developing technological tools for its Members**

34. TREB offers its Members a multitude of technological tools in addition to its VOW datafeed (which is discussed in greater detail below). TREB developed technological tools prior to its implementation of the VOW datafeed, and has continued to offer expanded technological tools since the implementation of its VOW datafeed.

35. Prior to the introduction of VOW or IDX technology, listing data was shared between brokerages (for the purpose of being displayed to the public) by virtue of a Data License Agreement (also known as a Data Transfer Agreement ("DTA")). TREB implemented the DTA system during the years of 2003-2005. These agreements permit a Member to direct TREB to send listing data to a Member's own website or to a third party website or service. Using these agreements, Members are able to share and advertise each other's listings, while honouring the ownership rights in the listing information.<sup>21</sup>

36. An IDX is an agreement between separate brokerages (or groups of brokerages) to advertise each other's listings on each other's websites. TREB's IDX was another pre-cursor to the VOW and was developed in the years following the creation of TREB's DTA system. TREB's IDX functions as a centralized version of the DTA system; the IDX is one large

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<sup>20</sup> Simonsen Evidence, October 7, 2015, p 1067 at lines 1-8; TC at **Tab 13**.

<sup>21</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 55; TC at **Tab 1**; Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit N (TREB Data License Agreement); TC at **Tab 14**; Richardson Evidence, September 24, 2012, p 1239 at lines 1-16, p 1240 at lines 1-23; TC at **Tab 15**.

shared pool of listings and participation is optional and reciprocal: brokers opt in to receive all listings from all participants, and they share their own listings as well.<sup>22</sup>

37. TREB's frameable IDX feed was made available in January 2010. In the frameable IDX, the portion of the Member's website containing the IDX is framed and static, and run directly off TREB's servers, and the Member puts his or her proprietary information and branding around the edge of the frame. TREB's downloadable datafeed-based IDX was introduced in November 2011. In the downloadable IDX, the Member is able to control how the display of information provided through the IDX feed appears on that Member's website.<sup>23</sup>

38. There are currently 694 firms representing 39,084 individual TREB Members who are part of TREB's IDX program. Well over 90% of TREB's Members are subscribed to TREB's IDX program.<sup>24</sup>

39. TREB is currently developing another online tool for its Members called Collaborate. Collaborate provides a platform for online collaboration between Members and clients. Collaborate essentially allows clients to collaboratively search active property listings with their agent through a unique shared webpage (somewhat similar in concept to a Facebook group page).<sup>25</sup>

40. TREB offers additional technological tools to its Members beyond the web-based tools described above, including: Property Match (an electronic means by which Members

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<sup>22</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 69; TC at **Tab 1**.

<sup>23</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 71-74; TC at **Tab 1**.

<sup>24</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 3, 76; TC at **Tab 1**.

<sup>25</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 57.3; TC at **Tab 1**.

can automatically email new listings of interest to clients);<sup>26</sup> Touchbase (a product that facilitates the booking of showings of listed properties);<sup>27</sup> and MPAC Propertyline™ for TREB (a product that allows Members to access information from MPAC and Teranet).<sup>28</sup>

**D. TREB's VOW Task Force**

**(i) VOWs Generally**

41. A VOW is a password protected portion of a website operated by a real estate brokerage, broker, or salesperson where customers and clients of that brokerage, broker, or salesperson can view certain listing information for properties that are listed for sale. The data provided in the VOW datafeed is determined by TREB, but the format which it is displayed to the consumer is determined by the VOW operator.<sup>29</sup>

**(ii) History of TREB and VOWs**

42. TREB first became aware of VOWs as a concept in 2002, as a result of the activities of certain Realtors in the United States. TREB began monitoring the concept by sending Members to attend conferences, such as Inman (a technology oriented conference) and National Association of Realtors ("NAR") conferences, and made a point generally to stay up to date on relevant developments in the U.S.<sup>30</sup>

43. It was evident to TREB that issues associated with VOWs were complex, because in 2005 the U.S. Department of Justice commenced antitrust proceedings against NAR with

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<sup>26</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 52; TC at **Tab 1**; Exhibit CR-040, Updated Witness Statement of Donald Richardson, Exhibit L (Property Match Sample Report); TC at **Tab 16**.

<sup>27</sup> Richardson Evidence, September 24, 2012, p 1194 at lines 1–14; TC at **Tab 17**.

<sup>28</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 57.1 – 57.2; TC at **Tab 1**.

<sup>29</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 109–10; TC at **Tab 1**.

<sup>30</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 111; TC at **Tab 1**; Richardson Evidence, September 24, 2012, p 1237 at lines 1–18; TC at **Tab 18**.



respect to NAR's VOW policy. This created a climate of uncertainty for TREB, and TREB was reluctant to proceed further with the development of a VOW Policy while the issues in the U.S. remained unresolved.<sup>31</sup>

44. TREB instead focused its efforts toward establishing its system of Data Transfer Agreements as discussed above, and in or around 2003 or 2004 TREB created an IDX/VOW Task Force to monitor the IDX/VOW concepts and keep track of any developments.<sup>32</sup>

45. After the NAR litigation settled in 2008, the Competition Bureau approached TREB and advised TREB that in the Bureau's view, TREB should have a VOW policy. In July 2008 TREB began the process of establishing a formal VOW Task Force. A list of Task Force members was ratified later that month. TREB asked the Competition Bureau to provide a representative to the Task Force, but the Bureau declined.<sup>33</sup>

46. TREB believed that the VOW issue was a national issue, and would benefit from participation of a CREA representative and CREA's counsel. The Bureau's representatives agreed that this was a national issue and indicated that they would turn their attention to CREA. As a result, TREB ceased the workings of its own Task Force with the understanding that CREA would be undertaking work on VOWs.<sup>34</sup>

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<sup>31</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 112; TC at **Tab 1**; Richardson Evidence, September 24, 2012, p 1238 at lines 3–10; TC at **Tab 18**.

<sup>32</sup> Richardson Evidence, September 24, 2012, p 1237 at lines 19–24, p 1239 at lines 1–22; TC at **Tab 18**.

<sup>33</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 113 – 114; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit Z (Board of Director Meeting Minutes, July 8, 2008); TC at **Tab 19**; Richardson Evidence, September 24, 2012, p 1243 at lines 1–21; TC at **Tab 18**; Exhibit CR-096, TREB's Request to Admit at para 48; TC at **Tab 20**.

<sup>34</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 115; TC at **Tab 1**; Richardson Evidence, September 24, 2012, p 1243 at line 22 – p 1244 at line 14; TC at **Tab 18**.

(iii) **CREA's Task Force**

47. In October 2008, CREA established its own VOW Task Force. TREB had Member and staff participation in the Task Force. CREA's Task Force met several times and produced a recommendation and report. However, CREA's Task Force stalled after reaching a point of impasse with the Competition Bureau in 2009 regarding the issue of mandatory brokerage participation.<sup>35</sup>

48. During the existence of the CREA VOW Task Force, TREB continued to develop its own web-based tools to offer to its members. In particular, TREB had turned its efforts and focus to establishing a frameable IDX, which was made available in January of 2010.<sup>36</sup>

(iv) **TREB's 2010-2011 Task Force**

49. In July 2010, TREB's Board of Directors engaged in its yearly strategic planning meetings and decided to revive the efforts to establish a VOW Policy as one its goals for the 2010-2011 fiscal year.<sup>37</sup>

50. In the fall of 2010, TREB was approached by the Competition Bureau. The Bureau requested that TREB complete a voluntary information request regarding VOWs. TREB agreed to respond to the voluntary information request, and responses were provided in late 2010 and early 2011. TREB's discussions with the Bureau continued into early 2011. In March 2011, when TREB's 2010-2011 Task Force was initially established, TREB was

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<sup>35</sup> Exhibit A-087, CREA VOW Task Force Meeting Minutes (October 15<sup>th</sup> & 16<sup>th</sup>, 2008); TC at **Tab 21**; Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 116; TC at **Tab 1**; Richardson Evidence, September 24, 2012, p 1244 at line 19 – p 1245 at line 11; TC at **Tab 18**.

<sup>36</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 117; TC at **Tab 1**.

<sup>37</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 118; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit AA (TREB's 2010/2011 Strategic Plan) at page 449; TC at **Tab 22**; Richardson Evidence, September 24, 2012, p 1245 at lines 12–24; TC at **Tab 18**.

simultaneously engaged in discussions with the Competition Bureau with respect to the constituents of a VOW policy.<sup>38</sup>

51. TREB's VOW Task Force members were selected and ratified in March 2011. In selecting the members, the Board looked to achieve a balance between members with experience and members that were "younger, and more plugged in" (i.e. members with a strong understanding of how the internet could be used as a tool to provide real estate brokerage services). For example, Chris Slightam was selected because he had also sat on CREA's VOW Task Force, Don Patterson was selected because he had extensive experience with respect to the implementation of internet banking, and Evan Sage was selected because his brokerage was very active in terms of incorporating new technology and the internet in the delivery of brokerage services.<sup>39</sup>

52. The mandate of TREB's VOW Task Force was to investigate and recommend the feasibility of adopting a VOW policy, and in particular to consider the areas of concern raised by the Competition Bureau.<sup>40</sup>

53. In March 2011 TREB received correspondence from counsel to the Commissioner indicating that TREB had until the end of August to create its VOW policy. The Task Force's process and progress was highly dictated by the pressure TREB was receiving from the Commissioner of Competition.<sup>41</sup>

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<sup>38</sup> Richardson Evidence, September 24, 2012, p 1245 at line 25 – p 1246 at line 21, p 1248 at lines 5–17; TC at **Tab 18**.

<sup>39</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 119–20; TC at **Tab 1**; Richardson Evidence, September 24, 2012, p 1247 at lines 12–25; TC at **Tab 18**.

<sup>40</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 122; TC at **Tab 1**.

<sup>41</sup> Richardson Evidence, September 27, 2012, p 1669 at line 6 – p 1670 at line 21; TC at **Tab 23**.

54. TREB's MLS® rule change policies stipulate that any proposed change to an MLS® rule is subject to a 60-day Member commentary period. This 60 day period had to fit within the Commissioner's August deadline, and the result was that the "four months" allotted by the Commissioner translated into only two working months. This two month "working period" is reflected in the meeting minutes of the VOW Task Force's first meeting when it contemplated the time period over which the Task Force would conduct its discussions and analysis. Because TREB faced a compressed timeframe, combined with the threat of litigation, TREB was unable to consult with the entities or regulatory bodies in the manner that it would have otherwise preferred.<sup>42</sup>

**(a) Meetings and Discussions of the Task Force**

55. Before the first meeting of the VOW Task Force, members of the Task Force were asked to review the VOW Rules and Policy that had been agreed to by NAR in its settlement with the US Department of Justice.<sup>43</sup>

56. On March 31, 2011 the VOW Task Force held its first meeting. At this meeting the Task Force members were provided with a briefing about VOWs, and each member shared his or her knowledge and experiences with VOWs and emerging technology. John

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<sup>42</sup> Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit LL (Procedures to Amend TREB's MLS® Rules and Policies); TC at **Tab 24**; Richardson Evidence, September 27, 2012, p 1672 at lines 13–15; p 1677 at line 2 – p 1678 at line 5; TC at **Tab 25**; Syrianos Evidence, September 28, 2012 (in camera), p 112 at lines 16–20; TC at **Tab 26**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit CC (Minutes of the VOW Task Force, March 31, 2011); TC at **Tab 27**.

<sup>43</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 123; TC at **Tab 1**.

DiMichele, at the time TREB's Chief Information Officer, provided a presentation on the evolution of IDX and VOWs in the U.S. market.<sup>44</sup>

57. The Task Force unanimously agreed (after being asked individually for their opinions) that it made sense to use the NAR policy and rules as a starting point for the creation of a TREB policy, as opposed to starting from scratch, and that changes could be made to those documents in order to make the policy applicable and compliant with TREB's rules and other Canadian laws.<sup>45</sup>

58. During the first meeting the Task Force members identified specific topics or issues to be discussed as part of its mandate to create a VOW Policy. These items included:<sup>46</sup>

- (a) the terms of use;
- (b) the requirement for a consumer or a client relationship;
- (c) the requirement for a "sign-in";
- (d) the type of information permitted to be displayed, (in particular with respect to consumers as opposed to clients);
- (e) advertisements on VOWs;
- (f) the ability of brokers/sellers to opt-out;
- (g) Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) considerations;
- (h) issues surrounding anonymity and the ability to validate the identity of a VOW user;

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<sup>44</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 123–24; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit CC (Minutes of the VOW Task Force, March 31, 2011); TC at **Tab 27**; Richardson Evidence, September 24, 2012, p 1255 at lines 5 – 12; TC at **Tab 28**.

<sup>45</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 123–124; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit CC (Minutes of the VOW Task Force, March 31, 2011); TC at **Tab 27**; Richardson Evidence, September 24, 2012, p 1253 at line 15 – p 1254 at line 12; TC at **Tab 28**.

<sup>46</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 126; TC at **Tab 1**; Richardson Evidence, September 24, 2012, p 1255 at lines 13–18; TC at **Tab 28**.

- (i) data mining;
- (j) concerns about compliance with the federal *Personal Information Protection and Electronic Documents Act*;
- (k) the possibility of creating CMAs online;
- (l) issues if members belong to more than one board; and
- (m) potential Real Estate Council of Ontario (“RECO”) involvement.

59. The Task Force met for the second time on April 21, 2011, during which the members of the Task Force discussed specific Terms of Use of VOWs and the revisions that would be required to be made to NAR’s VOW Policy. In particular, there was discussion about including a requirement on the number of times the VOW feed would need to be refreshed for purposes of accuracy, and it was agreed that there should be a limit on the number of downloads during a given period of time for reasons related to data security and prevention against data scraping.<sup>47</sup>

60. The Task Force also discussed the requirement of an email sign-in and password. The Task Force contemplated whether users would need to consent to terms of use, and how that could be achieved.<sup>48</sup>

61. The issue of a sign-in requirement went hand-in-hand with the discussion as to how, if possible, a client-agent relationship could be established through a VOW. Task Force members identified concerns with respect to the level of information that could be provided to a client as opposed to a consumer based on RECO regulatory concerns as well as privacy law

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<sup>47</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 127–28; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit DD (Minutes of the VOW Task Force, April 21, 2011); TC at **Tab 29**.

<sup>48</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 129; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit DD (Minutes of the VOW Task Force, April 21, 2011); TC at **Tab 29**.

concerns. It was suggested that publicly available information could be provided to a consumer, whereas a more detailed subset of information could be provided to a client as one way to address these concerns.<sup>49</sup>

62. Task Force members also considered whether to grant an “opt-out” option for brokerages and/or for home sellers. It was believed that mandatory brokerage participation was required in order for the VOW concept to succeed, though consensus was not achieved at this meeting and further discussion on the issue was required.<sup>50</sup>

63. The Task Force also discussed the possibility of VOWs being able to provide a CMA, and the privacy issues that might arise in the provision of this service. The Task Force agreed that there were fewer privacy concerns with the use of sold data in the context of preparing a CMA for a specific property (i.e. a limited extraction in response to a specific request), as opposed to a scenario where all sold data was available for search as part of a VOW as part of a general database.<sup>51</sup>

64. The Task Force also agreed that there were fewer privacy concerns in a scenario where an automated valuation platform could display an estimated value for a listed property without disclosing any information about any specific sold properties (in other words, no side

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<sup>49</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 129; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit DD (Minutes of the VOW Task Force, April 21, 2011); TC at **Tab 29**.

<sup>50</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 130; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit DD (Minutes of the VOW Task Force, April 21, 2011); TC at **Tab 29**.

<sup>51</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 131; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit DD (Minutes of the VOW Task Force, April 21, 2011); TC at **Tab 29**.

by side comparison of individual properties). These privacy issues were left to be considered in more detail at a later meeting.<sup>52</sup>

65. The third meeting of the Task Force was held on May 12, 2011. At the third meeting, members of the Task Force had a lengthy discussion about *PIPEDA* and the RECO, and whether it would be possible for TREB to provide sold data as part of the VOW feed.<sup>53</sup>

66. At its third meeting, the Task Force reached a consensus that pending sold information should not be provided in the VOW feed, as this was a privacy and consumer rights issue: disclosing the details of a potential sale before the sale was complete could result in harm to the seller in the event the transaction did not close.<sup>54</sup>

67. The question of whether the VOW feed should include any sold information at all was a more complicated issue. The Task Force agreed that providing sold information would raise issues of consent with both *PIPEDA* and RECO, and that if this information was going to be provided, it would have to be in accordance with RECO and *PIPEDA* requirements. There was also uncertainty as to whether consent to use personal information contained in the standard OREA listing agreement and buyer representation agreement would be sufficient to allow any historical sold information to be shared.<sup>55</sup>

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<sup>52</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 132; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit DD (Minutes of the VOW Task Force, April 21, 2011); TC at **Tab 29**.

<sup>53</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 133–34; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit EE (Minutes of the VOW Task Force, May 12, 2011); TC at **Tab 30**.

<sup>54</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 135; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit EE (Minutes of the VOW Task Force, May 12, 2011); TC at **Tab 30**.

<sup>55</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 135; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit EE (Minutes of the VOW Task Force, May 12, 2011); TC at **Tab 30**.



68. The privacy issues were further complicated by the fact that the Privacy Commissioner's Office had recently released an opinion wherein a real estate brokerage was sanctioned for releasing information about the price of a sold home without obtaining consent of the buyer. In that case, the Privacy Commissioner's Office held that even though the information was available in a public registry, the sale price was not "publically available" in the hands of the brokerage within the meaning of that term in *PIPEDA*, because the brokerage had not obtained the information from the public registry.<sup>56</sup>

69. The Task Force reviewed its position on providing sold information in the context of a Comparative Market Analysis or Automated Valuation Model. Task Force Members were favourable to providing this information, provided it would be possible from a technological standpoint, and whether proper consents were in place to disclose sold information given broader concerns about privacy issues.<sup>57</sup>

70. At this third meeting the Task Force also analyzed the NAR policy on a line-by-line basis and modified it in light of changes required for TREB standards and existing rules and policies.<sup>58</sup>

71. As a result of the meetings held on March 31, 2011, April 21, 2011 and May 12, 2011 the Task Force reached a consensus on a number of issues and a Task Force report was

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<sup>56</sup> *PIPEDA Case Summary #2009-002*, [2009] C.P.C.S.F. No. 2 at 3; Richardson Evidence, September 27, 2012 p 1670 line 22 – p 1672 line 8; TC at **Tab 31**.

<sup>57</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 136; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit EE (Minutes of the VOW Task Force, May 12, 2011); TC at **Tab 30**; Syrianos Evidence, September 28, 2012 (in camera), p 110 at line 21 – p 111 at line 2; TC at **Tab 32**; Richardson Evidence, September 27, 2012, p 1674 at lines 1–16; TC at **Tab 33**.

<sup>58</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 137; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit EE (Minutes of the VOW Task Force, May 12, 2011); TC at **Tab 30**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit FF (Task Force Report including revisions to NAR Policy) at p 514; TC at **Tab 34**.

circulated to the Board of Directors on May 18, 2011 for consideration at the next Board meeting. This report was also provided to members of the Task Force.<sup>59</sup>

72. A fourth meeting of the VOW Task Force was held on May 20, 2011. At the fourth Task Force meeting the members considered the outstanding issues on which it previously had been unable to achieve consensus. The first issue was whether there should be an “opt out” provision. The Task Force ultimately decided that a brokerage should not have the ability to exclude its listings from the feed because the VOW feed would lose its value if brokers were able to opt out, and it would render the service too similar to an IDX. However, the Task Force was of the opinion that the seller should always have the option as to whether their information would end up on the VOW feed.<sup>60</sup>

73. The Task Force also had to consider the concerns surrounding “sold” information and the rules with respect to *PIPEDA* and RECO. On the issue of sharing of sold data and information relating to pending solds, expired, terminated, suspended or withdrawn listings, there was a lengthy discussion about how parity could be achieved between Member activities in a “bricks and mortar” environment and Member activities through a VOW.<sup>61</sup>

74. The Task Force discussed the differences with respect to privacy concerns when a customer or client meets with a broker in an office setting as compared to the privacy concerns associated with VOW users. In an office setting (person to person), the broker can

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<sup>59</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 138; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit FF (Task Force Report including revisions to NAR Policy) at p 509; TC at **Tab 34**.

<sup>60</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 141–43; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit GG (Minutes of the VOW Task Force, May 20, 2011); TC at **Tab 35**.

<sup>61</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 142, 144; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit GG (Minutes of the VOW Task Force, May 20, 2011); TC at **Tab 35**; Syrianos Evidence, September 28, 2012 (in camera), p 112 at line 21 – p 113 at line 6; TC at **Tab 36**.

act as an intermediary and is able to safeguard how the information is distributed, and to whom, in accordance with the requirements of *PIPEDA* and *RECO*. Conversely, in a VOW setting, any sensitive information contained in the feed would be widely available to anyone with an internet connection. With limited abilities to monitor and trace the use of the information, it makes it harder for TREB to ensure accountability and prevent unauthorized or improper use or distribution.<sup>62</sup>

75. Furthermore, based on privacy concerns, concerns about *PIPEDA* and *RECO*, concerns about potential legal liability for TREB and its Members, the Task Force felt that it would be prudent to refrain from including information about solds, pending solds, expired, terminated, suspended or withdrawn listings as part of the VOW feed.<sup>63</sup>

**(b) Approval Process**

76. TREB needed to amend its MLS® Rules and Policies in order to implement the VOW Policy and Rules. TREB's MLS® policy for rule changes required that TREB follow a set process for the approval of the VOW Policy and Rules which included approval by the MLS® Committee, legal review, and approval by the Board of Directors.<sup>64</sup>

77. On May 26, 2011 the Board of Directors considered the report of the VOW Task Force, and gave initial approval for the MLS® Committee to review the VOW Policy and Rules. Despite being aware of the work that the VOW Task Force was undertaking, and in

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<sup>62</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 145–47; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit GG (Minutes of the VOW Task Force, May 20, 2011); TC at **Tab 35**.

<sup>63</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 148; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit GG (Minutes of the VOW Task Force, May 20, 2011); TC at **Tab 35**.

<sup>64</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 151; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit LL (Procedures to Amend TREB's MLS® Rules and Policies); TC at **Tab 37**.

spite of the previously communicated August deadline, the Commissioner of Competition commenced this Application on May 26, 2011.<sup>65</sup>

78. On June 1, 2011, the MLS® Committee met to consider the VOW Policy and Rules. The MLS® Committee reviewed the VOW Policy and Rules on a clause by clause basis, in part to ensure that brokerages operating in a VOW setting were able to operate in parity with brokerages operating in a “bricks and mortar” environment. The MLS® Committee proposed several changes to the VOW Policy and Rules that were geared generally at ensuring clarity, accuracy, and consistency within the Policy and Rules. The MLS® Committee voted to approve the VOW Policy and Rules, as amended by the Committee.<sup>66</sup>

79. Mr. Paul Stoyan, a lawyer with Gardiner Roberts LLP who had been retained by TREB, met with the MLS® Committee on June 13, 2011. He discussed amendments to the draft VOW policy, provided clarification on some items, and provided input on a new glossary of terms. Mr. Stoyan also explained the comments from CREA’s competition counsel with regards to the proposed VOW policy, which TREB had received on June 13, 2011.<sup>67</sup>

80. The VOW Policy and Rules were approved by votes of the Board of Directors on June 9, 2011, and June 23, 2011. During the meeting on June 23, 2011, TREB’s VOW Policy and

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<sup>65</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 149–50; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit HH (Memo of the MLS® Committee, May 26, 2011); TC at **Tab 38**.

<sup>66</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 151–52; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit II (Minutes of the MLS® Committee Meeting, June 1, 2011); TC at **Tab 39**.

<sup>67</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 153; TC at **Tab 1**; Richardson Evidence, September 27, 2012, p 1716 at lines 13–24, p 1718 at line 23 – p 1719 at line 6; TC at **Tab 40**.

Rules were subject to final modifications. These modifications were done in the presence of and at the suggestion of TREB's legal counsel.<sup>68</sup>

81. On June 24, 2011, in accordance with TREB's MLS® Rule Change Policy, TREB published the VOW Policy and Rules for a 60-day review period by Members and issued a news release in this regard. TREB received and considered comments from its Members during this 60 day review period.<sup>69</sup>

82. The Board of Directors met again on August 25, 2011, after the expiry of the 60 day review period. At this meeting the Board of Directors approved the VOW Policy and Rules and commenced the process of developing the technological infrastructure to implement the VOW datafeed.<sup>70</sup>

83. The VOW datafeed went live on November 15, 2011. The VOW data feed, which is provided to Members at no additional charge (beyond their annual membership dues) contains all non-confidential TREB MLS® data except for listings where the seller has elected to withhold the listing from the internet.<sup>71</sup>

84. The VOW datafeed is a technological tool that TREB makes available to its Members in addition to all of the other tools and services available to Members. Members that elect to use the VOW datafeed in their delivery of real estate services have the same access to

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<sup>68</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 154; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit JJ (Minutes of the Meeting of the Board of Directors, June 9, 2011); TC at **Tab 41**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit KK (Minutes of the Meeting of the Board of Directors, June 23, 2011); TC at **Tab 42**.

<sup>69</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 155; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit MM (VOW News Release, June 24, 2011) at page 563; TC at **Tab 43**.

<sup>70</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 156; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit NN (Minutes of the Special Meeting of the Board of Directors, August 25, 2011); TC at **Tab 44**.

<sup>71</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 157, 168; TC at **Tab 1**.

TREB's other tools and services as do all TREB Members, *including full access to the TREB MLS® database which includes the disputed fields that are at issue in this proceeding.*<sup>72</sup>

(v) **Further VOW Task Force Activities**

85. The VOW Task Force met again in late August 2012 to discuss improvements to the VOW datafeed and to respond specifically to feedback Mr. Pasalis provided in a letter of April 10, 2012. As a result of the meeting with Mr. Pasalis, and further discussion, the Board of Directors approved upgrades to the VOW data feed. In particular, and in response to items identified as important by Mr. Pasalis, the Board approved the inclusion of open house information, URLs to virtual tours, price changes, and days on market. The Board also approved the inclusion of the MLS number, the amount of additional monthly fees (eg condo fees), lot size, municipality, and parking and driveway information. This information became available as part of the VOW feed shortly after the Task Force met with Mr. Pasalis.<sup>73</sup>

86. After fulfilling its mandate, the original VOW Task Force ceased to exist on July 1, 2013.<sup>74</sup>

87. In early 2015, TREB's Board of Directors voted to create a new VOW Task Force to review TREB's existing VOW Policy. It was ultimately decided that the new VOW Task

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<sup>72</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 164; TC at **Tab 1**.

<sup>73</sup> Exhibit A-010, Witness Statement of John Pasalis at para 29; TC at **Tab 45**; Exhibit A-010, Witness Statement of John Pasalis, Exhibit B (Letter to Richard Silver of TREB, dated April 10, 2012); TC at **Tab 46**; Richardson Evidence, September 24, 2012, p 1166 at lines 12–20; TC at **Tab 47**; Exhibit CA-009, Letter to John Pasalis re Changes to the VOW Data Feed, dated August 31, 2012; TC at **Tab 48**.

<sup>74</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 191.1; TC at **Tab 1**.

Force should be placed on hold pending the resolution of the present Application of the Commissioner of Competition.<sup>75</sup>

**E. TREB's concerns about Privacy**

**(i) TREB's regime of consents**

88. TREB takes its privacy obligations very seriously. Privacy is not a new issue that emerged for the first time during the meetings of the VOW Task Force. The information that populates TREB's MLS® database comes from the personal and confidential information that the public entrusts with TREB's Members. It is essential that TREB preserves the trust and confidence of both Members and the public in that database by maintaining the privacy and security of sensitive personal and confidential information.<sup>76</sup>

89. TREB relies on its Members to obtain the appropriate consents prior to uploading information into the TREB MLS® database, which database the Membership then uses for internal business purposes in conducting their real estate brokerage business.<sup>77</sup>

90. TREB recommends that its Members use OREA's standard form agreements in their real estate practice, including the standard Listing Agreement and the standard Buyer Representation Agreement. These two agreements contain consent clauses regarding the use and distribution of data in the MLS® database.<sup>78</sup> Since the initial hearing, OREA has created an additional non-mandatory form called a Buyer Customer Service Agreement, which also contains a consent clause on the use and distribution of data in the MLS® database. Because

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<sup>75</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 192; TC at **Tab 1**; Richardson Evidence, October 5, 2015, p 640 at lines 14–18; TC at **Tab 49**.

<sup>76</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 77–78; TC at **Tab 1**.

<sup>77</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 96; TC at **Tab 1**.

<sup>78</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 97; TC at **Tab 1**.

neither the Buyer Representation Agreement nor the Buyer Customer Service Agreement are mandatory documents, there will be some buyers who purchased a home through TREB's MLS® that have signed neither document.<sup>79</sup>

91. TREB is commencing the process of reviewing its current consent regime to determine whether that regime is sufficient given recent changes to *PIPEDA* by way of Bill S-4, the *Digital Privacy Act*. While *PIPEDA* has always required informed consent, Bill S-4 enhanced the notion of what constitutes “informed” consent. Under the new regime, consent “is only valid if it is reasonable to expect that an individual to whom the organization’s activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting.”<sup>80</sup>

**(ii) Home buyers and sellers in the GTA are not comfortable with the wide dissemination of their sold information**

92. Century 21 operates a national franchise-wide website on which it displays sold prices of a small number of homes bought or sold in conjunction with the agents at its franchisee brokerages. Before sold information is posted, Century 21 (the franchisor) requires agents at the franchisee brokerage to obtain the express written consent of the buyer and the seller.<sup>81</sup>

93. At the time of the initial hearing, Ms. Prescott’s brokerage, Century 21 Heritage Group Ltd., offered its clients the option of having their sold prices posted on the Century 21

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<sup>79</sup> Richardson Evidence, October 6, 2015, p 682 at line 19 – p 683 at line 15, p 733 at line 21 – p 734 at line 16; TC at **Tab 50**.

<sup>80</sup> Richardson Evidence, October 6, 2015, p 737 at line 21 – p 738 at line 24; TC at **Tab 50**; Bill S-4, *An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act*, SC 2015 Ch 32, and in particular s. 5 therein.

<sup>81</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at para 12; TC at **Tab 51**.



website. At that time, only 5-10% of her brokerage's clients provided the required consent.<sup>82</sup> It was Ms. Prescott's evidence that the reason the uptake rate was so low was that while people were comfortable with sold information being accessed by real estate professionals in the provision of real estate services, the vast majority of people have privacy and security concerns and there is discomfort with that information being made widely available on the internet.<sup>83</sup>

94. At the initial hearing, Ms. Prescott testified that in her view, the consent language found in the standard OREA forms was not broad enough to cover the disclosure of sold information over the internet and she was not willing to upload sold information to the Century 21 website on the basis of those consents alone, in part because of conversations she had with clients where clients expressed a concern about their information being made available on the internet.<sup>84</sup> Separate and apart from a technical interpretation of the consents, Ms. Prescott knew that her clients were not comfortable with their sold information being available online.

95. Since the initial hearing, Ms. Prescott engaged in a broad consultation among a sampling of her agents and her brokerage's clients regarding the online display of sold information. Of all the feedback Ms. Prescott received, no one was comfortable with having the sold price of their home widely available on the internet. Consequently, Century 21

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<sup>82</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at para 12; TC at **Tab 51**.

<sup>83</sup> Prescott Evidence, September 28, 2012, p 1787 at line 3 – p 1788 at line 11, p 1822 at line 11 – p 1823 at line 1; TC at **Tab 52**.

<sup>84</sup> Prescott Evidence, September 28, 2012, p 1819 at line 18 – p 1823 at line 1; TC at **Tab 53**.

Heritage Group made a decision as a brokerage to stop sending sold information to the Century 21 website.<sup>85</sup>

96. Century 21 Heritage Group asks its clients to provide consent to advertise sold properties by way of a “just sold” card distributed locally in the neighbourhood. Less than 5% of Century 21 Heritage Group’s clients currently provide the consent required for this limited disclosure of sold information.<sup>86</sup>

97. Similarly, Mr. Syrianos testified that his brokerage also requests the consent of buyers and sellers to send out a “just sold” card in the neighbourhood. Mr. Syrianos’s evidence was that even though the advertisement is limited to sold cards and is never posted on the internet, only about 50% of clients felt comfortable enough to allow their information to be shared in this limited way.<sup>87</sup>

**(iii) TREB’s efforts to encourage its Members to respect the private and confidential nature of the information in its MLS® database**

98. TREB provides educational and other resources to its Members to ensure that they have the tools they need to meet their obligations under *PIPEDA* and RECO’s Code of Ethics. One of the resources TREB provides its Members is a document containing “Questions and Answers” on a variety of privacy-related topics. This information is available through TREB’s intranet website.<sup>88</sup>

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<sup>85</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at paras 12.1–12.5; TC at **Tab 51**; Prescott Evidence, September 24, 2015, p 437 at line 6 – p 438 at line 23; TC at **Tab 54**; Prescott Evidence, September 24 2015 (in camera), p 82 at line 23 – p 83 at line 5; TC at **Tab 55**.

<sup>86</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at para 12.1; TC at **Tab 51**.

<sup>87</sup> Exhibit R-168, Updated Witness Statement of Timoleon Syrianos at paras 13–14; TC at **Tab 56**; Syrianos Evidence, October 6, 2015, p 821 at lines 4–13; TC at **Tab 57**.

<sup>88</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 87–91; TC at **Tab 1**.

99. Through its “Questions and Answers” document, TREB advises its Members that Comparative Market Analyses in particular, which contain sold information, should be treated as a confidential document between the Member and the seller or prospective buyer and that CMAs should not be released to the general public.<sup>89</sup>

100. TREB seeks to maintain an awareness among its Members that the information they receive from clients is sensitive and ought to be treated in a thoughtful manner. Mr. Richardson’s evidence is that based on his experience, by and large TREB’s Members do treat the information as confidential and use it for the purpose for which it was collected.<sup>90</sup>

101. While there are some bad actors (such as the small handful of Members scraping the MLS® database), the Commissioner’s suggestion that sold information is being given away freely and without regard for consumer or client privacy as a matter of course by agents operating in a “more traditional” environment is simply not supported by the evidence before the Tribunal. Industry participants, including the Commissioner’s witness, Mr. Gidamy, testified that sold information is not provided to public but only to clients.<sup>91</sup> Mr. Pasalis himself testified that he recognizes that there are privacy issues associated with the disclosure of sold data on a VOW.<sup>92</sup>

102. The Commissioner’s “evidence” on the alleged practice of sold information being “handed out the back door” to anyone who asks is not compelling.

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<sup>89</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 90; TC at **Tab 1**.

<sup>90</sup> Richardson Evidence, October 5, 2015, p 642 at lines 3–22; TC at **Tab 58**.

<sup>91</sup> Exhibit A-015, Witness Statement of Tarik Gidamy at para 19; TC at **Tab 59**; Exhibit CR-164, Updated Witness Statement of Evan Sage at para 12; TC at **Tab 60**; Exhibit CR-153, Updated Witness Statement of Tung-Chee Chan at para 7; TC at **Tab 61**; Exhibit CR-169, Updated Witness Statement of Timoleon Syrianos at para 8; TC at **Tab 56**; Prescott Evidence, September 28, 2012, p 1828 at line 13 – p 1829 at line 16; TC at **Tab 62**.

<sup>92</sup> Pasalis Evidence, September 12, 2012, p 575 at line 3 – p 577 at line 6; TC at **Tab 63**; Exhibit R-011, Email of August 2, 2011, including blog post co-written by Mr. Pasalis, entitled “The end of Realtor.ca?”; TC at **Tab 64**.

**F. The GTA Real Estate Market is Highly Competitive****(i) Competition Generally**

103. Market shares in the residential real estate brokerage industry in the GTA are incredibly small, both among brokerages and among individual brokers and salespeople. The GTA residential real estate market is highly competitive.<sup>93</sup> The level of competition in the GTA residential real estate brokerage market has only intensified since the initial hearing.<sup>94</sup> The Commissioner's expert notes that this is a "cut-throat" market.<sup>95</sup>

104. There is competition in the real industry at all levels. Brokerages compete against other brokerages for business. Brokerages under the same franchise banner (e.g. Century 21 or Re/Max) compete with each other for the same listings and clients. Brokers and salespersons within the same brokerage compete with each other for the same listings and clients.<sup>96</sup>

**(ii) Commissions in the Real Estate Industry Vary Widely; there is no "Status Quo"**

105. Industry participants gave evidence that there is no "standard" rate of commission charged to clients for the sale of residential real estate in the GTA, on either side of the transaction. Negotiation of commission between clients and their agents is common-place in the industry, both on the listing side, and the cooperating side of the transaction. The

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<sup>93</sup> Exhibit R-080, Expert Report of Jeffrey Church at pp 52–62; TC at **Tab 65**; Exhibit A-031, Reply Expert Report of Gregory Vistnes at para 126; TC at **Tab 66**; Vistnes Evidence, September 18, 2012, p 977 at lines 16–18; TC at **Tab 67**.

<sup>94</sup> See, for example, Exhibit CR-133, Updated Witness Statement of Pamela Prescott at para 14.1; TC at **Tab 51**; See also Exhibit CR-169, Updated Witness Statement of Timoleon Syrianos at para 10; TC at **Tab 56**.

<sup>95</sup> Vistnes Evidence, October 5, 2015, p 599 at lines 13–16; TC at **Tab 168**

<sup>96</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at paras 6, 13–16; TC at **Tab 51**; Prescott Evidence, September 28, 2012, p 1788 at line 12 – p 1789 at line 14; TC at **Tab 68**; Exhibit CR-169, Updated Witness Statement of Timoleon Syrianos at para 10; TC at **Tab 56**; Syrianos Evidence, October 6, 2015, p 814 at line 3 – p 818; TC at **Tab 82**.

statistical evidence presented by industry participants generally reveals that there is a large degree of variation in commission rates. [REDACTED]

[REDACTED]

[REDACTED]

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106. Industry participants testified that it is common-place in the industry for clients to be offered a rebate down from the amount of commission initially negotiated. Ms. Prescott gave evidence that it is a very common practice for her 500-some agents to rebate a portion of the buyer's commission, and that the practice has become even more prevalent since the initial hearing. [REDACTED] Ms. Prescott also testified that since the initial hearing, her agents have frequently been rebating a portion of the seller's commission as well.<sup>98</sup>

107. The statistical information on commissions provided by industry participants actually over-states the amount of net commission received by their clients, because rebates are coming directly out of the pocket of the agent – the brokerage does not track the total net amount of commission received.<sup>99</sup>

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<sup>97</sup> Exhibit CR-133, Witness Statement of Pamela Prescott at paras 23 – 29.4; TC at **Tab 51**; Exhibit CR-169, Updated Witness Statement of Timoleon Syrianos at paras 9, 11–12; TC at **Tab 56**; Exhibit CR-153, Updated Witness Statement of Tung-Chee Chan at paras 6, 9–10; TC at **Tab 61**; Exhibit CR-164, Updated Witness Statement of Evan Sage at paras 16–19; TC at **Tab 60**; Exhibit CR-169, Updated Witness Statement of Timoleon Syrianos at paras 9, 11–12; TC at **Tab 56**.

<sup>98</sup> Exhibit CR-133, Witness Statement of Pamela Prescott at paras. 1, 28.1; TC at **Tab 51**; Prescott Evidence, September 24, 2015 (in camera), p 62 at line 3 – p 64 at line 9; TC at **Tab 69**.

<sup>99</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at para 29.3; TC at **Tab 51**; [REDACTED]

(iii) **No evidence linking “full information VOWs” to lower commission rates**

108. The Commissioner’s fact and expert witnesses provided only limited sample-based evidence about commission rates, and the expected impact on commission rates from the Commissioner’s proposed changes to TREB’s VOW policy.

109. In the GTA (using TREB’s current VOW feed), TheRedPin and Realosophy both offer commission rebates/discounts. There is no suggestion in the record that the commission rates charged by these brokerages would be any lower or their rebating any more prevalent in a world with full information VOWs.<sup>100</sup>

110. In Nova Scotia, while Viewpoint offered commission discounts at the time of the initial hearing, it has since ceased the practice.<sup>101</sup>

111. In the United States, RedFin offers a commission rebate to clients, although the amount of the discount has decreased over time.<sup>102</sup> ZipRealty and eRealty are two other American VOW operators that used to offer a rebate/discount. Although ZipRealty and eRealty used to offer commission rebates/discounts, both brokerages have ceased the practice.<sup>103</sup> From an industry-wide perspective in the United States, there is some evidence that commission rates have, in fact, increased since the advent of “full information VOWs”.<sup>104</sup>

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<sup>100</sup> Exhibit CA-114, Second Witness Statement of Tarik Gidamy at paras 9–12; TC at **Tab 71**; Pasalis Evidence, September 24, 2015, p 361 at line 24 – p 362 at line 4; TC at **Tab 72**.

<sup>101</sup> Exhibit CA-099, Second Witness Statement of Bill McMullin at paras 43–45; TC at **Tab 73**; McMullin Evidence, September 23, 2015, p 168 at line 24 – p 169 at line 8; TC at **Tab 74**.

<sup>102</sup> Exhibit A-008, Witness Statement of Scott Nagel at para 52; TC at **Tab 75**; Nagel Evidence, September 12, 2012, p 445 at line 22 – p 447 at line 10; TC at **Tab 76**.

<sup>103</sup> Exhibit A-029, Report of Dr. Gregory Vistnes at p 26, footnote 69; TC at **Tab 77**; Vistnes Evidence, September 18, 2012, p 1043 at line 10 – p 1044 at line 16; TC at **Tab 78**.

<sup>104</sup> Exhibit CR-172, Second Expert Report of Dr. Jeffrey Church at para 55; TC at **Tab 79**.

**G. VOWs are merely one technological tool available to TREB's Members**

112. TREB's Members use technology to compete in the residential real estate market in the GTA, and the internet has become a critical competitive arena among TREB's Members.<sup>105</sup>

**(i) Innovation (and lead generation through the internet) is not limited to brokerages that use VOW feeds on their websites**

113. A VOW datafeed is just one potential input among many for a brokerage's website. Not all "innovative brokerages" choose to implement a VOW 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 the VOW feed in its website. Using TREB's IDX feed and CREA's Data Distribution Facility ("DDF") feed, Sage Real Estate is turning its website into a home search portal for buyers not only in Toronto, but across Canada. Mr. Sage's evidence is that Sage Real Estate's new website will be an alternative to Realtor.ca, and will eventually allow his brokerage to grow strategically and open new offices across Canada as the brokerage generates leads in different cities.<sup>106</sup>

114. Re/Max Ultimately Realty has four separate websites and two different mobile apps. The website that is geared towards residential real estate uses TREB's IDX feed and CREA's

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<sup>105</sup> Gidamy Evidence, September 23, 2015, p 265 at line 9 – p 266 at line 20; TC at **Tab 80**.

<sup>106</sup> Exhibit CR-164, Updated Witness Statement of Evan Sage at paras 5, 11.1–11.5; TC at **Tab 60**; Sage Evidence, October 6, 2015, p 774 at line 13 – p 775 at line 8, p 806 at line 24 – p 808 at line 5; TC at **Tab 81**.

DDF feed. The mobile app that is geared towards residential real estate uses TREB's VOW feed. Between 75 and 125 leads are generated each month through these online tools.<sup>107</sup>

115. Lead generation through the internet is not a phenomenon exclusively associated with websites that contain a VOW feed, and there is a significant use of IDX and DDF technology to this end. As noted above, brokerages covering well over 90% of TREB's Membership are subscribed to TREB's IDX feed.<sup>108</sup> Nationally, 73% of CREA's members are subscribed to its DDF feed, in spite of the fact that provincial regulation prevents the participation of Realtors in Quebec, Manitoba and Saskatchewan.<sup>109</sup>

116. In addition to operating websites that aggregate listings, TREB's Members use technology for a variety of purposes including: promoting individual listings through property-specific websites; using social networking in promoting listings; automating real estate transaction paperwork; and providing "live chat" with the brokerage over the internet.<sup>110</sup>

- (ii) **The value proposition of brokerage websites that incorporate a VOW feed is that those websites aggregate and analyze a multitude of third party data and tend to have an enhanced focus on customer service**

117. Even among brokerages that do use a VOW feed as a component of their websites, much of the information displayed on those websites comes from sources other than the VOW feed.

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<sup>107</sup> Syrianos Evidence, October 6, 2015, p 814 at line 19 – p 816 at line 24; TC at **Tab 82**.

<sup>108</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 3, 76; TC at **Tab 1**.

<sup>109</sup> Exhibit IC-177, Updated Witness Statement of Gary Simonsen, Exhibit M (p. 372); TC at **Tab 83**; Simonsen Evidence, October 7, 2015, p 1032 at line 17 – p 1034 at line 7; TC at **Tab 84**.

<sup>110</sup> Exhibit CR-164, Updated Witness Statement of Evan Sage at paras 7–9.1; TC at **Tab 60**; Sage Evidence, October 6, 2015, p 771 at line 12 – p 774 at line 5; TC at **Tab 81**; Syrianos Evidence, October 6, 2015, p 818 at line 10 – p 819 at line 17; TC at **Tab 82**.



118. The Commissioner's industry witnesses in the GTA conceded that the majority of their website content does not come from the VOW data feed. For example, the Commissioner's GTA witnesses agreed that the following information and content displayed on their websites come from sources other than the VOW feed: blog posts; consumer guides (for example, "Defensive Home Buying"); original analysis (for example, Realosophy's "Big Mac" index rating the purchasing power across Toronto neighbourhoods); school information; school profiles; EQAO (Education Equality and Accountability Office) scores; walk score; neighbourhood descriptions and history; points of interest; Neighbourhood Match; "coffee politics"; information on local amenities and entertainment; information from the TREB sponsored access to Geowarehouse; demographics relating to family size, income, professions etc.; and information on local businesses. The foregoing information is all available on the public portion of these websites, without needing to log-in.<sup>111</sup>

119. Mr. Pasalis gave evidence that the real value of the Realosophy website wasn't in the provision of information in and of itself, but rather the useful analysis of that information that Realosophy provides, particularly through its blog, which is available to anyone on Realosophy's public website without even registering for the VOW.<sup>112</sup>

120. Similarly, Mr. McMullin gave evidence that Viewpoint's website contains a wealth of information that is obtained from sources other than his VOW feeds, such as school

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<sup>111</sup> Exhibit A-007, Witness Statement of Urmi Desai at paras 2, 5-7, 10-11, 14, 16-17, 19-24; TC at **Tab 85**; Exhibit A-007, Witness Statement of Urmi Desai, Exhibit G (Defensive Home Buying publication); TC at **Tab 86**; Desai Evidence, September 11, 2012, p 374 at lines 3-8, p 375 at line 23 - p 378 at line 16, p 382 at line 5 - p 384 at line 25, p 388 at line 2 - p 390 at line 2; TC at **Tab 87**; Exhibit A-010, Witness Statement of John Pasalais at paras 2, 14-16, 19-20; TC at **Tab 88**; Pasalis Evidence, September 12, 2012, p 523 at line 16 - p 524 at line 2, p 531 at lines 1-25; TC at **Tab 89**; Exhibit A-013, Witness Statement of Shayan Hamidi at paras 3, 6, 16; TC at **Tab 90**; Hamidi Evidence, September 13, 2012, p 627 at line 3 - p 628 at line 25, p 631 at lines 8-12; TC at **Tab 91**; Gidamy Evidence, September 23, 2015, p 261 at line 21 - p 264 at line 2; TC at **Tab 92**.

<sup>112</sup> Pasalis Evidence, September 24, 2015, p 366 at line 11 - p 367 at line 1; TC at **Tab 93**.

information, zoning information, garbage pick-up schedules, assessment data, foreclosure information, mortgage calculators, gas pipeline maps, information from the provincial registry, and aerial map views.<sup>113</sup>

121. In addition to data received from third party sources, the witnesses from Viewpoint and RedFin tout several aspects of their websites and general brokerage experience that are not dependent on the data fields that are in dispute in this proceeding, including: making “agent insights” available for properties visited by agents of the brokerage; a “listings matchmaker” that suggests homes you may be interested in based on homes that you have been browsing online (although the RedFin’s version of this tool uses both listed properties and sold properties viewed by a registered user, there is nothing to stop a similar tool being developed based on listed properties only); being able to book home tours through the internet; and automating various aspects of the back-office functionality of the brokerage.<sup>114</sup>

**(iii) VOW technology has been popular with “brand name” affiliated brokerages, and also can be easily adopted by any TREB Member**

122. TREB’s VOW datafeed has been adopted by 322 brokerages. The VOW datafeed has been very popular with established brokerages in the GTA, including brokerages that are affiliated with large “brand name” franchise-affiliated brokerages.<sup>115</sup>

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<sup>113</sup> McMullin Evidence, September 22, 2015, p 72 at lines 12–17, p 78 at line 3 – p 79 at line 23; TC at **Tab 94**; Exhibit CA-001, Witness Statement of William McMullin at paras 7, 45–46; TC at **Tab 95**; McMullin Evidence, September 11, 2012, p 170 at line 25 – p 171 at line 19, p 183 at lines 8–22, p 205 at line 12 – p 206 at line 14, p 272 at lines 4–13; TC at **Tab 96**.

<sup>114</sup> Exhibit CA-130, Second Witness Statement of Scott Nagel at para 18; TC at **Tab 97**; Nagel Evidence, September 24, 2015, p 394 at line 11 – p 396 at line 15; TC at **Tab 98**; Exhibit CA-099, Second Witness Statement of William McMullin at para 23; TC at **Tab 99**; McMullin Evidence, September 22, 2015, p 85 at line 3 – p 88 at line 18; TC at **Tab 100**.

<sup>115</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 176; TC at **Tab 1**; Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit RR; TC at **Tab 101**.

123. Re/Max Ultimate Realty was an early and enthusiastic adopter of VOW technology, and is generally a brokerage at the forefront of new technology. Re/Max Ultimate Realty's VOW app has been downloaded approximately 40,000 times. Mr. Syrianos wants to provide his agents with "the best tools available in the marketplace", and adopted VOW technology as part of this ethos.<sup>116</sup>

124. Furthermore, VOWs are not exclusively the domain of technologically savvy brokerages, and a brokerage does not need to possess technological know-how in order to have a highly functional and effective website, including a website that incorporates TREB's VOW datafeed, thanks to the Affiliated VOW Provider ("AVP") option contained in TREB's VOW Policy. AVP providers are able to craft a "turnkey" solution for brokerages "that would generate these websites on the fly and give Realtors access to the power of that platform with virtually no technical expertise required."<sup>117</sup>

#### **H. Real Estate Voyeurs (or: The problem with low conversion rates)**

125. While industry participants view real estate websites, including websites with a VOW feed, as lead generation tools, it is clear that many individuals access information on real estate websites with no intention of buying or selling property at all, or at the very least with no intention of using the brokerage website provider as their buying or selling brokerage.

126. The Commissioner's own witness, Mr. Enchin, testified at the initial hearing that in his view a VOW should not be a lead generation tool, because that is not the proper function of a VOW. Mr. Enchin is of the view that a VOW should only be used to service existing

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<sup>116</sup> Syrianos Evidence, October 6, 2015, p 818 at lines 3–8, p 819 at line 19 – p 820 at line 24; TC at **Tab 102**.

<sup>117</sup> Prochazka Evidence, September 23, 2015, p 302 at lines 2–17; TC at **Tab 103**.

clients, with the information on the VOW being used to assist with the provision of real estate services by the Realtor to those clients.<sup>118</sup>

127. Mr. McMullin's evidence is that approximately 1/3 of the adult population of Nova Scotia is registered as a user on Viewpoint. Those users would be able to, for any properly in Nova Scotia, view the sale history for any home that has sold using a Nova Scotia MLS®, with data going back to the start date of the MLS® database, and do so using an easy to navigate map function. A registered user of Viewpoint could zoom down to a neighbourhood level anywhere in the province and click on every house on the street and see how much money those houses were purchased for, restricted only by the start date of the MLS® database (a restriction that would become moot in time as house ownership turns over). Mr. McMullin observes that "obviously real estate is very, very interesting to people."<sup>119</sup>

128. Mr. McMullin also confirmed that there is no geographic restriction to being able to access and view information on ViewPoint's website and that the information can be seen by individuals outside the province of Nova Scotia.<sup>120</sup>

129. In addition to the real estate voyeurs visiting Viewpoint, many of the registered users who are in the market to buy or sell real estate visit the ViewPoint website to seek information with no intention of ever retaining Viewpoint as their brokerage. Mr. McMullin testified at

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<sup>118</sup> Enchin Evidence, September 14, 2012, p 760 at line 15 – p 761 at line 4; TC at **Tab 104**.

<sup>119</sup> McMullin Evidence, September 22, 2015, p 75 at lines 4–20; TC at **Tab 105**; McMullin Evidence, September 23, 2015, p 127 at line 18 – p 128 at line 2; TC at **Tab 106**; Exhibit CA-105, Viewpoint.ca demo, Registered User.

<sup>120</sup> McMullin Evidence, September 22, 2015, p 102 at lines 11–15; TC at **Tab 107**.

the initial hearing that some local agents direct their clients to use the ViewPoint website as an additional resource in the home buying or home selling process.<sup>121</sup>

130. Mr. McMullin's evidence at the initial hearing was that approximately 7% of the visitors to Viewpoint's website become registered users.<sup>122</sup>

131. Viewpoint has a very low conversion rate of registered users into clients of its brokerage. In 2015, there were [REDACTED] new registered users, while Viewpoint brokered [REDACTED] transactions.<sup>123</sup> That works out to a conversion rate of [REDACTED] of registered users, which is likely overstates Viewpoint's conversion rate, since surely some of the [REDACTED] transactions in 2015 were entered into by individuals who registered in 2014 or earlier.

132. In the United States, RedFin has similarly poor conversion rates of website visitors into registered users, and registered users into clients of the brokerage. From 2012 through 2014, approximately [REDACTED] of unique website visitors became registered users.<sup>124</sup> From 2012 through 2014, RedFin had approximately [REDACTED] new registered website users, while RedFin brokered [REDACTED] deals during that same period of time.<sup>125</sup> That works out to a conversion rate of [REDACTED] of registered users, which, just as with the Viewpoint figure likely overstates the true conversion rate.

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<sup>121</sup> McMullin Evidence, September 11, 2012, p 194 at lines 16–25; TC at **Tab 108**; McMullin Evidence, September 23, 2015, p 144 at line 24 – p 145 at line 3; TC at **Tab 109**.

<sup>122</sup> McMullin Evidence, September 11, 2012, p 335 at line 13 – p 337 at line 7; TC at **Tab 110**.

<sup>123</sup> Exhibit CA-103, Viewpoint Realty Business Metrics; TC at **Tab 111**.

<sup>124</sup> Exhibit CA-130, Second Witness Statement of Scott Nagel at para 18(b); TC at **Tab 112**.

<sup>125</sup> Exhibit CA-130, Second Witness Statement of Scott Nagel at paras 9, 18(a); TC at **Tab 112**.

133. In the GTA, using TREB's current VOW datafeed which excludes sold information, TheRedPin has a conversion rate of ■ meaning that ■ of TheRedPin's registered VOW users hire TheRedPin and use them as their brokerage on a successful close.<sup>126</sup>

134. Realtor.ca, a website that provides no sold information, delivered approximately one million leads to Realtors in 2014 and it is estimated that it will deliver approximately two million leads to Realtors in 2015.<sup>127</sup> It was Mr. Simonsen's evidence that in spite of receiving feedback from thousands of members of the public about Realtor.ca, users of the website are simply not requesting that sold information be provided on the website.<sup>128</sup>

**I. Brokerage websites are a complement to the provision of real estate brokerage services**

135. Brokerage websites, including websites that have a VOW, are merely complements to the wide range of real estate services provided by brokers and salespersons. The Commissioner's expert Dr. Vistnes concedes that VOWs are a complementary service and not a substitute for all services provided by brokers and salespersons.<sup>129</sup>

136. It has been recognized that the differentiating factor of that supposed "new wave" of agents provide to their clients is a higher level of customer service. Mr. Gidamy's business partner at TheRedPin, Mr. Fard, has explained in the media that "Data is a commodity. Data is something that everyone is going to be able to offer. We believe fundamentally that real estate needs a better service level. [...] Our focus is purely to provide that five-star customer

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<sup>126</sup> Exhibit CA-114, Second Witness Statement of Tarik Gidamy at para 19; TC at **Tab 71**.

<sup>127</sup> Simonsen Evidence, October 7, 2015, p 1047 at line 2 – p 1048 at line 10; TC at **Tab 113**; Exhibit IC-109, 2014 Consumer Insights Report for Realtors at p 6; TC at **Tab 114**.

<sup>128</sup> Simonsen Evidence, October 7, 2015, p 1072 at line 17 – p 1073 at line 5, p 1102 at lines 3–21; TC at **Tab 115**.

<sup>129</sup> Exhibit CA-137, Reply Report of Dr. Vistnes dated August 4, 2015 at pp 16-17 (Tribunal numbering); TC at **Tab 116**.

service.”<sup>130</sup> This focus on customer service and demonstrating value to clients is also evident from the evidence of other industry witnesses.<sup>131</sup>

**(i) The provision of real estate services requires a significant amount of time**

137. Industry witnesses agreed that brokers and salespersons provide a number of services to their clients, and only a portion of these services can be facilitated with the use of a VOW. A key example of a service that cannot be completed entirely online is the preparation of a comprehensive CMA that a client would rely on in determining a list price or determining an offer.

138. Industry witnesses testified that knowing the sold price of a home (even in combination with other basic information such as number of square feet, or number of bedrooms) is not sufficient knowledge to be able to do a proper comparison for the purpose of doing a CMA, or for deciding what to offer a seller. The sold price is one piece of information that needs to be analyzed and interpreted in the context of other factors that also impact the value of a home, for example, the condition of the home, the location of the home, or any current or planned development in the area.<sup>132</sup>

139. Industry participants agreed that when assessing the physical characteristics of a home, visiting or inspecting properties of interest to their clients was a regular and necessary part of their role as an agent. Industry witnesses testified that an in person visit to subject and

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<sup>130</sup> Exhibit R-119, “TheRedPin Want to Make Great Service Ubiquitous in The Canadian Housing Market”; TC at **Tab 117**.

<sup>131</sup> Nagel Evidence, September 24, 2015, p 375 at lines 13–15; TC at **Tab 118**; Sage Evidence, October 6, 2015, p 802 at lines 4–23; TC at **Tab 119**.

<sup>132</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at paras 19–22; TC at **Tab 51**; Prescott Evidence, September 28, 2012, p 1790 at line 3 – p 1793 at line 7; TC at **Tab 120**; Exhibit A-010, Witness Statement of John Pasalis at paras 36, 39; TC at **Tab 121**; Pasalis Evidence, September 12, 2012, p 546 at line 9 – p 547 at line 25; TC at **Tab 122**.

comparator properties is essential because there are elements to a home that are impossible to detect from a description or photos on a website. Considerations of this nature include structural or foundation issues, potential damage to the interior of the home, the extent of any upgrades, the flooring type or material, etc. There is both an art and a science to giving real estate advice.<sup>133</sup>

140. Because of the scope of the work, industry participants agreed that it can take considerable time to create a comprehensive, in depth CMA.<sup>134</sup>

141. CMAs are only one example of the suite of real estate brokerage services that full service brokerages provide to their clients. Clients also rely on their agents to take them to property showings, decide on a price, put together an offer, and negotiate the deal.<sup>135</sup>

**(ii) Meager examples of alleged concrete time savings from a “full information VOW”**

142. Apart from the vague and unquantified notion that agents will save time providing information concerning the excluded data fields through a VOW as opposed to other delivery mechanisms, the Commissioner’s witnesses put forward some examples of how a “full information VOW” would provide the brokerages savings in time in their delivery of real estate services.

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<sup>133</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at para 20; TC at **Tab 51**; Chan Evidence, September 27, 2012, p 1765 at lines 3–5; TC at **Tab 123**; Prescott Evidence, September 28, 2012, p 1814 at lines 3–9, p 1815 at lines 2–25; TC at **Tab 124**; Enchin Evidence, September 14, 2012, p 820 at lines 4–16; TC at **Tab 125**; Pasalis Evidence, September 12, 2012, p 544 at line 16 – p 545 at line 13; TC at **Tab 126**; Exhibit A-010, Witness Statement of John Pasalis at para 39; TC at **Tab 121**.

<sup>134</sup> Nagel Evidence, September 12, 2012, p 441 at lines 7–13; TC at **Tab 127**; Gidamy Evidence, September 13, 2012, p 687 at line 8 – p 688 at line 1; TC at **Tab 128**.

<sup>135</sup> Pasalis Evidence, September 12, 2012, p 539 at line 9 – p 540 at line 11, p 551 at line 24 – p 552 at line 16; TC at **Tab 129**.



143. Mr. Gidamy's evidence is that having sold information in a VOW feed could help to automate to some degree the CMA process. His evidence is that a CMA takes 10-60 minutes, but concedes that the entire CMA process would not be able to be automated – some amount of judgment and analysis would still be required by the agent. As of the date of his second witness statement, he estimated that TheRedPin conducts 200 CMAs per month, across 55 agents, which works out to 3.6 CMAs per month per agent.<sup>136</sup>

144. Mr. Pasalis' evidence at the time of his third witness statement was that having a full information VOW feed would assist in creating a dashboard for Realosophy agents, which he estimated would save 1 hour of agent time per showing. At the hearing, Mr. Pasalis advised that Realosophy developed a program called "Realosophy Pro" [REDACTED]

[REDACTED]<sup>137</sup>

## **J. The American and Nova Scotian Experience with VOWs**

### **(i) American Disclosure/Non-Disclosure States**

145. Certain areas in the U.S. do not permit the display of sold information in any format, and as a result, this information is not provided as part of the VOW feed in those jurisdictions. At the time of the initial hearing, Texas did not permit the disclosure of sold property information.<sup>138</sup> At the time of the reconsideration hearing, some parts of Texas, such as

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<sup>136</sup> Exhibit CA-114, Second Witness Statement of Tarik Gidamy at paras 5, 14; TC at **Tab 71**; Gidamy Evidence, September 23, 2015, p 272 at line 8 – p 277 at line 20; TC at **Tab 130**.

<sup>137</sup> Exhibit A-120, Second Witness Statement of John Pasalis, see for example para 7; TC at **Tab 131**; Pasalis Evidence, September 24, 2015 (in camera), p 28 at line 15 – p 29 at line 15; TC at **Tab 132**.

<sup>138</sup> Nagel Evidence, September 12, 2012, p 460 at line 18 – p 461 at line 10; TC at **Tab 133**.

Dallas, still did not permit the display of sold information, while other parts of Texas, such as Austin did provide sold prices for display on a VOW through an MLS-sourced datafeed.<sup>139</sup>

146. At the initial hearing, Mr. Nagel testified that RedFin did business in Texas, in particular in Austin and Dallas. Mr. Nagel also testified that agents in those cities charged the same amount to sell homes as they do in other states where disclosure of sold information is permitted. There was no evidence at the initial hearing or the reconsideration hearing that RedFin faces any sort of disadvantage operating in areas that have sold information in a datafeed versus those that do not.<sup>140</sup>

**(ii) Pending solds, WESTs, and cooperating brokerage commission**

147. RedFin does not display pending sold prices on its VOW – that is, homes that in which an agreement of purchase and sale has been signed, but the transaction not yet closed.<sup>141</sup>

148. At the time of the initial hearing, Viewpoint displayed pending sold prices on its VOW. In 2013, as a result of a change in policy at The Nova Scotia Association of Realtors, ViewPoint was no longer permitted to display pending sold information outside the Halifax-Dartmouth Regional Municipality. ViewPoint is still permitted to display pending sold information inside the Halifax-Dartmouth Regional Municipality. There was no evidence that the absence of pending sold data outside of the Halifax-Dartmouth Regional Municipality

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<sup>139</sup> Exhibit CA-130, Second Witness Statement of Scott Nagel at para 22(e); TC at **Tab 134**.

<sup>140</sup> Nagel Evidence, September 12, 2012, p 460 at line 18 – p 461 at line 10; TC at **Tab 133**.

<sup>141</sup> Nagel Evidence, September 12, 2012, p 472 at line 6 – p 473 at line 10, p 500 at line 13 – p 501 at line 10; TC at **Tab 135**.

causes any disadvantage to ViewPoint, and in fact this change in pending sold policy is not referenced at all in Mr. McMullin's updated witness statements.<sup>142</sup>

149. RedFin does not display expired or withdrawn listings on its VOW.<sup>143</sup>

150. Neither ViewPoint nor RedFin displays the cooperating broker's offer of commission on their VOWs.<sup>144</sup> Dr. Vistnes is unaware of any VOW that displays the cooperating broker's offer of commission.<sup>145</sup>

### (iii) Privacy issues in Nova Scotia

151. Mr. McMullin gave evidence that his brokerage receives "a couple of dozen" privacy complaints each year from members of the public regarding information about their properties on the Viewpoint website. ViewPoint was also subject to an investigation by the Privacy Commissioner for publishing the purchase price of the person's home on the viewpoint.ca website for view by registered users.<sup>146</sup>

152. Mr. McMullin testified that the Province of Nova Scotia had passed legislation in 2012 explicitly stating that sale prices recorded on an Affidavit of Value can be made public and published. No such equivalent legislation exists in Ontario.<sup>147</sup>

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<sup>142</sup> McMullin Evidence, September 23, 2015, p 162 at line 23 – p 164 at line 19; TC at **Tab 136**.

<sup>143</sup> Nagel Evidence, September 24, 2015, p 413 at line 11 – p 414 at line 6; TC at **Tab 137**.

<sup>144</sup> McMullin Evidence, September 23, 2015, p 178 at line 22 – p 179 at line 6; TC at **Tab 138**; Nagel Evidence, September 24, 2015, p 414 at lines 14–25; TC at **Tab 139**.

<sup>145</sup> Vistnes Evidence, October 5, 2015, p 539 at line 21 – p 540 at line 1; TC at **Tab 140**.

<sup>146</sup> McMullin Evidence, September 23, 2015, p 169 at line 20 – p 172 at line 15; TC at **Tab 141**.

<sup>147</sup> McMullin Evidence, September 22, 2015, p 97 at lines 8–18; TC at **Tab 142**.

(iv) **RedFin's theoretical entry into Canada**

153. RedFin has not investigated in any detail whatsoever the feasibility of its theoretical entry into Canada. At the time of the initial hearing, RedFin had not spoken with members of TREB, it had not it investigated whether the type of information it would need to in order to be competitive is available in Toronto, nor had it considered the differences between Canadian laws and American laws, in particular, federal and provincial privacy legislation.<sup>148</sup>

[REDACTED]

[REDACTED]

[REDACTED]<sup>149</sup>

154. Under questioning from the Panel, Mr. Nagel admitted that in spite of RedFin's position in this lawsuit, RedFin does operate in American jurisdictions that do not permit the display of sold prices.<sup>150</sup>

155. The notion of RedFin's entry into Canada is, at best, speculative.

**K. Effective entry by the Commissioner's GTA-based witnesses**

156. TheRedPin has enjoyed significant growth in its few years of existence, growing from a brokerage that in 2012 had 5 agents, to a brokerage with 55 agents that within the past year sold approximately \$325 million of real estate. TheRedPin's success has acted as a springboard as it has recently expanded operations to other regions in southern Ontario, and is

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<sup>148</sup> Nagel Evidence, September 12, 2012, p 451 at lines 3–15, p 452 at line 19 – p 454 at line 23; TC at **Tab 143**.

<sup>149</sup> Nagel Evidence, September 24, 2015 (in camera), p 40 at lines 6–20, p 42 at line 12 – p 43 at line 11; TC at **Tab 144**.

<sup>150</sup> Nagel Evidence, September 24, 2015, p 429 at line 18 – 430 at line 17; TC at **Tab 145**.

in the process of establishing itself as a brokerage in Vancouver (another jurisdiction with no sold information in its VOW data feed).<sup>151</sup>

157. TheRedPin also receives a generous amount of media coverage, with some media outlets picking up TheRedPin's content for publication.<sup>152</sup>

158. Realosophy has also has enjoyed growth since the initial hearing and enjoys a formidable media presence.<sup>153</sup>

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<sup>151</sup> Exhibit CA-114, Second Witness Statement of Tarik Gidamy at para 5; TC at **Tab 71**; Gidamy Evidence, September 23, 2015, p 243 at line 4 – p 244 at line 22, p 268 at lines 7–23; TC at **Tab 146**; Prochazka Evidence, September 18, 2012, p 936 at line 1 – p 937 at line 2; TC at **Tab 147**.

<sup>152</sup> Exhibit R-116, "TheRedPin In The News"; TC at **Tab 148**.

<sup>153</sup> Exhibit A-120, Second Witness Statement of John Pasalis at paras 3, 13; TC at **Tab 149**.

## NO ABUSE OF DOMINANT POSITION

159. TREB's VOW policy is not an abuse of dominant position.

160. Abuse of dominant position is governed by sections 78 and 79 of the *Competition Act*.

An abuse of dominant position occurs when the Competition Tribunal finds that:<sup>154</sup>

- (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.

161. Although a particular piece of supporting evidence may be considered under more than one element of the abuse of dominance framework, each element of the abuse of dominance framework must remain conceptually distinct.<sup>155</sup>

162. Where a firm has abused its dominant position, the Tribunal *may* make an order prohibiting that firm from engaging in the abusive practice where there has been a substantial lessening or prevention of competition.<sup>156</sup>

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<sup>154</sup> *Competition Act*, R.S.C. 1985, c. C-34, s 79(1).

<sup>155</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1027 (C.A.) at para 28.

<sup>156</sup> *Competition Act*, R.S.C. 1985, c. C-34, s 79(1).

163. In seeking a remedy pursuant to section 79 of the Competition Act, the burden is on the Commissioner to prove all three elements of the abuse of dominance test. If any of these elements is not established, the Commissioner's application must fail.<sup>157</sup>

164. The Commissioner's application against TREB must fail because: TREB does not control the relevant market(s); TREB's VOW policy is not an anticompetitive act; and TREB's VOW policy does not substantially lessen or prevent competition in the relevant market(s).

### **THE COMMISSIONER'S APPLICATION**

165. The Commissioner's Application raises two conceptually distinct theories of harm.

166. The first theory of harm put forward by the Commissioner (and the Commissioner's economist Dr. Vistnes) is that by withholding information on sold, pending sold, withdrawn, expired, suspended, and terminated listings (the "Confidential Data") from its VOW datafeed, TREB is preventing dynamic competition in the markets for real estate brokerage services in the GTA by preventing the emergence of "full information VOWs".

167. The second theory of harm put forward by the Commissioner (and Dr. Vistnes) is that by withholding information on the cooperating brokerage's offer of commission, TREB is facilitating "buyer steering" by cooperating brokerages away from homes with a low offer of commission. This second theory of harm was barely addressed during the reconsideration hearing and was not raised in the Commissioner's opening submissions or in the evidence in chief of Dr. Vistnes.

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<sup>157</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1027 (C.A.) at para 25.

168. The Commissioner has not met his burden to prove either theory of harm in this Application.

### **THEORY OF HARM #1: REDUCTION IN DYNAMIC COMPETITION**

#### **A. TREB Does Not Control the Relevant Markets**

169. TREB does not control the markets for residential real estate brokerage services (buy-side and sell-side) in the GTA. TREB does not participate in the relevant markets. TREB's Members do participate in the relevant markets, and TREB provides its Members with inputs (through the TREB MLS®) that are used in the provision of real estate services. TREB is an upstream supplier to its Members.

170. TREB does not control the markets for residential real estate brokerage services for three independently sufficient reasons.

171. First, TREB cannot profitably influence any dimension of competition in the markets and so it does not have market power.

172. Second, TREB is not dominant in the market for the provision of the Confidential Data. Based on the case as framed by the Commissioner (dominance in a downstream market by an upstream supplier), TREB would have to be dominant in the markets for the provision of the Confidential Data (the upstream market) in order for it to be dominant in the market for the provision of real estate brokerage services (the downstream market).



173. Third, there is a difference between the potential and the actual exercise of market power. Even if TREB does have market power (which is not admitted, but denied), TREB does not exercise market power against its Members.

**(i) Test for Market Control**

174. Section 79(1)(a) of the *Competition Act* provides that the Commissioner must prove that:<sup>158</sup>

one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business

175. This test has been interpreted to mean the Commissioner must prove a firm has market power within the relevant product market, and within a geographic market.<sup>159</sup>

176. In *Tervita*, the Supreme Court of Canada recently held that market power is the ability of a firm to profitably influence price, quality, variety, service, advertising, innovation, or other dimensions of competition. As also stated by the Court, market power is the ability of a firm to maintain prices above the competitive level for a considerable period of time without such action being unprofitable.<sup>160</sup>

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<sup>158</sup> *Competition Act*, R.S.C. 1985, c. C-34, s 79(1)(a).

<sup>159</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1028 (C.A.) at para 10.

<sup>160</sup> *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] S.C.J. No. 3 at para 44. See also *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1028 (C.A.) at para 6.

177. In order to determine whether a firm has market power, the Tribunal must first define the relevant product market. The purpose of defining the relevant product market is to identify the possibility for the exercise of market power.<sup>161</sup>

178. The definition of the product market begins by examining the product in respect of which the alleged abuse of dominance is occurring.<sup>162</sup> In defining the relevant product market, the Tribunal will consider substitutability: whether there exist sufficiently close substitutes to the product at issue, such that the market for the product at issue includes those substitutes.<sup>163</sup> Products will be close substitutes if 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.<sup>164</sup> Substitutability can be proven either by direct evidence or by indirect evidence. Indirect evidence includes factors such as functional interchangeability.<sup>165</sup>

**(ii) TREB cannot “profitably” influence any dimension of competition within the residential real estate brokerage market in the GTA**

179. The Tribunal in reconsidering this case must engage in an analysis of whether TREB has market power. The Federal Court of Appeal did not consider or apply the test for determining market power, and as such did not determine whether TREB had market power.<sup>166</sup> The Tribunal must apply the definition of market power as set out by the Supreme Court in *Tervita*.

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<sup>161</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1028 (C.A.) at paras 6, 11.

<sup>162</sup> Competition Bureau of Canada, Enforcement Guidelines: The Abuse of Dominance Provisions, September 20, 2012, p 3.

<sup>163</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1028 (C.A.) at para 12.

<sup>164</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1995] 3 F.C. 557 (C.A.) at para 161; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1028 (C.A.) at para 13.

<sup>165</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1995] 3 F.C. 557 (C.A.) at para 161.

<sup>166</sup> *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, [2014] F.C.J. No. 113 (C.A.) at para 13.

180. TREB does not compete in the residential real estate brokerage markets in the GTA and it has no financial interest in how competition occurs among its members. It is a supplier of inputs to entities that compete in the market. The manner in which TREB's members compete with each other does not affect TREB's business.<sup>167</sup>

181. To the extent that TREB is able to influence any aspect of competition within the residential real estate brokerage markets in the GTA as an input supplier, TREB cannot do so "profitably", and therefore TREB falls outside of the definition of market power as set out by the Supreme Court of Canada in *Tervita*.

182. Dr. Vistnes posits that TREB controls the residential real estate brokerage market in the GTA, in spite of the fact that TREB does not participate in the market, because TREB has the power to exclude competitors from the market. In his reply report in the reconsideration hearing (ie, his fourth report in this proceeding), Dr. Vistnes for the first time puts forward American cases and academic sources in support of the foregoing proposition.<sup>168</sup>

183. The late-in-the-day authorities raised by Dr. Vistnes are of no moment to the determination of whether TREB has market power for three reasons.

184. First, the test for market power in Canada is mandated by the Supreme Court's decision in *Tervita*, not by American jurists or academics.

185. Second, even among those academics and jurists that point to the ability to exclude as an indicator of market power, the concept of exclusion is intimately tied with the ability of a

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<sup>167</sup> *Canadian Standard Travel Agent Registry (c.o.b. CSTAR) v. International Air Transport Assn. (c.o.b. IATA)*, [2008] C.C.T.D. No. 14, at para 12.

<sup>168</sup> Exhibit CA-137, Reply Expert Report of Dr. Vistnes, August 4, 2015, pp 6–8 (Tribunal Numbering) ; TC at **Tab 150**.

firm to profitably raise prices. As one academic text (which was sent by counsel to the Commissioner in advance of the cross-examination of Dr. Church, although not put to him) in explaining the concept of the ability to exclude, notes that “[o]nce its rivals have been excluded or sufficiently damaged, the company is free to exploit that power by increasing its prices and hence its profits.”<sup>169</sup>

186. The concept of exclusion as stated in the foregoing text does not square with the Commissioner’s theory of market power in this case, and once again leads back to the observation that TREB cannot increase “profits” as a result of the theoretical exclusion of any competitor(s) in the markets for residential real estate brokerage services. As Dr. Church testified, the power to exclude is a necessary condition, but not a sufficient condition, to infer substantial and durable market power.<sup>170</sup>

187. Third, to the extent that the American experience is instructive in the market power analysis in an abuse of dominance proceeding, it is important to bear in mind that in order to attract monopoly liability under section 2 of the *Sherman Act*, a defendant has to compete in the relevant market.<sup>171</sup> “Essential to a claim for monopolization or attempted monopolization is a requirement that the defendant be a participant of the relevant market and have a share in it.”<sup>172</sup>

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<sup>169</sup> G. Niels, H. Jenkins, and J. Kavanagh, (2011), *Economics for Competition Lawyers*, Oxford: Oxford University Press, pp 118–119.

<sup>170</sup> Exhibit R-173, Summary of Second Expert Report of Dr. Church, October 6, 2015, p 14; TC at **Tab 151**.

<sup>171</sup> 15 USC s. 2; *Aquatherm Industries Inc. v. Florida Power & Light Company*, 1998-1 Trade Cas. (CCH) P72,206 (11<sup>th</sup> Cir.) at 82,337 – 82,338; *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc.*, 2004-1 Trade Cas. (CCH) P74,469 (11<sup>th</sup> Cir.) at 99,613; *Hackman v. Dickerson Realtors Inc.*, 2009-1 Trade Cas. (CCH) P76,669 (D. Ill.) at 114,591; *Banxcorp v. Apex Partners*, 2011-1 Trade Cas. (CCH) P77,424 (D. N.J.) at 120,301.

<sup>172</sup> *Banxcorp v. Apex Partners*, 2011-1 Trade Cas. (CCH) P77,424 (D. N.J.) at 120,301.

188. In *Hackman v. Dickerson Realtors Inc.*, the plaintiff Realtor brought an antitrust suit against several defendants, including the Rockford Area Association of Realtors (“RAAR”), and RAAR’s President. The plaintiff raised section 2 monopolization claims against RAAR and its President. The monopolization claims were dismissed by the District Court on a preliminary motion because neither RAAR nor its President competed in the relevant market.<sup>173</sup>

189. The Commissioner’s conception of control of a market seeks to change the statutory test for market power as set out by the Supreme Court in *Tervita*.<sup>174</sup> TREB cannot *profitably* influence any dimension of competition within the residential real estate brokerage market, and it therefore does not have market power in that market.

**(iii) The market at issue is the market for the Confidential Data, and TREB does not have market power in the market for the Confidential Data**

190. In the alternative, in the event that it is possible for TREB to have market power in the residential real estate brokerage market in spite of *Tervita*, a determination of market power in the downstream market must be crafted around the alleged manner in which TREB is said to be exercising its alleged market power. It must be done by reference to TREB’s exclusion of the Confidential Data from the VOW datafeed in the upstream market. It must be proven by the Commissioner that TREB has market power in the Confidential Data.<sup>175</sup>

191. While Dr. Church frames his analysis as being an essential facilities analysis and Dr. Vistnes frames his analysis as a foreclosure analysis, the fundamental question is the same:

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<sup>173</sup> *Hackman v. Dickerson Realtors Inc.*, 2009-1 Trade Cas. (CCH) P76,669 (D. Ill.) 114,591.

<sup>174</sup> *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] S.C.J. No. 3 at para 44.

<sup>175</sup> Exhibit CR-172, Report of Dr. Church, May 15, 2015 at para 16; TC at **Tab 79**

can brokerages substitute away from TREB's exclusion of the Confidential Data from the VOW datafeed?<sup>176</sup>

192. Dr. Vistnes' analysis on substitutability is flawed both in economics and at law, because he only considers whether perfect substitutes exist for the Confidential Data – in other words whether there is some alternative source of the exact same information. The appropriate analysis, completed by Dr. Church, requires a consideration of whether there exist *reasonable* substitutes.<sup>177</sup> In other words, Dr. Vistnes' analysis on substitutability does not account for functional interchangeability as required by the case law.<sup>178</sup> Because Dr. Vistnes does not consider functional interchangeability of the Confidential Data, he has failed to properly define the upstream market.<sup>179</sup>

193. Dr. Church has identified several potential substitutes for Confidential Data on a VOW, bearing in mind functional interchangeability. This analysis considers the purposes for which that Confidential Data would be used on a VOW by home buyers and sellers at two different points in time: the incubation/search phase, and the valuation/offer phase.<sup>180</sup>

194. At the search/incubation phase, consumers are becoming informed about the market. They are assessing factors such as the relative characteristics of different community, the

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<sup>176</sup> Exhibit CA-135, Report of Dr. Vistnes, February 6, 2015, pp 14-16 (Tribunal Numbering); TC at **Tab 152**; Exhibit CR-172, Report of Dr. Church, May 15, 2015 at para 26; TC at **Tab 79**.

<sup>177</sup> Exhibit CR-172, Report of Dr. Church, May 15, 2015 at para 26; TC at **Tab 79**.

<sup>178</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1995] 3 F.C. 557 (C.A.) at para 161.

<sup>179</sup> Exhibit R-173, Summary of Second Expert Report of Dr. Church, October 6, 2015, p 17; TC at **Tab 151**.

<sup>180</sup> Exhibit R-173, Summary of Second Expert Report of Dr. Church, October 6, 2015, p 18; TC at **Tab 151**.

relative values of homes in different communities, the relative values of different home characteristics, and price trends.<sup>181</sup>

195. At the valuation/offer phase, the consumer will need to receive professional advice from a Realtor as to the market value of the home they are selling (if a seller) or the home they are interested in making an offer for (if a buyer).<sup>182</sup>

196. The valuation of a home is not a mechanical exercise based solely on comparable sold home MLS® data. It is a subjective exercise which requires the skill and judgment of a real estate professional, as discussed in greater detail in the factual background. No one is going to be making an offer for a home, or deciding on a listing price, based solely on information contained on a VOW, they will be doing so in consultation with a Realtor (with full access to the MLS, including the Confidential Data) who will at that point in time be working directly with the consumer.

197. Accordingly, the Confidential Data would at most be used to help provide a general ballpark on valuation in the incubation/search phase. As a result, sold and pending sold information may not add any incremental value to a VOW.

198. There are several substitutes that are available for the purposes of providing VOW users a general ballpark on the valuation of a subject property.

199. First, in the GTA there is a stable 95% relationship between the list price of a property and the ultimate sale price. This relationship is stable across time and across communities.

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<sup>181</sup> Exhibit CR-172, Report of Dr. Church, May 15, 2015 at footnote 50 and associated cites; TC at **Tab 79**.

<sup>182</sup> Exhibit CR-172, Report of Dr. Church, May 15, 2015 at footnote 50 and associated cites; TC at **Tab 79**.

The list price of the property would provide a good general ballpark on the valuation of a subject property, and would be readily available on Realtor.ca. Second, brokerages have their own supply of transactional data. Third, there are third party appraisal services such as Zoocasa.<sup>183</sup>

200. In addition to the above potential substitutes that currently exist, it is important to bear in mind the “reverse cellophane fallacy.” That is to say that other potential substitutes could emerge in the future, and these potential substitutes should be considered in determining whether TREB has market power in the market for the Confidential Data.

201. TREB has been embroiled in this litigation with the Commissioner since before its VOW policy was enacted. If the Commissioner is not granted the relief he seeks, other suppliers may emerge for the Confidential Data. Some possible suppliers include Teranet, MPAC, a large corporate franchise group operating as a wholesale supplier, or the emergence of large assessor and recorder data companies as has recently transpired in the United States.<sup>184</sup> It is worth noting that the land registry in Nova Scotia provides ViewPoint with a datafeed containing sold data.<sup>185</sup>

202. As discussed above, there are several actual and potential substitutes for the display of the Confidential Data on a VOW.

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<sup>183</sup> Exhibit R-173, Summary of Second Expert Report of Dr. Church, October 6, 2015, p 19; TC at **Tab 151**; Church Evidence, October 2, 2012, pp 1952-1953; TC at **Tab 153**.

<sup>184</sup> Exhibit R-173, Summary of Second Expert Report of Dr. Church, October 6, 2015 pp 19, 21; TC at **Tab 151**.

<sup>185</sup> Exhibit CA-099, Second Witness Statement of William McMullin at para 5; TC at **Tab 154**.



203. Dr. Vistnes does not properly define or consider the upstream supply market,<sup>186</sup> and accordingly the Commissioner has not discharged his burden to prove that TREB has market power in the market for the Confidential Data.

**(iv) TREB does not exercise market power**

204. In the alternative, even if TREB does have market power, TREB does not control the relevant markets because it does not exercise its market power.

205. As noted in the *Canada Pipe* decision, the fundamental question that the Tribunal is trying to answer under the first branch of the abuse of dominance test is whether it is possible for the respondent to exercise market power.<sup>187</sup> It stands to reason that if a respondent is unable or unwilling to exercise its market power (if any), then that respondent will not be seen as controlling the market.

206. TREB has constraints on it that prevent it from exercising its market power, if any.

207. TREB is a not for profit entity that is controlled by its “customers” (in other words, its Members), TREB has no incentive to exercise market power against its Members, and TREB’s governance structure provides a constraint on the exercise of any market power TREB could have. TREB has incentives to operate its MLS® in a manner that facilitates the buying and selling of real estate.<sup>188</sup>

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<sup>186</sup> Exhibit R-173, Summary of Second Expert Report of Dr. Church, October 6, 2015, p 17; TC at **Tab 151**.

<sup>187</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1028 (C.A.) at para 6.

<sup>188</sup> Exhibit R-082, Summary of Expert Report of Dr. Church, October 1, 2012, p 30; TC at **Tab 155**; Exhibit R-079, Expert Report of Dr. Church, July 27, 2012, p 96 at para 248; TC at **Tab 156**.

208. The GTA real estate industry is incredibly competitive, with insignificant barriers to entry, and a large number of competitors with miniscule market shares. TREB's conduct in general is inconsistent with protecting the market shares of its existing Members. If TREB were interested in protecting the market shares of its existing members, a far more effective method of doing so would be to create general barriers to membership in TREB, which do not exist.<sup>189</sup>

209. Apart from general restraints on TREB's ability to exercise market power, if any, there are specific practical restraints on TREB exercising market power with respect to innovation and technology.

210. The evidence before the Tribunal demonstrates that TREB's Members are eager adopters of new technology generally, and of VOWs in particular. Well over 90% of TREB's Members are subscribed to TREB's IDX program,<sup>190</sup> while TREB's VOW datafeed has been adopted by 322 brokerages.<sup>191</sup> The VOW datafeed is very popular with established brokerages in the GTA, including brokerages that are affiliated with large "brand name" franchise-affiliated brokerages.<sup>192</sup>

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<sup>189</sup> Exhibit R-082, Summary of Expert Report of Dr. Church, October 1, 2012, p 30; TC at **Tab 155**; Exhibit R-079, Expert Report of Dr. Church, July 27, 2012, p 96 at paras 249–250; TC at **Tab 156**.

<sup>190</sup> Exhibit CR-142, Witness Statement of Donald Richardson at paras 3, 76; TC at **Tab 1**.

<sup>191</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 176; TC at **Tab 1**; Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit RR; TC at **Tab 101**.

<sup>192</sup> Exhibit CR 142, Updated Witness Statement of Donald Richardson at para 176; TC at **Tab 1**; Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit RR; TC at **Tab 101**.

211. There has been no empirical analysis presented by the Commissioner to demonstrate the collective views of TREB's membership on the topic of VOWs or adoption of new technology.<sup>193</sup>

212. It is true that not all of TREB's Members supported VOWs at the time the VOW datafeed was implemented in 2011, and a handful of e-mails from TREB Members opposed to VOWs from 2011 have been produced in this proceeding. However, there is a complete lack of evidence to make the leap that because a small handful of members did not support VOWs in 2011 that this was, or is the majority, or even a significant view among TREB's membership. Considering the evidence before the Tribunal regarding innovation and the use of technology by TREB's Members, there is no basis to conclude that TREB's Members (or some majority/plurality thereof), are opposed to innovation or are opposed to VOWs.

213. Even if TREB does have market power in the markets for residential real estate brokerage services, there are restraints that prevent it from exercising that market power, particularly with respect to issues of technology and innovation.

**B. TREB'S VOW Policy Is Not An Anti-Competitive Act**

214. TREB's VOW policy is not an anticompetitive act, because TREB did not act with the purpose of visiting a predatory, exclusionary, or disciplinary negative effect on a competitor in the market.

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<sup>193</sup> Vistnes Evidence, September 18, 2012 (IN CAMERA), pp 21–22; TC at **Tab 157**.

(i) **The Test for an Anti-Competitive Act**

215. For an act to be anti-competitive, it must have been done for the purpose of achieving an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.<sup>194</sup> The focus of the analysis is on the act itself: to discern the purpose of the act.<sup>195</sup> In determining the purpose of an act as part of this analysis, reference should be made to any evidence of subjective intent, the reasonably foreseeable or expected objective effects of the act, and any business justification.<sup>196</sup>

216. Even if the reasonably foreseeable consequences of an act are predatory, exclusionary, or disciplinary to a competitor, proof of a valid business justification for the conduct in question can demonstrate that the anti-competitive effects of the act are not the overriding purpose of the conduct in question. For the purposes of the section 79(1)(b) analysis, a business justification must provide an efficiency or pro-competitive rationale to counterbalance any anti-competitive effects.<sup>197</sup>

(ii) **TREB's VOW policy was not enacted with a predatory, exclusionary, or disciplinary purpose**

217. At the time TREB implemented its VOW policy, it was not reasonably foreseeable that the VOW policy would have a predatory, exclusionary, or disciplinary effect on its Members, or on potential entrants that wished to operate brokerages offering a VOW. The reasonably foreseeable consequence of TREB's VOW policy was that brokerages would be able to offer VOWs in the GTA. This is exactly what has happened.

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<sup>194</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1027 (C.A.) at paras 64–66.

<sup>195</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1027 (C.A.) at para 77.

<sup>196</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1027 (C.A.) at para 67.

<sup>197</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1027 (C.A.) at para 73.

218. Ultimately, TREB decided to exclude the Confidential Data from the VOW datafeed because of concerns about consumer privacy. The process behind this decision is set out in great detail above in the factual overview, and in even greater detail in Mr. Richardson's updated witness statement and the various meeting minutes contained within. Concerns about privacy were not some kind of after-the-fact attempt at a justification. Concerns about privacy were central to TREB's decision-making process about the implementation of VOWs, and part and parcel of those concerns was TREB's concern about data scraping.

219. In his opening remarks, counsel to the Commissioner argued that TREB's concerns about privacy are "contrived" and that TREB's actions were instead undertaken with "malice aforethought."<sup>198</sup>

220. The Commissioner's submissions on malicious intent are undermined by his own witness, Mr. Gidamy from TheRedPin. Although Mr. Gidamy obviously disagrees with TREB's decision to withhold the Confidential Data from the VOW datafeed, it is clear that he does not believe TREB made its decision to restrict the VOW feed in this manner to target TheRedPin as a technologically savvy brokerage:

MR. VAILLANCOURT: [...] But you don't get the sense that TREB is trying to keep you out of the market or doesn't want you to succeed?

MR. GIDAMY: **I don't think TREB's concerned about my business compared to the market share or the amount of transactions that exist.** I think, obviously, again, they're there to serve their members, which they do well, but there's some members that want to do better. (emphasis added)<sup>199</sup>

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<sup>198</sup> Opening Submissions, September 22, 2015, p 20 at line 25 – p 21 at line 11, p 32 at lines 6-22; TC at **Tab 158**.

<sup>199</sup> Gidamy Evidence, September 23, 2015, p 271 at lines 14–21; TC at **Tab 159**.

221. TREB's membership on the whole is supportive of new technology and innovation. Many established market participants have been early adopters of the VOW technology, and IDX adoption is almost universal. As a service-provider to its Members, TREB has no incentive to put anti-competitive restraints on the VOW datafeed. In fact, TREB has continued to listen to feedback from its Members in improving the VOW feed during the course of this litigation.<sup>200</sup>

222. A major plank for the Commissioner's position that TREB's privacy concerns are contrived seems to be a series of angry emails among TREB's Directors shortly after TREB was served with the Notice of Application in this matter. As if being sued is not reason enough to explain the anger of TREB's Directors, the Notice of Application was served during the window of time the Commissioner had given TREB to put together a VOW policy. The Commissioner had initially given TREB until the end of August 2011 to put together a VOW policy, the Application was commenced on May 26, 2011.<sup>201</sup> These emails must be read with bearing in mind the circumstances at the time. TREB's concern about privacy is evident from its public relations messaging during the summer of 2011.<sup>202</sup>

223. Another major plank for the Commissioner's position that TREB's privacy concerns are contrived seems to be based on the consents that TREB's Members obtain by way of the Listing Agreement, the Buyer Representation Agreement, and the Buyer Customer Service Agreement. The Commissioner's position, expressed in argument at the initial hearing, was

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<sup>200</sup> Exhibit A-010, Witness Statement of John Pasalis at para 29; TC at **Tab 45**; Exhibit A-010, Witness Statement of John Pasalis, Exhibit B (Letter to Richard Silver of TREB, dated April 10, 2012); TC at **Tab 46**; Richardson Evidence, September 24, 2012, p 1166 at lines 12–20; TC at **Tab 47**; Exhibit CA-009, Letter to John Pasalis re Changes to the VOW Data Feed, dated August 31, 2012; TC at **Tab 48**.

<sup>201</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 149–50; TC at **Tab 1**; Exhibit CR-040, Witness Statement of Donald Richardson, Exhibit HH (Memo of the MLS® Committee, May 26, 2011); TC at **Tab 38**.

<sup>202</sup> Exhibit A-004 (675), Defending MLS – Draft Response Roll-Out; TC at **Tab 160**.

that the current consents are good enough to permit the online display of sold information on a VOW, and even if the current consents were not good enough, it was within TREB's power to improve the consents to the point where those consents would be good enough. As discussed below, this position is untenable.

224. While TREB has been willing to consider constructive solutions that meet its concerns, including its concerns about privacy and data-scraping, this has proven difficult in light of an "I want it all" attitude.<sup>203</sup>

225. TREB's action to protect consumer privacy is best understood through a consideration of *PIPEDA*, RECO's *Code of Ethics*, and with consumer attitudes in the GTA, and its concern is vindicated by recent developments in the realm of privacy law.

(a) ***PIPEDA***

226. The online display of the Confidential Data engages numerous provisions of *PIPEDA*. The evolution of *PIPEDA* was developed in detail in TREB's submissions to the Tribunal in 2012.<sup>204</sup> The importance of privacy protection has been remarked upon around the globe.<sup>205</sup> In Canada, *PIPEDA* has been recognized by judges of the Federal Court as being quasi-constitutional legislation.<sup>206</sup>

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<sup>203</sup> Richardson Evidence, October 6, 2015, p 750 at line 7 – p 753 at line 6; TC at **Tab 161**.

<sup>204</sup> TREB Argument, October 18, 2012, p 2647 onward

<sup>205</sup> *Campbell v. MGN Limited*, [2004] UKHL 22 at para 12; Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy, February 2012, The White House, Washington.

<sup>206</sup> *Nammo v. Transunion of Canada Inc.*, 2010 FC 1284 at paras 74–75.

227. Part 1 of *PIPEDA* concerns the protection of personal information in the private sector. Personal information means information about an identifiable individual.<sup>207</sup> Part 1 applies to every organization in respect of personal information that the organization collects, uses, or discloses in the course of commercial activities.<sup>208</sup> The purpose of Part 1 is set out in section 3 of *PIPEDA*:

The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.<sup>209</sup>

228. *PIPEDA* provides that an organization may collect, use, or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.<sup>210</sup>

229. *PIPEDA* also provides that the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.<sup>211</sup> Consent must be meaningful and informed: the individual giving consent must understand how the information will be used and disclosed.<sup>212</sup> In obtaining consent, the reasonable

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<sup>207</sup> Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5 (“*PIPEDA*”), s 2 “personal information”

<sup>208</sup> *PIPEDA*, s 4.

<sup>209</sup> *PIPEDA*, s 3.

<sup>210</sup> *PIPEDA*, s 5(3).

<sup>211</sup> *PIPEDA*, Principle 4.3.

<sup>212</sup> *PIPEDA*, Principle 4.3.2.



expectations of the individual are relevant.<sup>213</sup> An organization might not obtain meaningful consent if it uses an overly broad consent provision.<sup>214</sup>

230. *PIPEDA* also provides that an organization is prohibited from, as a condition of supplying a product or service, requiring an individual to consent to the collection, use, or disclosure of information beyond that required to fulfill the explicitly specified, and legitimate purpose(s) for which the information is being collected.<sup>215</sup>

231. The provisions of Part 1 of *PIPEDA* apply despite any other Act of Parliament unless the other Act expressly declares that it operates despite the provisions of Part 1 of *PIPEDA*.<sup>216</sup>

232. The above principles were in play at the time TREB made the decision to withhold the Confidential Data from the VOW datafeed. As discussed in greater detail below, *PIPEDA*'s informed consent provisions have been further strengthened since the initial hearing.

233. At the time TREB implemented its VOW policy, there had been several decisions from the Privacy Commissioner in the realm of residential real estate.

234. In *PIPEDA Case Summary #2009-002*, a real estate salesperson placed an advertisement in a real estate publication stating that the property has sold for "99.3% of asking price." Based on that figure, it was possible to calculate the amount received for the sale.

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<sup>213</sup> *PIPEDA*, Principle 4.3.5.

<sup>214</sup> *PIPEDA Case Summary #385*, [2007] C.P.C.S.F. No. 21 "Insurance broker asked to amend privacy language" at preamble and paras 2, 11; *PIPEDA Case Summary #2002-83*, "Alleged disclosure of personal information without consent for secondary marketing purposes by a bank", online: <[http://www.priv.gc.ca/cf-dc/2002/cf-dc\\_021016\\_1\\_e.asp](http://www.priv.gc.ca/cf-dc/2002/cf-dc_021016_1_e.asp)> at p 2, 3.

<sup>215</sup> *PIPEDA*, Principle 4.3.3.

<sup>216</sup> *PIPEDA*, s 4(3).

235. The Office of the Privacy Commissioner considered that the sold price would likely be available in a public property registry. Although section 7(3)(h.1) of *PIPEDA* provides that an organization may disclose personal information without consent where that information is publicly available, the Commissioner's Office held that the exception did not apply on the facts of that case. She reasoned that:

[T]his Office interprets paragraph 7(3)(h.1) to apply in situations where the information is actually collected from a publicly available source. In the case at hand, the information would have been collected from purchase agreements that the salesperson was privy to in the course of his duties as sales agent for the seller [not the publically available source].<sup>217</sup>

236. Prior to the Privacy Commissioner's decision, certain real estate boards in British Columbia, including Vancouver, offered a VOW datafeed that included sold price information. In approximately 2009, these boards stopped providing sold information as part of the datafeed.<sup>218</sup>

237. The issue of privacy and consent is of ongoing concern within the real estate industry.

238. In addition to the foregoing case, the Privacy Commissioner's Office has also issued rulings that information about the market value of a home, and photographs of a home constitute personal information pursuant to *PIPEDA*.<sup>219</sup>

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<sup>217</sup> *PIPEDA Case Summary #2009-002*, [2009] C.P.C.S.F. No. 2 "Realtor advertises purchase price of condominium in trade publication without buyer's consent" at para 10. See also "Interpretation Bulletin – Publicly Available Information" Office of the Privacy Commissioner of Canada, March 17, 2014, p 3.

<sup>218</sup> Evidence of Sam Prochazka, September 18, 2012, p 936 at line 1 – p 937 at line 2; TC at **Tab 147**.

<sup>219</sup> *PIPEDA Case Summary #349*, [2006] C.P.C.S.F. No. 26, "Photographing of tenants' apartments without consent for insurance purposes"; *PIPEDA Case Summary #390*, [2008] C.P.C.S.F. No. 2, "Residential property appraisal documents are owners' personal information"

239. TREB's decision to exclude the Confidential Data from the VOW datafeed was prudent given the requirements of *PIPEDA*, and in particular given the 2009 decision from the Office of the Privacy Commissioner, which was know to and considered by the Task Force in its deliberations.<sup>220</sup>

240. Considering the attitudes of home buyers and home sellers in the GTA, discussed in greater detail below, it is questionable as to whether a reasonable person would consider the disclosure of sold home information over a VOW feed to be an appropriate use of that information, irrespective of any purported consent.<sup>221</sup>

241. On the issue of consent, TREB does not have express consent from all home buyers, because neither the Buyer Representation Agreement nor the Buyer Customer Service Agreement are mandatory documents.<sup>222</sup>

242. Furthermore, the current consent clauses are not sufficient. These are broadly worded consents that do not specifically mention the wide distribution of information over the internet. The wide display of information over the internet is a radical departure from the reasonable expectation of individuals buying and selling real estate. This is reflected by the attitudes of the home buying and selling public in the GTA, discussed below.

243. Finally, it would contravene *PIPEDA* for TREB to create a tie between buying or selling a house on the MLS, and the mandatory consent to the wide dissemination of sold

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<sup>220</sup> Richardson Evidence, September 27, 2012 p 1670 line 22 – p 1672 line 8; TC at **Tab 31**.

<sup>221</sup> *PIPEDA*, s 5(3). See also *PIPEDA Report of Findings No. 2015-001 – Results of Commissioner Initiated Investigation into Bell's Relevant Ads Program*, [2015] C.P.C.S.F. No. 1 at para 53.

<sup>222</sup> Richardson Evidence, October 6, 2015, p 682 at line 19 – p 683 at line 15, p 733 at line 21 – p 734 at line 16; TC at **Tab 50**.

information over the internet. This goes beyond the legitimate purpose for which the information was being collected.

244. TREB's decision to withhold the Confidential Data was eminently sensible considering the privacy climate at the time under *PIPEDA*.

**(b) RECO's Code of Ethics**

245. The VOW Task Force also considered regulatory concerns regarding RECO with respect to the disclosure of the Confidential Data.

246. RECO's *Code of Ethics* imposes obligations on TREB's members as it pertains to sold and pending sold information. The *Code of Ethics* mandates that information regarding the contents of an agreement of purchase and sale, including the price, can only be included in an advertisement where all parties to the transaction have consented in writing.<sup>223</sup>

247. The *Code of Ethics* also mandates that an advertisement cannot include anything that could reasonably be used to identify a party to the acquisition or disposition of an interest in real estate unless the party has consented in writing, and cannot 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.<sup>224</sup>

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<sup>223</sup> *Code of Ethics*, O Reg 580/05, s 36(9)

<sup>224</sup> *Code of Ethics*, O Reg 580/05, ss 36(7), 36(8)

248. The Competition Bureau has previously observed that the consent requirement contained in provincial real estate regulations “are there to protect the public and do not cause any competition concerns.”<sup>225</sup>

249. At the initial hearing the Commissioner argued that VOWs are not advertising and are not subject to RECO’s advertising rules. TREB took the opposing view. Since the initial hearing, RECO has removed any lingering doubt and confirmed that VOWs are, in fact, advertising.<sup>226</sup> In any event, TREB’s privacy concerns with *PIPEDA* compliance as articulated above would apply irrespective of the additional regulatory requirements of RECO.

250. Just as informed consent would be required to disclose sold home information on a VOW in order to remain compliant with *PIPEDA*, informed consent would be required for such disclosure in order for TREB’s members to remain compliant with the requirements imposed by RECO. TREB was justified in considering the requirements of RECO in opting to withhold the Confidential Data from the VOW datafeed.

**(c) Consumer attitudes in the GTA**

251. Consumers in the GTA are strongly opposed to the widespread distribution of their sold information over the internet. Ms. Prescott’s evidence regarding her brokerage’s experience with the display of sold home prices over Century 21’s website is particularly informative to this end. While people are comfortable with sold price information being accessed by real estate professionals in the provision of real estate services, they have privacy

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<sup>225</sup> Exhibit R-094, “Self Regulated Professions: Balancing Competition and Regulation”, Competition Bureau 2007, p 126; TC at **Tab 162**.

<sup>226</sup> Exhibit R-155, For the RECOrd (Winter 2013), p 11; TC at **Tab 163**.

and security concerns and there is discomfort with that information being made widely available on the internet. People simply do not want their sold home price information available online.<sup>227</sup>

252. The Commissioner suggests that TREB should build the “perfect consent” that would force everyone to consent to the online display of their sold home information. Leaving aside for a moment that such a tied mandatory consent would contravene *PIPEDA*, why would TREB force the customers of its Members into an outcome that makes them uncomfortable and which they do not want? This simply makes no sense.

253. While an individual’s sold price information will be available to other home buyers and sellers through TREB’s Members in the provision of real estate services, that type of disclosure is light-years away from having the information be widely available over the internet to anyone with an internet connection. 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.<sup>228</sup> This notion was confirmed by Justice Brown in the Fraser Beach litigation where he observes that TREB’s Members act as a buffer to the information in the MLS database.<sup>229</sup>

254. Consumers’ reluctance to having sensitive personal information available online is understandable, particularly given Mr. McMullin’s evidence about the pervasiveness of real estate voyeurs in Nova Scotia.<sup>230</sup> Sold information is put out there largely as a curiosity for

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<sup>227</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at paras 12–12.5; TC at **Tab 51**.

<sup>228</sup> *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (SCOTUS), at para 489; *Burnett v. County of Bergen, Supreme Court of New Jersey*, A-43, September Term 2008, at para 27.

<sup>229</sup> *Beach v. Toronto Real Estate Board*, [2009] O.J. No. 5227 (S.C.J.) at para 88; aff’d [2010] O.J. No. 5541 (C.A.).

<sup>230</sup> McMullin Evidence, September 22, 2015, p 75 at lines 4–20; TC at **Tab 105**

people that are noseey, but have no intention of entering into a real estate transaction. To borrow a phrase from Mr. McMullin, these people are just very, very interested in real estate. Apprehension is warranted!

**(d) Recent developments in privacy**

255. Developments in the realm of privacy law since the implementation of TREB's VOW policy confirm that TREB was right to exercise caution about including the Confidential Data in the VOW datafeed.

256. In *PIPEDA Report of Findings No. 2015-001 – Results of Commissioner Initiated Investigation into Bell's Relevant Ads Program*, the Privacy Commissioner made several adverse findings against the consent regime put in place by Bell Canada regarding a program that used its customers' website browsing history to generate individually targeted advertising. The Privacy Commissioner found that the consents obtained by Bell were insufficient due to the sensitive nature of the information at play (including financial information) and the reasonable expectations of Bell's customers.<sup>231</sup> The Privacy Commissioner held that Bell was required to clearly explain Bell's use of its customer's personal information via prominent detailed explanations so that its customers could understand the full extent to which their personal information was being used.<sup>232</sup> The Privacy Commissioner rejected a casual approach to consent similar to the approach that has been proposed by the Commissioner of Competition in the present case.

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<sup>231</sup> *PIPEDA Report of Findings No. 2015-001 – Results of Commissioner Initiated Investigation into Bell's Relevant Ads Program*, [2015] C.P.C.S.F. No. 1 at paras 6, 65-68, 79, 87.

<sup>232</sup> *PIPEDA Report of Findings No. 2015-001 – Results of Commissioner Initiated Investigation into Bell's Relevant Ads Program*, [2015] C.P.C.S.F. No. 1 at paras 112-115.

257. Also in 2015, the informed consent provisions *PIPEDA* were amended by Bill S-4, the *Digital Privacy Act*. Pursuant to the amendment, “the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization’s activities are directed would understand the nature, purpose and consequences of the collection, use, or disclosure of personal information to which they are consenting.”<sup>233</sup> In other words, the diverse real estate buying and selling public in the GTA must clearly understand the nature of the consent being given. This change in law has caused TREB to commence the process of reviewing its current consent regime.<sup>234</sup>

258. In addition to the above examples showing a trend towards enhanced privacy protection, there have also been appellate decisions confirming the primacy of privacy protections in modern Canadian society including the creation of the tort of intrusion upon seclusion,<sup>235</sup> the recognition of a right of online anonymity,<sup>236</sup> and the recognition that under *PIPEDA*, a mortgagee cannot provide a mortgage discharge statement to a judgment creditor without the mortgagor’s express consent, a court order, or pursuant to a statutory requirement.<sup>237</sup>

259. Mr. McMullin gives evidence about a complaint to the Privacy Commissioner regarding Viewpoint. This evidence is not particularly instructive to TREB’s motivations because it post-dates TREB’s implementation of the VOW datafeed; because of the limited details available to the Tribunal; and because of the Nova Scotia legislation mandating that

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<sup>233</sup> Bill S-4, *An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act*, SC 2015 Ch 32, and in particular s 5 therein; *PIPEDA*, s 6.1

<sup>234</sup> Richardson Evidence, October 6, 2015, p 737 at line 21 – p 738 at line 24; TC at **Tab 50**.

<sup>235</sup> *Jones v. Tsige*, [2012] O.J. No. 148 (C.A.).

<sup>236</sup> *R v. Spencer*, [2014] S.C.J. No. 43.

<sup>237</sup> *Royal Bank of Canada v. Trang*, 2014 ONCA 883.



sale prices can be made public and published, which may have influenced the Privacy Commissioner's view of what is "publically available" in Nova Scotia.<sup>238</sup>

260. TREB's privacy concerns were well founded in 2011 and, as it turns out, are even more so in 2015.

**(iii) Efficiency justifications**

261. Compliance with *PIPEDA*'s requirements and RECO's regulatory requirements, as discussed above, are valid efficiency justifications in this matter. TREB must act in compliance with the law.

262. There are several other efficiency justifications for TREB's VOW policy directed at preserving the utility of the TREB MLS® system.

263. As noted by the Commissioner's expert:

[I]f I really had concerns that this policy, if enacted, or if TREB made much freer use of its information, was going to cause a downfall of the MLS®, that would be a calamitous event. That would be a bad thing, because the MLS® is a very good thing. It provides a lot of benefits.<sup>239</sup>

264. The TREB VOW policy: promotes liquidity of the MLS® system, prevents the unauthorized commercial exploitation of the MLS® database, and preserves incentives for investment in the MLS® by TREB Members. These points will all be briefly addressed

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<sup>238</sup> McMullin Evidence, September 22, 2015, p 97 at lines 8-18; TC at **Tab 142**.

<sup>239</sup> Vistnes Evidence, September 18, 2012, p 1007; TC at **Tab 164**.

below, and are more fully canvassed in the first expert report of Dr. Jeffrey Church at pages 110-130.<sup>240</sup>

(a) **MLS® Liquidity**

265. TREB's VOW policy promotes MLS® liquidity in three ways: protecting privacy, preventing strategic advantage, and preventing potential interference with contractual relations.<sup>241</sup>

266. **Protecting privacy:** This is the most important MLS® liquidity factor. As discussed above, consumers in the GTA are not comfortable having their sold information posted online. If the use of the TREB MLS® to sell a property is tied with automatic inclusion of sold information in a VOW datafeed, this will place the public in a difficult position, as they will have to choose between their privacy, and being able to access the MLS® to sell their property.

267. Since the initial hearing, there has been an expansion of “pocket” and “whisper” listings in the United States in what amounts essentially to a “pre-MLS” listing regime, which demonstrates that there are alternatives to a centralized MLS® in transacting real estate.<sup>242</sup>

268. **Preventing strategic advantage:** The disclosure of WEST and pending listings on a VOW will provide information to buyers about homes listed for sale, to the disadvantage of the sellers. This information may reveal reservation prices, or other information detrimental to the seller's interest.

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<sup>240</sup> TC at Tab 165.

<sup>241</sup> Exhibit R-082, Summary of Expert Report of Dr. Church, October 1, 2012, p 63; TC at Tab 166.

<sup>242</sup> Exhibit CR-172, Second Expert Report of Dr. Church, May 15, 2015, para 81; TC at Tab 79.

269. **Preventing potential interference with contractual relations:** the display of pending sold information invites home owners and sellers to be targets of unsolicited approaches to provide services, and even unsolicited offers to sellers that are already under contract with a purchaser.

**(b) Prevention of Unauthorized Commercial Use**

270. TREB's MLS® database contains information, and there is a low marginal cost to copy information. Sold price data, in particular, is information that may be commercially valuable to various third party operators. TREB's copyright protection prevents the database from being re-sold or otherwise distributed to the detriment of TREB. The notion of copyright as a defence to this application will be explored in greater detail in a section that follows.

**(c) Preservation of Incentives to Invest in the MLS®**

271. The core of the Commissioner's theory of the case is that operators of "full-information VOWs" will be able to erode the market share of incumbent brokerages by using superior technology. As noted below in the analysis on "substantial lessening or prevention of competition," this position is without merit. However, if the Commissioner's theory were correct, TREB would be justified in enacting rules to preserve the utility of the MLS®.

272. Incumbent brokerages would have no incentive to make further investments in the MLS® database (by way of contributing listings), if "full information VOWs" would then use those listings to erode incumbent market share. This would amount to free-riding on the investments of incumbent brokerages made in securing listings. If the Commissioner's theory

of the case were true (which it is not), this would amount to an expropriation of sunk investments by incumbent brokerages. In the face of this scenario, large brokerages, and franchise groups, would have an incentive to leave TREB's MLS® and establish a rivalrous multiple listing system.<sup>243</sup>

273. If the Commissioner's theory of the case were true (which it is not), TREB would have an efficiency justification to ensure the ongoing utility and viability of the TREB MLS®.

**C. TREB's VOW Policy does not substantially lessen or prevent competition**

274. TREB's VOW policy has not, does not, and is not likely to substantially lessen or prevent competition in the markets for residential real estate services (buy-side and sell-side) in the GTA.

275. The Commissioner's case must fail on this branch of the abuse of dominance test for two independently sufficient reasons.

276. First, TREB's VOW policy does not create, enhance, or maintain market power in the relevant markets. This is a critical prerequisite for a finding of a substantial lessening or prevention of competition. The absence of the creation, enhancement, or maintenance of market power in this case is fatal to the Commissioner's Application.

277. Second, even if a substantial lessening or prevention of competition is conceptually possible in the absence of the creation, enhancement, or maintenance of market power, the

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<sup>243</sup> Exhibit R-082, Summary of Expert Report of Dr. Church, October 1, 2012, pp 60–62; TC at **Tab 166**; Exhibit R-173, Summary of the Second Expert Report of Dr. Church, October 6, 2015, pp 35–37; TC at **Tab 151**.

relevant markets would not be substantially more competitive in a world with “full information VOWs”.

**(i) The Test for a Substantial Lessening or Prevention of Competition**

278. In determining whether a firm has, is, or is likely to substantially lessen or prevent competition in a market, the Tribunal will determine whether that firm’s impugned conduct has created, enhanced, or maintained its market power.<sup>244</sup>

279. The *Competition Act* contains several provisions that require an examination of whether a given practice or event has resulted in, is resulting in, or is likely to result in a substantial lessening or prevention of competition. For any part of the *Competition Act* where the Tribunal must make an enquiry as to whether competition has been substantially lessened or prevented, the focus of the Tribunal’s enquiry is to determine whether the conduct at issue has created, maintained, or enhanced market power.<sup>245</sup>

280. In determining whether a firm’s impugned conduct has created, enhanced, or maintained its market power:

the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is “substantial”.<sup>246</sup>

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<sup>244</sup> *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co.*, [1990] C.C.T.D. No. 17 at p 27 (Comp Trib); *Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd.*, [1995] C.C.T.D. No. 20 at pp 31-32 (Comp Trib); Competition Bureau of Canada, Enforcement Guidelines: The Abuse of Dominance Provisions, September 20, 2012, p 13.

<sup>245</sup> *Canada (Commissioner of Competition) v. CCS Corp.*, [2012] C.C.T.D. No. 14., per Chief Justice Crampton (concurring) at paras 367–368, adopted by the Supreme Court of Canada in *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] S.C.J. No. 3 at paras 50, 54–55.

<sup>246</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1027 (C.A.) at para 37.

281. Put another way, the Tribunal must determine whether the relevant markets would be substantially more competitive but for the impugned practice of anti-competitive acts.<sup>247</sup>

282. The Tribunal has previously articulated a principled basis for evaluating what qualifies as “substantial” lessening and prevention of competition in merger context, although has yet to do so in the abuse of dominance context. The Chief Justice, writing academically before his appointment to the bench, suggested that the approach from the merger cases should be adopted in the abuse of dominance area. The Chief Justice proposed that substantiality should be defined as occurring where price would be materially greater or levels on non-price competition would be materially lower than in the absence of the conduct, and that such effect is not likely to be eliminated by existing or new competitors within two years.<sup>248</sup>

283. The Chief Justice also opined in that same article that the Tribunal, in abuse of dominance cases, should follow the approach of merger decisions by making it clear that competition cannot be substantially lessened in the absence of significant barriers to entry.<sup>249</sup>

**(ii) No Creation, Enhancement, or Maintenance of Market Power**

284. The Commissioner’s theory of the case is not that TREB has created, enhanced, or maintained its own market power, but rather that it has created, enhanced, or maintained market power of certain of its Members in the downstream market. As articulated in the Commissioner’s written argument at the initial hearing, TREB is allegedly creating,

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<sup>247</sup> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J. No. 1027 (C.A.) at para 38

<sup>248</sup> Paul Crampton, ““Abuse” of “Dominance” in Canada: Building on the International Experience” (2006) 73 *Antitrust Law Journal*, pp 862-863. See also *Director of Investigation and Research v. Southam Inc.* (1992), 43 CPR (3d) 161, [1992] C.C.T.D. No. 7 at p 76 (Comp Trib).

<sup>249</sup> Paul Crampton, ““Abuse” of “Dominance” in Canada: Building on the International Experience” (2006) 73 *Antitrust Law Journal*, p 863. See also *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 CPR (3d) 289, [1992] C.C.T.D. No. 4 at p 22 (Comp Trib).

enhancing, or maintaining market power “by shielding TREB’s non-VOW members from price and non-price competition from VOWs.”<sup>250</sup>

285. The Commissioner suggests that TREB’s “non-VOW members” have market power. This suggestion is deeply flawed for several reasons.

286. The Bureau’s 2012 iteration of its Abuse of Dominance Enforcement Guidelines discusses collective market power in the context of the joint dominance provisions of s. 79. The Guidelines note that “[v]igorous price and non-price rivalry among firms is an indicator of competitive markets. If the firms in the allegedly dominant group are, in fact, competing vigorously with one another, they will not be able to jointly exercise market power.”<sup>251</sup>

287. Dr. Vistnes himself testified that the GTA residential real estate markets is a “cut-throat” competitive market.<sup>252</sup> The GTA residential real estate market is far too competitive for any collection of firms to jointly have market power. The Commissioner’s conception of “market power” does violence to its well established definition.

288. In the alternative, if the GTA residential real estate market can be carved up by brokerages’ use of technology in an effort to determine which group (if any) has “market power” that is being created, enhanced, or maintained, the Commissioner has failed to meet his burden because he has failed to put forward any economic analysis to demonstrate the existence of “market power” among any collection of brokerages in the downstream market.

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<sup>250</sup> Closing Submissions of the Commissioner of Competition, Initial Hearing, para 620; TC at Tab 167.

<sup>251</sup> Competition Bureau of Canada, Enforcement Guidelines: The Abuse of Dominance Provisions, September 20, 2012, p 9.

<sup>252</sup> Vistnes Evidence, October 5, 2015, p 599 at lines 13–16; TC at Tab 168.

289. In his opening argument at the reconsideration hearing, the Commissioner’s counsel noted that Dr. Vistnes’ reports show that over the last 8 to 10 years, the top five franchise banners “have controlled and continued to control 75 percent of the market in the GTA.”<sup>253</sup> The 75% figure is meaningless for at least two reasons.

290. First, there is a significant degree of independence within a franchise network, which is largely a branding exercise. Re/Max brokerages pay a royalty fee and operate independently from Re/Max, and there is similar evidence regarding Century 21.<sup>254</sup> Franchise-affiliated brokerages are independent businesses that compete with each other.<sup>255</sup> There is no evidence of cohesion within any individual franchise network, let alone collectively among the top five.

291. Second, many brokerages from the top 5 franchise groups are adopters of innovative technology generally and VOWs specifically.<sup>256</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

292. It appears that the Commissioner is simply adding up market shares of franchise groups to create a concept of “market power” in the aggregate based upon the collective

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<sup>253</sup> Opening Submissions, September 22, 2015, p 17 at lines 11–15; TC at Tab 169.

<sup>254</sup> Syrianos Evidence, October 6, p 813 line 19 – p 814 line 2; TC at Tab 170.

<sup>255</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at paras 6, 13–16; TC at **Tab 51**; Prescott Evidence, September 28, 2012, p 1788 at line 12 – p 1789 at line 14; TC at **Tab 68**; Exhibit CR-169, Updated Witness Statement of Timoleon Syrianos at para 10; TC at **Tab 56**; Syrianos Evidence, October 6, 2015, p 814 at lines 3–18; TC at **Tab 170**.

<sup>256</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 176; TC at **Tab 1**; Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit RR; TC at **Tab 101**.



market share. There is a complete lack of any economic analysis that the top five franchise groups collectively have market power or that this collective market power is being created, enhanced, or maintained by any conduct at issue in this proceeding. At the initial hearing, Dr. Vistnes admitted that he was not using the top 5 franchise groups as short-hand for a group that was collectively opposed to VOWs/innovation.<sup>257</sup>

293. Finally, to the extent that the Commissioner wishes to divide up the market based on usage of technology to examine the potential existence of market power, such a division should be done by reference to the adoption of innovation and use of technology generally, as opposed to the more narrow use and adoption of one aspect of technology, VOWs, which is just one additional source of data for a brokerage's website. This is, in fact, how the Commissioner divides up the market his Amended Notice of Application, as being "traditional brokers" on one hand and "innovative brokers" on the other.<sup>258</sup> This is also consistent with how the Commissioner's own "VOW witnesses" self-identify, as a technology-driven brokerage, not as "VOW brokerages."<sup>259</sup>

294. Again, Dr. Vistnes provides no economic analysis to determine whether market power exists in the downstream market among "traditional" brokerages, and the fact evidence is to the contrary, as over 90% of TREB's members are subscribed to TREB's IDX program.

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<sup>257</sup> Vistnes Evidence, September 18, 2012 (IN CAMERA), p 17 at line 10 – p 21 at line 9; TC at **Tab 171**.

<sup>258</sup> Amended Notice of Application at paras 3, 5, 7, 49, 58; TC at **Tab 172**.

<sup>259</sup> McMullin Evidence, September 11, 2012, p 217 at line 9 – p 218 at line 5, and in particular: "I have always been of the mind that VOW is a definition that somebody, somebody came up with to define some kind of class of brokerage that has never been recognized"; TC at **Tab 173**; See also Nagel Evidence, September 12, 2012, p 416 at line 19 – p 417 at line 11; TC at **Tab 174**.

295. Market power does not exist in the residential real estate brokerage market, whether on an individual basis,<sup>260</sup> or collectively by arbitrarily tallying up market shares.

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

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

297. At the conclusion of the initial hearing, Justice Simpson commented that the Tribunal was "concerned that if [...] there is a prevention or lessening of competition occurring, it may not be substantial on the evidence that we have."<sup>261</sup> While this observation is not a binding finding of fact, it is certainly informative, particularly since the evidence on substantiality has only improved in TREB's favour since the initial hearing including, for example, evidence of the declining fortunes of VOWs in the United States, and evidence about the comparative ability of TheRedPin to convert clients using TREB's VOW datafeed as compared with Viewpoint and RedFin, which have VOWs that include sold prices.

298. TREB's VOW policy does not result in prices that are materially greater, or non-price competition that is materially lower. There is no substantial lessening of prevention of competition.

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<sup>260</sup> Exhibit A-031, Reply Expert Report of Gregory S. Vistnes at para 30: TREB's conduct "is *not* likely to have a significant effect on any individual agent's or broker's market power" (emphasis in original); TC at **Tab 175**.

<sup>261</sup> Closing Argument, October 17, 2012 p 2554 at line 22 – p 2555 at line 2; TC at **Tab 176**.

(a) **The Relevant “But For” World**

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

300. As admitted by Dr. Vistnes, in evaluating whether TREB’s VOW policy, as enacted, substantially lessens or prevents competition, the appropriate analysis compares the present world where the VOW datafeed does not contain the excluded data against a “but-for” world in which the information is available in a VOW datafeed.<sup>262</sup>

301. However, in his evidence Dr. Vistnes often conflates the benefits to the real estate brokerage industry that come from advances in internet technology, or advances of VOWs in general, and he does not isolate the incremental additional value (if any) that would accrue from the addition of the Confidential Data to a VOW.

302. In considering whether TREB’s conduct with respect to VOWs substantially lessens or prevents competition, the relevant “but for” comparison is between TREB’s current VOW policies, and the “full information VOWs” advocated by the Commissioner. In other words, the Tribunal must consider the incremental value of the Confidential Data (which is already available through agents by other delivery methods) being available *for search and display on a VOW*.

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<sup>262</sup> Exhibit A-031, Reply Expert Report of Gregory S. Vistnes at para 15; TC at **Tab 177**.

(b) **“Full information VOWs” will not have a substantial impact on consumer choice of brokerage**

303. In conducting the “but for” analysis in this matter, it is critical to bear in mind the markets at issue in the proceeding: the markets for residential real estate brokerage services. Accordingly, it is not sufficient that VOW-based brokerages might receive more traffic to their websites if the VOW datafeed included the withheld data. Rather, the appropriate inquiry is to ask whether a VOW-based brokerage would be hired by significantly more clients as a real estate brokerage as a result of being able to display the Confidential Data on their VOWs. It is not relevant to the SLC/SPC analysis if a website becomes more popular with real estate voyeurs or consumers that are ultimately going to hire another brokerage.

304. During argument at the initial hearing, Justice Simpson identified the ability to prove increased lead generation as being “the first domino in a stand of dominos” for the Commissioner’s case on substantiality.<sup>263</sup>

305. The primacy of conversion is referenced in the Commissioner’s Amended Notice of Application,<sup>264</sup> and recognized in the evidence of his witnesses (eg Mr. Prochazka’s “almighty conversion rate”).<sup>265</sup> Put simply, the reason that VOW operators want to design new attractive website features is to convert website users into clients of the brokerage.

306. Dr. Vistnes conceded the importance of conversion rates in cross-examination at the initial hearing:

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<sup>263</sup> Closing Argument, October 17, 2012, p 2555 at lines 3-16; TC at **Tab 176**.

<sup>264</sup> Amended Notice of Application at para 64; TC at **Tab 172**.

<sup>265</sup> Gidamy Evidence, September 23, 2015, p 255 at line 24 – p 256 at line 6; TC at **Tab 178**; Prochazka Evidence, September 23, 2015, p 310 at lines 8–11; TC at **Tab 179**.

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

DR. VISTNES: I would agree with that.

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

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

And so ultimately it would not be competitively significant.<sup>266</sup>

**(c) The competitive impact of “full information VOWs” could have been measured by looking at the United States and Nova Scotia**

307. The Commissioner’s position on the issue of substantial lessening and prevention of competition is based heavily on theory with no relevant empirical evidence to back up those theories.

308. Dr. Vistnes failed to conduct any empirical analysis whatsoever on the competitive impact of “full information VOWs” in those jurisdictions (United States and Nova Scotia) where full information VOWs currently exist.

309. Dr. Vistnes justifies his failure to conduct any empirical analysis by saying that the likely improvements in the residential real estate brokerage market will be improvements in quality of service, and that quality is difficult to measure empirically.<sup>267</sup>

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<sup>266</sup> Vistnes Evidence, September 19, 2012, pp 1077–1078; TC at **Tab 180**.

310. However, conversion rates are where the rubber meets the road in evaluating the competitive implications of TREB's VOW policy. The reason that brokerages are designing new bells and whistles on their websites is to turn website users into clients. To state Dr. Vistnes' admission another way: new website features will only be competitively significant if they result in more clients for the brokerage.<sup>268</sup>

311. Dr. Vistnes' evidence is that, in his opinion, VOWs are a disruptive technology that represent an economic threat to market incumbents.<sup>269</sup> If VOWs truly were a disruptive technology, then one would expect them to come to dominate the markets where they were allowed.<sup>270</sup>

312. Instead of conducting an analysis of market-wide impact of full information VOWs, the Commissioner has put forward a sampling of evidence of the most successful "VOW-based" brokerage in the United States, and of the most successful "VOW-based brokerage" in Nova Scotia. These examples are irrelevant for proving the market-wide impact of this supposedly "disruptive" new way of doing business.<sup>271</sup> As Dr. Church testified: "you cannot just look at these [...] relatively small market shares of one entrant and then summarize and say, oh, that means there is going to be a big impact from relaxing the TREB VOW policy, because it doesn't tell you that at all."<sup>272</sup>

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<sup>267</sup> Vistnes Evidence, October 5, 2015, p 473 at lines 6–15; TC at **Tab 181**.

<sup>268</sup> Vistnes Evidence, September 19, 2012, pp 1077–1078; TC at **Tab 180**; see also Exhibit CR-172, Expert Report of Dr. Church, May 15, 2015, para 45; TC at **Tab 79**.

<sup>269</sup> Exhibit CA-029, Report of Dr. Vistnes, June 22, 2012, paras 133–134; TC at **Tab 182**.

<sup>270</sup> Exhibit CR-172, Expert Report of Dr. Church, May 15, 2015, para 59; TC at **Tab 79**.

<sup>271</sup> Church Evidence, October 7, 2015, p 993 at line 16 – p 997 at line 3; TC at **Tab 183**.

<sup>272</sup> Church Evidence, October 7, 2015, p 996 at lines 13–19; TC at **Tab 183**.

313. Dr. Vistnes's evidence fails to analyze and consider the competitive impact of "full information VOWs" in the United States, in spite of the fact that full information VOWs have existed in the United States for over 7 years, and in spite of his evidence at the initial hearing that it would be fair to look to the US experience for guidance about the effect of VOWs with sold information, and that the US market provides an "actual experiment."<sup>273</sup>

314. Although Dr. Vistnes points to the unavailability of data as a justification for not having considered the broader American market, questioning from the Tribunal made it clear that Dr. Vistnes made the recommendation to the Commissioner not to bother trying to obtain such data; data that was available to him as an expert in the DOJ's proceeding against NAR.<sup>274</sup>

315. If full information VOWs were going to be as competitively significant as Dr. Vistnes suggests, then one would expect that this would be borne out by the American experience. The Commissioner fails to put forward any evidence of the overall American market impact of full information VOWs, and in fact it would appear that full information VOW websites have not been significant in the United States over the past 7 years.<sup>275</sup>

316. With respect to Nova Scotia, it was Mr. McMullin's evidence that other brokerages have operated VOWs in Nova Scotia and that some of those brokerages decided to stop using

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<sup>273</sup> Vistnes Evidence, October 5, 2015, p 514 at line 16 – p 515 at line 25; TC at **Tab 184**.

<sup>274</sup> Vistnes Evidence, October 5, 2015, p 557 at line 20 – p 559 at line 18, p 606 at line 20 – p 607 at line 2; TC at **Tab 185**.

<sup>275</sup> Exhibit CR-172, Expert Report of Dr. Church, May 15, 2015, para 53; TC at **Tab 79**.

VOWs.<sup>276</sup> Dr. Vistnes does not consider this evidence, or any evidence of the market-wide impact of “full information VOWs” in Nova Scotia.

317. Dr. Vistnes even fails to analyze and consider the competitive impact of the current VOWs that are being offered in the GTA,<sup>277</sup> in spite of the evidence of the success of at least two such brokerages (Realosophy and TheRedPin), with TheRedPin having sold approximately \$325 million of real estate over the past year and using the GTA as a springboard to expand across southern Ontario and into Vancouver.<sup>278</sup> TheRedPin and Realosophy have not put forward evidence about their profitability operating in the GTA, and an adverse inference should be drawn against the Commissioner.<sup>279</sup>

318. There is evidence that there are other brokerages of the same ilk as Realosophy and TheRedPin operating in the GTA (for example, Zolo), yet Dr. Vistnes has not engaged in any analysis to determine the ability of these brokerages to enter the market and gain market share while offering a VOW using TREB’s VOW datafeed.<sup>280</sup>

319. Since Dr. Vistnes has not done any of the above market-wide analysis, he has obviously not engaged in any comparative analysis as to the market impact of full information VOWs as compared with the market impact of VOWs as they currently exist in the GTA.

320. If full information VOWs were a disruptive technology that was going to have a substantial competitive impact in the residential real estate brokerage market, then these

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<sup>276</sup> McMullin Evidence, September 22, 2015, p 83 at lines 13-18; TC at **Tab 186**.

<sup>277</sup> Vistnes Evidence, October 5, 2015, p 516 at line 1 – p 517 at line 12; TC at **Tab 184**.

<sup>278</sup> Gidamy Evidence, September 23, 2015, p 243 at line 4 – p 244 at line 22, p 268 at lines 7–23; TC at **Tab 146**.

<sup>279</sup> *The Commissioner of Competition v. The Canadian Real Estate Association*, 2015 Comp. Trib. 3 at para 41.

<sup>280</sup> Gidamy Evidence, September 23, 2015, p 265 at line 9 – p 266 at line 20; TC at **Tab 80**; Vistnes Evidence, October 5, 2015, p 516 at line 1 – p 517 at line 12; TC at **Tab 184**.



impacts would be observable in the United States and Nova Scotia. Dr. Vistnes has failed to conduct any empirical analysis of these markets. There has been effective entry by at least some brokerages offering VOWs in the GTA, and Dr. Vistnes has provided no empirical analysis demonstrating barriers to entry.

321. The evidence that is before the Tribunal suggests that full information VOWs have not had a competitive impact, let alone a *substantial* competitive impact, where the technology has been offered to market participants.

**(d) No substantial increase to website conversion rates**

322. While the foregoing argument is dispositive on the issue of substantiality, there is additional evidence that disproves the Commissioner's position on substantiality that bears discussion.

323. As part of his overall failure to measure market-wide competitive impact, Dr. Vistnes failed to do any analysis on the ability of brokerages operating VOWs to convert website users into clients.<sup>281</sup> Dr. Vistnes also does not compare the ability of brokerages operating IDX populated websites to create leads as compared with either VOWs generally, or full information VOWs specifically.

324. Using TREB's current VOW datafeed, TheRedPin is able to convert ■■■ of its registered users into clients of the brokerage. Realosophy did not provide any evidence of its conversion rate. Operating VOWs that contain sold prices, Viewpoint has a conversion rate

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<sup>281</sup> Vistnes Evidence, September 19, 2012, pp 1080–1081; TC at **Tab 180**; Vistnes Evidence October 5, 2015 (in camera), p 94 at line 24 – p 95 at line 14; TC at **Tab 187**.

of [REDACTED] of its registered users into clients, while RedFin has a conversion rate of [REDACTED] of its registered users into clients.<sup>282</sup> [REDACTED]

[REDACTED]<sup>283</sup>

325. RedFin operates in some municipalities where it can display sold prices on its VOW and in other municipalities (such as Dallas, Texas) where it cannot. The Commissioner has provided no evidence of the comparative ability of RedFin to convert users into clients in locations where it does have sold prices available for search and display on a VOW versus those locations where it does not. This was not considered by Dr. Vistnes at the initial hearing, and it remains unconsidered at the reconsideration hearing.<sup>284</sup>

326. Mr. Nagel was the Commissioner's witness. The above comparative information was available to him. Consistent with the Tribunal's decision in the recent *CREA* decision, the failure to produce comparative information about RedFin's effectiveness in non-disclosure areas and disclosure areas supports the inference that it is not favourable to the Commissioner's position.<sup>285</sup>

327. The Commissioner's failure to adduce empirical evidence is fatal in and of itself, but the impact of the omission is compounded by empirical evidence that suggests that [REDACTED] The

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<sup>282</sup> Exhibit CA-103, Viewpoint Realty Business Metrics; TC at **Tab 111**; Exhibit CA-130, Second Witness Statement of Scott Nagel at para 18(b); TC at **Tab 112**; Exhibit CA-130, Second Witness Statement of Scott Nagel at paras 9, 18(a); TC at **Tab 112**.

<sup>283</sup> Vistnes Evidence, October 5, 2015 (in camera), p 94 at lines 4-13; TC at **Tab 187**.

<sup>284</sup> Vistnes Evidence, September 19, 2012, pp 1081-1082; TC at **Tab 180**; Vistnes Evidence, October 5, 2015 (in camera), p 94 at line 24 - p 95 at line 14; TC at **Tab 187**.

<sup>285</sup> *The Commissioner of Competition v. The Canadian Real Estate Association*, 2015 Comp. Trib. 3 at para 41.

evidence that is available suggests that there is no causal relationship whatsoever between having a “full information VOW” and being able to convert website users into clients.

328. There is no evidence that full information VOWs are more effective at converting registered users into clients, let alone *substantially* more effective at converting website users into clients.

**(e) No substantial increase to quality of service**

329. As noted above, TREB’s position is that any alleged substantial increase in “quality of service” would be manifested in more customers hiring a brokerage, which can be measured in the manners discussed above (market-wide impact generally and conversion rates in particular). It is the hiring of the brokerage which is the competitively significant event – examining quality of service is just a proxy to gauge a firm’s ability to compete for business.

330. No attempt was made to measure the effectiveness of “full information VOW” brokerages at gaining clients. Leaving that dispositive issue aside for the moment, the Commissioner’s theoretical argument that there is a substantial impact on “quality of service” visited by TREB’s VOW policy does not withstand scrutiny.

331. The majority of the content displayed on a website with a VOW comes from sources other than the VOW datafeed. The real value of these websites is not in the provision of information itself, but rather in the analysis of that information.<sup>286</sup> As Mr. Fard from

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<sup>286</sup> See section G(ii): “The value proposition of brokerage websites that incorporate a VOW feed is that those websites aggregate and analyze a multitude of third party data and tend to have an enhanced focus on customer service”.

TheRedPin explained, “Data is a commodity. Data is something that everyone is going to be able to offer.”<sup>287</sup>

332. If sold data were available on the VOW datafeed, it would be a simple thing for any brokerage in the GTA to display that data on their website.<sup>288</sup> In the words of Mr. Fard, that would be something that everyone is going to be able to offer.

333. If the Commissioner’s theory of the case is correct, his “innovative brokers” will bring value by way of their analysis of sold information, as opposed to the mere display of that information. Therefore, in examining competitive impact, the analysis should be restricted to the additional incremental value that comes from data analysis of sold information.

334. Considering the preponderance of data analysis already contained on the website of VOWs in the GTA, the facilitation of some additional data analysis (such as by showing which neighbourhoods are “hot”) would not represent a significant increase in quality of service. This is particularly so given that brokerages in the GTA already provide analysis based on sold data,<sup>289</sup> as does TREB through its MarketWatch publication.<sup>290</sup>

335. Furthermore, substantiality isn’t made out even taking into account the quality impact of having sold prices available for search and display on a VOW (which for the reasons above TREB says is not the appropriate analysis, since everyone would be able to provide this service).

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<sup>287</sup> Exhibit R-119, “TheRedPin Want to Make Great Service Ubiquitous in The Canadian Housing Market”; TC at **Tab 117**.

<sup>288</sup> Vistnes Evidence, October 5, 2015, p 518 at line 23 – p 519 at line 25; TC at **Tab 184**.

<sup>289</sup> Exhibit CR-164, Updated Witness Statement of Evan Sage at para 15.1; TC at **Tab 60**; Exhibit A-067, Sage Real Estate September Market Report; TC at **Tab 188**; Exhibit A-010, Witness Statement of John Pasalis at para 14; TC at **Tab 88**; Exhibit A-010, Witness Statement of John Pasalis, Exhibit A; TC at **Tab 189**.

<sup>290</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 59–61; TC at **Tab 1**; Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit Q (MarketWatch); TC at **Tab 190**.

336. A brokerage website with the Confidential Data on its VOW would not provide a significant increase in quality at either the incubation/search stage or the valuation/offer stage, and in any event any quality effect would not have an impact, let alone a substantial impact, on choice of brokerage.

337. The value of the Confidential Data in the incubation/search phase would be much less than in the subsequent valuation/offer stage, because buyers at this stage are just generally trying to learn about the home buying market.<sup>291</sup>

338. While full information VOWs allow registered users to compare properties listed for sale to homes that have already sold, sold home data is not self-interpreting. Valuing a home is a subjective exercise. In order to complete a proper CMA, a real estate professional will visit the subject home, as well as the homes that are being compared to the subject home. None of the Commissioner's witnesses suggested that consumers would be able to actually determine the fair market value of a home if consumers were provided with sold home information.<sup>292</sup>

339. The price of apparently comparable homes can vary widely. In his witness statement at the initial hearing, Mr. Nagel provides an example of a RedFin's computerized "nearby similar sales" for a particular property listed for sale in Seattle, Washington. The results that come back as "similar" in this example range from \$500,000 to \$1,600,000. This wide range

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<sup>291</sup> Exhibit R-173, Summary of Second Expert Report of Dr. Church, October 6, 2015, p 18; TC at **Tab 151**.

<sup>292</sup> Exhibit CR-133, Updated Witness Statement of Pamela Prescott at paras 19, 21–22; TC at **Tab 51**; Prescott Evidence, September 28, 2012, p 1791 at line 24 – p 1793 at line 7; TC at **Tab 120**; Pasalis Evidence, September 12, 2012, p 546 at line 9 – p 547 at line 25; TC at **Tab 122**; Exhibit A-010, Witness Statement of John Pasalis, paras 36, 39; TC at **Tab 121**; Nagel Evidence, September 12, 2012, p 441 at lines 7–13; TC at **Tab 127**; Gidamy Evidence, September 13, 2012, p 687 at line 8 – p 688 at line 1; TC at **Tab 128**.

provides little, if any, assistance to a home buyer in determining the market value of the home they are considering.<sup>293</sup>

340. In the GTA, there is a stable 95% relationship between the list price of a property and the ultimate sale price. This relationship is stable across time and across communities.<sup>294</sup>

341. The list price of the property itself would provide a much better “general ballpark” on valuation than would the wide spread contained in RedFin’s sample website comparative market analysis. This is particularly so because the list price would have been determined taking in mind all the characteristics of the property being listed for sale.

342. Although the Confidential Data is valuable to clients during the valuation/offer stage, there is no significant incremental value to that data being available on a VOW versus other delivery mechanisms, including orally or by hand from the agent.

343. Sold price information is no easier for clients to interpret at the valuation/offer stage than it is at the incubation/search stage. This information must be interpreted by a real estate professional in order to determine the market value for a property that a buyer wishes to buy, or a seller wishes to sell. As Mr. Pasalis testified at the initial hearing, even well-informed consumers prefer to hire a broker or salesperson to complete a real estate transaction.<sup>295</sup>

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<sup>293</sup> Exhibit A-008, Witness Statement of Scott Nagel, Exhibit B (Sample Listing and CMA) at p 23; TC at **Tab 191**.

<sup>294</sup> Exhibit R-173, Summary of Second Expert Report of Dr. Church, October 6, 2015, p 19; TC at **Tab 151**; Church Evidence, October 2, 2012, pp 1952–1953; TC at **Tab 153**.

<sup>295</sup> Exhibit A-010, Witness Statement of John Pasalis, para 7; TC at **Tab 88**.

344. When a client is listing their home, or making an offer on a home, they have personal access to their salesperson or broker, who will in turn have access to TREB's MLS® database, including sold home information.

345. Considering a broker or salesperson is going to have to take the time to complete their own CMA in any event before they either list a property for sale for their selling clients, or recommend an offer price to their buying clients, there is at best only a marginal increase in quality of service by having sold information available through a VOW.

346. Even if having sold price information on a VOW was marginally useful, the availability of the Confidential Data on a VOW would not have any impact on the choice of brokerage, let alone a *substantial* impact on choice of brokerage. If the opposite were the case, then there would be an observable market-wide impact in areas that permit “full information VOWs”, which is not the case.

**(f) No evidence of costs savings (either passed on to consumers or retained to be re-invested)**

347. While the Commissioner initially framed this case largely in terms of consumer savings of commissions,<sup>296</sup> there is no evidence before the Tribunal that full information VOWs result in lower commissions than VOWs as they currently exist in the GTA.

348. As described in greater detail in the factual overview,<sup>297</sup> TheRedPin and Realosophy offer discounts/rebates in the GTA in the environment with the current VOW feed, and there was no suggestion in the evidence that they would reduce commissions further as a result of

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<sup>296</sup> Amended Notice of Application, para. 6, 9; TC at **Tab 172**.

<sup>297</sup> Section F(iii), “No evidence linking “full information VOWs” to lower commission rates”.

having a full information VOW. The Commissioner has only put forward evidence of one American VOW that currently offers discounts/rebates (with two who have stopped the practice). From an industry-wide perspective, there is evidence that commission rates have actually increased in recent years in the United States. In Nova Scotia, ViewPoint has stopped its past practice of offering discounts/rebates.<sup>298</sup>

349. There is simply no evidence upon which to conclude that full information VOWs will have *any* impact on commission rates, let alone a *substantial* impact on commission rates. The Commissioner's initial theory of the case has proven to be completely wrong.

350. There is also no compelling evidence that full information VOWs would result in internal cost savings to brokerages as compared to VOWs as they currently exist in the GTA (savings which, in theory, could be used to reinvest in the business if not passed on to customers).

351. Dr. Vistnes does not consider the actual expenses required to operate a brokerage with a VOW (including technology costs) versus a brokerage that does not operate a VOW.<sup>299</sup> This makes it difficult, if not impossible, to assess the claim that full information VOWs would result in cost savings for brokerages operating a VOW.

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<sup>298</sup> Exhibit CA-114, Second Witness Statement of Tarik Gidamy at paras 9–12; TC at **Tab 71**; Pasalis Evidence, September 24, 2015, pp 361 at line 24 – 362 at line 4; TC at **Tab 72**; Exhibit CA-099, Second Witness Statement of Bill McMullin at paras 43–45; TC at **Tab 73**; McMullin Evidence, September 23, 2015, pp 168 at line 24 – 169 at line 8; TC at **Tab 74**; Exhibit A-008, Witness Statement of Scott Nagel at para 52; TC at **Tab 75**; Nagel Evidence, September 12, 2012, pp 445 at line 22 – 447 at line 10; TC at **Tab 76**; Exhibit A-029, Report of Dr. Gregory Vistnes at p 26, footnote 69; TC at **Tab 77**; Vistnes Evidence, September 18, 2012, pp 1043 at line 10 – 1044 at line 16; TC at **Tab 78**; Exhibit CR-172, Second Expert Report of Dr. Church, May 15, 2015, at para 55; TC at **Tab 79**.

<sup>299</sup> Vistnes Evidence, September 18, 2012, pp 1054–1055; TC at **Tab 192**.



352. In evaluating the “cost savings” claim, it is also important to remember that the vast majority of consumers want to access the full suite of brokerage services when they buy or sell a home.<sup>300</sup> As a result, brokers and salespeople need to spend time completing tasks such as producing CMAs, taking prospective buyers from property to property, staging a home for sale, drafting agreements of purchase and sale, and negotiating offers.

353. The overall universe of tasks performed by a broker or salesperson is great, and it is not clear how full information VOWs would “substantially” increase the efficiency of a VOW-based brokerage. This is particularly so when considering the issue from an incremental point of view: having a “full information VOW” would not result in a substantial benefit to a VOW-based broker as compared with VOWs in their present form.

354. Finally, Dr. Vistnes admits that in evaluating the incremental value of the Confidential Data on a VOW, one relevant consideration would be to consider the proportion of time saved by the inclusion of that data in a VOW. However, in his report he does not consider the amount of time that a real estate agent spends providing brokerage services to clients, and does not consider the proportionate amount of time that would be saved if the withheld data were included in the VOW feed.<sup>301</sup>

355. At the reconsideration hearing, the Commissioner’s GTA witnesses put forward two specific examples of ways that a full information VOW feed could allegedly save time for their agents, both pertaining to conducting CMAs in advance of showing a house. Dr. Vistnes agreed that the time savings proffered by TheRedFin was (in and of itself) not a substantial

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<sup>300</sup> Pasalis Evidence, September 12, 2012, p 539 at line 9 – p 540 at line 11, p 551 at line 24 – p 552 at line 16; TC at **Tab 129**; Vistnes Evidence, October 5, 2015, p 487 at line 20 – p 488 at line 7; TC at **Tab 193**.

<sup>301</sup> Vistnes Evidence, September 18, 2012, pp 1071–1073; TC at **Tab 194**.

savings of time.<sup>302</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>303</sup>

356. At the reconsideration hearing, for the first time, Mr. McMullin gave evidence that Viewpoint’s agents complete 20-22 transactions per year as compared with a “Provincial average” of 10-12 deals per agent. This evidence should be treated with caution for several reasons. First, there is no documentary support for either of these figures, which were put forward for the first time at the hearing.<sup>304</sup> These figures, particularly the “Provincial average” figures, have not been adequately proven.

357. Second, the individual circumstances of agents are highly determinative of the number of transactions that each agent completes, so it is questionable whether any firm conclusions can be drawn from Mr. McMullin’s numbers, even if they are accurate. The average doesn’t reflect individual circumstances.<sup>305</sup>

358. Third, even if Mr. McMullin’s numbers are accurate, they would speak more to the internet in general as a lead generation tool rather than the comparative benefits of “full information VOWs” versus the VOWs that currently exist in the GTA. As discussed in greater detail in the factual overview, lead generation through the internet is not limited to

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<sup>302</sup> Vistnes Evidence, October 5, 2015, p 528 at line 1 – p 531 at line 23; TC at **Tab 195**.

<sup>303</sup> Exhibit A-120, Second Witness Statement of John Pasalis, see for example para 7; TC at **Tab 131**; Pasalis Evidence, September 24, 2015 (in camera), p 28 at line 15 – p 29 at line 15; TC at **Tab 132**.

<sup>304</sup> McMullin Evidence, September 23, 2015, p 218 at lines 10–17; TC at **Tab 196**.

<sup>305</sup>

[REDACTED] Sage Evidence, October 6, 2015, p 781 at lines 10–11; TC at **Tab 199**.

brokerages that use VOW feeds on their website.<sup>306</sup> Furthermore, brokerages currently operating VOWs in the GTA also use the internet to generate leads. As noted above, there has been no empirical analysis completed to compare the lead generation effectiveness of full information VOWs to the VOWs currently operating in the GTA.<sup>307</sup>

359. Fourth, a comparison of agent productivity could have been conducted with RedFin to see whether its agents in Dallas (and other non-disclosure jurisdictions) is worse than in jurisdictions where sold prices are displayed on the VOW.<sup>308</sup> The same comments made above on adverse inferences apply to the failure to present evidence on this topic.<sup>309</sup>

360. The Commissioner's "more productive agents" theory of the case has not been proven.

361. For all of the foregoing reasons, the Commissioner has not put forward sufficient evidence to prove that a brokerage with a full information VOW would have lowered costs, let alone *substantially* lowered costs, than a brokerage with a VOW using TREB's current datafeed.

### (g) Pending Solds

362. The incremental value of pending sold information in the VOW datafeed is subject to the same general arguments found in the preceding sections. Pending sold data provides no significant incremental benefit to a VOW operator.

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<sup>306</sup> See Section G(i) - Innovation (and lead generation through the internet) is not limited to brokerages that use VOW feeds on their websites.

<sup>307</sup> Vistnes Evidence, October 5, 2015, p 533 at line 22 – p 534 at line 4; TC at **Tab 200**.

<sup>308</sup> Vistnes Evidence, October 5, 2015, p 534 at lines 5–14; TC at **Tab 200**.

<sup>309</sup> To the extent that the Commissioner points to RedFin as a brokerage with an enhanced ability to generate leads, RedFin's numbers do not segregate out the effectiveness in lead generation in jurisdictions with and without sold data. Furthermore, RedFin's "budgeted" 36 deals per year only applies to their "deal writing agents", and RedFin has a veritable army of other types of agents (such as agents to do house tours), which significantly reduces the overall average deal statistics if one takes into account all agents at RedFin. Nagel Evidence, September 12, 2012, p 431 at line 10 – p 434 at line 11; TC at **Tab 201**.

363. There are additional considerations that apply for pending sold data.

364. As noted by Mr. Nagel, RedFin's website does not contain pending sold data; sold data is available for search and display only at the time a transaction closes.<sup>310</sup>

365. There has been no evidence presented by the Commissioner that the lack of pending sold data impedes RedFin's ability to compete in the United States at all, let alone *substantially*.

366. Viewpoint displays pending sold information inside the Halifax-Dartmouth Regional Municipality ("HRM"), but since 2013 has not displayed pending sold information for the rest of the Province. There is no evidence that the absence of pending sold information outside HRM has impeded Viewpoint's ability to compete outside HRM at all, let alone *substantially*.

367. There is an additional justification for withholding pending sold data, which is the prejudice potentially caused to the seller if the pending sale falls through, as it signals a reservation price to possible future buyers.

368. The exclusion of pending sold listings from the VOW datafeed has no bearing on the ability of brokerages to compete in the markets for residential real estate brokerage services in the GTA.

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<sup>310</sup> Nagel Evidence, September 12, 2012, p 472 at line 6 – p 473 at line 10, p 500 at line 13 – p 501 at line 10; TC at **Tab 135**.

**(h) WESTs**

369. The incremental value of WESTs in the VOW datafeed is subject to the same general arguments found in the preceding sections. WEST data provides no significant incremental benefit to a VOW operator.

370. WESTs, by definition, do not contain transactional data. These are listings that did not result in a sale.

371. RedFin does not display expired or withdrawn listings on its VOW.<sup>311</sup> There has been no evidence presented by the Commissioner that the lack of expired or withdrawn listings impedes RedFin's ability to compete in the United States at all, let alone substantially.

372. The exclusion of WEST listings from the VOW datafeed has no bearing on the ability of brokerages to compete in the markets for residential real estate brokerage services in the GTA.

**(iv) General conclusion on SLC/SPC: Dr. Vistnes did not apply the correct test in determining substantiality**

373. Dr. Vistnes' understanding of substantiality is that one should weigh the anticompetitive effect of conduct against the proposed efficiency justifications, and if the magnitude of the harm is greater than the magnitude of the efficiency justifications, the impact on competition is "substantial." He gave evidence that speaking from his perspective

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<sup>311</sup> Nagel Evidence, September 24, 2015, p 413 at line 11 – p 414 at line 6; TC at **Tab 137**.

as an economist “[i]f there is nothing on that justification side of the balance then it shouldn’t even take much” to make a conclusion of substantiality.<sup>312</sup>

374. Dr. Vistnes further explained that if “the harm exceeds the benefits, then that is going to give to the economist substantial harm.”<sup>313</sup> He also testified that he was concerned about identifying “harm that I care about, harm that goes beyond a trivial *de minimus* level.”<sup>314</sup>

375. In the face of such *de minimus* harm, Dr. Vistnes wants to let the marketplace decide whether there is value to the Confidential Data being available for search and display on a VOW:

**DR. VISTNES:** [...] why not let consumers confirm, why not let the market confirm what at least so many of these brokers are saying, is that incremental information is really very valuable. And if they are wrong, if the incremental value is actually really pretty darn small, then these VOWs will disappear.<sup>315</sup>

376. Dr. Vistnes wants an antitrust remedy granted in the face of even a *de minimus* competitive impact so that the marketplace can pick winners and losers. Dr. Vistnes’ understanding of “substantiality” is completely inconsistent with the notion of substantiality as contained in section 79(1)(c) of the *Competition Act*. Dr. Vistnes’ concept of substantiality effectively reads out the word “substantial” from substantial lessening or prevention of competition.

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<sup>312</sup> Vistnes Evidence, October 5, 2015, p 462 at lines 12–23, p 464 at lines 14–23, p 469 at line 12 – p 470 at line 6, p 546 at line 4 – p 547 at line 17; TC at **Tab 202**.

<sup>313</sup> Vistnes Evidence, October 5, 2015, p 595 at lines 11–14; TC at **Tab 203**. See also Vistnes Evidence, October 5, 2015, p 547 at lines 9–17; TC at **Tab 202**.

<sup>314</sup> Vistnes Evidence, October 5, 2015, p 596 at lines 2–7; TC at **Tab 203**.

<sup>315</sup> Vistnes Evidence, October 5, 2015, p 593 at lines 1–16; TC at **Tab 204**.

377. Dr. Vistnes' conception of "substantiality" taints his entire analysis. Dr. Vistnes rendered his opinion in this case based on his faulty understanding of the test under section 79(1)(c). This is the lens through which he analyzed the evidence, which may explain why he concluded that there is a substantial lessening or prevention of competition in the absence of any empirical evidence whatsoever.

378. It is clear the Dr. Vistnes' opinion was guided by principles that are inconsistent with the appropriate analysis under s. 79(1)(c), and as a result his opinion on substantiality should be given no weight.

#### **THEORY OF HARM #2: BUYER STEERING**

379. Buyer steering is another academic theory raised by Dr. Vistnes in his reports from the initial hearing. The buyer steering theory is not raised in the pleadings, and appears to have been abandoned by the Commissioner at the reconsideration hearing. The concept was not even raised during Dr. Vistnes' evidence in chief.

380. This Commissioner's change in tack is not surprising given Justice Simpson's comments about buyer steering during closing argument at the initial hearing:

MADAM JUSTICE SIMPSON: Well, the Tribunal, I think, in our conversations, also conclude it is not very likely to be happening. Now that people can see what's available, they can identify the houses in the neighbourhood that interest them and go to a broker and say, I have looked at these five. They look like possibles. And the broker might say, Well, there are a couple of more.

But people are now so informed that they're not going to be able to be manipulated that way, it seems to me.<sup>316</sup>

381. When all of the listings are available on Realtor.ca, how is it possible for anyone to be steered? To the extent that further written submissions on the point would be instructive, TREB commends the panel to paragraphs 411-429 of its written closing argument from the initial hearing.

### **TREB'S VOW POLICY IS A MERE EXERCISE OF ITS INTELLECTUAL PROPERTY RIGHTS**

382. TREB's conduct in this proceeding is not anti-competitive, because its conduct is the mere exercise of its copyright in the TREB MLS®.

383. The mere exercise of a right under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, or *Trade-marks Act* is not an anti-competitive act for the purposes of section 79 of the *Competition Act*. If an act is a mere exercise of copyright, this serves as a complete defence to an application alleging an abuse of dominance – **even if the act is exclusionary in effect.**<sup>317</sup>

384. In any event, the Tribunal does not have jurisdiction to order TREB to grant a compulsory licence of its intellectual property in this proceeding.

#### **A. TREB owns the copyright in the TREB MLS® database**

385. TREB owns the copyright in the TREB MLS® database.

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<sup>316</sup> Closing Argument, October 18, 2012, p 2764 at line 25 – p 2765 at line 10; TC at **Tab 205**.

<sup>317</sup> *Competition Act*, R.S.C. 1985, c. C-34, s. 79(5); *Canada (Competition Act, Director of Investigations and Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8 at para 65.



386. Copyright in relation to a work means the sole right to produce or reproduce the work in any form. The copyright owner has the right to assign or licence the work.<sup>318</sup>

387. Copyright subsists in an original literary work, which includes tables, computer programs, and compilations of literary works. Compilations are defined in the *Copyright Act* to mean a) a work resulting from the selection or arrangement of literary, dramatic, musical, or artistic works or parts thereof, or b) a work resulting from the selection or arrangement of data.<sup>319</sup>

388. For a work to be sufficiently “original” to qualify for copyright protection, the work must have been the subject of skill and judgment.<sup>320</sup>

389. The Supreme Court has recently described copyright in a compilation as follows:

Copyright protects originality of form or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. "It is not the several components that are the subject of the copyright, but the overall arrangement of them which the plaintiff through his industry has produced"<sup>321</sup>

390. In *Tele-Direct (Publications) Inc. v. American Business Information, Inc. (C.A.)*, Justice Décaré of the Federal Court of Appeal discussed the “originality” requirement with respect to compilations of data:

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<sup>318</sup> *Copyright Act*, R.S.C. 1985, c C-42, ss 3(1), 13(4).

<sup>319</sup> *Copyright Act*, R.S.C. 1985, c C-42, s 2 “compilation”, s 2 “literary work”, s 5.

<sup>320</sup> *CCH Canadian Ltd v. Law Society of Upper Canada*, [2004] S.C.J. No. 12 at para 16.

<sup>321</sup> *CCH Canadian Ltd v. Law Society of Upper Canada*, [2004] S.C.J. No. 12 at para 33.

Essentially, for a compilation of data to be original, it must be a work that was independently created by the author and which displays at least a minimal degree of skill, judgment and labour in its overall selection or arrangement. The threshold is low, but it does exist.<sup>322</sup>

391. To determine whether copyright subsists in a compilation, the overall arrangement must be considered, not the individual fragments that make up the compilation.<sup>323</sup>

392. Applying the above principles, the Federal Court found that there was copyright in the telephone listings in Italian-Canadian phone books - phone books in British Columbia and Alberta that contained the names of individuals of Italian background.<sup>324</sup>

393. Both the Superior Court of Justice and the Court of Appeal for Ontario allude to TREB's copyright in the MLS database in the Fraser Beach litigation, with the Court of Appeal describing TREB as having a "proprietary ownership interest" in the database.<sup>325</sup>

394. American courts have held that MLS operators own the copyright in their MLS databases, because the MLS database compilation met the test for originality. In particular, by way of efforts made by the MLS operator in overseeing and controlling the quality and accuracy of the content of the database.<sup>326</sup>

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<sup>322</sup> *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* (C.A.), [1998] 2 F.C. 22 (C.A.) at para 28.

<sup>323</sup> *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* (C.A.), [1998] 2 F.C. 22 (C.A.) at para 5.

<sup>324</sup> *ITAL-Press Ltd v. Sicoli*, [1999] F.C.J. No. 837 (T.D.) at para 110.

<sup>325</sup> *Beach v. Toronto Real Estate Board*, [2009] O.J. No. 5227 (S.C.J.) at paras 100–101; aff'd [2010] O.J. No. 5541 (C.A.) at para 21.

<sup>326</sup> *Metropolitan Regional Information Systems Inc. v. American Home Realty Network Inc.*, 2012 U.S. Dist. LEXIS 121352 at 22-23 (of Lexis); *Metropolitan Regional Information Systems Inc. v. American Home Realty Network Inc.*, 2012 U.S. Dist. LEXIS 162111 at 7-8 (of Lexis); *Metropolitan Regional Information Systems Inc. v. American Home Realty Network Inc.*, 2013 U.S. App. LEXIS 14445 at 10-11 (of Lexis); *Montgomery County Association of Realtors Inc. v. Realty Photo Master Corporation*, 1995 U.S. Dist. LEXIS 2111 at 7 (of Lexis).

395. It is quite remarkable for the Commissioner to, on the one hand, take the position 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 taking the position that the MLS database does not demonstrate sufficient skill and judgment to grant TREB copyright protection of that database. The Commissioner's submissions on the issue of copyright are completely inconsistent with the Commissioner's submissions on the issue of market power.

396. The record is replete with evidence as to TREB's skill, judgment, and labour with respect to the TREB MLS® database. Some of the more important elements of this evidence are:

- Use of the TREB MLS® database is governed by a comprehensive set of rules that are enacted and administered by TREB. Among other things, these rules ensure the accuracy and quality of the information contained in the database, and the orderly operation of the database. The Rules cover the uploading of data and the updating of data through the mandatory reporting of transactions. The reporting of a transaction causes an active listing to become an inactive listing in the database.<sup>327</sup>
- TREB provides its members with a Data Information Form to be used as part of the data entry process in order to ensure certain characteristics of properties are entered

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<sup>327</sup> Exhibit R-039, Witness Statement of Donald Richardson, Exhibit D (MLS® Rules) at p 144–171; TC at **Tab 6**; Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 34; TC at **Tab 1**.

into the database for any listing. Certain data fields are mandatory and certain data fields are optional.<sup>328</sup>

- TREB ensures the accuracy of the listings in the TREB MLS® database by way of proprietary software, and also encourages its members to report any inaccuracies found in listings.<sup>329</sup>

397. TREB's Authorized User Agreement provides that the MLS® database is proprietary to TREB, and also provides that TREB's Members grant TREB a content licence with respect to the listings they upload into the TREB MLS® database.<sup>330</sup>

398. TREB's software licence agreement with Stratus (the owner of the software that runs TREB's MLS® database) provides that TREB owns the intellectual property associated with the data inputted into the MLS®.<sup>331</sup>

399. TREB's MLS® database satisfies the incredibly low bar test for a copyright in a compilation. TREB owns the copyright in the TREB MLS® database.

**B. The provisions of TREB's VOW policy are a mere exercise of its intellectual property rights**

400. The Tribunal considered the scope of the section 79(5) defence in the Tele-Direct decision, which involved trade-marks. In that case, the Tribunal held that the selective refusal

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<sup>328</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit F (Data Information Form); TC at **Tab 206**; Exhibit CR-142, Updated Witness Statement of Donald Richardson at paras 37–39; TC at **Tab 1**.

<sup>329</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson at para 43; TC at **Tab 1**.

<sup>330</sup> Exhibit R-039, Witness Statement of Donald Richardson, Exhibit E (AUA), pp 175–176 at cl 5; TC at **Tab 207**.

<sup>331</sup> Exhibit CR-142, Updated Witness Statement of Donald Richardson, Exhibit P.1, "Software Licence Agreement" at third clause of preamble ("Whereas TREB is a multiple listing service..."), cl 1.12 "Intellectual Property", cl 1.18 "MLS Data", cl 1.38 "TREB Data", cl 2.6 "Scope of the License Grant"; TC at **Tab 4**.

to license a trade-mark was the mere exercise of the respondent's statutory right, and was not an anti-competitive act: “[s]omething more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there than be a finding of misuse of [intellectual property] (emphasis added).”<sup>332</sup>

401. The Tribunal held that:

The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence. [emphasis added]<sup>333</sup>

402. The foregoing passage was adopted by the Tribunal with respect to copyright in its decision in *Warner Music*, which was a “refusal to deal” case.<sup>334</sup>

403. The Tribunal in *Tele-Direct* held that **the motivation for the decision to refuse to licence its intellectual property was irrelevant for the application of section 79(5):**

While the evidence suggests that Tele-Direct is motivated, at least in part, by competition in its decision to refuse to license its trade-marks, the fact is that the Trade-marks Act allows trade-mark owners to decide to whom they will license their

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<sup>332</sup> *Canada (Competition Act, Director of Investigations and Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8. at paras. 60-70, quote from para 65.

<sup>333</sup> *Canada (Competition Act, Director of Investigations and Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8. at para 66.

<sup>334</sup> *Canada (Competition Act, Director of Investigations and Research) v. Warner Music Canada Ltd.*, [1997] C.C.T.D. No. 53 at para 32.

trade-marks. The respondents' motivation for their decision to refuse to license a competitor becomes irrelevant as the Trade-marks Act does not prescribe any limit to the exercise of that right. [emphasis added]<sup>335</sup>

404. TREB has decided not to licence the Confidential Data as part of the VOW feed. By selectively refusing to grant a licence with respect to this data, TREB is squarely within the reasoning of the Tribunal in *Tele-Direct*. TREB's intention or motivation with respect to this licensing decision is irrelevant.

405. In argument at the initial hearing, the Commissioner drew an analogy between TREB's conduct and the conduct in *Eli Lilly and Co. v. Apotex Inc.* (2005) 44 CPR 4<sup>th</sup> 1 (FCA). In *Lilly*, 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 the *Lilly* decision the "something more" was Lilly's pre-existing patent ownership. In the case of TREB there is no "something more" - the conduct at issue is the mere denial of access to intellectual property through a refusal to licence.

406. The Commissioner's argument at the initial hearing also claims that TREB's conduct goes beyond the mere exercise of its IP rights because its conduct creates, enhances, or maintains market power.<sup>336</sup> This argument, if accepted, would render meaningless the defence in s. 79(5), because by definition the only conduct reachable by s. 79(1) is conduct that creates, enhances, or maintains market power.

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<sup>335</sup> *Canada (Competition Act, Director of Investigations and Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8. at para 68.

<sup>336</sup> Closing Submissions of the Commissioner of Competition, Initial Hearing, para 729; TC at Tab 208.

407. Finally, the Tribunal does not have jurisdiction to order TREB to grant a compulsory licence with respect to its intellectual property, because section 79 of the *Competition Act* does not expressly grant the Tribunal jurisdiction to order the compulsory licensing of intellectual property.

408. Section 79 of the *Competition Act* can be contrasted with section 32 of the *Competition Act* which is exclusively geared at intellectual property-related remedies that the Attorney General of Canada can seek from the Federal Court. That provision affords a respondent with a defence based on treaty provisions, and requires the Attorney General to meet a competition impact test in order to obtain a remedy.<sup>337</sup>

409. In the absence of clear language, it would be wrong to conclude that the Tribunal has been given the power to ignore intellectual property rights and order the respondent to grant what are, in effect, compulsory licences, when 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.

410. The foregoing argument was considered by the Tribunal in the *Warner Music* case, and was accepted with respect to the proper interpretation of the “refusal to deal” provisions of the *Competition Act*.<sup>338</sup>

411. The Tribunal does not have the jurisdiction to grant the remedy sought by the Commissioner.

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<sup>337</sup> *Competition Act*, R.S.C., 1985, c. C-34, s 32.

<sup>338</sup> *Canada (Competition Act, Director of Investigations and Research) v. Warner Music Canada Ltd.*, [1997] C.C.T.D. No. 53 at paras 26–28, 31.

**IF A REMEDY IS GRANTED - THE NEED FOR INFORMED CONSENT**

412. If, in spite of the foregoing submissions, the Tribunal finds that TREB's VOW policy is an abuse of dominant position for which a remedy can be granted, the Tribunal should exercise care in crafting a remedy that will respect the privacy interests of people that have used, and will use, TREB's MLS® to buy or sell property. In particular, the remedy should ensure that the personal information of these individuals is not widely disclosed on the internet without their informed consent as required by *PIPEDA*, as amended.

413. In the event the Tribunal chooses to grant a remedy in this case, TREB submits that further submissions are warranted prior to the imposition of such remedy so that submissions on privacy considerations can be made with regard to the specific ways in which TREB is found to have contravened section 79. There are different considerations at play among WESTs, pending sold prices, and sold prices. There are also different considerations at play with historical data versus data on a go-forward basis. The privacy issues may vary to a certain degree depending upon the findings of the Tribunal. TREB should be granted an opportunity to make submissions on privacy specifically tailored to the potential remedy being considered by the Tribunal.

**ORDER REQUESTED**

414. The Toronto Real Estate Board requests that the Commissioner's Application be dismissed with costs of the initial 2012 hearing and the reconsideration hearing.



ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of October, 2015.

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**CT-2011-003**

**COMPETITION TRIBUNAL**

**THE COMMISSIONER OF COMPETITION**  
**Applicant**

**- and -**

**THE TORONTO REAL ESTATE BOARD**  
**Respondent**

**- and -**

**THE CANADIAN REAL ESTATE ASSOCIATION**  
**Intervenor**

**CLOSING ARGUMENT OF  
THE TORONTO REAL ESTATE BOARD  
(RECONSIDERATION HEARING – OCT 28 2015)**

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