

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

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

Intervenors

CLOSING SUBMISSIONS OF THE COMMISSIONER OF COMPETITION

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Overview

1. The Toronto Real Estate Board ("TREB") is a trade association of 35,000 GTA real estate agents. It controls the Multiple Listing Service ("MLS") system, a cooperative selling system that is a comprehensive source of active and historical residential property listings, the breadth and depth of which is unparalleled. The MLS system and its database are used pervasively by TREB's members in providing residential real estate brokerage services to buyers and sellers.
2. Through its control of the MLS and its rule-making powers, TREB can significantly influence the terms of trade and how its members carry on business in the residential real estate brokerage market. TREB has exercised that power to protect its incumbent members from competition from those who would innovate and do business differently and more efficiently using a virtual office website ("VOW"). TREB's anticompetitive acts have substantially prevented or lessened competition, by first excluding VOWs entirely, and more recently by increasing their costs and reducing their effectiveness, to marginalize their competitive impact.
3. According to the witnesses in this hearing, TREB's anticompetitive acts mean that those who seek to challenge incumbents by offering services efficiently through a website cannot realistically do so. Entry into the brokerages services market is prevented and expansion inhibited. Those who wish to innovate and use technology to develop better services must instead carry on business in the traditional manner. TREB's conduct perpetuates the *status quo* and shields its members from price and non-price competition from innovative competitors.

4. TREB's conduct strikes at the heart of competition principles. TREB's members who wish to offer services innovatively through a website should be able to do so in a manner *they* choose. Their trade association should not restrict them from doing so. Incumbent brokerages should be exposed to new and different kinds of competition. Their trade association should not protect them from that competition by restricting other members. Consumers should be allowed the opportunity to choose how they prefer to receive brokerage services when they buy or sell a home. The ultimate outcome should be up buyers and sellers, without TREB's restrictions that preordain the result.

5. The Commissioner requests that the Tribunal make Orders under subsections 79(1) and (2) to prohibit TREB's anticompetitive conduct and to restore competition to the market. The evidence demonstrates that TREB's conduct violates subsection 79(1) of the *Competition Act*. TREB controls the market for the provision of real estate brokerage services, and has undertaken a practice of anticompetitive acts that have had, are having, and are likely to have the effect of preventing or lessening competition substantially in a market. The evidence is summarized below and reviewed in considerable detail in the body of these submissions.

6. **Product Market:** TREB has market power in the supply of residential real estate brokerage services with MLS access in the GTA. There are no substitutes for MLS-based brokerage services, and no evidence of home buyers and sellers switching to other services even in response to rising prices. Industry participants testified that the MLS has no close substitute thus agents provide MLS-based brokerage services. Evaluation of other information sources confirms that the MLS is the most comprehensive and rich source of information about homes in the GTA. Other information sources are not close substitutes. They are less available, less robust, less useful, and more costly. Two economists, Dr. Vistnes and Dr. Flyer, testified that

the relevant product market is the market for residential real estate brokerage services. TREB's economist suggested a much narrower product market, but cross-examination revealed deep flaws in his conclusion and the absence of any analysis.

7. **Geographic Market:** The parties do not seriously dispute that the relevant geographic market is the GTA. TREB is a trade association of GTA agents. It operates the MLS for the GTA. 93% of all residential listings on TREB's MLS are GTA properties. The economists all agreed that residential real estate brokerage services are local.

8. **TREB's Market Power:** TREB's members share residential property listings through the MLS and use it to match home buyers and sellers through one large and common platform, like a stock exchange for homes. The vast majority of GTA homes sell through the TREB MLS. A 2006 survey found that 78% of Toronto home buyers and 84% of Toronto home sellers bought and sold homes through an MLS listing that year. Both figures were up from 2003. In 2011, nearly 90,000 homes representing \$40 billion sold through TREB's MLS. With so many GTA homes selling through it, TREB's MLS has rich and comprehensive information about homes for sale and those that have sold.

9. TREB's MLS is a key input of residential real estate brokerage services in the GTA. The economists testified about the efficiencies that the MLS creates for agents in matching home buyers and sellers. Agents testified that they need the current and historical information in TREB's MLS to provide services. Because of the efficiencies created and the richness of the MLS data, agents without MLS access cannot effectively compete. Both the Ontario Superior Court and the Court of Appeal for Ontario have found that loss of MLS access is so severe that agents without access cease providing brokerage services in the GTA.

10. TREB's MLS is the foundation of its control over and market power in the relevant market. By controlling access to the MLS, TREB can force its members to comply with the numerous rules, policies and agreements it promulgates. TREB's MLS Rules and Policies penetrate deeply into how TREB members provide residential real estate brokerage services. They govern many aspects of how TREB's members compete in the relevant market including how they advertise, what agreements they use with their clients, how they use MLS data, and how they offer each other commissions. Non-compliance with those rules and policies have profound implications for members – discipline, expulsion, and losing access to the TREB MLS system.

11. Because of its control of the MLS and through its rule-making power, TREB has market power as defined in the jurisprudence: the *ability* to affect levels of price and non-price competition among its members.

12. **TREB's Practice of Anticompetitive Acts:** TREB has engaged and continues to engage in a practice of anticompetitive acts to shield its non-VOW members from effective competition from VOWs.

13. *Before August, 2011*, TREB enacted and maintained MLS Rules which effectively prohibited VOWs from operating. In order to obtain a datafeed of any Listing information, TREB required members to obtain the written consent of listing brokerages. Such permissions were a practical impediment to operating a VOW, yet TREB did nothing to fix the situation between 2003 to 2011. It was only in response to actions taken by the Commissioner that TREB finally created the VOW Task Force in March 2011. In the interim, TREB suppressed innovation by cutting off two members from the MLS and driving them from the market in 2007.

Whether or not TREB was justified in taking legal steps, it did nothing to solve the underlying problem that its rules were stifling innovation and the delivery of services on websites such as VOWs. And instead of enabling its members in this period, TREB disabled the bulk download feature of its Stratus system that allowed all TREB members to obtain sold and other data in an efficient way to use in their brokerage business. These actions sent a chill through members who feared losing access to the MLS themselves.

14. *After August, 2011*, and in response to pressure from the Commissioner, TREB finally enacted its VOW Rules and Policies at its Board of Directors meeting in August, 2011. But TREB restricted the information that may be downloaded, searched and displayed on a VOW. In practice, such restrictions do not apply to non-VOW delivery mechanisms, such as email or fax. Then in November, 2011, TREB implemented a VOW datafeed that omitted critical MLS data – sold, pending sold, and WEST listings (referred to as the Historical MLS Data) and offers of commission. It also imposed an agreement on VOW operators that restricts how VOW-operators use information contained in the VOW datafeed. These restrictions do not apply to non-VOW operators.

15. TREB's anticompetitive acts had the foreseeable consequence of excluding VOWs (before 2011) and significantly reducing their competitive effectiveness (after 2011). Although VOWs now exist in the GTA, TREB's conduct has increased their cost by requiring them to provide services and information to customers in less efficient ways. And without all of the listing information in the VOW datafeed, VOW operators cannot leverage technology to deliver services based on the MLS data in more efficient and improved ways. According to the case law, TREB is deemed to intend the reasonably foreseeable consequences of its acts.

16. The evidence reveals that TREB *intended* its acts to exclude and disadvantage VOWs. On cross-examination, a member of TREB's VOW Task Force admitted that other agents had expressed concerns that technology would put pressure on commission rates. Internal emails between TREB's Directors and its VOW Task Force revealed that members of both groups expressed serious concerns about sharing MLS data with VOWs. One TREB director said that it was "worse than a knee replacement". Another compared it to TREB opening a food bank for information and giving the MLS data away for free. One complained, "realtors built the systems & data, why should we be forced to share?"

17. When confronted with these emails on cross-examination, TREB's CEO admitted the "bad sentiment" expressed and described one as "a horrible email". When asked to explain these emails as anything other than expressions of fear about price competition from VOWs, TREB's CEO could only reply that some members "may be a little fearful of new technology".

18. In response to the pattern of evidence showing fear competition from VOWs, there is a dearth of testimony explaining TREB's conduct. TREB's Board of Directors met four times between May and August 2011 to consider and discuss iterations of the VOW Rules and Policy. The minutes of those meetings provide no insight into what motivated the Board to adopt the VOW Rules and Policies. In most cases, TREB's lawyers attended the sessions and TREB turned off the recording tapes. Thus, the minutes do not record the discussion that occurred, only the conclusions reached.

19. Despite the absence of any meaningful record from the Board's minutes, TREB did not lead evidence from any Director that attended those meetings. Heather Fuller was a Director, and chaired both TREB's VOW Task Force and its MLS Committee. She did not testify. Bill

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Johnston was TREB's 2010/2011 President and a member of the Board. He did not testify. Richard Silver was TREB's 2011/2012 President, a member of TREB's Board, and had experience with committees on VOWs as far back as 2003. He did not testify. John DiMichele was TREB's Chief Technology Officer and had been involved in VOW-related committees as early as 2003. He did not testify. Von Palmer was TREB's Chief Privacy Officer and attended the final hour-long discussion of the Board of Directors concerning the VOW Rules and Policy. He did not testify.

20. In fact, TREB did not adduce evidence from any decision-maker to explain why its Directors approved the VOW Rules and Policy at issue in this proceeding. Instead, it led evidence from its CEO, who is not a member of the Board of Directors and who *was not even present* for the Board's hour-long discussion about the VOW Rules and Policy on August 25, 2011.

21. In a meagre effort to explain TREB's conduct, its CEO asserted that TREB wanted to provide all of the MLS data for display on VOWs, but that privacy laws and provincial regulatory requirements prohibited TREB from doing so. The evidence revealed that neither of these explanations has merit.

22. With respect to privacy, the evidence established a pattern of conduct from TREB in which it interprets the consents received from home buyers and sellers to permit it to distribute the critical MLS data as and when it chooses. It continues to permit members to distribute all MLS data by email, but refuses to permit them to do the same through a VOW. Although TREB has ensured revised consents in the past when it needed to, in this case it did not even seriously consider the possibility. It relies on a 2-page case summary from the Assistant Privacy

Commissioner with respect to certain MLS data, but it made no genuine effort to get clarity from the Privacy Commissioner with respect to VOWs.

23. With respect to provincial regulations, the provision of services on a VOW is not advertising. In 2009, the Ontario Superior Court held that the publication of listings on a website did not constitute advertising contrary to the RECO *Code of Ethics*. RECO's 2011 Advertising Guidelines define advertising as being "directed at the public". But unlike public websites such as realtor.ca and century21.ca, VOWs display information after a person has registered and become a customer of the brokerage. In other words, VOWs are not "directed at the public" as contemplated in the Advertising Guidelines. Finally, although TREB claims uncertainty about RECO's views on VOWs, it made no effort to get RECO's views, despite having sent its VOW Rules and Policy directly to RECO's CEO on the day they were passed.

24. During the hearing, TREB's CEO *admitted* that existing consents from home sellers in Section 11 of the standard form Listing Agreement permitted the distribution of WEST listings. He further *admitted* that where sellers have signed Listing Agreements and buyers have signed Buyer Representation Agreements, both have consented to the distribution of pending sold and sold listings. All four TREB witnesses who followed TREB's CEO testified that their buyers *always* sign Buyer Representation Agreements.

25. Consistent with that evidence, TREB members routinely provide MLS data to buyers and sellers across the GTA, but cannot do so through a VOW.

26. There is no basis to conclude that TREB's conduct was motivated by anything other than its exclusionary and anticompetitive effect on VOWs and the brokerages that wish to use them.

27. **Substantial Prevention of Lessening of Competition:** TREB's anticompetitive acts substantially prevent or lessen competition. They create, maintain, or enhance market power by shielding TREB's non-VOW members from price and non-price competition from VOWs.

28. *Before August 2011*, TREB's conduct completely excluded VOWs from the GTA. Dr. Vistnes reviewed the many competitive advantages of VOWs and concluded that TREB substantially prevented or lessened competition before 2011 by excluding VOWs. There is no contrary economic evidence as TREB's economist admitted on cross-examination that he had not been asked to opine on the pre-2011 period.

29. *Since August 2011*, TREB has shielded its non-VOW members from effective competition from VOWs. GTA VOWs cannot display critical MLS data. If a VOW-operator wants to provide this critical information to its customers, it must do so by less efficient delivery mechanisms, thereby undermining the critical value proposition that distinguishes VOW brokerages from non-VOW brokerages. VOWs permit agents to provide (i) more information and better services, (ii) to more customers, (iii) in a more attractive and efficient way, than in a non-VOW setting.

30. In VOW models outside the GTA, home buyers and sellers do not have to email, phone or physically interact with an agent early in their search or sale process to get the critical MLS data they need. Once they register, they can educate themselves about neighbourhoods and the market using comprehensive data and the technology the VOW offers. Harnessing the power of a website and technology in this way means that VOW-based brokerages can serve more customers at the "top of the funnel" (i.e., those buyers and sellers that are looking but remain uncertain about whether to buy or sell). They can maintain a large network of customers, and

serve them in an effective but very efficient way, through their VOW. As home buyers and sellers move to the "bottom of the funnel", agents can then engage with them in a more direct way. This model creates efficiencies and lets operators pass on cost savings in the form of rebates.

31. TREB's restrictions disadvantage members who wish to offer services through VOWs in two fundamental ways. First, TREB increases their costs because they cannot serve customers or generate leads as efficiently as if they had the critical MLS data in a datafeed. Second, TREB reduces the attractiveness of the VOW business model by impairing VOW-operators' ability to innovate new and better services using the data.

32. These disadvantages serve the interests of the vast majority of TREB's members and perpetuate the *status quo* – the traditional ways of doing business and generating leads through personal networks and other well-known marketing methods. Home buyers and sellers must continue to contact agents by email, phone, or in person to obtain the information that they want and need.

33. **Copyright:** TREB has not adduced sufficient evidence to ground any copyright claim in the MLS database. Even if it had, its acts are more than a "mere exercise" of intellectual property rights. They are anticompetitive controls on how members use information and provide services, not whether members have access to the information. Jurisprudence recognizes that section 79(5) of the Competition Act does not immunize anticompetitive terms of use.

Industry Background

a) Witnesses

34. The Commissioner led evidence from the following witnesses:

- (a) William McMullin: Mr. McMullin is the CEO of ViewPoint Realty Services Inc. ("ViewPoint"), a technology-driven Nova Scotia brokerage. It provides online services and other information through its website, ViewPoint.ca.
- (b) Urmi Desai: Ms. Desai is a co-founder of Realosophy Realty Inc. ("Realosophy"), a full-service GTA brokerage which provides services through two websites and through its storefront office in the Leslieville area of Toronto. Ms. Desai is responsible for Realosophy's strategy and marketing.
- (c) John Pasalis: Mr. Pasalis is a co-founder and broker of record of Realosophy. Mr. Pasalis works as a broker and provides analytics and real estate commentary for its website and in the public media.
- (d) Scott Nagel: Mr. Nagel is the chief of real estate operators for Redfin Corporation ("Redfin"). Redfin is a technology-driven real estate brokerage operating in 20 metropolitan areas around the United States. It provides online services and other information through its website, Redfin.com.
- (e) Shayan Hamidi: Mr. Hamidi is a co-founder and CEO of TheRedPin.com Realty Inc. ("TheRedPin"). Based in the GTA, TheRedPin is one of Canada's first online brokerages and operates a website, TheRedPin.com.

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- (f) Tarik Gidamy: Mr. Gidamy is a co-founder and broker of record of TheRedPin. He has been licensed in real estate in Ontario since 1997 and a member of TREB since that time.
 - (g) Joel Silver: Mr. Silver is the Managing Director of Trilogy Growth, LP ("Trilogy Growth"), which strategically invests in early stage, innovative companies. In 2012, Trilogy Growth invested in TheRedPin and Mr. Silver is a member of its board of directors.
 - (h) Mark Enchin: Mr. Enchin is a Guelph-area real estate agent with a history of developing technology-based tools for use by agents. He is a sales representative with Realty Executives Plus Ltd. and is developing a VOW.
 - (i) Sam Prochazka: Mr. Prochazka is the founder and CEO of Sam & Andy Inc. ("Sam & Andy"), a real estate software company that builds websites for real estate professionals in Western Canada, the U.S., and the GTA.
 - (j) Dr. Greg Vistnes: Dr. Vistnes is an economist specializing in the fields of industrial organization and the economics of competition. He holds a Ph.D. in economics from Stanford University. He is a Vice President in the Washington, DC office of Charles River Associates.
35. TREB led evidence from:
- (a) Donald Richardson: Mr. Richardson is TREB's CEO, which position he has held for approximately 12 years. Before that time he was OREA's CEO.

- (b) Tung-Chee Chan: Mr. Chan is the sole owner and broker of record of Tradeworld Realty Inc. ("Tradeworld") and has been since 1985. Tradeworld is a brokerage that trades under its own banner. Tradeworld has five offices in the GTA: Markham, Thornhill, on Dundas Street West, at Kennedy and Sixteenth Avenue, and West Harbor City in the City of Toronto.
- (c) Pamela Prescott: Ms. Prescott is the owner and broker of record of Century 21 Heritage Group Ltd. ("Century 21 Heritage"), an independently-owned brokerage with offices in Thornhill, Richmond Hill, Newmarket, and Bradford.
- (d) Evan Sage: Mr. Sage is a Vice President and sales representative at Sage Real Estate. He is a member of TREB's VOW Task Force.
- (e) Tim Syrianos: Mr. Syrianos is the owner, President, and broker of record of Ultimate Realty Inc. ("Ultimate Realty"), a Re/Max franchisee with two offices in the GTA. Mr. Syrianos is a member of TREB's VOW Task Force.
- (f) Dr. Jeffrey Church: Dr. Church is a Full Professor in the Department of Economics at the University of Calgary. He holds a Ph.D. in economics from the University of California, Berkeley.

36. TREB did not call evidence from John DiMichele, its Chief Technology Officer, Von Palmer, its Chief Privacy Officer, any member of its 2010-2011 Board of Directors or its 2011-2012 Board of Directors, its 2010-2011 President, Bill Johnston or its 2011-2012 President, Richard Silver.

37. Finally, CREA led evidence from:

- (a) Gary Simonsen: Mr. Simonsen is CREA's CEO. Prior to becoming CEO on July 3, 2011, he was CREA's Chief Operating Officer.
- (b) Dr. Frederick Flyer: Dr. Flyer is an economist holding a Ph.D. in economics from the University of Chicago and an M.S. in labour and industrial relations from the University of Illinois. He is a Senior Vice President at Compass Lexecon.

b) Real Estate in the GTA

38. Real estate agents help people buy and sell real estate. Ontario's *Real Estate and Business Brokers Act, 2002* ("REBBA 2002")¹ does not use the term "real estate agent". Instead, it refers to three types of registrants:

- (a) **Brokerage:** The entity that trades in real estate on behalf of others for compensation. It is often synonymous with the real estate office/business.
- (b) **Broker:** A person registered under REBBA 2002 as such. A broker is subject to additional licensing requirements under the legislation, typically supervises salespersons, and may be the owner of the brokerage. Brokerages must have a broker-of-record that is responsible for the operation of the brokerage.
- (c) **Salesperson:** A person registered under REBBA 2002 as such. A salesperson is often an independent contractor and works in a brokerage under a broker's supervision.

39. No one may "trade in real estate" in Ontario as one of these three entities unless registered as such under REBBA 2002.²

¹ *Real Estate and Business Brokers Act, 2002*, S.O. 2002, Chapter 30, Schedule C.

40. In addition to the three labels above, many Ontario registrants refer to themselves as REALTORS, which is a certification trademark jointly owned in Canada by the Canadian Real Estate Association ("CREA") and the National Association of Realtors ("NAR").³ Only members of CREA may refer to themselves as REALTORS.⁴

41. Given the numerous terms used in the industry, for simplicity and consistency, these submissions use the term "agent" to refer to brokers and salespersons as those terms are used in REBBA 2002.

42. Agents may provide services in respect of all real property sales. However, the Commissioner's application focuses on residential real estate. In the residential context, agents provide services to two distinct sets of consumers: home sellers and home buyers. Most agents serve both. Based on TREB data for 2010 and 2011, less than 12% of active agents focused their efforts on just one side of the deal.⁵

43. The services agents provide to home sellers and buyers overlap but are not the same. To home sellers, agents generally provide a number of services, including educating sellers about the real estate market, helping sellers evaluate their home and set the right price, marketing the home to potential buyers, negotiating on the seller's behalf, and completing paperwork required to formalize offers, contracts, and transfer documentation.

44. Agents provide many similar services to home buyers. For example, buyers also require education about the market and local neighbourhoods. Agents assisting buyers will often also

² REBBA 2002, s. 4(1).

³ Exhibit IC84, Simonsen Statement, para 9, p. 3.

⁴ October 9 Transcript p. 2258.

⁵ Exhibit A30, Expert Report of Dr. Greg Vistnes dated June 22, 2012 ("First Vistnes Report") at para 30, p. 13.

help a buyer determine the characteristics and price of the home they wish to purchase, and then identify homes that match the buyer's criteria. Once several potential homes are identified, a agent may accompany a buyer to open houses to determine whether a home for sale matches the buyer's needs. Like with home sellers, an agent will also help the buyer estimate the right price for a home, often negotiate on the buyer's behalf, and help complete any required paperwork.

45. Industry participants refer to agents working with sellers as the listing agent (because that agent has helped the home seller list a home for sale) and to agents working with buyers as the cooperating agent or sometimes the selling agent. For consistency, these submissions will refer to the agent working with the seller as the listing agent/brokerage and the agent working with the buyer as the cooperating agent/brokerage.

46. Many brokerages choose to associate with large national and international real estate franchises, such as Re/Max, Century 21, and Royal LePage. These franchises do not themselves provide real estate brokerage services or trade in real estate,⁶ although they may develop products, services, and initiatives to help their franchisees. For example, Ms. Prescott testified that, Century 21 provides assistance like optional training materials and other systems and products. As a Century 21 franchisee, her brokerage is also part of a larger Century 21 referral network, which can result in national and international referrals.⁷

47. In return for the benefits of franchise association, [REDACTED]

[REDACTED]

⁶ September 27 Transcript p. 1730-1731.

⁷ September 28 Transcript p. 1783-1784.

[REDACTED],
[REDACTED].

48. Brokerages like Ms. Prescott's, Mr. Syrianos', Mr. Sage's, and Mr. Chan's rely on a large number of agents to attract leads, or as Mr. Gidamy characterized them "an army of sales representatives".⁹ These agents are usually independent contractors.¹⁰ Mr. Hamidi testified that traditional brokerage models rely on agents to help with prospecting, bringing new clients to the business, and servicing those clients. He said that the model revolves around attracting more agents.¹¹ Mr. Gidamy testified how each individual agent "is kind of doing their own thing on their own prospecting leads, whether it be through door knocking or however they like to generate business."¹² This can take a significant amount of time, as much as 40-60% of an agent's time in the early years, and between one-third to one-half of an experienced agent's time.¹³

49. Agents typically receive compensation in the form of a commission payment calculated as a percentage of the home's sale price. Although agents may sometimes receive non-commission compensation, there is no evidence that fixed-rate payments are common. Instead, commissions are the industry standard, as reflected in TREB's Rules, which refer to "commissions" rather than the more neutral "compensation". For example, Rule 705 provides that "[t]he commission offered by the Listing Brokerage to a Cooperating Brokerage including

⁸ [REDACTED].

⁹ Exhibit A15, Gidamy Statement, para 13, p. 4.

¹⁰ Exhibit R62, Prescott Statement, para 15, p. 4.

¹¹ September 13 Transcript p. 611-12.

¹² September 13 Transcript p. 674.

¹³ Exhibit A15, Gidamy Statement, para 9, p. 3.

any exclusions, incentives and/or adjustments shall be disclosed on TREB's MLS System and be clearly and fully stated in the "Commission to Cooperating Brokerage" field."¹⁴

50. The documentation produced by TREB's own witnesses confirms that, [REDACTED]
[REDACTED]¹⁵ As one TREB document categorically describes it, "Commissions are how REALTORS are paid..."¹⁶

51. Generally, home sellers pay a commission to the listing brokerage. The seller and listing brokerage have typically agreed to offer a portion of that commission to the cooperating brokerage (i.e., the brokerage that represents the eventual buyer) to entice agents working with buyers to show the home for sale. Review of TREB's MLS data and testimony from industry participants confirm that the *offer* of commission to the cooperating agent is 2.5% of the sale price in nearly 90% of cases.¹⁷ [REDACTED]

[REDACTED]¹⁸

52. Because cooperating agents receive a commission from the listing agent, home buyers do not usually pay their own agent directly (unless they have an alternative arrangement directly with the agent). Payment from the buyer to the cooperating agent is indirect in that the final sale

¹⁴ Exhibit R39, Witness Statement of Donald Richardson, p. 156 (emphasis added). See also Rules 710 and 740.

¹⁵ [REDACTED]

¹⁶ Exhibit A4, Document 278 p. 1.

¹⁷ Exhibit A30, First Vistnes Report at p. 102.

¹⁸ [REDACTED]

price might be higher because the home seller has factored the cooperating agent's commission into the final sale price.¹⁹

53. Many Canadians know that housing prices in the GTA²⁰ are high and have been rising steadily for a decade, if not longer. TREB's CEO agreed the GTA housing market has been a "very good market for a long period of time."²¹ Analysis of TREB's MLS data showed that GTA housing prices have risen steadily since 2007 (the earliest available year of data). In fact, GTA housing prices have risen substantially higher than the inflation rate over the last five years. In 2007, the average GTA home sold through the TREB MLS sold for \$369,340. Only five years later, it sold for \$464,264.²²

54. The GTA housing market is also likely the largest in Canada. In 2011, TREB's MLS processed nearly 90,000 residential sales totaling more than \$40 billion.

c) Organized Real Estate: TREB and CREA

55. TREB is a member organization of more than 35,000 competing agents. It operates as a corporation without share capital in accordance with its general by-law. Its membership elects 16 directors, who "guide" TREB's activities.²³

56. TREB membership requires annual dues. For 2012–2013, new individual members pay an initial fee of \$460 and annual dues of \$651.80. New brokerage members pay an initiation fee

¹⁹ Exhibit A30, First Vistnes Report para 34, p. 14.

²⁰ The GTA being comprised of the City of Toronto, and the municipal regions of Peel, Halton, Durham, and York.

²¹ September 25 Transcript p. 1466.

²² Exhibit A30, First Vistnes Report Exhibit 1b, p. 95.

²³ Exhibit R39, Richardson Statement, para 18, p. 4.

of \$4,960 and annual membership dues of \$721.80.²⁴ TREB's CEO testified that the initiation fees reflect, in part, the fact that new members gain immediate access to information that has been built up over the years in TREB's MLS.²⁵

57. TREB's membership is "principally concentrated" in the GTA²⁶ and TREB members comprise the vast majority of all GTA real estate professionals. As of Summer 2012, 59,544 registered real estate professionals operated in Ontario in the following regions: 15% in Eastern and Northern Ontario, 67% in the GTA, and 18% in Southwestern Ontario.²⁷ That division implies 39,894 registrants operating in the GTA, of which TREB's 35,000 members would comprise nearly 88%. However, this percentage likely understates the real figure because the GTA in the above breakdown may include large cities on the outskirts of the GTA, like Hamilton and Burlington, which have their own real estate board.²⁸ In addition, the figures likely include registrants who remain registered under REBBA 2002, but are not actively trading in real estate. In other words, TREB members likely comprise well over 90% of all registrants actually trading in real estate in the GTA.

58. By virtue of membership in TREB, a member also becomes a member of the Ontario Real Estate Association ("OREA") and the Canadian Real Estate Association ("CREA").²⁹ TREB, OREA, and CREA refer to themselves as Organized Real Estate.³⁰

²⁴ Exhibit R39, Richardson Statement, para 11-12, p. 3.

²⁵ Exhibit R39, Richardson Statement, para 11, p. 3.

²⁶ Exhibit R39, Richardson Statement, para 7, p. 2.

²⁷ R83-5, Document 10117, p. 11.

²⁸ Exhibit IC84, Simonsen Statement, p. 446. It is the REALTORS® Association of Hamilton-Burlington.

²⁹ October 9 Transcript, p. 2245-2246.

³⁰ September 24 Transcript p. 1305-1306.

59. Each of TREB, OREA, and CREA is a trade association. None has a statutory mandate to act in the public interest. Instead, the Real Estate Council of Ontario ("RECO") administers REBBA 2002 and its associated regulations in Ontario, such as the Code of Ethics.

60. As a trade association, TREB is member-focused. TREB's CEO describes its core purpose "advanc[ing] the continuing success of its Membership".³¹ To do so, TREB speaks of ensuring "that members maintain a central position in the real estate transaction"³² and demonstrating the value of agents to the public "such that Members maintain a key position in real estate transactions."³³

61. Organized Real Estate is keenly aware of the antitrust concerns associated with trade associations and joint action on the part of competitors. CREA employs a full-time competition counsel in-house.³⁴ TREB's policy for updating its MLS Rules and Policies requires that CREA review the rule or policy for competition concerns.³⁵ TREB goes to great lengths to talk about how little it knows about the commissions its members charge in the marketplace, no doubt to avoid allegations of enabling price fixing or other antitrust activity.³⁶

62. Although concerned about antitrust scrutiny, Organized Real Estate oversees the MLS, a cooperative selling system among its thousands of members. The system involves all levels of Organized Real Estate.

³¹ Exhibit R39, Richardson Statement, para 5, p. 2.

³² Exhibit A4, Document 481, p. 13.

³³ Exhibit A4, Document 1365, p. 6.

³⁴ October 9 Transcript p. 2255.

³⁵ Exhibit R39, Richardson Statement, Exhibit LL, p. 561.

³⁶ Exhibit R39, Richardson Statement, paras 23-24, p. 5.

63. CREA owns the MLS trade-marks, which Mr. Simonsen described as "a cooperative marketing system that exists on a member-to-member basis".³⁷ CREA licenses the MLS marks to boards and associations and their members across the country. Use of the marks requires adherence to CREA's license agreements and rules. These include CREA's Three Pillars of the MLS Mark, one of which requires members to offer compensation to the cooperating agent. Rule 17.1.1.3 bluntly states "An offer of compensation of zero is not acceptable."³⁸

64. OREA promulgates standard form agreements, which members use when listing homes on the MLS. Section 2 of the standard form listing agreement (the first substantive section after the definitions) provides for the offer of commission to be made to the cooperating agent.³⁹

65. TREB adopts OREA's standard forms for use by its members. To post a listing on TREB's MLS, members must complete a listing agreement. They must also complete a MLS data information form⁴⁰ (discussed further below), which includes a mandatory field for the offer of commission to the cooperating agent.⁴¹ TREB will not accept the listing if that field is not completed.⁴² As noted, for the vast majority of GTA listings, the offer of cooperating commission is 2.5%.

³⁷ October 9 Transcript p. 2194.

³⁸ Exhibit IC84, Simonsen Statement, Exhibit 1, p. 82.

³⁹ Exhibit R39, Richardson Statement, Exhibit Y, p. 435.

⁴⁰ Exhibit R39, Richardson Statement, Exhibit F, p. 185.

⁴¹ Exhibit R39, Richardson Statement, Exhibit OO, p. 611 (TREB's MLS Rules and Policies define "Mandatory Fields" as those dark shaded fields on the data entry form.) & Exhibit R39, Richardson Statement, Exhibit F, p. 185 (The "Commission to Cooperating Brokerage" field is shaded dark.)

⁴² Exhibit R39, Richardson Statement, Exhibit D, p. 148, Rule 304(b).

The MLS

a) The MLS and TREB's Stratus System

66. The TREB MLS is a joint venture among its members designed to facilitate the matching of home sellers and home buyers.⁴³ According to TREB's CEO, TREB members have shared properties listings with each other since the 1930s.⁴⁴ Such early sharing is the precursor to today's more sophisticated MLS, which TREB describes as "an elaborate cooperative system over an intranet".⁴⁵

67. As the MLS has evolved, it has become an increasingly powerful tool. By 2006, 78% of Toronto home buyers and 84% of Toronto home sellers bought and sold homes through a MLS listing.⁴⁶ In 2011, nearly 90,000 homes sold through the TREB MLS.⁴⁷ As of March 29, 2012, there were [REDACTED] active residential listings in TREB's MLS database.⁴⁸

68. Cooperative sharing of listings underlies the MLS's functionality and main value proposition. Sharing listings through one central clearing house produces efficient matches. TREB labels this clearing house its MLS database – "a searchable compilation of real estate listings that have been provided to the TREB MLS by its members."⁴⁹ By searching the TREB MLS database, cooperating agents can identify thousands of properties listed for sale that may interest their clients. By uploading listing information to the MLS database, listing agents ensure a wide audience of cooperating agents and their buyer clients.

⁴³ Exhibit A30, First Vistnes Report at para 7, p. 5.

⁴⁴ Exhibit R39, Richardson Statement, para 26, p. 6.

⁴⁵ Exhibit R39, Richardson Statement, para 27, p. 6.

⁴⁶ Exhibit A4, Document 869 p. 51.

⁴⁷ Exhibit R39, Richardson Statement, para 61, p. 13.

⁴⁸ Exhibit CA3, Document 1383 p. 1.

⁴⁹ Exhibit R39, Richardson Statement, para 30, p. 7.

69. Getting information into the MLS database begins with the listing agent and the home seller. The seller must execute a Listing Agreement, which includes an offer of commission to the cooperating broker. Then the seller and listing agent complete the appropriate MLS Data Information Form. There are different forms for different property types (e.g. freehold properties, condominiums etc.). TREB makes these forms available to its members.⁵⁰

70. The MLS Data Information Form is a fill-in-the-blanks form.⁵¹ It has mandatory fields, such as the street name and number, the list price, and the number of rooms. It also has optional fields such as the age of the building or the approximate square footage.⁵²

71. There is also space for "Remarks for Clients", which are often descriptions about the property and its condition to attract buyers.⁵³ The field "Remarks for Brokerages" includes comments to assist agents showing the property. Comments may include details about when the owner will or will not be at home or details about lockbox access.⁵⁴

72. Through the MLS Data Information Form, the seller may also agree to permit the listing brokerage to grant other brokerages permission to advertise the home, to distribute the listing to Internet portals, and to display the home address on the Internet.⁵⁵

73. Once completed, the information on the MLS Data Information Form is uploaded to TREB's MLS database.⁵⁶ All of this information and attributes about a property form part of

⁵⁰ Exhibit R39, Richardson Statement, para 37, p. 8.

⁵¹ Exhibit R39, Richardson Statement, para 38, p. 8.

⁵² Exhibit R39, Richardson Statement, para 39, p. 9.

⁵³ Exhibit R39, Richardson Statement, p. 199. See also September 24 Transcript p. 1335.

⁵⁴ Exhibit R39, Richardson Statement, para 39, p. 9.

⁵⁵ Exhibit R39, Richardson Statement, para 40, p. 9.

⁵⁶ Exhibit R39, Richardson Statement, para 41, p. 9.

what these submissions refer to as a "listing". For example, a "sold listing" includes the sold price *and* all of the homes other attributes (number of bedrooms, photos etc.).

74. Once uploaded, the listing becomes visible through TREB's intranet system almost instantaneously⁵⁷ and appears when members search the database using software provided by a third-party software provider named Stratus Data Systems Inc. ("Stratus").⁵⁸

75. The Stratus software enables members to view listing information in different report formats. Broker Full is the default report. It contains all of the information in the MLS database about a given listing.⁵⁹ For example, it includes the "Remarks for Brokerages" comments completed in the MLS Data Information Form.

76. Other report formats include the Client Full format. It resembles the Broker Full format but does not contain some information like the "Remarks for Brokerages".⁶⁰

77. The Stratus software permits and facilitates members to email links to the Broker Full or Client Full reports to anyone they choose.⁶¹ Although TREB's CEO says he personally discourages emailing Broker Full listings, he acknowledged on cross-examination that it occurs.⁶² Likewise, TREB's witness, Mr. Chan, frankly acknowledged that his agents provide

⁵⁷ Exhibit A92, p. 2.

⁵⁸ Exhibit R39, Richardson Statement, para 49, p. 11.

⁵⁹ Exhibit R39, Richardson Statement, para 50, p. 11.

⁶⁰ Exhibit R39, Richardson Statement, p. 201.

⁶¹ September 25 Transcript p. 1485-1486.

⁶² September 25 Transcript p. 1454-1457.

clients with copies of Broker Full listings when they do not have copies of Client Full reports handy.⁶³

b) Historical MLS Data is Critical to Brokerage Services

78. In addition to Available listings (i.e., homes currently listed for sale), the MLS database also contains an archive of Unavailable listings (i.e., homes once listed for sale that have either sold or ceased to be actively listed).⁶⁴

79. Unavailable listings fall into three broad categories that these submissions refer to as Historical MLS Data.

80. *First*, WEST listings. These are withdrawn, expired, suspended, or terminated listings.⁶⁵ They were once homes listed for sale that for whatever reason did not sell. Because they did not sell, there is no sale price associated with the listing in the MLS database.⁶⁶ Instead, the relevant information is their status. The fact that a home did not sell at a certain price may be relevant information to home buyers and sellers evaluating appropriate offer/sale prices for other homes.⁶⁷

81. *Second*, pending sold listings. These are listings for which sellers and buyers have executed agreements of purchase and sale, but which have yet to close. Rule 610 of TREB's MLS Rules and Policies requires TREB members to report the sale of a property to the TREB

⁶³ September 28 Transcript p. 1776.

⁶⁴ Exhibit R39, Richardson Statement, para 44, p. 10.

⁶⁵ See Exhibit A53, Sample CMA of TREB's Residential Freehold Unavailable Sale & September 25 Transcript p. 1468.

⁶⁶ See Exhibit A53, Sample CMA of TREB's Residential Freehold Unavailable Sale.

⁶⁷ Exhibit A4, Document 1345, p. 19.

MLS database within two business days of the execution of an agreement of purchase and sale.⁶⁸ Because agreements of purchase and sale may have conditions precedent to the final sale, TREB differentiates between two types of pending sales:

- (a) **Conditional sales:** When the buyer and seller have executed an agreement of purchase and sale with conditions precedent.⁶⁹ TREB requires members to report the fact of a conditional sale within two business days of the execution of the agreement of purchase and sale.⁷⁰ The listing status changes from "available" to "unavailable" and the database displays the home as "sold conditional".⁷¹ At this point, TREB does not require members to report the agreed sale price to the MLS.

- (b) **Firm sales:** When the sale is unconditional or any conditions have been met or waived.⁷² Two days after a firm sale, TREB requires members to report the removal of all conditions and the agreed sale price. The Stratus software then displays the sale price to members. The sale price of firm sales is often referred to as the pending sold price until the transaction closes. In response to questions from the Chair, Mr. Enchin testified that the average time between a firm sale and the closing date is between two and four months. In hot markets, it could be less and in weak markets it could be more.⁷³

⁶⁸ Exhibit R39, Richardson Statement, p. 155-156.

⁶⁹ September 13 Transcript p. 670-671.

⁷⁰ Exhibit R39, Richardson Statement, p. 155-156.

⁷¹ See Exhibit A53, Sample CMA of TREB's Residential Freehold Unavailable Sale.

⁷² September 13 Transcript p. 670-671.

⁷³ September 14 Transcript p. 779-780.

82. *Third*, sold listings. These are listings where the transaction has closed. TREB members have already reported the sale price when it became firm.

83. As with Available listings, TREB's intranet system (powered by the Stratus software) permits members to search Unavailable listings and display Broker Full or Client Full report formats. Where members have reported a sale price to the MLS database, both the Broker Full and Client Full report formats will display the sold price of the property.⁷⁴ They can then email those report formats directly from Stratus to whomever they choose.⁷⁵

84. The evidence indicates that TREB members use the Historical MLS Data for two main purposes essential to providing brokerage services: (i) to inform themselves and their customers about market conditions generally, and (ii) to provide more detailed price valuations for specific properties through a Comparative Market Analysis ("CMA").

85. The monthly market report distributed by TREB's witness, Mr. Sage, to his brokerage's mailing list is a good example how agents use the Historical MLS Data to inform customers about the market generally. Mr. Sage testified that each month his brokerage prepares a monthly report on sale activity on a neighbourhood-by-neighbourhood basis for about forty Toronto neighbourhoods.⁷⁶ "Hundreds or into the thousands" of Mr. Sage's customers receive links to the reports by email.⁷⁷ Mr. Sage acknowledged that any recipient could then forward the email to anyone they chose.⁷⁸

⁷⁴ September 25 Transcript p. 1454-1457 & 1485-1486.

⁷⁵ September 25 Transcript p. 1454.

⁷⁶ September 28 Transcript p. 1836.

⁷⁷ September 28 Transcript p. 1861.

⁷⁸ September 28 Transcript p. 1862-1863

86. Each email contains links to Mr. Sage's forty reports.⁷⁹ Recipients can click any link and view reports about different GTA neighbourhoods, such as Leslieville or Rosedale. Mr. Sage's report displays some aggregate statistics about market activity such as average sales price and average days on market. It then lists all of the neighbourhood homes sold in the last month. The chart includes, for each property sold, the property address, sold price, list price, percent of list price, the days on market before the sale, and other information about the property such as type, size, and number of bedrooms.⁸⁰

87. Mr. Sage sources this information from the TREB MLS database.⁸¹ His brokerage finds these reports sufficiently valuable that it commits 12 hours to manually pulling the data from the TREB MLS database and another 30 hours of time preparing the final reports each month.⁸²

88. The reports also include a page describing the benefits of working with Mr. Sage's brokerage. As Mr. Sage acknowledged, these reports are one of the marketing efforts his brokerage uses to attract business.⁸³ To do so, his brokerage maximizes the distribution of the information and reports.⁸⁴ In his own words, the reports are "our take on the data that we pull every month, and then compile it and pull this together, because we believe this is what consumers want".⁸⁵

⁷⁹ Exhibit A-67, p. 1.

⁸⁰ Exhibit A-67, p. 4.

⁸¹ September 28 Transcript p. 1863.

⁸² September 28 Transcript p. 1864.

⁸³ September 28 Transcript p. 1866.

⁸⁴ September 28 Transcript p. 1861.

⁸⁵ September 28 Transcript p. 1863 (emphasis added).

89. Other witnesses agreed with Mr. Sage's characterization of what consumers want. Mr. McMullin testified about the importance of the MLS Historical Data and how home buyers and sellers want to use it on his VOW, ViewPoint.ca:

MR. McMULLIN: [...] The sold price of properties really is the essence of the real estate marketplace. For buyers, buyers who can see this information can rationalize the marketplace more quickly and I guess -- and come to better decisions more quickly by being able to, on their own time, look in the neighbourhoods for properties that have sold and look at them to determine are they comparable to one or more that they are looking at buying.

Without seeing that sold price, it's my opinion that they are essentially misled because they only would have the listing price. And, as we all know, not all houses, at least I can say in Nova Scotia, the vast majority of houses do not sell for listing price, they sell for somewhat less than the listing price.

For sellers, sellers use sold prices to get them, help them understand what the likely, how much they could get for their property. So they use the sold data obviously differently, well, hopefully to set what I will call a reasonable asking price.⁸⁶

90. Witnesses also testified about CMAs, the second main way agents use the Historical MLS Data. A CMA is a report that compares a specific property to other properties that have recently sold.⁸⁷ A CMA allows agents and customers to see what similar homes have recently sold for, which may help them value a particular property. Several witnesses testified about performing CMAs and using them to advise existing clients as well as attract new clients through listing presentations.⁸⁸

⁸⁶ September 10 Transcript p. 151-152.

⁸⁷ Exhibit A4, Document 1348, pp. 62-70 & Exhibit R39, Richardson Statement, para 54, p. 12.

⁸⁸ September 14 Transcript p. 816-819; September 11 Transcript p. 240-242; September 12 Transcript p. 437-439, September 28 Transcript p. 1907-1909.

91. TREB facilitates CMA creation through the Stratus software (although one witness criticized its functionality).⁸⁹ Among other things, TREB's Status software permits members to create a Comparable Summary Report, which displays sold prices, and then email that report to customers and clients.⁹⁰

92. TREB's workbook, "TorontoMLS Contacts & CMA",⁹¹ explains the CMA process in detail and educates TREB members about their creation and use. The TorontoMLS Contacts & CMA workbook also provides an example of a more formal CMA for an imaginary couple, "Kevin and Kathy Wilson", living at 27 Rose Way in Toronto. The example CMA includes several pages setting out four recently sold properties that have been identified as suitable comparable properties.⁹² In each case, the CMA discloses the sold price, sold date, the days on market, and the original listing price. The workbook goes on to describe how TREB members can use software provided by TREB to create a CMA using the Historical MLS Data in the TREB MLS.⁹³

93. Another TREB workbook is even more revealing. "Appraisal for Superior Sales and Listings"⁹⁴ categorically describes the CMA as an agent's "BEST Marketing Tool!"⁹⁵ It explains in detail how important all of the Historical MLS Data is to performing a proper home valuation

⁸⁹ September 13 Transcript p. 667-668.

⁹⁰ Exhibit A4, Document 1098, p. 185, 245, 251. See also Exhibit R41.

⁹¹ Exhibit A4, Document 1348, pp. 62-70 & Exhibit R39, Richardson Statement, para 54, p. 12.

⁹² Exhibit A4, Document 1348, p. 69-72.

⁹³ Exhibit A4, Document 1348, p. 75-128.

⁹⁴ Exhibit A4, Document 1345.

⁹⁵ Exhibit A4, Document 1345, p. 6.

and equates information in the MLS with information about the status of the larger market: "Market Value reflects the actions of the Market (MLS®)".⁹⁶

94. The workbook teaches TREB members about performing an effective listing presentation (i.e., the pitch to win a home seller's business). As part of that presentation, home sellers expect to receive information about the value of their home and a suggested listing price. Thus, the workbook teaches a valuation approach that incorporates sold listings, WEST listings, and active listings. Each is important. Expired listings show sellers what prices buyers have recently rejected. With this information, sellers know what their home will not sell for. Sold listings provide the historical picture and a baseline from which to adjust values to reflect changing market conditions (e.g., this home sold for \$X but the market has improved since then so your home might be worth \$X + Y%). The more recent the sale, the more useful the information.⁹⁷ Current listings show homes currently on the market and what other sellers are asking for their homes. Using this information, the workbook encourages the agent to recommend a suggested listing price.⁹⁸

95. The workbook also encourages TREB members to use a CMA when working with a buyer because it helps "clients feel comfortable with what they are offering and having a realistic offer price will help to get the property sold".⁹⁹

96. On cross-examination, Mr. Richardson initially tried to downplay how important CMAs are for home buyers and sellers. However, counsel directed him to the workbook which cited a

⁹⁶ Exhibit A4, Document 1345, p. 7.

⁹⁷ Exhibit A20, Witness Statement of Mark Enchin, para 15, p. 6.

⁹⁸ Exhibit A4, Document 1345, p. 22.

⁹⁹ Exhibit A4, Document 1345, p. 23.

study that suggested just the opposite – 70% of home buyers and sellers view CMAs as their number one interest:

MR. ROOK: [...] Now, would you go to page 4 of this document, please? And on that page under the heading "What we will cover today", it says:

"CMA - your most valuable sales tool!"

And that concept one that is presented by the board to its members?

MR. RICHARDSON: It is one that Mr. Lebow has included in this. My impression is that CMAs are not as highly valued a sales tool as this case has made it out to be.

[...]

MR. ROOK: Yes. And then if you go to the next page, he refers in the bottom of the page, under the heading below the picture, "No. 1 public need". Do you see that?

MR. RICHARDSON: I see it.

MR. ROOK: And "NAREC", who is that? Is that the National Association of Realtors® Education Committee?

MR. RICHARDSON: It might be. I am not familiar with that acronym. NAR usually stands for National Association of Realtors®.

MR. ROOK: And they did a survey which suggested that 70 percent of buyers and sellers thought that a CMA was the number 1 thing that they were interested in, correct?

MR. RICHARDSON: I'm not familiar with it, but if you have found it in there, then I am assuming it is correct.

MR. ROOK: Go over the page, page 6.

"CMA is your best marketing tool. 70 percent of survey wanted that service."

And that is what Mr. Lebow, if he is still presenting these seminars, is telling your members, is he not?

MR. RICHARDSON: Seems to be.

MR. ROOK: Is he still alive?

MR. RICHARDSON: Yes, I believe he is.

MR. ROOK: Is he still involved in providing educational seminars?

MR. RICHARDSON: I would have to check, but I would assume he probably is.¹⁰⁰

97. Not only was Mr. Richardson's evidence inconsistent with a NAR survey, but it contradicts TREB's own position that the Historical MLS Data is essential to the MLS system because it permits TREB members to complete CMAs. TREB considers the Historical MLS Data so important to its members that it describes it as "essential to the operation of the TREB MLS system so REALTOR Members can continue to provide comparative market analysis and valuations to customers and clients".¹⁰¹ The data is so important that TREB refuses to remove the data from the MLS, even upon the seller's request. It states that "[r]emoval of the MLS listing information would seriously and adversely impact the usefulness of MLS historical information."¹⁰² Likewise, CREA advises home buyers and sellers that "[b]oth current and historical data is essential to the operation of the MLS® system and by placing your listing information on the MLS® system, you are agreeing to allow this ongoing use of listing and sales information."¹⁰³

98. Mr. Richardson's attempt to downplay the importance of CMAs, and thereby the Historical MLS Data, also contradicts the evidence of actual market participants (Mr. Richardson

¹⁰⁰ September 25 Transcript, p. 1475-1477.

¹⁰¹ Exhibit R39, Richardson Statement, p. 431. (emphasis added) See Policy 103.

¹⁰² Exhibit R39, Richardson Statement, p. 431.

¹⁰³ Exhibit IC 84, Simonsen Statement, Exhibit 8, p. 350.

has not been an agent since 1980).¹⁰⁴ For example, Mr. Enchin testified that CMAs and property valuations are key services provided by agents.¹⁰⁵ His first VOW-product included an appraisal feature that helped attract new clients and better serve his existing clients. Likewise, Mr. Gidamy of TheRedPin confirmed that that home sellers want to know what their home might sell for, and a CMA is one of the most important ways to determine a reasonable selling price. Information about the sale prices of recently sold properties is fundamental to a CMA, and to attracting sellers' business.¹⁰⁶

99. The evidence demonstrates that agents use the Historical MLS Data to serve existing clients and to attract new ones. TREB facilitates this use through the functionalities of the Stratus interface over all delivery mediums except websites, allegedly for privacy and regulatory reasons. The background of these issues follows.

c) The Consents Obtained to Permit Use and Disclosure of Historical MLS Data

100. Mr. Richardson testified that TREB and its members have obligations under the *Personal Information Protection and Electronic Documents Act*¹⁰⁷ ("PIPEDA") in relation to their collection, use and distribution of information from customers and clients.¹⁰⁸ Mr. Richardson states that information provided by buyers and sellers to agents during the process is personal information as defined in PIPEDA.¹⁰⁹ According to a 2-page case summary #2009-002, the

¹⁰⁴ September 24 Transcript p. 1275.

¹⁰⁵ Exhibit A30, Enchin Statement, paras 11, 22, p. 4-5, 7-8.

¹⁰⁶ Exhibit A15, Witness Statement of Tarik Gidamy, paras 16-17, p. 6.

¹⁰⁷ SC 2000, chapter 5.

¹⁰⁸ Exhibit R39, Richardson Statement, para 96, p. 20.

¹⁰⁹ Exhibit R39, Richardson Statement, para 96, p. 20.

Assistant Commissioner of Privacy noted that "in some contexts" personal information can include the purchase price of real estate.¹¹⁰

101. In general, PIPEDA requires informed consent for the collection, use, and distribution of personal information. Notably, in case #2009-002, both the agent and the buyer (who complained to the Privacy Commissioner) agreed that the buyer had not consented to the distribution of her personal information (which in that case occurred through a newspaper ad).

102. In addition to PIPEDA requirements, RECO's Code of Ethics prohibits agents from advertising certain information about buyers and sellers, or the details of a real estate transaction.¹¹¹ Both the buyer and seller must consent before agents may do so (whether the prohibitions on advertising in RECO's Code of Ethics apply to VOWs at all is discussed in more detail later in these submissions).

103. Thus, informed consent is the critical commonality between PIPEDA requirements and RECO's Code of Ethics. With informed consent of buyers and sellers, agents and TREB can collect, use and distribute the Historical MLS Data within the limits of the consent provided.

104. Agents obtain the consent of buyers and sellers through standard form agreements created by OREA and used throughout TREB's territory. The first such agreement is the standard form Listing Agreement signed by the seller when listing a home for sale. Section 11 of that form relates to the Use and Distribution of Information. It reads:

11. USE AND DISTRIBUTION OF INFORMATION: The Seller consents to the collection, use and disclosure of personal information by the Brokerage for the purpose of listing and marketing the Property

¹¹⁰ Exhibit IC84, Simonsen Statement, p. 354-355.

¹¹¹ Section 36(9) Code of Ethics, O. Reg 580/05.

including, but not limited to: listing and advertising the Property using any medium including the Internet; disclosing Property information to prospective buyers, brokerages, salespersons and others who may assist in the sale of the Property; such other use of the Seller's personal information as is consistent with listing and marketing of the Property. The Seller consents, if this is an MLS Listing, to placement of the listing information and sales information by the Brokerage into the database(s) of the appropriate MLS system(s), and to the posting of any documents and other information (including, without limitation, photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions) provided by or on behalf of the Seller into the database(s) of the appropriate MLS systems(s). The Seller hereby indemnifies and saves harmless the Brokerage and/or any of its employees, servants, brokers or sales representatives from any and all claims, liabilities, suits, actions, losses, costs and legal fees caused by, or arising out of, or resulting from the posting of any documents or other information (including, without limitation, photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions) as aforesaid. The Seller acknowledges that the MLS database is the property of the real estate board(s) and can be licensed, resold, or otherwise dealt with by the board(s). **The Seller further acknowledges that the real estate board(s) may: during the term of the listing and thereafter, distribute the information in the MLS database to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others; market the Property, at its option, in any medium, including electronic media; during the term of the listing and thereafter, compile, retain and publish any statistics including historical MLS data and retain, reproduce and display photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions which may be used by board members to conduct comparative market analyses;** and make such other use of the information as the Brokerage and/or real estate board(s) deem appropriate in connection with the listing, marketing and selling of real estate during the term of the listing and thereafter.¹¹²

105. TREB considers the consent sellers provide in Section 11 so critical that Rule 340 prohibits its deletion or amendment: "Use and Distribution of Information... [is] necessary for

¹¹² Exhibit R39, Richardson Statement, Exhibit Y p. 436 (emphasis added).

the orderly operation of TREB's MLS® System and notwithstanding any other provisions of the MLS® Rules or Policies shall not be amended or deleted."¹¹³

106. The second standard form agreement TREB members use is the Buyer Representation Agreement ("BRA"). As its name suggests, buyers rather than sellers sign this document. Like the Listing Agreement, the BRA contains a Use and Distribution of Information clause:

8. USE AND DISTRIBUTION OF INFORMATION: The Buyer consents to the collection, use and disclosure of personal information by the Brokerage for such purposes that relate to the real estate services provided by the Brokerage to the Buyer including, but not limited to: locating, assessing and qualifying properties for the Buyer; advertising on behalf of the Buyer; providing information as needed to third parties retained by the Buyer to assist in a transaction (e.g. financial institutions, building inspectors, etc...); and such other use of the Buyer's information as is consistent with the services provided by the Brokerage in connection with the purchase or prospective purchase of the property.

The Buyer agrees that the sale and related information regarding any property purchased by the Buyer through the Brokerage may be retained and disclosed by the Brokerage and/or real estate board(s) (if the property is on MLS® Listing) for reporting, appraisal and statistical purposes and for such other use of the information as the Brokerage and/or board deems appropriate in connection with the listing, marketing and selling of real estate, including conducting comparative market analyses.¹¹⁴

107. On cross-examination, Mr. Richardson tried to suggest that the above language might not provide sufficient consent from the buyer for TREB members to use and distribute Historical MLS Data. However, upon intervention from the Chair, Mr. Richardson agreed that it would:

MR. ROOK: So that to the extent that there are these BRAs in effect, there really can't be any issue about the supply of sold information by your members to prospective purchasers in a CMA?

¹¹³ Exhibit R39, Richardson Statement, Rule 340, p. 151.

¹¹⁴ Exhibit R39, Richardson Statement, Exhibit Y p. 440.

MR. RICHARDSON: Provided that the circumstances are appropriate and these consents cover any provincial or federal law, yes.

MR. ROOK: I know you keep repeating that phrase, but I suggest to you that the plain meaning of the language that I just read is that assuming there is such an agreement in place, a broker or a salesperson can freely provide sold information to prospective buyers that are consulting with the broker?

MR. RICHARDSON: If the circumstances are deemed appropriate –

MADAM JUSTICE SIMPSON: Could you answer the question, Mr. Richardson?

MR. RICHARDSON: I'm sorry. Yes.

MADAM JUSTICE SIMPSON: The question gave you the circumstances. He said there was a prospective buyer. Please answer the question.

MR. RICHARDSON: If there was a prospective buyer, then I believe the answer would generally be "yes" to your question.¹¹⁵

108. In answer to questions from the panel, Mr. Richardson later suggested that BRAs are infrequently signed and that older agents do not use BRAs.¹¹⁶ He also suggested that one could not assume that every buyer signs a BRA when evaluating whether buyers have provided consent to distribution of pending sold and sold listings.¹¹⁷

109. However, TREB's later witnesses contradicted Mr. Richardson and *unanimously* testified that their agents *always* have buyers sign BRAs. Although Mr. Chan testified that many of his agents are "boomers" (i.e., the older agents that Mr. Richardson suggested do not use BRAs), Mr. Chan testified that his agents always have buyers sign BRAs. He said that buyers may not sign BRAs initially, but "when we see the house, then we definitely will want them to sign to

¹¹⁵ September 25 Transcript p. 1429-1430.

¹¹⁶ September 27 Transcript p. 1728-1729.

¹¹⁷ September 27 Transcript p. 1751.

protect ourselves, which means every deal we have a Buyer Representation Agreement."¹¹⁸ Mr. Sage and Mr. Syrianos also testified that BRAs are always signed.¹¹⁹

110. In fact, Ms. Prescott testified that having signed BRAs before entering into a transaction is a RECO requirement¹²⁰ and that she will not pay her agents unless one is signed:

MR. LITTLE: So is it fair to say that in your business the BRA is always signed?

MS. PRESCOTT: It has to be. I won't pay a Realtor® if there is a FINTRAC document missing, if there is a buyer agency missing. If they're missing documents, they don't get paid.

MR. LITTLE: Everybody wants to get paid.

MS. PRESCOTT: Everybody wants to get paid.¹²¹

111. Even before buyers get to the stage where they sign a BRA, OREA provides a standard form called a Buyer Customer Service Agreement. It contains a Use and Distribution clause similar to the BRA. On cross-examination, Mr. Richardson agreed that the consent provided through the Buyer Customer Service Agreement also alleviates concerns with respect to the use and distribution of Historical MLS Data:

MR. ROOK: Thank you. And can I suggest to you that where a buyer has engaged the services of a Realtor® and executes such an agreement, there cannot be any issue as to whether the information can be disclosed, including information with respect to the purchase of a property?

MR. RICHARDSON: My answer would be the same as for the other document, yes.

¹¹⁸ September 27 Transcript p. 1769-1770.

¹¹⁹ September 28 Transcript p. 1856 & 1907.

¹²⁰ Section 14 Code of Ethics, O. Reg 580/05.

¹²¹ September 28 Transcript p. 1807.

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MR. ROOK: Thank you. Can you confirm that these forms or this form is currently in use within TREB's territory?

MR. RICHARDSON: You keep using "TREB's territory", and I guess, in reality, TREB doesn't have a territory. But in terms of what you are intending, yes.¹²²

112. Finally, there is evidence that agents often attach a Schedule B to the Agreement of Purchase and Sale. The standard Schedule B form (Form 105) is blank.¹²³ It permits agents to insert additional language as appropriate and append the provisions as a schedule to the Agreement of Purchase and Sale. Three of TREB's witnesses testified that they always attach such a schedule.¹²⁴ They each provided an example of the schedule they regularly use. Each contains a clause permitting the agent to advertise some or all of the information related to the sale (e.g., the fact of the sale, the sold price as a percentage of the list price, or the sold price itself).

113. In one case, Ms. Prescott testified that she and other Century 21 agents use a Schedule B to obtain the consent of buyers and sellers to permit Century 21 to display the home's sold price and some other information on Century 21's *public* website.¹²⁵

114. The consents provided by home buyers and sellers are robust and broad. As noted later in these submissions, they should alleviate any privacy concerns related to the distribution of the Historical MLS Data to member agents in connection with providing services on VOWs. Indeed, Organized Real Estate has relied on these consents for nearly a decade.

¹²² September 25 Transcript p. 1434-1435.

¹²³ September 27 Transcript p. 1603-1604.

¹²⁴ Prescott: September 28 Transcript p. 1786; Sage: September 28 Transcript p. 1856; & Syrianos: October 2 Transcript p. 1914.

¹²⁵ September 28 Transcript p. 1785-1786.

d) Organized Real Estate's Interpretation of the Consents Obtained

115. Because the Historical MLS Data is so important to its members, TREB and Organized Real Estate have interpreted the consents provided by buyers and sellers, and primarily the Use and Distribution clause in Section 11 of the Listing Agreement, to permit the use and distribution of the Historical MLS Data as and when needed (at least until issues regarding VOWs arose). And when concerns arose about the clause's breadth, TREB took steps to have OREA amend the clause to ensure a more robust consent.

116. Organized Real Estate's earliest privacy "Questions and Answers" appears in December 2003, the month before PIPEDA obligations arose. The very first question was "Can REALTORS still provide a Comparative Market Analysis (CMA) service to their clients or customers using listing and sale information from the Board's MLS system?" The answer at that time was a qualified "yes", saying that members could perform a CMA but PIPEDA might prohibit members from providing copies of CMAs to their prospective clients:

As TREB, OREA and CREA continue to review the "Use and Distribution of Information" clause in these agreements, the current "thinking" is that the Board's MLS system authorizes Members to generate CMAs as an appropriate use in connection with the listing, marketing and selling/leasing of real estate. In benefiting from similar CMA services when listing their property, the vendor has also provided implicit consent for their property information on the MLS system to also be used for similar CMA purposes. The sold price ultimately appears in a public registry.

Actually providing a CMA report to clients or customers to retain where the report identifies specific property addresses and the sold price before the closing date is under review for privacy implications.¹²⁶

¹²⁶ Exhibit A4, Document 81, p. 2. See also September 25 Transcript p. 1514-1516.

120. At this point, Ms. Dore forwarded OREA's response to senior executives of Ontario's largest real estate boards: Mr. Richardson and Hugh Foy (TREB), Carol Mallet and Ross Godsoe. Her one line email: "Mission accomplished – have a great weekend my friends, Betty".

121. On cross-examination, Mr. Richardson admitted that the "mission" that was accomplished was [REDACTED]

[REDACTED]¹²⁹.

122. Sometime after this exchange, the "Questions and Answers" disclaimer cautioning members not to leave copies of CMAs with prospective clients disappeared. Instead, future materials contained the following paragraph preaching caution but ultimately blessing members leaving copies of CMAs with prospective sellers and prospective buyers:

Although it cannot be said with absolute certainty given the lack of precedents or case law on the ultimate interpretation of many aspects of PIPEDA, a strong argument can be made that the words "conduct comparative market analyses" contained in the consent clause of the OREA standard for listing agreement can be interpreted broadly enough to include the essential part of "conducting a CMA", that is, providing that information to a prospective seller or prospective buyer.¹³⁰

123. While Organized Real Estate had accomplished its mission [REDACTED]
[REDACTED] uncertainty remained about whether members could use pending sold data in a CMA. On February 11, 2009, Sandy Raymer, the Executive Officer of the Georgian Triangle Real Estate Board, emailed all Ontario real estate boards to ask their position on the privacy of *pending* sold data.¹³¹ Every response she received from other

¹²⁹ September 25 Transcript p. 1527.

¹³⁰ Exhibit R39, Richardson Statement, Exhibit X, p. 425-426.

¹³¹ Exhibit A4, Document 285, p. 3. See also September 27 Transcript p. 1621-1627.

boards indicated that their members used pending sold data in CMAs, although they "acknowledge it's [sic] problem with PIPEDA".

124. Later Ms. Raymer, like Ms. Dore before her, asked Mr. Harrington for legal advice. She had two questions. First, "can sale prices for properties that have not yet closed [i.e. pending sold prices] be used in CMAs"?¹³² Second, "can sale prices for properties which have not yet closed be sent to individual clients, not as part of a CMA but just as – here's a recent sale that gives you an idea of what properties in that neighborhood are going for"?¹³³

125. In a February 20, 2009 email to Mr. Palmer (TREB's Privacy Officer) and others, Mr. Harrington records his advice to Ms. Raymer. [REDACTED] Mr. Harrington advised Ms. Raymer that the Listing Agreement provided all the consent needed to use and distribute pending sold information:

What I told Sandy is this: In terms of CMA's, from a privacy perspective, whether the transaction has closed or not should be irrelevant, given the wording in the listing agreement. If the "sale price" is available on the MLS System, it falls within the "Use and Distribution" clause in the agreement that includes the ability to retain and publish any statistics including historical MLS® data which may be used by board members to conduct comparative market analyses;

Therefore, there is consent.¹³⁴

126. With regard to Ms. Raymer's second question about sending the pending sold price of a single home, Mr. Harrington simply analogized such distribution to the "undefined" CMA and said that consent had been provided for sending such "one offs":

¹³² Exhibit A4, Document 285, p. 1. See also September 27 Transcript p. 1621-1627.

¹³³ Exhibit A4, Document 285, p. 1. See also September 27 Transcript p. 1621-1627.

¹³⁴ Exhibit A4, Document 285, p. 1. See also September 27 Transcript p. 1621-1627.

With respect to her second question, my view firstly is that there is no definition of CMA, and sending information on a house that sold to a prospective purchaser you are representing, is comparable activity to providing a CMA and is part of that consent. Alternatively, it falls into the "general" consent provision - and such other use of the information as the Brokerage and/or real estate board deems appropriate in connection with the listing, marketing and selling of real estate.¹³⁵

127. Just like with Ms. Dore's 2004 question about [REDACTED] the answer with respect to distributing pending sold data was "it's OK" based on the consent provided in the Listing Agreement.

128. But it is not just sold and pending sold information that members may distribute. Documents show that Organized Real Estate has consistently interpreted the consent in the Listing Agreement to permit collection, use, and distribution of other information when it served its interests. For example, in December 2003, Mr. Harrington sent a dispatch to all CREA members regarding expired listings. In response to the question "Can a board post on its MLS system the fact that a listing has expired?", Mr. Harrington answered "yes" because the Listing Agreement provides consent:

The best answer to this question is likely yes, since the expiry of a listing is a fact.

[...]

...the right to place the listing itself and all listing information on the MLS systems is clear. In CREA's opinion, implied in that consent is the right to show the date on which a listing has expired, since that is simply a fact related to the listing information.¹³⁶

¹³⁵ Exhibit A4, Document 285, p. 1. See also September 27 Transcript p. 1621-1627.

¹³⁶ Exhibit A4, Document 82, p. 1.

129. The evidence shows that Organized Real Estate has consistently interpreted the consent provided in the Listing Agreement as sufficient to permit its members to distribute Historical MLS Data to customers and clients. Even where doubt has existed, it has still generally permitted members to distribute Historical MLS Data. Organized Real Estate is so confident in the consent provided in the Listing Agreement that TREB admits that it "does not rely on the Buyer Representation Agreement to obtain consent for TREB's MLS®."¹³⁷ This aligns with CREA's publication (posted on TREB's intranet) that only the seller's consent is necessary to permit the uses contemplated by the MLS:

A question that has arisen is what happens if a seller gives a board permission to use the information for all MLS® purposes and the buyer, after purchasing the property, says that the information is now his and he wants the board to stop using it for any purpose. It appears that one party cannot argue a "better right" to the information than the other. The better position is that all of the information, with the possible exception of the buyer's name, has been authorized to be provided by the seller. It should not, then, be within the buyer's power after the deal has been closed to contact the board and indicate that he wishes this information to be deleted from the MLS® system. The board has been given the consent to post that information by the seller. The seller has at least as much right to the information as the buyer and the board should be able to retain it.¹³⁸

130. The evidence also demonstrates that when concerns arise about the breadth of the consent provided in Section 11 of the Listing Agreement, TREB has ensured that amendments are implemented to broaden the clause's scope and continue to permit its members to use and distribute the information as necessary.

¹³⁷ Exhibits A26 & A28, TREB Admission #380.

¹³⁸ Exhibit A4, Document 1128, p. 35 (emphasis added).

131. For example, less than a year before TREB's VOW Task Force considered the privacy issues allegedly raised by VOWs, TREB's MLS Committee considered similar concerns about interior home photos that remained on the MLS after the property had sold.

132. On March 17, 2010, TREB executives, Mr. DiMichele and Mr. Foy, wrote a memorandum to the MLS Committee.¹³⁹ They explained that in 2006 TREB's Board of Directors had decided to remove all interior home photos from the MLS post-closing. However, according to Mr. DiMichele and Mr. Foy this "policy was not well received by TREB Members". TREB's members said they needed the interior photos to identify comparable properties and provide accurate CMAs. TREB's MLS Committee agreed, and TREB's Privacy Officer opined that "this is not a privacy issue for the Board but only a Policy in which the Board of Directors made a decision".¹⁴⁰ Accordingly, TREB's Board backtracked and implemented a policy that "interior photos must not be removed" from the TREB MLS.

133. However, around the time of the March 17, 2010 memorandum from Mr. DiMichele and Mr. Foy, sellers and buyers had challenged TREB's policy and increasingly requested that it remove any interior home photos from its MLS post-closing. In response, TREB sought and received legal advice that identified TREB's retention of interior photos in its MLS as "a privacy issue" (which directly contradicted the opinion of TREB's Privacy Officer from 2006). Thus, the issue returned to the MLS Committee for consideration.

¹³⁹ Exhibit CA3, Document 1178, p. 6. See also September 25 Transcript p. 1442-1447.

¹⁴⁰ Exhibit CA3, Document 1178, p. 8. See also September 25 Transcript p. 1442-1447.

134. Although initially on the agenda for April 9, 2010,¹⁴¹ the MLS Committee did not discuss the issue until its September 1, 2010 meeting.¹⁴² The minutes of that meeting record that Mr. DiMichele and Mr. Foy gave the Committee background on the "privacy issue" and referred the Committee to the legal opinion received. In just one meeting, the MLS Committee decided to recommend to TREB's Board of Directors:

(MLS® /002/09/10)

That the TREB Board of Directors recommend to the OREA Standard Forms Committee that they strengthen the wording in Section 11 of the Listing Agreement as recommended by legal counsel regarding privacy concerns with inside pictures of subject property.

(MLS®/003/09/10)

That subject to Legal approval that a policy be adopted whereby photos on TorontoMLS can only be removed upon a written request from the Listing Brokerage, Cooperating Brokerage, Seller or Buyer of the subject property.¹⁴³

135. Counsel's precise recommendation to "strengthen the wording in Section 11" remains a mystery because TREB claimed privilege over the legal opinion. But comparing Section 11 of the 2011¹⁴⁴ and 2012¹⁴⁵ Listing Agreements shows the changes made between 2011 and 2012. Changes that appear designed to address the "privacy issue" related to interior photos (changes are emphasized):

USE AND DISTRIBUTION OF INFORMATION: The Seller consents to the collection, use and disclosure of personal information by the Brokerage for the purpose of listing and marketing the **Property** including, but not limited to: listing and advertising the Property using any medium including the Internet; disclosing Property information to prospective

¹⁴¹ Exhibit CA3, Document 1178, p. 1. See also September 25 Transcript p. 1442-1447.

¹⁴² Exhibit CA3, Document 1192, p. 2. See also September 25 Transcript p. 1442-1447.

¹⁴³ Exhibit CA3, Document 1192, p. 2. See also September 25 Transcript p. 1442-1447.

¹⁴⁴ Exhibit A4, Document 1399, p. 13.

¹⁴⁵ Exhibit R39, Richardson Statement, Exhibit Y, p. 436.

buyers, brokerages, salespersons and others who may assist in the sale of the Property; such other use of the Seller's personal information as is consistent with listing and marketing of the Property. The Seller consents, if this is an MLS Listing, to placement of the listing information and sales information by the Brokerage into the database(s) of the appropriate MLS system(s), and to the posting of any documents and other information **(including, without limitation, photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions)** provided by or on behalf of the Seller into the database(s) of the appropriate MLS systems(s). **The Seller hereby indemnifies and saves harmless the Brokerage and/or any of its employees, servants, brokers or sales representatives from any and all claims, liabilities, suits, actions, losses, costs and legal fees caused by, or arising out of, or resulting from the posting of any documents or other information (including, without limitation, photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions) as aforesaid.** The Seller acknowledges that the MLS database is the property of the real estate board(s) and can be licensed, resold, or otherwise dealt with by the board(s). The Seller further acknowledges that the real estate board(s) may: **during the term of the listing and thereafter**, distribute the information **in the MLS database** to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others; market the Property, at its option, in any medium, including electronic media; **during the term of the listing and thereafter**, compile, retain and publish any statistics including historical MLS data **and retain, reproduce and display photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions** which may be used by board members to conduct comparative market analyses; and make such other use of the information as the Brokerage and/or real estate board(s) deem appropriate in connection with the listing, marketing and selling of real estate **during the term of the listing and thereafter.**

136. The evidence demonstrates that Organized Real Estate has interpreted the consents provided by buyers and sellers in an expansive manner over the years to suit their purposes and their members' needs. When the consents require amendment and it serves their purposes, Organized Real Estate amends them. That no such effort was made with respect to VOWs is discussed later in these submissions and is very revealing.

Virtual Office Websites**a) VOWs are a Means of Providing Real Estate Brokerage Services**

137. VOWs are at the core of this application. They are a type website or a website feature that permits a brokerage to provide services online. VOWs permit so much to occur online that some VOW-based brokerages do not have physical offices at all. Instead, they interact with customers primarily through their websites and increasingly their brokers engage customers and clients online, rather than inside a physical office.

138. There is much dispute between the parties about VOWs' value and attractiveness, their competitive significance, and the cost savings they permit, among other things. But there are few disputes between the parties about the functional characteristics that distinguish VOWs. For example, TREB and the Commissioner agree that VOWs:

- (a) Provide MLS data for search and display by consumers (the parties dispute what data can be made available for search and display);
- (b) Involve registration, usually by the user providing a name and valid email address;
- (c) Have terms of use requiring use of the VOW only by those with a bona fide interest in buying or selling real estate, and prohibiting other uses (like copying the data to solicit home buyers and sellers with moving services);
- (d) Establish a lawful service (or sometimes agency) relationship between the user and agent;

- (e) Provide the full MLS data only once the user has logged in using a secure, and usually, time-limited password; and
- (f) Must be "fed" MLS data through a datafeed to be efficient (the parties dispute what data should be in the feed).

139. Among other things, these features, like the registration requirements, stop the general public from browsing the full MLS data (and the Historical MLS Data if it were permitted) on a VOW. Mr. Simonsen testified that "even an additional click is something that deters a consumer from use of a site."¹⁴⁶ The evidence of Redfin and ViewPoint confirms that thousands of users viewed the "open" or non-VOW parts of their websites between January 1, 2012 and May 31, 2012: in Redfin's case ██████████¹⁴⁷ in ViewPoint's 380,888.¹⁴⁸ But a lesser number of total website visitors register to use the VOW (Redfin, ██████████¹⁴⁹ ViewPoint, 7%).¹⁵⁰ The percentage of registered to non-registered users shows that a segment of the population wishes to take the next step and "enter" the agent's VOW. Although the total number of VOW registrants can still be high, a VOW's information and services are not available to the general public but only to registered users.

140. Because a segment of users have registered, VOWs can offer additional services that rely on knowing the user's identity and contact information. Such services can include communicating with an agent, booking showings, or other similar activity. Without the user's

¹⁴⁶ October 9 Transcript p. 2200.

¹⁴⁷ Exhibit CA38, Letter from S. Nagel, p. 1.

¹⁴⁸ Exhibit A2, McMullin Statement, Exhibit A p. 33.

¹⁴⁹ Exhibit CA38, Letter from S. Nagel, p. 1.

¹⁵⁰ September 11 Transcript p. 336-7.

identity, the VOW-operator could not provide such services. It simply would not know who it was speaking to or how to reach the user.

141. Mr. Hamidi of TheRedPin testified about the services his business can provide through its website and VOW. He described it as a tool and a "home buying application" because of the services and functionality it could provide customers:

And the ones that agree to our terms and would like to get into a consumer relationship with our brokerage, get immediate access to a lot more information and tools on the website.

So for us, we offer a range of services through our website, so we are actually working with our website. So it's not just a resource centre that you can get information, but it's actually a tool. We refer to our website as a home-buying application, not just a home-buying website that you can do research and discovery. You can actually do work through the site.¹⁵¹

b) VOWs are Different than Other Websites which Advertise Listings rather than Provide Services

142. A VOW's features differentiate it from other websites, which are directed at the general public (i.e., have no registration requirement) and which advertise listings rather than provide brokerage services to a narrower group of customers. These websites include:

- (a) **Internet Data Exchanges (IDXs):** IDXs permit agents to share active listings with each other for display on each other's websites.¹⁵² TREB's IDX enables agents to opt-in to the IDX data pool.¹⁵³ Once in, agents may display the active listings of any other agent in the data pool. However, that agent must also share

¹⁵¹ September 13 Transcript p. 614.

¹⁵² See September 28 Transcript p. 869-871 for Mr. Prochazka's testimony about the differences between IDXs and VOWs.

¹⁵³ Exhibit R39, Richardson Statement, paras 69-76, p. 15-16.

its active listings with all the other agents in the pool. TREB's IDX does not display Historical MLS Data and has no registration requirement.¹⁵⁴

- (b) **Realtor.ca:** Realtor.ca is CREA's public listings website. It displays active listings from across the country.¹⁵⁵ Every day, local boards upload active listings from their MLSs for display on realtor.ca. The website does not display Historical MLS Data.¹⁵⁶ There is no registration requirement and its terms of use do not require the user to have an interest in buying or selling real estate.¹⁵⁷
- (c) **Third Party Websites:** These include websites such as Craig's List, Kijiji, and Zoocasa.¹⁵⁸ They may be online general "classifieds" listings (Craig's List) or real estate focused (Zoocasa). They do not have registration requirements.
- (d) **Century 21's Website:** Century 21 operates a website on which it advertises its listings, including some sold listings. The website does not require registration, even to view the sold listings.¹⁵⁹

143. Although VOW-operators may use their VOWs to attract business, comparison to typical advertising media is inapt. To the extent VOW-operators use the information and services held behind the registration "wall" to attract business, the more appropriate comparison is to the

¹⁵⁴ No registration: September 27 Transcript, p. 1745; No historical data: September 28 Transcript p. 1886. See also September 28 IN CAMERA Transcript p. 121-125 for discussion of the differences between IDXs and VOWs.

¹⁵⁵ Exhibit IC84, Simonsen Statement, para 27-28.

¹⁵⁶ October 9 Transcript p. 2202.

¹⁵⁷ October 9 Transcript p. 2209-2210.

¹⁵⁸ Exhibit R39, Richardson Statement para 62, p. 14.

¹⁵⁹ September 28 Transcript p. 1799-1800.

services agents provide to customers *upon their request* to inform them about the market and serve them as they search and perhaps purchase or sell a home.

144. For example, witnesses testified that home sellers may interview several agents before choosing to list with one.¹⁶⁰ The interview may include an in-person listing presentation in which the agent provides a CMA to the prospective seller to justify the recommended list price. On cross-examination, Mr. Richardson testified that TREB's members provide CMAs to customers and clients in such circumstances:

MR. ROOK: But the bottom line is that RECO -- I'm sorry, that the Toronto Real Estate Board's members continue to provide CMAs to customers or potential customers and clients as we speak?

MR. RICHARDSON: Yes.¹⁶¹

145. Similarly, Mr. Sage testified that his brokerage considers their monthly Market Report acceptable because their customers must request it from them before receiving it.¹⁶² Put another way, Mr. Sage's Market Report is a service offered to customers, rather than an advertisement directed at them or the public. It educates customers about neighbourhoods, the market and trends. As Mr. Sage acknowledged, that service hopefully attracts potential buyers and sellers to the benefits of listing with or buying through Mr. Sage's brokerage.¹⁶³

146. Three fundamental commonalities exist between the service examples of a CMA and Mr. Sage's Market Report: i) an identifiable customer, ii) requesting information from an agent, iii) to assist in the purchase/sale of a home. A VOW meets all three criteria. Other websites do not.

¹⁶⁰ September 28 Transcript p. 1789.

¹⁶¹ September 25 Transcript, p. 1390.

¹⁶² September 28 Transcript p. 1868.

¹⁶³ September 28 Transcript p. 1866.

Instead, other websites are akin to "traditional" advertising media such as mail drops, sponsoring events, advertising on billboards and bus shelters, handing out fridge magnets and calendars.¹⁶⁴ All of these lack both an identifiable customer and the element of a request for services, just like IDXs, realtor.ca, third party advertising websites, and Century 21's website.

c) VOWs Outside the GTA: Redfin and ViewPoint

147. The Tribunal heard evidence from two non-GTA VOW-operators, Mr. Nagel of Redfin and Mr. McMullin of ViewPoint. Both testified about the impressive functionality of their websites, the critical role it plays in their business model, and the importance of providing Historical MLS Data online to registered users.

148. Mr. Nagel described Redfin's business model and testified that Redfin's use of technology and its VOW permit it to operate more efficiently and return some of those cost savings to clients in the form of commission rebates.¹⁶⁵ It generates efficiencies in part by transferring some of the searching for a home to buyers who can use Redfin's website to find homes that interest them. This frees up Redfin's agents to focus on other services, like negotiating the deal.

149. In addition, whereas many agents spend large amounts of time developing leads, Redfin generates almost all of its leads through its website. That frees up its agents to handle more deals and also reduces the cost of lead generation.¹⁶⁶ Mr. Nagel testified that "most real estate agents spend most of their time trying to find new clients. And with Redfin, they don't have to do that.

¹⁶⁴ September 28 Transcript p. 1810

¹⁶⁵ Exhibit A8, Nagel Statement, paras 49-52, p. 14.

¹⁶⁶ Exhibit A8, Nagel Statement, para 44, p. 12-13.

Our website generates those clients and provides it to them so that when they have time off, they truly have time off. They don't have to worry about 'Where is my next client coming from'.¹⁶⁷

150. But to effectively generate leads through its website, Mr. Nagel testified about how Redfin's website needed "to be the best there is in order for people to come use that website, find out about our agents and then decide to work with Redfin."¹⁶⁸ Providing some Historical MLS

Data through its website plays a critical role in the attractiveness of Redfin's website:

...we need to have people come to Redfin for information that they can't get anywhere else or hardly anywhere else, and we need to make sure that it's displayed in a way that's useful to them.

Solds is critical in that regard because, you mentioned the data feed that we get and the timeliness of it. For most of the MLSs® that we work with, we get an update on data every 15 minutes. Some, it's 30 minutes; a few, it's four hours. And one very small one in Boston, I think it's one day. But for most MLSs®, it's every 15 minutes. And we will update our website on that same time frame.

And the sold information is useful for our consumers at a lot of different stages throughout the process...

[...]

...you arm the consumer with better information about that area: Can they afford it. When they decide to make a move, how quickly do they have to make a move. What's the sale, the list price on average. How much, you know, if the list is X, can you probably win it at 95 per cent of the list price, or, in some markets, do you have to go to 105 per cent of the list price.¹⁶⁹

151. As a result, Mr. Nagel testified that where Redfin can, it displays information on sold prices, which it obtains from the local MLSs and public records. It receives and displays the

¹⁶⁷ September 12 Transcript p. 402.

¹⁶⁸ September 12 Transcript p. 398.

¹⁶⁹ September 12 Transcript p. 403-405.

details of sold properties as soon as they are posted by real estate agents to the local MLS provider.¹⁷⁰ Mr. Nagel confirmed at the hearing that Redfin receives sold data when the transaction closes. In other words, it does not receive the price of pending sold properties. However, he described how it receives status changes so Redfin can display "what just went under contract and what just switched to a sold categorization."¹⁷¹ He described that even without the pending sold *price*, information about status changes is still very important to buyers and sellers:

Usually, they have lost one or two homes because they didn't think they had to bid as much as they did, but it's so competitive that then they start to really look at the market, they love the fact that they get updated every 15 minutes about what just changed, what went pending, what was its price, what just sold, what was its price, so that they can go in to the next round of negotiations where there may be two, three or sometimes 30 offers on a home and know that they are in a better position than most people who aren't using Redfin.¹⁷²

152. Mr. Nagel also testified about the functionality that having some of the Historical MLS Data in the feed permits. Redfin offers customers sophisticated tools to permit home buyers and sellers to evaluate comparable homes, their prices, and become better educated, on their own time, about current market conditions.¹⁷³ Redfin also arms its agents with more information and better tools developed in-house to better serve customers and clients.¹⁷⁴

153. Because of the efficiencies Redfin generates through technology and its website, in 2011, Redfin rebated an average of US \$5,386 to home sellers and US \$6,188 to home buyers, for

¹⁷⁰ Exhibit A8, Nagel Statement, para 26, p. 8.

¹⁷¹ September 12 Transcript p. 410.

¹⁷² September 12 Transcript p. 411. (emphasis added)

¹⁷³ September 12 Transcript p. 408 and 439-440.

¹⁷⁴ Exhibit A8, Nagel Statement, para 11-12, p. 4.

aggregate rebates of over US \$24,000,000.¹⁷⁵ It also completed 4,400 transactions in 2011 and ranked as the 13th largest brokerage in the United States based on the number of closed sales per agent.¹⁷⁶ Redfin expects its agents to close up to 3 deals *per month*, far in excess of the industry standard of six to eight per agent *per year*.¹⁷⁷

154. Mr. Nagel also testified about the speed of Redfin's growth. On January 1, 2011, he noted that Redfin did not even have 200 agents.¹⁷⁸ By the end of 2011 its agent total had nearly doubled to 397.¹⁷⁹

155. Likewise, Mr. McMullin testified about his experience operating ViewPoint in Nova Scotia and its website/VOW, ViewPoint.ca. In many respects, Mr. McMullin described the same experience as Redfin. His website permits ViewPoint to operate more efficiently by downloading information searching onto home buyers and sellers and keeping his agents focus on "providing professional advice and assistance to customers and clients such as showing properties, and negotiating the purchase and sale of properties".¹⁸⁰

156. Attracting home buyers and sellers to ViewPoint by offering them Historical MLS Data online is critical to ViewPoint's business model. Mr. McMullin testified about his vision that making Historical MLS Data available to customers on a password-protected website would attract a large audience of consumers to the site.¹⁸¹ Like Redfin, Viewpoint.ca displays

¹⁷⁵ Exhibit A8, Nagel Statement, para 54, p. 15.

¹⁷⁶ Exhibit A8, Nagel Statement, para 48, p. 13.

¹⁷⁷ September 12 Transcript p. 403.

¹⁷⁸ September 12 Transcript p. 436.

¹⁷⁹ September 12 Transcript p. 435.

¹⁸⁰ Exhibit A2, McMullin Statement, para 8, p. 3.

¹⁸¹ Exhibit A2, McMullin Statement, para 11, p. 4.

Historical MLS Data. And in fact, because agents in Nova Scotia upload pending sold prices to the relevant MLSs, ViewPoint.ca displays not just the pending status (like Redfin does), but it also displays the price agreed to between the buyer and seller (in the case of a firm sale).

157. Mr. McMullin's experience with ViewPoint.ca has confirmed his belief in the attractiveness of online display of Historical MLS Data. Since January 2010, 92,000 users have registered for ViewPoint's VOW,¹⁸² 28,000 of those between January 16, 2012 and May 31, 2012.¹⁸³ Mr. McMullin explained that distributing MLS data to customers and clients online provides a competitive advantage over other brokerages who do not do so.¹⁸⁴ On cross-examination he described the Historical MLS Data as "much of the information that the consumers really want to see" and testified that he could only share this with them after they registered and chose to become customers of his brokerage.¹⁸⁵

158. Again, like Redfin, ViewPoint's experience is that technology and its VOW have permitted it to close many more transactions per agent than the average brokerage. In September 2011, ViewPoint refocused its efforts on brokerage services to buyers and sellers rather than the website services it had provided to that point.¹⁸⁶ In its first year of operation as a brokerage, ViewPoint completed 117 residential real estate transactions.¹⁸⁷ But as of September 10, 2012, ViewPoint employed only eight agents¹⁸⁸ and for most of its first year it had only six agents.¹⁸⁹

¹⁸² September 10 Transcript p. 136.

¹⁸³ Exhibit A2, McMullin Statement, para 30, p. 9.

¹⁸⁴ Exhibit A2, McMullin Statement, para 33, p. 9.

¹⁸⁵ September 11 Transcript p. 224.

¹⁸⁶ Exhibit A2, McMullin Statement, para 26, p. 8.

¹⁸⁷ September 10 Transcript p. 140.

¹⁸⁸ September Transcript p. 137.

¹⁸⁹ Exhibit A2, McMullin Statement, par 26, p. 8.

That equates to between 14 and 20 transactions per agent. Mr. McMullin attributes ViewPoint's quick success to the availability of MLS data on ViewPoint.ca. He testified that obtaining so much business in such a short period as a new entrant would not have been possible without it.¹⁹⁰ Likewise, providing so much information to so many customers would be virtually impossible but for ViewPoint.ca (the alternative is having a very large number of agents working for ViewPoint).¹⁹¹

159. Both ViewPoint and Redfin display Historical MLS Data behind the "wall" of their password-protected VOW. Users must register and agree to terms of use before accessing the Historical MLS Data.

160. Both Mr. Nagel and Mr. McMullin testified that the availability of the Historical MLS Data from TREB in a datafeed is critical to their decision about whether or not to enter the GTA. Mr. Nagel testified that Redfin would require the Historical MLS Data to effectively compete in the GTA.¹⁹² Mr. McMullin was even more categorical. He testified that without the Historical MLS Data in a datafeed, ViewPoint has no realistic basis for competing effectively in the GTA.¹⁹³ As a result, although it is a member of TREB, ViewPoint does not offer brokerage services in the GTA.

d) The Disadvantages Faced by GTA VOWs

161. GTA VOW operators consistently testified that they want to offer functionality similar to (and perhaps better than) Redfin and ViewPoint through their VOWs, but cannot because of

¹⁹⁰ Exhibit A2, McMullin Statement, para 28, p. 8.

¹⁹¹ Exhibit A2, McMullin Statement, para 35, p. 10.

¹⁹² Exhibit A8, Nagel Statement, para 57, p. 15-16.

¹⁹³ Exhibit A2, McMullin Statement, para 10, p. 4.

TREB's restrictions. Witnesses testified about the value of displaying the Historical MLS Data to their customers, and the disadvantages they face when they cannot. They testified how its inclusion in the VOW datafeed would improve the services they could offer their customers and clients. They also testified that but for TREB's restrictions they would be more efficient, more popular, and better able to serve their customers and clients.

162. Mr. Hamidi and Mr. Gidamy, co-founders of TheRedPin, testified about the role of technology and their website in their business model, and the importance of having the Historical MLS data in a datafeed. Mr. Hamidi described the importance of the Historical MLS Data to home buyers and sellers and some of the ways TheRedPin would like to use it to improve the quality of what it can offer to its customers:

MR. DAVIS: [...] Why does TheRedPin need the information that you listed in paragraph 38, which included the sold price of homes, for example? Why does TheRedPin need that in the feed?

MR. HAMIDI: Right, so some of the information that's missing -- or that's missing today from the feed, such as sold data, I think, I doubt anyone will argue that they are key information while you are making a decision whether you want to buy or sell. So our belief is that if you have access to that key information and if you can actually innovate on top of that information and offer services, then it will be very valuable.¹⁹⁴

163. Mr. Hamidi went on to provide examples of the "innovative" services TheRedPin could provide if it had the Historical MLS Data in a datafeed from TREB:

- (a) Trending information, such as "heat maps" to show customers "hot" neighbourhoods and other neighbourhood characteristics over time.¹⁹⁵

¹⁹⁴ September 13 Transcript p. 619 (emphasis added).

¹⁹⁵ September 13 Transcript p. 620.

- (b) Detailed information and analysis on properties at granular levels, such as showing customers what streets are selling well or are the most expensive.¹⁹⁶
- (c) Sophisticated comparisons between resale properties and new developments, particularly relevant for the GTA condo market.¹⁹⁷
- (d) More robust CMAs based on technology developed in-house to better account for small but important differences between comparable homes.¹⁹⁸ Mr. Hamidi criticized TREB's existing CMA software as limited.¹⁹⁹

164. Mr. Gidamy described the "serious competitive disadvantage" TheRedPin faces by not being able to provide the Historical MLS Data through its website.²⁰⁰ Mr. Hamidi and Mr. Gidamy want to leverage technology to increase the productivity of their agents and improve the attractiveness of their services. But without the Historical MLS Data, Mr. Gidamy testified that they cannot increase the volume of their business without "hiring an army of new sales representatives".²⁰¹

165. Again, like Redfin and ViewPoint, TheRedPin believes that sharing more information with home buyers and sellers online creates efficiencies and attracts them to the services TheRedPin offers. Mr. Hamidi described how the traditional brokerage model depends on the number of agents in a brokerage, how brokerages depend on their agents to prospect for clients,

¹⁹⁶ September 13 Transcript p. 621.

¹⁹⁷ September 13 Transcript p. 620.

¹⁹⁸ September 13 Transcript p. 620.

¹⁹⁹ September 13 Transcript p. 667-668.

²⁰⁰ Exhibit A15, Gidamy Statement, para 22, p. 7.

²⁰¹ Exhibit A15, Gidamy Statement, para 13, p. 4.

and how brokerages are therefore agent-focused.²⁰² He compared this to TheRedPin's consumer-centric model, which like Redfin's and ViewPoint's, revolves around the attraction of its website to generate prospects or leads for its agents. Because of its consumer-focus and reliance on its website for leads, Mr. Hamidi testified that it is important to offer information to customers online:

we don't hold a lot of the information back to get our customers, in a way prospects should come to us to use the raw data. We actually provide them with a lot of information that is okay to share with the customer, so they can also do some of the thinking themselves. That frees up some of our time and makes it more efficient for us.²⁰³

166. More interaction through TheRedPin's website permits it to engage with home buyers and sellers at all stages of what Mr. Hamidi described as the "funnel". Many buyers and sellers want to research on their own before committing to working with an agent. TheRedPin's website enables it to provide some information to these anonymous buyers and sellers. Then, when a buyer or seller is more serious about a purchase or sale, they can register through TheRedPin's website and become a customer of the brokerage. At that point, they receive additional information (although still not the Historical MLS Data because of TREB's restrictions). When they reach "the bottom of the funnel", that is, when they are serious about completing a transaction, they can engage with TheRedPin's agents who shepherd them through the remaining aspects of the transaction.²⁰⁴ Mr. Hamidi testified that most brokerages simply lack the resources to engage buyers and sellers so early in the process and keep them engaged throughout.²⁰⁵

²⁰² September 13 Transcript p. 611-612.

²⁰³ September 13 Transcript p. 612 (emphasis added).

²⁰⁴ September 13 Transcript p. 623-4.

²⁰⁵ September 13 Transcript p. 622.

167. In addition to displaying information to customers, Mr. Gidamy testified about how he could use technology and the Historical MLS Data internally to improve the quality of services his agents could offer.

MR. GIDAMY: Sure. Our industry is regulated by fiduciary duties and ethics towards clients, and that includes being able to offer them the highest level of professionalism, accuracy of data, amongst other things.

And having the information in its raw form and being able to get as close as possible to an automated way to be able to look at different statistics, to look at different sold prices in the area to come up with more accurate -- as opposed to assumptions, come up with more accurate ways to give buyers the information that they need in order to make a better decision, I would call it, in their home-buying or selling experiences, I think is key in this industry.

[...]

So if you are a niche brokerage where you are focused on one specific neighbourhood, you may be more aware than others, but if most of the traditional brokerages tend to service people everywhere and anywhere, putting this data together in a way where you can present it to a client that makes financial sense when they are buying the biggest investment of their life, is critical. It can make the difference of thousands of dollars.²⁰⁶

168. Mr. Pasalis of Realosophy echoed Mr. Gidamy's testimony about how Historical MLS Data and technology could improve the services his agents offered their customers and clients:

MR. PASALIS: [...] I mean, with technology, what it allows us to do is effectively build a dashboard for each house, much the same way Redfin's is. So that when we are looking at a listing, we can look at the last time it was sold, the last time it was listed on the MLS®, whether it was terminated.

A lot of times Realtors® will list a house, terminate it, relist it, and it skews the days on market.

So if we have all of the statistics internally, our Realtor®s are a lot more informed when they are showing houses. And it really just speeds up this

²⁰⁶ September 13 Transcript p. 679 (emphasis added).

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process of becoming familiar with a particular house's history every time they are going to show it.

MR. LITTLE: And does that have a knock-on effect for your ability to advise your customers and clients?

MR. PASALIS: Yeah, of course, because your Realtors® are way more prepared when they are showing houses and can give much better advice.²⁰⁷

169. Mr. Enchin testified about how leveraging technology and innovating using the Historical MLS Data can create efficiencies and improve the services agents provide. Mr. Enchin had developed a VOW-product in the early 2000s. He testified that his VOW-product saved him time, because his clients could search for homes themselves. It also permitted them and him to perform robust CMAs quickly, very accurately and in a professional manner:

MR. ENCHIN: [...] -- you have to understand that when I use sold data, I am allowed to do now appraisals or what we call CMAs, comparative market analysis.

Before, it would take sometimes hours and maybe a day. In the old days, I had to go back to the office, I had to go on the computer system, print everything else out, I had to then input it into a spreadsheet, I had to massage it, print it, create the whole package and then bring it back to the client. Well, that could be a day or two later sometimes.

What I created was a system that when someone asked me what their home was worth, I used to be able to say, 'well, let me come over to your house, I will go online at your house, and we will input your information, we will click a button, and you will start to see the information for yourself'.

The biggest problem I had as a Realtor® was the fact that if you call five real estate agents today about appraising your house, you are going to get five different answers. And that, to me, is not what I would call a

²⁰⁷ September 12 Transcript p. 520-521 (emphasis added).

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profession. They are sales people. And I have been focusing for 20 years on trying to make the industry a profession.²⁰⁸

170. Although Mr. Enchin is developing a new VOW using TREB's existing datafeed, it will not have the functionality of his earlier VOW-product.

171. Finally, GTA VOW operators described the possibilities for innovation using the Historical MLS Data, and how you cannot know until you have the information just what you can develop using it. Mr. Prochazka, a AVP providing website services to agents in the GTA, Western Canada, and the U.S. testified about the immediate possibilities if he had access to the Historical MLS Data and the possibilities that would develop over time:

MR. DAVIS: You mentioned you would provide services for clients in the GTA if you had that data. Why would you do that?

MR. PROCHAZKA: Well, you know, I would like to say we're pioneers in it, but we're really not. If you look at what is happening south of the border, there are tools down there, statistical analysis tools, based on historical data that are phenomenal, offer incredible services, statistical analyses of price fluctuations, historical days on market, so historical property sales rates, et cetera, et cetera.

These are things that we would be able to offer with that. These are the first things we would be able to offer with historical data. But I think, as time went on and the competitive forces were applied, I think that, you know, there would be some very interesting tools that would result from it, from being able to process that data.²⁰⁹

172. Likewise, Mr. Pasalis testified about how VOW-operators will only begin to invest the time and effort in developing even more tools and services using the Historical MLS Data once they have access to it:

²⁰⁸ September 14 Transcript p. 761-2 (emphasis added).

²⁰⁹ September 18 Transcript p. 873 (emphasis added).

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MR. LITTLE: [...] You mentioned there that there are things you might be able to do and you don't even know yet. Can you explain that comment in a little more detail?

MR. PASALIS: Yeah, I mean, I think it really has a lot to do with, as I mention in the statement, I mean, before we got our, the VOW feed or knew that it was possible, we didn't really think about being able -- developing a way for people to search houses by school districts. It's almost like you have to have access to the data and look at exactly what data you are given and what format before you can really understand and think about kind of brainstorming.

I mean, we are not really brainstorming about these things right now because it's not possible. It's almost a wasted effort. We could dream all we want, but we don't have it.

So once you have it, you can really start brainstorming about how to use this and how it can change your business so that you can be more efficient and effective at what you are doing.²¹⁰

TREB's Efforts to Prevent VOW-based Competition

173. Since at least 2003, Canadian Organized Real Estate recognized that the "Internet created many new challenges for REALTORS."²¹¹ One such challenge was that technology could "disintermediate" the industry. That is, technology could render agents obsolete and replace them in the same way that technology had largely replaced travel agents and stock brokers.²¹² This threatened commission levels and Organized Real Estate's goal of keeping "the Realtor at the centre of the transaction".²¹³

174. The evidence demonstrates Organized Real Estate's deep reluctance to share MLS data with new entrants or "upstart" VOW operators, because such sharing could contribute to disintermediation and price competition. Evidence begins in 2003 and reappears over the years,

²¹⁰ September 12 Transcript p. 521-3 (emphasis added).

²¹¹ Exhibit IC84, Simonsen Statement, Exhibit 18, p. 496.

²¹² Exhibit IC84, Simonsen Statement, Exhibit 18, p. 496.

²¹³ Exhibit IC84, Simonsen Statement, Exhibit 18, p. 494.

including in 2011 in the deliberations of TREB's VOW Task Force and Board of Directors. The recurring sentiment: why should agents share MLS data with new entrants like VOW operators who threaten to change the industry and introduce more price competition?

a) 2003: CREA's EDU Task Force and TREB's Inaction on VOWs

175. The earliest formal consideration of VOWs in Canada (and their earliest restriction) occurred in 2003 by CREA's Electronic Data Usage Task Force ("EDU Task Force"). The Task Force included two prominent TREB connections: Mr. DiMichele, TREB's Chief Information Officer (and now deputy CEO), and Mr. Silver, TREB's 2011-2012 President.

176. Like TREB's VOW Task Force would do eight years later, the EDU Task Force modeled its guidelines on a US VOW policy. In early 2003, it obtained a copy of the draft VOW policy NAR proposed adopting in the United States ("2003 Draft NAR Policy").²¹⁴ On January 17, 2003, the EDU Task Force charged two of its members, chairperson Ken MacKenzie and Sherry Chris, with reviewing the 2003 NAR Policy and recommending what elements to adopt in Canada.²¹⁵

177. MacKenzie circulated a revised version of the 2003 Draft NAR Policy for consideration on February 25, 2003.²¹⁶ He and Chris left most of the 2003 Draft NAR Policy unchanged. Their one major change: they removed board's ability to choose whether to permit VOWs to display sold data.

²¹⁴ Exhibit A4, Document 43 attaching Exhibit CA3, Document 1124.

²¹⁵ Exhibit A4, Document 41 p. 1.

²¹⁶ Exhibit A4, Document 45 attaching Exhibit CA3, Document 1125.

178. The 2003 Draft NAR Policy permitted MLSs to make sold data available on a VOW. It provided that:

An MLS may permit Participants to make "Sold" data available on a VOW for search by Registrants. If "Sold" data is made available, the MLS may establish reasonable limits on the number of listings that Registrants may retrieve or downloads in response to an inquiry.²¹⁷

179. Yet even such permissive, non-binding language proved unpalatable to Mr. MacKenzie and Ms. Chris who simply deleted this paragraph in their revised version, which in many other respects adopted the 2003 Draft NAR Policy verbatim.²¹⁸

180. Initial feedback on the revisions was divided and internal communication between EDU Task Force members revealed a deep reluctance to permit VOWs at all. Mr. MacKenzie reported receiving feedback from a series of CREA meetings saying that "I got the distinct feeling that clear guidelines are wanted by everyone who spoke to me but a feeling from some that we should not tolerate any kind of VOW."²¹⁹

181. Another member thought that not allowing VOWs was "like saying we should go back to the horse and buggy... It won't happen!"²²⁰ But he noted that, "[b]rokers must have the choice of opting in or out..."²²¹ Meaning that those agents who did not like VOWs would not have to share their listings with VOW-operators.

²¹⁷ Exhibit CA3, Document 1124 p. 5.

²¹⁸ Exhibit CA3, Document 1125, p. 4-5.

²¹⁹ Exhibit CA3, Document 10026, p. 1 (emphasis added) & Exhibit A4, Document 10027, p. 1.

²²⁰ Exhibit CA3, Document 10026, p. 1 (emphasis added) & Exhibit A4, Document 10027, p. 1.

²²¹ Exhibit CA3, Document 10026, p. 1 (emphasis added) & Exhibit A4, Document 10027, p. 1.

182. Another EDU Task Force member advocated strong restrictions on VOWs writing, "I see that NAR is proposing fairly extensive restrictions on VOW's. We would be advised to do the same."²²²

183. But for some members, "extensive restrictions" did not suffice. Rules are made to be broken and one member lobbied for an outright prohibition on VOWs:

The problem is – no matter what type of rules we put in for VOWs – the second they are adopted – many people will try to find a way around the rules.

Has the idea of not allowing VOWs been set aside?²²³

184. In response, Mr. MacKenzie noted that the EDU Task Force did not have to decide whether to prohibit VOWs or not. Because of the guidelines the EDU Task Force proposed, each local board could enable or prohibit VOWs at a local level. As Mr. MacKenzie wrote, "I guess we will find out if prohibiting VOWs nation wide is an option as we release the guidelines. You will note in the draft guidelines the Opt Outs include Boards, Brokers and Individual listings. So a Board can do just that"²²⁴ (i.e., opt out and thereby not permit VOWs locally).

185. As Mr. MacKenzie previewed, rather than recommending a policy or other binding document, the EDU Task Force delivered a set of guidelines that local boards could either adopt or not. And even if boards chose to adopt them, the guidelines neutered VOWs in two important respects.

²²² Exhibit CA3, Document 53 p. 1 and Exhibit A4, Document 865, p. 1.

²²³ Exhibit A4, Document 10033, p. 1.

²²⁴ Exhibit A4, Document 60, p. 1.

186. *First*, even though VOWs supposedly displayed richer MLS information than other data sharing websites,²²⁵ the EDU Task Force's final guidelines limited VOWs to displaying active listings – the exact same data available on CREA's website, mls.ca (later renamed realtor.ca). Such limited information greatly reduced VOWs' appeal to the general public. VOWs had complicated registration requirements, but could display no more information than mls.ca, which had no registration requirement. As one EDU Task Force member noted, "Why would anyone use a password and jump through hoops [to access a VOW] when he can get the same information directly from mls.ca without going through it."²²⁶

187. *Second*, the guidelines permitted any agent to opt out of having its listings displayed on a VOW. So not only did the guidelines rob VOWs of critical MLS information (i.e., the sold data), but they threatened the comprehensiveness of what VOWs could show. Agents who feared competition from tech-savvy VOWs could refuse to share listings with VOWs. Yet those same listings would appear on mls.ca. The result placed VOWs at a severe disadvantage. Not only were website users more likely to use mls.ca because it offered the same information without a registration requirement, but mls.ca potentially offered a more comprehensive set of active listings. As a result, VOWs as proposed by the EDU Task Force were hardly an attractive option for industry participants.

188. Both the EDU Task Force Report delivered in October 2003 and Mr. MacKenzie himself bluntly described the rationale behind the restrictive VOW guidelines: to keep the Realtor at the centre of the transaction and protect agents who did not want to share their "hard earned" data with upstart VOW-operators. As stated on the first page of the EDU Task Force's Report:

²²⁵ October 10 Transcript, p. 2298.

²²⁶ Exhibit CA3, Document 53 p. 1 and Exhibit A4, Document 865, p. 1.

There is a legitimate fear on the one hand of capitulating to misuse of REALTORS' hard earned data banks, and on the other hand of being left behind in an electronic revolution moving at the speed of light.

The objective always is to ensure the REALTOR remains central to the real estate transaction and that efforts to guide the use of MLS data are to that end.²²⁷

189. Likewise, Mr. MacKenzie stated when reporting on the EDU Task Force's recommendations:

When we started this project, our primary objective was to make sure the REALTOR remains central to the real estate transaction. Any debate we had on the use of MLS data followed that guideline. There was a legitimate fear on one hand of developing a policy that would help erode the REALTOR or Broker's hard earned data, but on the other hand we did not want members falling behind in an electronic revolution.²²⁸

190. As Mr. MacKenzie had earlier predicted, local boards' ability to prohibit VOWs meant that most boards simply did nothing. Even with TREB's Chief Technology Officer a prominent member of the EDU Task Force, TREB did not adopt a VOW policy in this period.

b) 2004: Websites "burgeon" but TREB Takes No Action on VOWs

191. Instead of creating a VOW policy in 2003, TREB's CEO testified that TREB largely left website issues to what he described as a private marketplace of website developers that was starting to "burgeon" between 2003 and 2005.²²⁹ To display MLS listings on a website pursuant to TREB's MLS Rules, TREB members had to sign data transfer agreements ("DTA") to authorize TREB to transfer their listing data to a third party website developer. To display the entire set of MLS listings, as appeared on mls.ca, TREB members had to obtain DTAs from

²²⁷ Exhibit IC84, Simonsen Statement, Exhibit 18, p. 494 (emphasis added).

²²⁸ Exhibit A4, Document 78, p. 7 (emphasis added).

²²⁹ September 24 Transcript p. 1241.

every brokerage listing through TREB's MLS. With thousands of brokerages and members, not all of whom would be willing to share their listings for online display, the DTA process was costly and produced an incomplete set of MLS listings.²³⁰

192. Yet TREB was aware of VOWs in the United States and much closer to home. During this period, Mr. Enchin demonstrated the VOW-product he had developed, including his appraisal feature that used MLS data sourced from TREB's MLS database. At one presentation in Guelph, TREB's Chief Technology Officer, Mr. DiMichele, watched Mr. Enchin's presentation and discussed his VOW-product with Mr. Enchin afterwards.²³¹ Mr. DiMichele told Mr. Enchin that "politics" would get in the way of the vision Mr. Enchin had of empowering agents through technology like VOWs:

MR. ENCHIN: I think he was kind of surprised that I would go through that much effort. I talked to him about my vision about what I thought Realtors® should have for the future. He told me at the time he doesn't disagree with me, but the times weren't going to allow it based on the politics and everything else that was being played out. So I think he wished me good luck and we kind of ended it like that, so...²³²

193. Later, Mr. Enchin demonstrated his VOW-product to TREB's then President, Cynthia Lai. She was impressed, but told Mr. Enchin that she doubted she would have time to "put this through with all the other things that were on her mandate to do."²³³

194. Despite its awareness of a "burgeoning" marketplace for private websites and knowledge of nascent VOWs, like Mr. Enchin's, TREB did not adopt a VOW policy in this period.

²³⁰ Exhibit A13, Hamidi Statement, paras 18-19, p. 5-6.

²³¹ Exhibit A20, Enchin Statement, para 27, p. 9.

²³² September 14 Transcript p. 756-757. (emphasis added)

²³³ September 14 Transcript p. 758.

c) **2005-2007: Litigation in the United States and TREB Shuts Down BNV's VOW**

195. In 2005, the U.S. Department of Justice began proceedings against NAR over NAR's then existing VOW policy. At that time, NAR's VOW policy permitted individual agents to opt-out or withhold their listings from display on VOWs. The DOJ alleged, among other things, that such an opt-out seriously disadvantaged VOWs and was anticompetitive.²³⁴

196. Mr. Richardson testified that during this period, TREB was watching how events would unfold in the U.S. and was reluctant to proceed with a VOW policy.²³⁵

197. Thus by 2007, four years after the EDU Task Force's Report, TREB still did not have a VOW policy, did not provide a VOW datafeed, and did not have any formal way for members to display MLS data on their own websites. TREB's MLS Rules required separate permission from every listing brokerage. Such permission was far too costly and cumbersome. It was also unlikely to produce a comprehensive stable of MLS listings if agents were unwilling to share listings with upstart tech-savvy competitors.

198. In March 2007, Bell New Ventures Real Estate Inc. ("BNV") approached TREB about purchasing TREB's MLS data in bulk.²³⁶ Like websites who purchase MLS data from American MLSs, BNV wanted to "build a better mouse trap by moving [the] business of selling residential real estate into the world of "virtual office".²³⁷ TREB refused to sell the MLS data to BNV.

²³⁴ Exhibit A4, Document 10050, US DOJ Amended Complaint.

²³⁵ Exhibit R39, Richardson Statement, para 112, p. 23.

²³⁶ Exhibit A4, Document 3, p. 2, TREB Presentation: MLS Data Security Issues: The Challenge of Keeping Control.

²³⁷ Exhibit A4, Document 363, Decision of Brown J. para 1, p. 1.

199. In May 2007, BNV partnered with Fraser Beach, an agent and TREB member. Using Mr. Beach's MLS access password, BNV downloaded listing information from TREB's MLS and displayed the information on its own brokerage website, www.realestateplus.ca. When TREB learned of BNV's and Mr. Beach's activity, they terminated their access to the MLS database.²³⁸

200. Undeterred, in the fall of 2007, BNV joined forces with Realtysellers, an existing brokerage in the GTA, and resumed accessing TREB's MLS database to populate its website. TREB then terminated Realtysellers' access to the MLS database.²³⁹

201. Having lost access to the MLS database to populate its website, BNV exited the residential real estate brokerage market and sold its website technology to Torstar (which did not intend to follow BNV's business model).²⁴⁰

202. Litigation between TREB, Realtysellers, Mr. Beach, and BNV ensued. In the fall of 2007, Realtysellers sued TREB and moved for an interlocutory injunction to retain its access to the MLS database. The court dismissed the motion.²⁴¹ Realtysellers ultimately discontinued that particular claim against TREB in May 2008.²⁴²

203. Mr. Beach applied in the Ontario Superior Court seeking declarations that BNV's website complied with TREB rules and that TREB had violated its own rules and procedures by

²³⁸ Exhibit A4, Document 363, Decision of Brown J. para 1, p. 1 & Exhibit R39, Richardson Statement, para 102, p. 21.

²³⁹ Exhibit A4, Document 3, p. 3, TREB Presentation: MLS Data Security Issues: The Challenge of Keeping Control & Exhibit R39, Richardson Statement, para 103, p. 21.

²⁴⁰ Exhibit A4, Document 3, p. 4, TREB Presentation: MLS Data Security Issues: The Challenge of Keeping Control.

²⁴¹ Exhibit A4, Document 3, p. 4, TREB Presentation: MLS Data Security Issues: The Challenge of Keeping Control.

²⁴² Exhibit A4, Document 3, p. 4, TREB Presentation: MLS Data Security Issues: The Challenge of Keeping Control.

unilaterally terminating his access to the MLS database. The application was converted into a trial heard by Justice Brown in June 2009. In reasons released on December 7, 2009, Justice Brown dismissed Mr. Beach's application and refused to grant any of the relief he requested at trial. His Honour held that Mr. Beach had violated TREB's Authorized User Agreement and TREB had been permitted to terminate his access to the MLS database under those circumstances. Justice Brown expressly declined to comment on any competition issues arising from TREB's conduct.²⁴³ The Court of Appeal for Ontario upheld Justice Brown's decision on December 21, 2010.²⁴⁴

204. The experience with BNV, Mr. Beach, and Realtysellers demonstrated a demand on the part of some members and some new entrants to move services to a "better mousetrap" online. However, TREB still did not consider or adopt a VOW policy at this time.

205. Instead, TREB terminated its members' ability to download up to 100 listings at a time from the MLS database.²⁴⁵ This "bulk download" feature had enabled Mr. Enchin to populate his VOW-product, and Mr. Pasalis to undertake neighbourhood-by-neighbourhood analysis for his customers using the MLS data.²⁴⁶ Now both were impossible.

206. Mr. Pasalis testified how, at this time, a TREB representative contacted him to find out how he created his neighbourhood reports. He specifically wanted to know if Mr. Pasalis was

²⁴³ Exhibit A4, Document 363, Decision of Brown J. para 6, p. 2.

²⁴⁴ Exhibit A4, Document 10101, Decision of Court of Appeal.

²⁴⁵ Exhibit R39, Richardson Statement, para 104, p. 21.

²⁴⁶ Exhibit A10, Pasalis Statement, para 23, p. 7.

scraping data (he wasn't). TREB's contact concerned Mr. Pasalis that TREB might cut off his MLS access as it had done to Mr. Beach and Realtysellers.²⁴⁷

207. TREB also enacted Policy 508 which provided that TREB could terminate a member's MLS access for improper use at any time and in its sole discretion: "TREB in its, sole discretion may terminate or suspend a Member's user name and password code and/or authorized use of an Authenticator in the event of any unauthorized or improper use of TREB's MLS® Online system."²⁴⁸

208. During this period, Mr. Richardson, TREB's CEO, developed a presentation outlining TREB's experience with BNV. It did not refer to VOWs or a VOW policy at all. Instead, it described how TREB would react to keep control of MLS data going forward as expressed in its title: "MLS Data Security Issues: The challenge of keeping control."²⁴⁹

d) 2008: NAR & DOJ Settle but TREB Puts Its VOW Task Force On Hold

209. In November 2008, the DOJ and NAR finally settled their litigation. They attached an agreed VOW policy ("NAR VOW Policy") to the proposed Final Judgment filed in May 2008. The NAR VOW Policy had two critical components. First, VOWs did not require the permission of listing brokers to display information on a VOW. Put another way, listing brokers could not "opt out" or otherwise refuse to "share" their MLS listings with VOW operators:

²⁴⁷ Exhibit A10, Pasalis Statement, para 23, p. 7, Policy 508 effective October, 2008.

²⁴⁸ Exhibit R39, Richardson Statement, Exhibit D p. 171.

²⁴⁹ Exhibit A4, Document 3, p. 1, TREB Presentation: MLS Data Security Issues: The Challenge of Keeping Control.

The display of listing information on a VOW does not require separate permission from the Participant whose listings will be available on the VOW.²⁵⁰

210. Second, the NAR VOW Policy enshrined principles of non-discrimination. American MLSs could prohibit VOWs from displaying some listing information, but only if that prohibition applied equally to non-VOW operators:

An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms:

a. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS Participants and their affiliated licensees:

- i. Expired, withdrawn, or pending listings.
- ii. Sold data unless the actual sales price of completed transactions is accessible from public records.
- iii. The compensation offered to other MLS Participants.
- iv. The type of listing agreement, i.e., exclusive right to sell or exclusive agency.
- v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.
- vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.²⁵¹

211. The terms of the Consent Judgment itself between NAR and the DOJ in November 2008 further enshrined this non-discrimination principle. NAR-affiliated MLSs had to treat all

²⁵⁰ Exhibit A4, Document 233 NAR VOW Policy attached to Final Judgment p. 14.

²⁵¹ Exhibit A4, Document 233, NAR VOW Policy attached to Final Judgment p. 21.

methods of delivery equally. They could not single out VOWs or otherwise unfairly disadvantage them.²⁵²

212. Following the announcement of the possible DOJ/NAR settlement, in June 2008, the Competition Bureau approached TREB about implementing a similar VOW policy based on principles of non-discrimination. When CREA struck its own VOW Task Force ("CREA 2008 VOW Task Force"), TREB put consideration of VOWs on hold until further notice.²⁵³

213. But five years and NAR's US settlement had not reduced Canadian Organized Real Estate's reluctance to share MLS data with VOW operators. Like in 2003, CREA representatives expressed deep reluctance about sharing MLS data with VOWs. In July 2008, Calvin Lindberg, then CREA's President, described forced data sharing with VOWs as a "line in the sand". He predicted a severe member backlash if CREA forced members to "open what they have spent years creating":

We need to carefully consider how we handle this latest move the by Bureau. They are obviously reacting from the DOJ/NAR settlement and want to see the same thing here. This may be our "line in the sand" because, from a personal standpoint, a forced national VOW with no opt out provision that has been forced on us by the Bureau is not something I could accept in my business and neither could my company agree to change their business model, and I believe there are numerous companies across the country that have spent hundreds of thousands of dollars creating their very successful niche market. We would create a big backlash if we were to force those companies to open what they have spent years creating to just any REALTOR to frame on their VOW, and not offer them an opt out.²⁵⁴

²⁵² Exhibit A4, Document 233, Proposed Final Judgment p. 4-5.

²⁵³ Exhibit R39, Richardson Statement, paras 113-115, p. 23.

²⁵⁴ Exhibit A4, Document 1148, p. 1 (emphasis added).

214. CREA's 2008 VOW Task Force met a handful of times, but did not develop a VOW policy. Members continued to debate opt-outs and sold data, which the minutes record "were felt to be the most contentious issues."²⁵⁵ There was no resolution with the Competition Bureau. As Mr. Richardson himself describes, CREA's 2008 VOW Task Force effectively "stalled".²⁵⁶

215. Also in 2008, Mr. Hamidi approached TREB about the website platform that he and his co-founders had developed. He met with Mr. DiMichele who told him that TREB did not have a policy in place to transfer MLS data in a feed as Mr. Hamidi wanted. Mr. DiMichele explained that Mr. Hamidi would have to collect signatures from each and every individual brokerage to allow him to display their listings on his website.²⁵⁷

216. Mr. Hamidi and his co-founders tested their website platform using a datafeed transfer from two brokerages, but realized that it would be too much work to get every brokerage to provide them with listings in a datafeed format.²⁵⁸ As a result, they abandoned their efforts to obtain a datafeed of TREB MLS data and instead focused on new condominiums, a decision that allowed TheRedPin to stay in business.²⁵⁹

217. More time passed, and still TREB did not have a VOW policy.

²⁵⁵ October 10 Transcript p. 2329. Exhibit A87.

²⁵⁶ Exhibit R39, Richardson Statement, para 116, p. 23.

²⁵⁷ Exhibit A13, Hamidi Statement, para 18, p. 5.

²⁵⁸ Exhibit A13, Hamidi Statement, para 19, p.6.

²⁵⁹ Exhibit A13, Hamidi Statement, paras 21-22, p. 6.

e) **2011: TREB Responds to Pressure from the Competition Bureau regarding VOWs**

218. TREB's inaction during this period mimicked CREA's. Having ceded responsibility for a VOW policy to CREA in 2008, TREB took no action on VOWs until early 2011 when renewed pressure from the Competition Bureau finally pushed TREB to adopt a VOW policy.

219. TREB asserts that it began the process of developing a VOW Policy in the summer of 2010 independent of the Competition Bureau. The evidence does not support its claim. TREB's 2010/2011 Strategic Plan refers very briefly to VOWs in a list of potential MLS tools to develop for members:

STRATEGIES FOR 2010-2011

2. MLS System Tools and Statistics

b. Empower our Members by providing cutting edge tools (e.g. MLS, IDX Download, VOW's, Syndication)²⁶⁰

220. However, prior Strategic Plans consistently demonstrate that TREB's "objectives" with respect to VOWs go unachieved until they are conveniently forgotten.

221. **2004:** In its 2004 Strategic Plan, TREB stated its objective to "Work with CREA to implement permissions management re: deep-link framing, VOWS policy and IDX policy re: MLS.ca".²⁶¹

222. **2005/2006:** TREB obviously did not achieve its 2004 objective as it restated the same goal in its 2005/2006 Strategic Plan: "Work with CREA to implement permissions management re: deep-link framing, VOWS policy and IDX policy re: MLS.ca"²⁶²

²⁶⁰ Exhibit R39, Richardson Statement, Exhibit AA p. 449.

²⁶¹ Exhibit A4, Document 124, 2004 Strategic Plan p. 11.

223. **2006/2007:** By its 2006/2007 Strategic Plan, references to VOWs disappeared from TREB's Strategic Plan altogether. As before, TREB listed IDX technology as a goal but unlike previous years said nothing about VOWs, even though TREB had not developed a VOW policy:

MLS System Tools – add new, street practical services to TorontoMLS on a continuous, planned basis including implementation of a board IDX, implementation of permissions management for MLS.ca, easy access to zoning information and continual upgrade of e-mail system and anti-spamming.²⁶³

224. **2007/2008:** In 2007/2008, TREB simply republished its unmet objective from the previous year. Again, TREB did not refer to VOWs:

MLS System Tools – add new, street practical services to TorontoMLS on a continuous, planned basis including implementation of a board IDX, implementation of permissions management for MLS.ca, easy access to zoning information and continual upgrade of e-mail system and anti-spamming.²⁶⁴

225. **2009/2010:** Even though the Competition Bureau had approached TREB about VOWs in 2008, TREB's 2009/2010 Strategic Plan did not refer to VOWs at all: "MLS System Tools – Add new, services to TorontoMLS on a continuous and planned basis."²⁶⁵

226. Simply put, "objectives" in TREB's Strategic Plan often go unmet. And with respect to VOWs specifically, they went unmet from 2004 until 2007, when VOWs disappeared from TREB's objectives altogether.

²⁶² Exhibit A4, Document 146, 2005/2006 Strategic Plan p. 11.

²⁶³ Exhibit A4, Document 482, 2006/2007 Strategic Plan p. 12.

²⁶⁴ Exhibit A4, Document 481, 2007/2008 Strategic Plan p. 12.

²⁶⁵ Exhibit A4 Document 338, 2009/2010 Strategic Plan, p. 19.

227. In a revealing email in May 2011, one of TREB's directors indicted his fellow directors and executives for TREB's decade-long inaction on VOWs:

We don't need to rebutt [sic] anyone and the only thing some could accuse us of being guilty [sic] of is the absolute lack of leadership in dealing with VOWS. This is a confrontation between the Competition Bureau and TREB not other boards.

This issue has been around for years (I believe at least 10) and other Boards in Canada and the USA have long ago produced a policy of dealing with them and allowing them to operate. TREB drags it's [sic] feet and puts it into committees and still doesn't have it's [sic] policy in place. We get bad press because we look to make excuses rather that move ahead.

This is about LEADERSHIP or rather the absense [sic] of it from us volunteers and staff.

We just need to deal with it and the Competition Board will go away and take credit for forcing us to get our act together.

Let's get it DONE and stop whining!²⁶⁶

228. At the hearing, when asked by the Chair whether TREB had taken any serious action on VOWs between its July 2010 Strategic Plan and the creation of the VOW Task Force in March 2011, Mr. Richardson admitted it had not:

MADAM JUSTICE SIMPSON: Can you think of any work on VOWs that TREB undertook between July of 2010 and March of 2011?

MR. RICHARDSON: Other than tracking of the VOW phenomena in the US, no.²⁶⁷

229. The reality is that TREB took action on VOWs only in response to the Commissioner's Voluntary Information Request ("VIR") concerning VOWs delivered on November 9, 2010.²⁶⁸

²⁶⁶ Exhibit CA3, Document 1254 & Exhibit A4, Document 1032. See also September 27 Transcript p. 1696-1698.

²⁶⁷ September 27 Transcript p. 1748.

Only after receiving this request did TREB appear to take VOWs seriously. And whereas TREB had done nothing on VOWs for a decade, it suddenly sprang into action when it knew it had no choice but to finally move forward.

230. At the Board's January 20, 2011 meeting, Mr. Richardson reported that TREB had responded to the Commissioner's VIR and that "TREB should expect increase [sic] discussion and activity regarding VOW issues within the next few months."²⁶⁹ The Board added consideration of a VOW Task Force to its February meeting agenda.

231. At the Board's February 24, 2011 meeting, Mr. Richardson was categorical. He reported that TREB had to "[s]olve VOW issues and implement." TREB's Board agreed to "consider the creation of a VOW Task Force" and it approved a list of potential Task Force members.²⁷⁰

232. On March 17, 2011, Mr. Richardson reported to the Board about discussions between TREB and the Competition Bureau concerning VOWs. He noted that TREB's counsel would report on a "Principles" document that the Bureau had provided to TREB which set out the fundamental elements of an acceptable VOW policy. Mr. Richardson noted that the Bureau's position largely mimicked the result achieved in the DOJ/NAR settlement (i.e., no opt outs and the non-discrimination principle). Mr. Richardson delivered copies of NAR's VOW rules to the Board which clearly set out the non-discrimination principle.²⁷¹

233. At the Board's March 24, 2011 meeting, Heather Fuller, Chair of the new VOW Task Force, reported that the Task Force's first meeting was scheduled for March 31, 2011. TREB's

²⁶⁸ Exhibit CA3, Document 1198 & Exhibit A4 Document 888.

²⁶⁹ Exhibit CA3, Document 1207 p. 1 & Exhibit A4, Document 913.

²⁷⁰ Exhibit CA3, Document 1211 p. 1 & Exhibit A4, Document 912.

²⁷¹ See Exhibit A4, Documents 542, 543, and 544 & September 25 Transcript p. 1571-1574.

Board approved the final list of Task Force members²⁷² and its mandate: "To investigate and recommend to the Board of Directors, the feasibility of TREB adopting a VOW Policy".²⁷³

234. The next day, Mr. Richardson emailed Task Force members copies of the meeting agenda for the March 31st meeting, as well as background documents on the NAR VOW Policy.²⁷⁴

f) March to May 2011: TREB's VOW Task Force

235. TREB's VOW Task Force first met on March 31, 2011. The Task Force members were all agents.²⁷⁵ However, solving "the VOW issues" was so important (likely given the pressure from the Commissioner) that Mr. Richardson himself joined the VOW Task Force as a staff liaison. He would ultimately prepare minutes of each meeting, prepare the draft policy and rules, and write the VOW Task Force's final report.²⁷⁶

236. The VOW Task Force met four times: March 31, April 21, May 12, and May 20.²⁷⁷ It delivered a final report that recommended significant restrictions on VOWs. Although the VOW Task Force decided at its initial meeting to simply "trebicize" the NAR VOW Policy and rules,²⁷⁸ the Task Force ultimately recommended a policy and rules which removed the critical non-discrimination language that was the cornerstone of the NAR VOW Policy, and the Commissioner's position on treatment of VOWs.

²⁷² Exhibit CA3, Document 1213 p. 1 & Exhibit A4, Document 914.

²⁷³ Exhibit R39, Richardson Statement, Exhibit BB p. 458.

²⁷⁴ Exhibit R39, Richardson Statement, Exhibit BB p. 454-492.

²⁷⁵ Exhibit R39, Richardson Statement, Exhibit BB p. 455.

²⁷⁶ September 25 Transcript p. 1397-1399.

²⁷⁷ Exhibit CR40, Richardson Statement, Exhibits CC (March 31 Minutes), DD (April 21 Minutes), EE (May 12 Minutes) & GG (May 20 Minutes). These minutes were made public at the hearing. See September 24 Transcript, p. 1249-1252.

²⁷⁸ Exhibit CR40, Richardson Statement Exhibit CC, p. 495. These minutes were made public at the hearing. See September 24 Transcript, p. 1249-1252.

237. On May 18, 2011, Mr. Richardson circulated a "trebicized" (i.e., revised) version of the NAR VOW Policy (the "May 18 Drafts"). The May 18 Drafts tracked the NAR VOW Policy with minor changes to adjust the language for a Canadian context. But whereas the NAR VOW Policy required equal treatment of VOWs and other delivery mechanisms, the May 18 Drafts draft struck out this critical non-discrimination language:

~~1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of M L S listing data in providing brokerage services via all other delivery mechanisms:~~

~~a. A Participant's Member's VOW may not make available for search by or display to Registrants Consumers the following data intended exclusively for other MLS Participants Members and their affiliated licensees brokers and salespersons:²⁷⁹~~

238. NAR's VOW Policy permitted restriction on display of certain information only if the restriction applied to all delivery mechanisms. The May 18 Drafts were just the opposite. They targeted VOWs and imposed no restriction on how members could display MLS data through other delivery mechanisms.

239. On May 20, 2011, the VOW Task Force approved the report and recommended the discriminatory May 18 Drafts.²⁸⁰ Its report and the May 18 Drafts went to TREB's Board of Directors. On May 26, 2011, even though TREB's Board knew the Commissioner insisted on a VOW policy that did not discriminate between VOWs and other delivery mechanisms, the Board approved the discriminatory May 18 Drafts. It directed the May 18 Drafts be included in the

²⁷⁹ Exhibit CR40, Richardson Statement, Exhibit FF p. 521. These minutes were made public at the hearing. See September 24 Transcript, p. 1249-1252.

²⁸⁰ Exhibit CR40, Richardson Statement, Exhibit GG, p. 538.

MLS Rules and Policies.²⁸¹ That process required review by TREB's MLS Committee, CREA, TREB's lawyers, and the Board again before being published for a 60-day member comment period.²⁸²

240. Initially, during his cross-examination, Mr. Richardson strongly denied that concerns over the competitive threat posed by VOWs had motivated the May 18 Drafts. He flatly denied that any member had expressed concern about sharing MLS data with VOWs. Mr. Richardson stated that he was sure no such discussion had ever occurred:

MR. ROOK: Was there not a concern expressed by the members, or some of them, that, We are the persons that are responsible for the MLS®. We have collected the data. We have paid for it with our fees over the years. And along come the Redfins of this world, whomever they might be, and they want to horn in on the action, and we're being forced to share our information and it is not fair.

MR. RICHARDSON: No.

MR. ROOK: That was never expressed?

MR. RICHARDSON: No.

MR. ROOK: I see. You are sure of that?

MR. RICHARDSON: I am sure of that.²⁸³

241. However, when confronted with emails evidencing such discussions, Mr. Richardson admitted he was wrong.²⁸⁴

²⁸¹ Exhibit CA3, Document 1243, May 26 Minutes, p. 1.

²⁸² Exhibit R39, Richardson Statement, Exhibit LL, p. 561.

²⁸³ September 27 Transcript p. 1683.

²⁸⁴ September 27 Transcript p. 1684-1685.

242. At the May 12th meeting, at least one Task Force member had questioned why agents should share MLS data with VOWs at all. The minutes Mr. Richardson drafted do not record this discussion.

243. Instead, one email on May 13, 2011 provides a window into the discussions of the VOW Task Force that the May 12th minutes conveniently fail to record. Don Patterson, a VOW Task Force member, emailed Mr. Richardson about the previous day's meeting. He wrote that another member, Chris Slightham (who had also been a member of CREA's 2008 VOW Task Force),²⁸⁵ had questioned the need to share MLS data with VOWs at all. Mr. Patterson then compared VOWs to his experience with "upstart" ATM providers when he had worked in the banking industry, thereby providing insight into how the VOW Task Force members perceived VOWs in the first place. He proposed positioning the VOW issue properly to get positive press. Patterson wrote:

Hi Don,

That was an excellent session yesterday.

I completely understand where Chris is coming from: realtors built the systems & data, why should we be forced to share?

Unfortunately the public and Competition Bureau don't see it that way and I am afraid we would be seen in a very negative light if again making that argument or having our members raise the issue.

When I was at TD Bank, we had a similar issue and argument over the ATM network: why should we be forced to share a system with upstart ATM providers? In the end, there was little or no effect on the Banks as they have continued to flourish in their full service financial model (definite parallels with our industry).

²⁸⁵ Exhibit A87.

If we position this properly, I believe we can get positive press and continue to support our members as they provide professional real estate advice to their clients.

If I can be of assistance going forward, please let me know.²⁸⁶

244. Although he had previously denied such conversations, when confronted with this email on cross-examination, Mr. Richardson admitted they had occurred. However, he tried to downplay it as an isolated incident.

245. It was anything but.

246. The same questions arose during the VOW Task Force's April 21st meeting. Unlike the obviously incomplete May 12th minutes, the April 21st minutes record that some members questioned why agents should be forced to share their listings with VOW operators:

8) Mandatory vs. Opt-out – Brokerage/Seller

- Essential that option exists for seller
- Some feel that mandatory participation is required for success of VOWs
- What about respect for brokerage rights – listings and historical
- Need to discuss this issue further²⁸⁷

g) May 2011: TREB's Reaction to the Commissioner's Application

247. It was not only Task Force members that expressed reluctance about sharing MLS data with VOWs. TREB's directors raised the same concerns after the Commissioner filed the Notice of Application with the Tribunal on May 27, 2011.

²⁸⁶ Exhibit A4, Document 562, p. 1 (emphasis added). See also September 27 Transcript p. 1683-1688.

²⁸⁷ Exhibit CR40, Richardson Statement, Exhibit DD, p. 499 (emphasis added). These minutes were made public at the hearing. See September 24 Transcript, p. 1249-1252.

248. On May 30, 2011, one TREB director, [REDACTED] emailed [REDACTED] fellow directors and TREB's executives. [REDACTED] implied that the relief sought by the Commissioner – sharing MLS data with VOWs – was worse than a knee replacement and claimed that VOW operators wanted the MLS data "for nothing". So incensed was [REDACTED] that [REDACTED] lashed out at the Commissioner personally, saying that the Commissioner needed to "get a life".

This is worse than a knee replacement [sic] ... I say let them start their own VOW .. let them get their own information and show us how great it is .. if it is going to be that wonderful then every member in TREB will jump ship .. But do not ask for the history of a board for 90 odd years and say you want it for nothing .. also if they are that great why have they not brought their ideas to TREB .. oh .. wow .. could it be that we want to make a profit .. also how many businesses have been stopped from doing this ... is it only the three musketeers ... and seeing that she is on a regular paid job by the Conservative Government.. and she gets paid first and we only get paid once the job is done .. never mind all the privacy issues .. and what type of mess would we all be in if they have their way .. maybe .. the negatives should be worked out and the positive things that we are already doing be hi lited .. at some points you just wonder what if we said sorry guys we are closed and loose all the data ... then what.. the lady needs to get a life .. [...].²⁸⁸ sorry guys I am in pain and some bad drugs ..

249. When confronted with this email on cross-examination, Mr. Richardson described it simply as "horrible."²⁸⁹ He admitted that [REDACTED] was expressing the same aversion to sharing MLS data with VOWs as Mr. Slightham had expressed on the VOW Task Force.²⁹⁰

250. At the time in 2011 however, another director, [REDACTED], agreed with [REDACTED] view. [REDACTED] told [REDACTED] that "everyone else is on drugs...not you!" [REDACTED] then likened the Commissioner's request that TREB share MLS data with VOWs to a supermarket filling

²⁸⁸ Exhibit CA56, p. 1 (emphasis added). See also September 27 Transcript p. 1689-1694.

²⁸⁹ September 27 Transcript p. 1694.

²⁹⁰ September 27 Transcript p. 1692.

the shelves with food, opening doors and let everyone help themselves and not having to pay. Obviously unable to charge the consumer for the goods or access to the shelves or use of the premises it will be necessary to seek government assistance to replenish the shelves and maintain the business.²⁹¹

251. ██████████ suggested that TREB would become a "kind of charity food bank for information".²⁹²

252. When asked by the Chair to explain these emails and other documents expressing the same sentiment, TREB's CEO could not. He admitted that reticence about a VOW datafeed reflected a fear of technology (presumably because technology could impact commission levels and upset the remunerative *status quo*):

MADAM JUSTICE SIMPSON: -- over the years? Yes, okay. Does that mean that the real concern that the members seem to have -- some of them at least -- is that these people who take this data and use it are somehow going to be more cost effective and start a price war in the commission department? I mean, that is what is really the problem here, isn't it, a perception that there is going to be a commission price war, rightly or wrongly?

MR. RICHARDSON: I am honestly probably the wrong person to answer that question, in that if there is anything I am not involved in as the CEO of the Toronto Real Estate Board, it is discussions at any point in time about commissions and commission plans, et cetera.

MADAM JUSTICE SIMPSON: Well, seeing that the -- we have agreed, I think, that the idea that they're getting something for nothing is not valid. I was looking for another possible reason why the members, as we've seen, some of them were upset by the notion of a VOW feed going up. That was all I could come up with. Do you have any other idea? You obviously speak to your members and the board and the VOW task force. Any other explanation that makes sense for why they would have the level of concern that we saw in the documents?

²⁹¹ Exhibit CA57, p. 1. See also September 27 Transcript p. 1698-1700.

²⁹² Exhibit CA57 p. 1. See also September 27 Transcript p. 1698-1700.

MR. RICHARDSON: Some may be a little fearful of new technology. Other than that, I really don't have much of an explanation. It might be a good question to ask some of the practitioners who are going to follow me with evidence.²⁹³

253. Counsel did ask a practitioner who followed Mr. Richardson. On cross-examination, Mr. Sage admitted agents' concerns that technology will put downward pressure on commission rates:

MR. ROOK: I appreciate that. I am asking you for a more general observation at this point. I am suggesting to you that there are some members of the real estate community, if I can put it that way –

MR. SAGE: Sure.

MR. ROOK: -- who are concerned that the introduction of more and more technology will put pressure on commission rates.

MR. SAGE: I'm sure there are some members that would.

MR. ROOK: And that is something that you have heard expressed, have you not, over the years?

MR. SAGE: I couldn't narrow it down to who, but, yes.²⁹⁴

h) June 2011: TREB's Lawyers Revise the draft VOW Rules and Policy

254. In accordance with the Board's direction to enshrine the discriminatory May 18 Drafts in TREB's MLS Rules and Policies, the MLS Committee convened a special meeting on June 1, 2011. It made minor revisions and recommended the revised version to the Board.²⁹⁵ On June 9,

²⁹³ September 27 Transcript p. 1741-1742.

²⁹⁴ September 28 Transcript p. 1873-1874 (emphasis added).

²⁹⁵ Exhibit CR40, Richardson Statement, Exhibit II, p. 542-543. See also September 27 Transcript p. 1712-1713.

2011, the Board approved the MLS Committee's revisions and the drafts were sent for review to TREB's lawyers and to CREA's competition counsel.²⁹⁶

255. On June 10, 2011, Gardiner Roberts, TREB's lawyers, circulated revised versions of the May 18 Drafts (the "June 10 Drafts").²⁹⁷ Like the May 18 Drafts, the June 10 Drafts discriminated against VOWs. Only VOWs could not display MLS data. Display via other delivery mechanisms was permitted.

256. On June 13, 2011, MLS Committee met again.²⁹⁸ Mr. Richardson claims that Paul Stoyan of Gardiner Roberts reviewed additional changes to the drafts with the MLS Committee, although the minutes do not record specifics of the revisions.²⁹⁹ According to Mr. Richardson, Mr. Stoyan's review included language that would appear for the first time in drafts dated June 15, 2011 (the "June 15 Drafts").³⁰⁰ The below table shows the differences in the relevant provision:

May 18 & June 10 Draft	June 15 Draft
A Member's VOW shall not make available for search by, or display to, Consumers any of the following information:	A Member, whether through a Member's VOW or by any other means, may not make available for search by, or display to, Consumers the following MLS data intended exclusively for other Members and their brokers and salesperson, subject to applicable laws, regulations and the RECO Rules:

²⁹⁶ Exhibit CR40, Richardson Statement, Exhibit JJ, p. 546. See also September 27 Transcript p. 1712-1713.

²⁹⁷ Exhibit A4, Documents 598 (Policy), 599 (Rules), & 600 (Glossary).

²⁹⁸ Exhibit CA3, Document 1304. See also September 27 Transcript p. 1717-1718.

²⁹⁹ September 27 Transcript p. 1718-1719.

³⁰⁰ Exhibit A4, Documents 1269 (Policy) and 1270 (Rules).

257. Thus, whereas the May 18 Drafts and June 10 Drafts had prohibited VOWs alone from displaying certain MLS information, TREB's lawyers added language that purported to prohibit members from displaying the information through a VOW or "by any other means".

258. At its meeting on June 23, 2011, TREB's board approved final drafts dated June 23, 2011 (the "June 23 Drafts").³⁰¹ The June 23 Drafts included the same language as the June 15 Drafts. TREB then circulated the June 23 Drafts for a 60-day member comment period.

259. However, while the language added by Gardiner Roberts appeared to add non-discrimination language, the evidence in this proceeding indicates that it has no effect on non-VOW agents. Discrimination continues in practice. While VOWs cannot display the Historical MLS Data and commission offers, TREB witnesses freely admit that no restrictions exist on other delivery mechanisms. Mr. Richardson admitted on cross-examination that members can and do email listing information with Historical MLS Data directly from Stratus to anyone they want.³⁰²

260. Contrary to any suggestion that TREB's VOW Policy prohibits members from providing Historical MLS Data by other delivery mechanisms, TREB's economist, Dr. Church, bluntly states in his report that "TREB puts no restrictions on the ability of any broker to fax or email WEST listings, pending solds, and sold data to their clients."³⁰³

261. Cross-examination revealed that even Sage Real Estate, owned by Mr. Sage, one of the members of the VOW Task Force, sends out monthly neighbourhood reports to an email mailing

³⁰¹ Exhibit A4, Documents 657 (Policy), 1281 (Rules), and 1282 (Glossary).

³⁰² September 25 Transcript p. 1452-1455.

³⁰³ Exhibit R79, Church Report para 15, p. 11.

list. Recipients need only provide an email address. These reports list every neighbourhood property sold in the last month. They list the address, list price, sold price, days on market, and other supposedly "confidential" or "private" information. Mr. Sage admitted that these reports were not a secret, but he had not mentioned them during his tenure on the VOW Task Force, even as it debated the "confidential" nature of such data.³⁰⁴

i) July and August 2011: TREB's Media Campaign against the Commissioner

262. During the Summer of 2011 and with the advice of its public relations consultant, Navigator, TREB orchestrated a public relations campaign against the Commissioner. Like the initial reaction of its Board, TREB's campaign targeted the Commissioner personally and questioned her motives in litigating against TREB.

263. TREB executives accused the Commissioner of a personal crusade against the real estate industry, not in service of the public interest, but to further her own career. For example, in June 2011, TREB's then President, Bill Johnston, characterized the Commissioner's application as "nothing but an attempt at headline-grabbing".³⁰⁵ Then on July 8, 2011, Johnston suggested increasing the forcefulness of a planned TREB press release to "slap [the Commissioner] around". He wrote:

I think the release is pretty good. I am inclined to take a more adversarial approach. I would also be inclined to state more forcefully that we are doing the right thing independent of any commissioner interference, and that we will resist her attempts to build her career at our expense to the bitter end. Realtors across the country are being slagged by her, and we should slap her around in return.³⁰⁶

³⁰⁴ September 28 Transcript p. 1868.

³⁰⁵ Exhibit A4, Document 602, p. 1.

³⁰⁶ Exhibit A4, Document 681, p. 1 (emphasis added).

264. To "slap the Commissioner around", TREB relied heavily on advice from its public relations consultant, Navigator, and Navigator's principal John Ratchford. In July 2011, Navigator outlined its public relations strategy after discussing the issues raised in the litigation with TREB's executives. Like the internal discussion of the VOW Task Force and the internal emails of the Board of Directors, Navigator's July report provides another window into TREB's motives in opposing the Commissioner's application and in restricting VOWs in the manner it did.

265. Navigator repeated the mantra that VOWs were unfairly taking advantage of data that did not belong to them:

We have outlined a series of proactive tactics which will maintain public pressure and are designed to leverage your three types of supporter: members, third-party supporters, and clients and the general public. Messages will continue to reinforce that the Competition Bureau's comments regarding VOW and MLS are irresponsible, and that your competitors are trying to take advantage of a system at no cost that has been built by TREB for its members through hard work and cost to itself.³⁰⁷

266. Later in the report, Navigator wrote that one of its tactics in the campaign would be to show that "organizations supporting the Competition Bureau's suit are seeking unfair access to TREB's MLS system without fair financial reimbursement."³⁰⁸

267. Navigator recommended an aggressive campaign noting that the "tribunal and the Competition Bureau will respond to public pressure..."³⁰⁹ Thus, as part of its public relations

³⁰⁷ Exhibit A4, Document 675, p. 5. See also September 27 Transcript p. 1703-1704.

³⁰⁸ Exhibit A4, Document 675, p. 6. See also September 27 Transcript p. 1706-1707.

³⁰⁹ Exhibit A4, Document 675, p. 4 (emphasis added). See also September 27 Transcript p. 1707-1708.

campaign in 2011, TREB seized every opportunity to publicly question the Commissioner's motives:

- (a) In a July 8, 2011 press release, TREB stated that it had "responded to more legal and publicity manoeuvres by the Commissioner of the Competition Bureau."³¹⁰
- (b) TREB's press release on August 19, 2011 quoted TREB's new President, Mr. Silver, who described the Commissioner's Amended Application as "unnecessary posturing for publicity."³¹¹
- (c) TREB continued this approach in its September 2, 2011 press release announcing that "the Commissioner continues to posture..."³¹²

268. TREB and Navigator also brainstormed creative ways to publicly embarrass the Commissioner. On August 23, 2011, Mr. Palmer emailed Mr. Ratchford about TREB's plan to uncover how much money the Competition Bureau had spent investigating TREB to date. Mr. Palmer wrote, "we're contemplating a Freedom of Information request for the Bureau to release records showing resources expended to date challenging TREB on this issue. Is this a wise course of action and, if so, is it viable?"³¹³

269. Mr. Ratchford replied the next day approving of TREB's proposed FOI request. He cautioned that "the Commissioner may attempt to resist an FOI application on the basis of privilege or some other exception". But he noted that the application would still be worth the

³¹⁰ Exhibit A4, Document 1276, p. 2.

³¹¹ Exhibit A4, Document 1276, p. 3.

³¹² Exhibit A4, Document 1276, p. 5.

³¹³ Exhibit A4, Document 698, p. 1.

effort because "Even if the Commissioner is able to resist it, TREB could later say that the Commissioner is refusing to "come clean" about the costs of her unnecessary application."³¹⁴

270. In other words, the FOI request was seen as a no-lose situation for TREB. If TREB found out how much the Bureau had spent investigating and litigating against TREB, it would draw public attention to the (hopefully large) amounts spent. If TREB could not obtain this information, it could accuse the Commissioner of having something to hide.

j) August 2011: TREB's Board Approves Final VOW Policy and Rules

271. By the end of the summer, the 60-day member comment period had passed. On August 25, 2011, TREB's Board met again to consider the final VOW Policy and Rules. Surprisingly, what should have been a formality took nearly an hour of the Board's time. Unfortunately, because TREB has claimed privilege over the discussions, there is no record of what was discussed. The minutes record that an hour-long round table Q&A session occurred.³¹⁵ Mr. Richardson could not even testify about this meeting since he did not attend it.³¹⁶

272. Although he did not attend the meeting, later that day Mr. Richardson emailed a copy of the final VOW Rules and Policy to certain "key CEOs", including Tom Wright, RECO's CEO.³¹⁷

k) November 2011: TREB Implements its VOW Datafeed but Limits How Members Provide Services Through VOWs

273. In November 2011, TREB launched its VOW datafeed through which it provides the MLS listing information to VOW operators for display on a VOW. As expected, given TREB's

³¹⁴ Exhibit A4, Document 710, p. 3.

³¹⁵ Exhibit CR40, Richardson Statement, Exhibit NN p. 588. See also September 24 Transcript p. 1287-1289.

³¹⁶ September 24 Transcript p. 1287-1288.

³¹⁷ September 24 Transcript p. 1300.

restrictive VOW Rules and Policies, its VOW datafeed lacked the Historical MLS Data and offers of commission. TREB also required VOW operators to execute an agreement which imposed additional discriminatory restrictions. In total, the launch of TREB's VOW datafeed confirmed that TREB restricted how its members provide MLS data and real estate brokerage services over a VOW in three distinct ways.

274. *First*, TREB's VOW Rules and Policies prohibit members from making certain MLS data available for search or display on a VOW. Rule 823 contains the main prohibition, which Policies 15, 17, and 24 assist in enforcing. Rule 823 provides that:

A Member, whether through a Member's VOW or by any other means, may not make available for search by, or display to, Consumers the following MLS® data intended exclusively for other Members and their brokers and salespersons, subject to applicable laws, regulations and the RECO Rules:

- (a) Expired, withdrawn, suspended or terminated Listings, and pending solds or leases, including Listings where sellers and buyers have entered into an agreement that has not yet closed;
- (b) The compensation offered to other Members;
- (c) The seller's name and contact information, unless otherwise directed by the seller to do so;
- (d) Instructions or remarks intended for cooperating brokers only, such as those regarding showings or security of listed property; and
- (e) Sold data, unless the method of use of actual sales price of completed transactions is in compliance with RECO Rules and applicable privacy laws.³¹⁸

³¹⁸ Exhibit R39, Richardson Statement, Exhibit OO p. 600.

275. Members who wish to provide the MLS data listed above in (a), (b), and (e) to their clients or customers as part of the real estate brokerage services they provide must do so through another, less efficient delivery mechanism, such as email.

276. *Second*, TREB restricted how its members provide real estate brokerage services over a VOW by excluding critical MLS data from the VOW datafeed. Once listings became unavailable in TREB's MLS database (i.e., no longer listed for sale), they simply disappeared from the VOW datafeed.³¹⁹ The result is that the VOW datafeed lacks the Historical MLS Data and the offers of commissions from Active listings at issue in this proceeding.

277. *Third*, TREB's VOW Datafeed Agreement limits the use members can make of the limited MLS data in the VOW datafeed. According to the VOW Datafeed Agreement, VOW operators can only use the information in the feed for one purpose: to display the MLS data on a VOW to consumers.³²⁰ They cannot use it more generally to provide real estate brokerage services³²¹ (which might include manipulating the data internally to provide insight and analysis for clients and customers). Such manipulation appears to violate sections 4.1, 6.2(f) and (i) which restrict how VOW operators can use the MLS data arriving through the VOW datafeed.

278. For example, section 4.1 provides that "Subject to the terms and conditions of this Agreement and the VOW Policy and Rules, TREB will provide to Member or AVP, if operating Member's VOW on behalf of Member, a VOW Datafeed to Member or AVP, solely and exclusively for the Purpose ("Services")."

³¹⁹ Exhibit A2, McMullin Statement, para 105, p. 30.

³²⁰ Exhibit R39, Richardson Statement, Exhibit PP, p. 618.

³²¹ Exhibit R39, Richardson Statement, Exhibit PP, p. 621, s. 6(f).

279. The Agreement defines "Purpose" as only the *display* of Listing information:

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

280. These restrictions appear to prohibit members from using the MLS data received through the VOW datafeed internally to perform neighbourhood analysis and other useful analysis. To do such analysis, they would have to copy data manually from Stratus, a costly and time consuming endeavour. As Mr. Pasalis testified:

MR. PASALIS: [...] I mean, again, if we want to discuss this, I mean we might need to look at the VOW policy. My understanding is that we can't use this data for our internal business purposes other than displaying it on a website. I mean, it might be worthwhile to bring it up to verify that. So my understanding is, I am not allowed to analyze this data and do statistics and do what I am doing online. I have to cut and paste from PDF.³²²

281. In contrast, such a restriction does not apply to non-VOW operators. TREB's Authorized User Agreement ("AUA") expressly permits members to access and use the MLS Database "for the purpose of and directly related to the Authorized User's ordinary carrying on of its business..."³²³ The limit is not display, but service provision. This provides an opportunity for sophisticated use of the MLS data by copying the MLS data from Stratus, as Sage Real Estate does. VOW operators do not have this opportunity with data in the VOW datafeed. In fact, the

³²² September 12 Transcript p. 585 (emphasis added).

³²³ Exhibit R39, Richardson Statement, Exhibit E p. 175, s. 2.

AUA permits members to copy information from the MLS Database to provide to persons involved in the buying or selling of real estate.³²⁴

TREB is a "Person" under s. 79(1)(a)

282. The *Competition Act* does not define "person", but the *Interpretation Act*³²⁵ provides that in every Federal enactment, "person" or any word or expression descriptive of a person, includes a corporation.³²⁶ TREB is trade association that operates as a corporation.

Product Market

283. "Class or species of business" in s. 79(1)(a) means the product market.³²⁷ Products are in the same market if they are *close* substitutes.³²⁸ To identify close substitutes, the Tribunal uses the substitutability test: would a buyer switch from one product to another in response to a change in price? The Tribunal outlined the substitutability test in *D & B*:

The standard test for establishing whether products that are differentiated in one or more ways are close substitutes and therefore in the same product market is to determine whether small changes in relative price would cause buyers to switch from one product to another. Direct evidence of switching behaviour in response to small changes in relative price would provide proof of substitutability. Where price and quantity changes are not in evidence, [...], it is necessary to answer the question less directly by examining the evidence of both buyers and suppliers regarding the characteristics, the intended use and the price of the various types of market tracking services. As noted in *NutraSweet*, the

³²⁴ Exhibit R39, Richardson Statement, Exhibit E p. 175, s. 4.

³²⁵ RSC, 1985, c. I-21.

³²⁶ *Interpretation Act*, section 35(1).

³²⁷ *Director of Investigation and Research v. D & B Companies of Canada* (1995), 64 CPR (3d) 216, p. 231g [*D & B*], Commissioner's Book of Authorities, vol. 1, tab 1; see also *Director of Investigation and Research v. NutraSweet* (1990) 32 CPR (3d) 1, pp. 31h-32b [*NutraSweet*], Commissioner's Book of Authorities, vol. 1, tab 2.

³²⁸ *Director of Investigation and Research v. Tele-Direct (Publications) Inc. et al.* (1997) 73 CPR (3d) 1 at p. 35a-c [*Tele-Direct*]. Commissioner's Book of Authorities, vol. 1, tab 3.

characteristics to be examined in establishing whether products are close substitutes will vary from case to case.³²⁹

284. As the Tribunal noted in *D & B*, evidence of substitutability can be both direct and indirect. Direct evidence of substitutability will be considered first and is very persuasive. For example, in *Tele-Direct*, the Tribunal held that statistical evidence of high demand elasticity is "virtually conclusive that two products are in the same product market."³³⁰ Likewise, anecdotal evidence from buyers about their price sensitivity is "a persuasive factor tending to show that products are close substitutes".³³¹

285. Where direct evidence is unavailable, the Tribunal examines indirect evidence. Examples of indirect evidence include:

- (i) the end use, physical and technical characteristics of the product(s), usually referred to as "functional interchangeability";
- (ii) the views, strategies, behaviour and identity of buyers;
- (iii) the views, strategies and behaviour of competitors (inter-industry competition);
- (iv) price relationships and relative price levels; and

³²⁹ *D & B, supra*, p. 241b-c, Commissioner's Book of Authorities, vol. 1, tab 1.

³³⁰ *Tele-Direct, supra*, p. 36a, Commissioner's Book of Authorities, vol. 1, tab 3, citing *Director of Investigation and Research v. Southam Inc.* (1995), 63 CPR (3d) 1, at p. 60d [*Southam*], Commissioner's Book of Authorities, vol. 2, tab 4.

³³¹ *Tele-Direct, supra*, p. 36, Commissioner's Book of Authorities, vol. 1, tab 3, citing *Southam, supra*, p. 60d, Commissioner's Book of Authorities, vol. 2, tab 4.

(v) switching costs.³³²

286. The first example of indirect evidence, functional interchangeability, is a “necessary but not sufficient condition to be met before products will be placed in the same market.”³³³ This is the case because, while functional interchangeability reveals that switching is *possible*, it does not indicate whether switching *has happened or is likely to happen*. Thus, other indirect evidence must supplement evidence of functional interchangeability to establish actual or likely consumer behaviour.³³⁴ As the Tribunal stated in *Superior Propane*:

While functional interchangeability can indicate something about the possibility of substitution between two or more products, it does not convey any information about the actual or likely consumer behaviour in response to the exercise of market power.

In that regard the evidence drawn from actual behaviour (i.e., the elasticities) and the opinions provided by expert witnesses such as Professors Ryan, Plourde, Schwindt and Globerman carry more weight in the Tribunal’s opinion as to what products constitute the relevant competition market. Consequently, the Tribunal finds that the relevant competition market is “retail propane” and excludes other fuels.³³⁵

287. In addition, when evaluating whether products are functionally interchangeable, the Tribunal will consider only a product's usual uses and not mere possible uses unsupported by the evidence.³³⁶

³³² *Tele-Direct, supra*, p. 37a, Commissioner's Book of Authorities, vol. 1, tab 3.

³³³ *Tele-Direct, supra*, p. 38c, Commissioner's Book of Authorities, vol. 1, tab 3, citing *Southam, supra*, p. 63e, Commissioner's Book of Authorities, vol. 2, tab 4.

³³⁴ *Tele-Direct, supra*, p. 38e-g, Commissioner's Book of Authorities, vol. 1, tab 3.

³³⁵ *Commissioner of Competition v. Superior Propane Inc. et al.* (2001) 7 CPR (4th) 385, paras. 68-69, p. 409 (emphasis added) [*Superior Propane*], Commissioner's Book of Authorities, vol. 2, tab 5.

³³⁶ *Tele-Direct, supra*, p. 46c, Commissioner's Book of Authorities, vol. 1, tab 3.

288. Application of the Tribunal's substitutability test to the evidence establishes that there are two related product markets for the purposes of this proceeding: first, the market for the provision of *buy-side* real estate brokerage services that provide MLS accessibility; and second, the market for the provision of *sell-side* real estate brokerage services that provide MLS accessibility. In overview, the direct and indirect evidence of these two markets is as follows:

- (a) The anecdotal evidence from industry participants is that MLS-based services are without substitute. In addition, the parties' economists agree that MLS access provides significant benefits to consumers. These benefits make it unlikely that consumers would switch away from MLS-based services in response to price increases.
- (b) Prices for MLS-based real estate brokerage services have increased significantly in the last five years but there is no evidence that home buyers and sellers have switched away from MLS-based brokerage services. Instead, the evidence is that more home buyers and sellers use MLS-based services, and that agents who lose access to the MLS cease providing services all together.
- (c) Evaluation of non-MLS information sources confirms they are not close substitutes. The TREB MLS is the only comprehensive source of pending sold and WEST listing information in the GTA. Agents use this information when providing services to home buyers and sellers, who find the information very valuable and useful. If home buyers and sellers switched away from MLS-based services, they would lose access to this critical information, making switching very unlikely. Information from non-MLS sources is not a close substitute of

information in the TREB MLS. Non-MLS sources lack the comprehensiveness of TREB's MLS information, the quality of their information is inferior and less useful, and there are significant barriers associated with obtaining the information. As a result, there is no evidence of agents or consumers switching to information from non-MLS sources.

- (d) Dr. Church's proposed product market is too narrow and riddled with flaws. It fails to appreciate the scope of the Commissioner's application and of TREB's restrictive practices which go beyond what Dr. Church labels the "confidential price data". Even Dr. Flyer rejected Dr. Church's narrow product market.

289. A discussion of each of these points follows.

a) Industry Participants Consider the MLS without Close Substitute

290. Industry participants consider the TREB MLS without close substitute. Economic evidence confirms this anecdotal evidence: an MLS creates efficiencies for home buyers and sellers such that the benefits of MLS-based brokerage services outweigh the cost of rising prices. Home buyers and sellers are unlikely to sacrifice these efficiencies by switching to inferior non-MLS based services. Direct evidence that consumers will not switch away from MLS-based services confirms a distinct product market of MLS-based brokerage services.

291. According to industry participants, the MLS has no close substitutes. Real estate professionals consistently testify that they require MLS access to serve their clients, which suggests that their clients refuse to switch away from MLS-based services. Because if home buyers and sellers switched from MLS-based services, real estate professionals would not need MLS access. They would provide non-MLS-based services instead. But this does not occur.

Instead, Mr. Enchin testified that "[r]ealtors require access to the MLS to provide services to their clients."³³⁷ Mr. McMullin agreed: "Access to the MLS database is essential to the purchase and sale of residential real estate in [the Halifax Regional Municipality]".³³⁸ Mr. Pasalis testified that his brokerage's business model "depends on having access to data, particularly from the TREB MLS system."³³⁹ Even Mr. Syrianos testified that while "exclusive" listings (i.e., non-MLS listings) exist, they are very uncommon, and that many sellers who begin "exclusive" choose to later sell through the MLS.³⁴⁰

292. TREB and CREA documents agree that home buyers and sellers consider MLS access critical. Nearly a decade ago in 2003, CREA's EDU Task Force reported that home buyers and sellers "have come to rely on the ability of MLS to market properties".³⁴¹ Since then, TREB and CREA have described a board's MLS as "invaluable to REALTORS and their clients"³⁴² and "the single most powerful tool for buying and selling a home".³⁴³ Home buyers and sellers are unlikely to switch away from such an "invaluable" and "powerful" tool as the MLS in favour of non-MLS-based services.

293. The anecdotal evidence of an MLS's importance is not surprising. Dr. Vistnes and Dr. Church agreed that MLSs provide unique economic benefits to home buyers and sellers. Dr. Church stated that home sellers rely on the MLS to increase their chances of successfully selling their home. He noted that the "MLS® is the tool most commonly used by agents in Canada to

³³⁷ Exhibit A20, Enchin Statement, para 34, p. 11.

³³⁸ Exhibit A2, McMullin Statement, para 20, p. 6.

³³⁹ Exhibit A10, Pasalis Statement, para 6 p. 2.

³⁴⁰ September 28 Transcript p. 1909-1910.

³⁴¹ Exhibit IC84, Simonsen Statement, p. 494.

³⁴² Exhibit A4, Document 278, p. 4.

³⁴³ Exhibit A30, First Vistnes Report, para 148, p. 49.

list information about properties for sale. Exposure to the largest possible audience maximises the chances of successfully selling a property."³⁴⁴ Elsewhere he wrote that the MLS "bolsters matching efficiency and reduces transaction costs".³⁴⁵

294. To explain consumers' reliance on MLS-based services, Dr. Vistnes examines the unique benefits MLSs provide to home buyers and sellers. He concludes that MLSs provide significant efficiencies to consumers "because MLSs can facilitate matches between buyers and sellers and because MLSs reduce agents' costs of facilitating those matches."³⁴⁶ These efficiencies are not marginal. Instead, they are significant enough that Dr. Vistnes cautions that they "make it very important for brokers and agents to have access to the MLS since, absent access, they cannot effectively compete with other brokers and agents that do have access to the MLS and its related efficiencies."³⁴⁷ In other words, service providers without MLS access provide less efficient services to home buyers and sellers making home buyers and sellers unlikely to use their services or switch away from MLS-based services.

295. There is no evidence that any other product or service offers home buyers and sellers the efficiencies of the TREB MLS. Since other products cannot offer these efficiencies, home buyers and sellers are unlikely to switch away from MLS-based services because in doing so, they would lose the associated efficiencies. This direct evidence confirms that MLS-based services have no close substitutes.

³⁴⁴ Exhibit R79, Church Report, para 39, p. 21.

³⁴⁵ Exhibit R79, Church Report, para 91, p. 41.

³⁴⁶ Exhibit A30, First Vistnes Report, para 21, p. 10.

³⁴⁷ Exhibit A30, First Vistnes Report, para 21, p. 10.

b) Even With Rising Prices, There is No Evidence of Home Buyers and Sellers Switching away from MLS-based Services

296. If substitutes existed for MLS-based real estate brokerage services, one would expect direct evidence that home buyers and sellers would switch to other products in response to rising prices. Prices for MLS-based real estate brokerage services in the GTA have risen significantly since at least 2007. Yet, there is no evidence that home buyer and sellers have switched to other products. Instead, the evidence is that they use MLS-based services more. In other words, there is direct evidence that consumers do *not* substitute to other products in response to significant price increases.

297. The evidence before the Tribunal is that GTA agents receive more money today than they did in 2007. In other words, prices for real estate brokerage services have risen since 2007. Dr. Vistnes calculates the price increase at approximately 22%.³⁴⁸

298. Dr. Vistnes calculated the 22% price increase by analyzing the only source of comprehensive data on commission rates available at the time: data from TREB's MLS. Every TREB MLS listing includes an offer of compensation made by the listing agent to the cooperating agent. Dr. Vistnes reviewed these offers. He found that between January 1, 2007 and February 1, 2012, the overwhelming majority of all listings, approximately 85%, offered the cooperating agent a 2.5% commission on the final sale price.³⁴⁹ Offers of 2.25% were the next most prevalent offer, being offered approximately 8% of the time. Very infrequent offers of 2%, 2.75%, and 3% made up the balance of the offers.

³⁴⁸ Exhibit A30, First Vistnes Report, para 99, p. 35.

³⁴⁹ Exhibit A30, First Vistnes Report, Exhibit 2a, p. 102.

299. Not only did Dr. Vistnes find that offers of 2.5% were the overwhelming majority of offers, but he found that the percentage of listings offering 2.5% remained relatively constant over time. Rates fell only very slightly as there were marginally fewer offers of 2.5% and marginally more offers of a 2.25% commission in 2011 and January 2012.³⁵⁰

300. While offers of commission remained largely unchanged at 2.5%, Dr. Vistnes noted that home prices in the GTA rose substantially between 2007 and 2012. Using the MLS Data, he calculated that, in 2007, the average GTA home sold through the TREB MLS sold for \$369,340. Only five years later, it sold for \$464,264.³⁵¹

301. Because home prices increased at the same time as offers of commission remained static, the dollar value of the offers of commission increased significantly over this period. In 2007, the average commission offered to cooperating agents had a dollar value of \$9,172. By 2012 its dollar value was approximately 22% higher, at \$11,405.³⁵²

302. TREB has responded to Dr. Vistnes' analysis with no statistical evidence of its own. There is no statistical evidence before the Tribunal that offers of commission or actual commission rates have fallen since 2007, as one would expect to occur if home buyers and sellers were switching away from MLS-based services and the supply of real estate brokerage services remained constant or increased (which it has as discussed elsewhere in these submissions).

³⁵⁰ Exhibit A30, First Vistnes Report, Exhibit 2a, p. 102.

³⁵¹ Exhibit A30, First Vistnes Report, Exhibit 1b, p. 95.

³⁵² Exhibit A30, First Vistnes Report, Exhibit 2c, p. 104.

303. Some of TREBs witnesses testified that commission rates vary. When put to the test by Dr. Vistnes' analysis and evidence of the frequency with which they offered a 2.5% commission to cooperating agents, they responded by producing some, but not all, of their commission records.

304. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁵³

305. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁵⁴
[REDACTED]
[REDACTED]

306. [REDACTED]
[REDACTED]
[REDACTED]³⁵⁵ [REDACTED] On cross-examination, Mr. Sage admitted that his brokerage tries to maximize the value it provides

353 [REDACTED]
354 [REDACTED]
355 [REDACTED]

to its customers but that this manifests itself in the commission rates "being as close to 2½ percent on the sell side and 2½ on the buy side" as possible.³⁵⁶

307. Despite evidence that overall payments for residential real estate brokerage services are rising, there is no evidence that sellers have switched away from MLS-based services. Even Dr. Church admits that the vast majority of home sellers use MLS-based services. For example, he cites an American report that 87% of sellers in the United States make use of agents.³⁵⁷ He offers no evidence that given rising prices more GTA sellers are selling their homes themselves, colloquially known as "going FSBO" (for sale by owner). Instead, Dr. Church admits that FSBO sales are not prevalent in Canada: "the share of houses for sale by owners is much lower in Canada than elsewhere".³⁵⁸

308. There is also no evidence that home buyers have switched away from MLS-based services. Dr. Church admits that 89% of buyers in the United States make use of agents.³⁵⁹ Dr. Vistnes analyzed the MLS Data to determine the upper bound of buyers buying a home without an agent, colloquially known as "going solo". He confirmed that the upper bound has remained relatively unchanged since 2007.³⁶⁰ One would expect a contrary result if home buyers were switching away from agent services and going solo.

309. In fact, rather than showing that home buyers and sellers are switching away from MLS-based services, the evidence shows that they are using MLS-based services *even more*. For example, CREA's National Ad Campaign 2006 Overview reports that in 2006:

³⁵⁶ September 28 Transcript p. 1876.

³⁵⁷ Exhibit R79, Church Report, para 29, p. 16.

³⁵⁸ Exhibit R79, Church Report, at footnote 11, p. 17.

³⁵⁹ Exhibit R79, Church Report, at para 29, p. 16.

³⁶⁰ Exhibit A30, First Vistnes Report, para 105, p. 36-37.

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- (a) more Toronto home buyers (87% v. 68%) and sellers (89% v. 84%) used a Realtor to buy and sell homes than they did in 2003;³⁶¹ and
- (b) more Toronto home buyers (78% v. 73%) and sellers (84% v. 72%) bought and sold homes through an MLS listing than they did in 2003.³⁶²

310. Dr. Vistnes concluded that it is not surprising that there is no evidence of buyers "going solo" and sellers "going FSBO". He reasoned that the incentive to save the entire 5% commission will often be sufficient to attract those home sellers that are comfortable selling their home themselves to the FSBO option. A small but significant increase in the price of MLS-based brokerage services is unlikely to entice more sellers to go the FSBO route. As Dr. Vistnes explains:

Consider, for example, a home selling for \$400,000 and a commission of 5 percent. By going FSBO, a home seller could save \$20,000 in avoided commission fees. That potential savings is sufficiently large to persuade at least some consumers to try the FSBO approach. Now consider a 5 percent increase in brokerage services. This would increase the commission to 5.25 percent, and thus result in a commission payment of \$21,000. This \$1,000 increase in potential savings is unlikely to cause much additional substitution since those consumers that were comfortable selling their own home would likely have already chosen the FSBO route to obtain \$20,000 in savings.³⁶³

311. Dr. Vistnes also noted that typically home buyers do not directly pay their own agent.³⁶⁴ The buy-side agent receives a portion of the total commission payment made by the seller. The commission payment is essentially a hidden cost to the buyer in the total purchase price of the

³⁶¹ Exhibit A4, Document 869, p. 50.

³⁶² Exhibit A4, Document 869, p. 51.

³⁶³ Exhibit A30, First Vistnes Report, para 98, p. 34-35.

³⁶⁴ Exhibit A30, First Vistnes Report, para 104, p. 36.

home. This leads to the erroneous feeling that the buy-side agent's services are free, thus there is no disadvantage to hiring an agent as a buyer.

312. Although there is some evidence that a significant number of residential properties are sold every year in the GTA privately (usually by a developer in the case of a condominium or new home development), there is no evidence that buyers have switched from purchasing homes listed on the MLS to those sold privately because of the rising costs of MLS-based brokerage services. As noted by Dr. Vistnes, buyers typically do not experience the cost of purchasing real estate brokerage services and thus are insulated from rising prices for brokerage services.

313. Obviously, new home sales and new condominium sales have absolutely no bearing on whether home sellers use MLS-based brokerage services to sell their home.

314. Finally, one would expect that if home buyers and sellers had switched or wanted to switch away from MLS-based services, there would be evidence of more agents offering non-MLS-based brokerage services. Again, this is not the case. There is no evidence that agents have stopped providing MLS-based services to cater to home buyers and sellers who want something different.

315. Instead, the evidence is that TREB's membership is growing rapidly, indicating that there is a demand for more agents with MLS access who can provide MLS-based services to home buyers and sellers.

316. On other side of the coin, the evidence is that when agents cannot access the MLS, they cease providing brokerage services (BNV) or choose not to enter the GTA marketplace (ViewPoint).

317. Direct evidence of a lack of switching in response to rising prices confirms that MLS-based brokerage services as without close substitute.

c) **TREB's MLS is the Only Comprehensive Source of Critical Information and Non-MLS Sources are not Close Substitutes**

318. The TREB MLS offers unique information that home buyers and sellers value. It is not "functionally interchangeable" with other information sources. Non-MLS information sources are not close substitutes because they do not provide the same quality, timeliness, or comprehensiveness of the MLS data. Home buyers and sellers are unlikely to switch away from MLS-based services to services using inferior information.

319. The TREB MLS offers uniquely comprehensive information to GTA home buyers and sellers. It is the only comprehensive source of information in the GTA about the pending sale price of properties that sell through the TREB MLS and the status of properties listed for sale through the TREB MLS (WEST listings).

320. Although large franchisors *may* (there is no evidence that they do) have databases with information on pending solds and WEST listings, the utility of such information would be extremely limited. Even the largest franchisor would have only about 28% of the WEST and pending listings.³⁶⁵ Agents with access to that information would know what happened to the 28% of the Unavailable homes, but they would have no idea what happened to the other 72%. They would be unable to advise their clients about whether particular homes sold, expired or were withdrawn. This problem would be particularly acute in neighbourhoods where the large franchisor had fewer transactions. Agents would be left telling their clients, "Well I can't tell you

³⁶⁵ Exhibit R79, Church Report, para 214 p. 85.

what happened with that home, because I just don't know. It's a Royal LePage home, or a Re/Max home. I'm a Century 21 agent."

321. In addition to comprehensive WEST and pending listings, TREB's MLS also offers the final sale price and sale date of properties that have sold through the TREB MLS. In 2011 alone, 89,347 residential properties sold through the TREB MLS. This figure represents a significant majority of all residential property sales in the GTA. Even Dr. Church cites evidence which indicates that up to 70% of all GTA residential transactions occur through the TREB MLS.³⁶⁶ A CREA survey puts this number even higher (between 78% and 84%).³⁶⁷ Thus, the TREB MLS has a very comprehensive stable of GTA sold data.

322. Perhaps more importantly, the TREB MLS links sold data, pending sold data, and WEST listings to a home's location and physical characteristics. Information about a home's physical characteristics and location permits TREB MLS users to identify comparable homes (i.e., homes with similar physical characteristics and location). Armed with a list of comparables which have sold, pending sold, and WEST listing information, agents advise home sellers and buyers about a home's likely value (i.e., what sellers should list or sell their home for and what buyers should offer or pay for a home) based on what similar properties recently sold for and other activity in the market. This process is usually called a CMA.

323. Industry participants agree that home buyers and sellers value CMAs, and the comprehensive information that permits robust and accurate CMAs. Mr. Gidamy testified that "sellers are very interested in knowing what their property may sell for and one of the most

³⁶⁶ Exhibit R79, Church Report, para 239 p. 108.

³⁶⁷ Exhibit A4, Document 869, p. 51.

important ways to determine a reasonable selling price is through a CMA."³⁶⁸ Ms. Prescott discussed CMAs as a service agents use to "help their clients make informed decisions during what will be one of the biggest transactions of their lives."³⁶⁹ Mr. Enchin characterized the sold and pending sold data underlying CMAs as "the most essential data a Realtor can provide to his or her clients".³⁷⁰

324. Because buying or selling a home is the largest financial transaction in most people's lives, home buyers and sellers value *accurate* CMAs. Accuracy increases with the sample size of comparable properties and the timeliness the information. As TREB admits, "[t]he more extensive and up-to-date the comparable solds to which a broker has access, the more accurate the price estimates that the broker will be able to generate for their customers."³⁷¹

325. Along with active listings, pending sold information and WEST listings are the most up-to-date pieces of information that agents can use to prepare CMAs and otherwise advise their customers about a home's value. Pending solds show the most recently agreed sale price for comparable homes. They provide the best indication of a likely value range.³⁷² WEST listings show what prices buyers have recently rejected, forcing sellers to lower asking prices or to pull the listing from the market. WEST listings tell home sellers what the upper limit of a likely price will be because they show what price level buyers will not accept. Finally, active listings show what sellers are asking for comparable homes in the market today.³⁷³

³⁶⁸ Exhibit A15, Gidamy Statement, para 17, p. 6.

³⁶⁹ Exhibit R62, Prescott Statement, paras 17-18, p. 4.

³⁷⁰ Exhibit A20, Enchin Statement, para 34, p. 11.

³⁷¹ Exhibits A26 & A28, TREB Admission #339.

³⁷² Exhibit A20, Enchin Statement, para 15, p. 6.

³⁷³ Exhibit A4, Document 1345, p. 22.

326. Mr. McMullin of ViewPoint testified that the MLSs he deals with in Nova Scotia are the only source of "the prices of homes that have recently sold, days on market, price reductions/increases and status changes".³⁷⁴ For the GTA market, he testified that, "[t]here is no other comprehensive source of residential properties for sale and sold in the Toronto area."³⁷⁵

327. In the midst of the largest financial transaction of their lives, home buyers and sellers are unlikely to switch away from MLS-based services that provide access to robust, accurate and timely data to help them value a home. Again, this explains why Dr. Vistnes' statistical analysis demonstrated that home buyers and sellers have not switched away from MLS-based services even though prices have risen in the last five years.

328. Despite no evidence that agents or home buyers and sellers *have* switched away from MLS-based services, Dr. Church speculates that they *may* switch to other information sources. He asserts (rather than establishes) that substitutes exist for the Historical MLS Data. His report highlights the speculative nature of his argument:

- (a) "...there is nothing to suggest that any industry participant cannot contract with Teranet, for example, and subject to agreement of Teranet be able to use the relevant data in the manner permitted by current provincial and federal regulations."³⁷⁶

³⁷⁴ Exhibit A2, McMullin Statement, para 11, p. 4.

³⁷⁵ Exhibit A2, McMullin Statement, para 104, p. 22.

³⁷⁶ Exhibit R79, Church Report, para 213, p. 85 (emphasis added).

- (b) "The internal databases that such large franchisors could compile might provide a sample of the MLS data. Depending on how representative it is, it could be used instead of the MLS data, in the valuation process."³⁷⁷

329. Dr. Church's cross-examination also revealed that he had not evaluated whether his proposed substitutes were effective.³⁷⁸

330. Dr. Church's speculation is mistaken. He identifies five potential replacement information sources: Teranet, MPAC, agents' own listings, FSBO websites, and appraisers. In his reply report, Dr. Vistnes considered Dr. Church's five potential replacement sources. He concluded that none is a close substitute for TREB's MLS data because these five sources do not provide the same quality, timeliness, or comprehensiveness of the data in TREB's MLS. Thus, they are not functionally interchangeable with the MLS data and home buyers and sellers are unlikely to switch away from MLS-based services.

331. First, Dr. Vistnes considered information from Teranet. On the evidence, he rejected Teranet as functionally interchangeable from an economic point of view because its data:

- (a) was not as comprehensive as the Historical MLS Data;
- (b) cost far more money than the Historical MLS Data (if it could be obtained at all);
and
- (c) lacked the critical quality and functionality of the Historical MLS Data.

³⁷⁷ Exhibit R79, Church Report, para 215, p. 85 (emphasis added).

³⁷⁸ October 2 Transcript p. 2119.

332. With respect to the comprehensiveness of the Teranet data, Dr. Vistnes noted that Teranet lacks the critical pending sold and WEST listing information that makes the Historical MLS Data so useful and timely.³⁷⁹ Likewise, Teranet lacks other useful listing information found only in the TREB MLS, such as interior photos, days on market, and prices changes.³⁸⁰ Even TREB admits that Teranet's data may be incomplete: "[s]ome GeoWarehouse reports may be incomplete due to the amount of data collected during POLARIS title automation."³⁸¹ Because it lacks comprehensiveness and critical information, Dr. Vistnes concludes that Teranet's data is not a close substitute for TREB's MLS data. Instead, the evidence shows Teranet's data *complements* rather than *substitutes* for TREB's MLS data.³⁸² TREB pays Teranet ██████████ per year so that TREB's members can use Teranet's data in a very limited way. If Teranet's data was a close substitute of the Historical MLS Data, TREB would not need to purchase it for its members use. TREB members would simply use TREB's MLS data exclusively. TREB's purchase of Teranet's data in addition to its own data, implies that Teranet data complements rather than substitutes for the Historical MLS Data.

333. With respect to the high cost of Teranet data, Dr. Vistnes noted that TREB pays Teranet approximately ██████████ per year.³⁸³ In return, TREB members may access Teranet's data, but they face tight restrictions on use. For example, although they can access Teranet data through Teranet's GeoWarehouse product, Teranet does not permit TREB members to republish the data

³⁷⁹ Exhibit A32, Reply Vistnes Report, footnote 119, p. 41.

³⁸⁰ Exhibit A32, Reply Vistnes Report, para 91, p. 42.

³⁸¹ Exhibits A26 & A28, TREB Admission #370.

³⁸² Exhibit A32, Reply Vistnes Report, para 91, p. 42.

³⁸³ Exhibit A32, Reply Vistnes Report, para 91, footnote 127, p. 43.

electronically. This suggests that TREB members would have to pay even more to display Teranet data to their customers in a more fulsome manner on a VOW.

334. In fact, the only evidence before the Tribunal about the cost of Teranet data for an individual VOW operator came from Mr. Enchin, who approached Teranet because he wished to purchase information on the square footage of properties. Teranet told him the information could cost as much as \$5 per information field per property.³⁸⁴ Based on Teranet's quote, Dr. Vistnes calculated that a VOW operator would have to pay about \$450,000 per year – a prohibitively high amount for only one or two data fields.

335. Mr. Enchin's evidence also calls into question Teranet's willingness to provide its data directly to VOW operators at all. When Mr. Enchin explained that he wished to use the Teranet data to develop his own appraisal feature for use on his VOW, Teranet's representatives "left me with the clear impression that they were very reluctant to sell me this information. They told me that Teranet had its own appraisal software which it sells. They said it might be a conflict of interest to sell data fields to me since I planned to use the fields to offer a competing appraisal feature."³⁸⁵

336. Teranet's response to Mr. Enchin is not surprising. Dr. Vistnes noted that Teranet has a strong economic incentive to restrict republication of its data, in part to maintain high revenues from its major customers, such as TREB.³⁸⁶ This evidence raises serious questions about whether Teranet would make its data available to VOW operators for display, no matter what the cost.

³⁸⁴ Exhibit A21, Reply Enchin, para 11, p. 5.

³⁸⁵ Exhibit A21, Reply Enchin, para 11, p. 5.

³⁸⁶ Exhibit A32, Reply Vistnes Report, para 91, p. 43.

337. With respect to the quality and utility of Teranet data, Dr. Vistnes identified testimony from industry participants that non-MLS information sources lacked pending sold information making them less timely and useful than the TREB MLS.³⁸⁷ Even TREB admits that Teranet's data may not be timely, agreeing that "[d]ata contained in GeoWarehouse reports, other than the Parcel Register, may be out of date ten business days or more from data contained in POLARIS (the Land Registration System of Ontario)."³⁸⁸

338. Dr. Vistnes analyzed the TREB MLS data and confirmed the anecdotal evidence of industry participants. He calculated an average period of 7 weeks between when pending sold information becomes available on the TREB MLS and closing (when the parties would register the sale on Ontario land registry system). He also noted that 10 to 14 days pass after closing before the sold information becomes available through Teranet's GeoWarehouse product. Thus, Teranet's data is approximately two months old before it would be available to VOW operators.

339. But stale data is less useful to agents because of the sometimes volatile nature of the housing market. Mr. Enchin testified that:

The timeliness of information matters to Realtors and their customers. Real estate markets can change almost overnight. Realtors need up-to-date information to advise their clients about what the market is like at that moment. Even a 5% price drop is a \$40,000 swing on an \$800,000 home. Because of the money on the line, sellers and buyers want to know what the market is like today, not several months ago (when prices might have been higher or lower). But sales several months ago reported by Teranet or MPAC may not reflect current market conditions. Knowing that a comparable house down the street sold last week for \$500,000 is more

³⁸⁷ Exhibit A20, Enchin Statement, para 15, p. 6. "Other sources of information, such as Teranet, were not as up-to-date and therefore did not as accurately reflect current market conditions as the pending sold information in the MLS did."

³⁸⁸ Exhibits A26 & A28, TREB Admission #369.

useful to sellers and buyers than knowing that another comparable nearby house sold for \$500,000 six months ago.³⁸⁹

340. For all of these reasons, Dr. Vistnes concluded that, from an economic perspective, Teranet's data is not functionally interchangeable with TREB's MLS data, and is therefore not a close substitute. On cross-examination, even Dr. Church admitted that consumers currently have to "pay per draw" to obtain this information,³⁹⁰ and that there are "clearly qualitative differences in the information that is available from Teranet".³⁹¹

341. Second, Dr. Vistnes considered information from MPAC. MPAC receives its information on sold listings from Teranet. Thus, the flaws of Teranet's information apply to MPAC as well and Dr. Vistnes rejected it as a close substitute for the same reasons.³⁹² Like Teranet, the evidence before the Tribunal indicates that MPAC charges a flat fee for access to a very limited amount of property information.³⁹³ The cost of assembling a comprehensive stable of information for use on a VOW would be prohibitive.

342. In addition, evidence demonstrates that even MPAC does not consider its information a close substitute for TREB's MLS data. In June 2010, an MPAC representative emailed TREB and asked to purchase TREB's MLS property listing and sold information.³⁹⁴ If MPAC's information was a close substitute for TREB's MLS data, and in particular the sold information,

³⁸⁹ Exhibit A21, Reply Enchin, para 8, p. 4.

³⁹⁰ October 4 Transcript, p. 2130.

³⁹¹ October 4 Transcript, p. 2130.

³⁹² Exhibit A32, Reply Vistnes Report, paras 93-95, p. 45-46.

³⁹³ Exhibit R47, Pricelist Catalogue, p. 2.

³⁹⁴ Exhibit A4, Document 937, p. 2.

MPAC would not be asking TREB to buy that very information. In light of all of the evidence, information from MPAC is not a close substitute of the Historical MLS Data.

343. Third, Dr. Vistnes considers agents' own information. He specifically tested and rejected Dr. Church's statistical analysis of the TREB MLS Data which purported to show that data from any one of the large franchisors could adequately replace the full complement of TREB MLS data for valuation purposes.

344. Not only does Dr. Church's assertion conflict with TREB's admission that more comprehensive information produces more accurate CMAs,³⁹⁵ but Dr. Vistnes demonstrated in his reply report that Dr. Church's approach of using less than the full TREB MLS dataset produced inaccuracies that would cost GTA home buyers and sellers up to *\$1.4 billion dollars a year*.

345. In his reply report, Dr. Vistnes showed how Dr. Church's "solution" (using only data from the largest corporate franchise brokerage to value GTA homes) would produce errors in estimated home values of approximately \$85 million in January 2012.³⁹⁶ But Dr. Vistnes also showed how Dr. Church significantly underestimated the magnitude of errors by focusing solely on the largest corporate franchisor's data and by only looking at the communities in which it is largest. When Dr. Vistnes corrected for these biases, he discovered that reliance on limited datasets would produce errors totaling \$120 million in January 2012 alone.³⁹⁷ Over a year, home buyers and sellers would suffer harm of \$1.4 billion.

³⁹⁵ Exhibits A26 & A28, TREB Admission #339.

³⁹⁶ Exhibit A32, Reply Vistnes Report, para 114.

³⁹⁷ Exhibit A32, Reply Vistnes Report, paras 116-117.

346. It is unclear why Dr. Church expected home buyers and sellers to replace MLS information with less comprehensive information that produces \$1.4 billion of errors every year. Those errors would cost the average GTA home buyer or seller approximately \$15,700³⁹⁸ – a substantial amount of money for the average home owner. In the midst of the most significant financial transaction of their lives, home buyers and sellers are unlikely to risk \$15,000 by relying on inferior data. With such a high cost associated with switching, they are unlikely to switch away from MLS-based services using the Historical MLS Data in favour of those that rely on inferior data.

347. Fourth, Dr. Vistnes considered FSBO websites. He saw no evidence that FSBO websites:

- (a) had comprehensive information, since FSBOs represent a very small portion of the real estate market³⁹⁹ and those listed on websites are probably a small portion of total FSBO sales (since many FSBO sales happen between buyers and sellers who know each other already, like family members, and would not post their home on a website);
- (b) had timely information since no intermediary, like a agent, ensures that information is uploaded in a timely fashion upon closing;⁴⁰⁰ and
- (c) had sold, pending sold, or WEST listing information at all.⁴⁰¹

³⁹⁸ Assuming \$1.4 billion/year and 89,000 sales as occurred in 2011.

³⁹⁹ Exhibit A32, Reply Vistnes Report, para 99, p. 47.

⁴⁰⁰ Exhibit A32, Reply Vistnes Report, para 99, p. 47.

⁴⁰¹ Exhibit A32, Reply Vistnes Report, para 99, p. 47.

348. In these circumstances, Dr. Vistnes concluded that FSBO websites were not close substitutes at all for TREB MLS data.

349. Finally, Dr. Vistnes considered appraisers. Dr. Vistnes noted that appraisers rely on the same data sources that agents rely on: the MLS, Teranet, and MPAC. Thus, the same flaws that apply to Teranet and MPAC data apply to data from appraisers.⁴⁰² In addition, Dr. Vistnes examined the quality of automatic valuation tools powered by "appraisal" data. He noted that they produce errors of about 10%, which suggests that they lack the comprehensive dataset required to produce accurate estimates.⁴⁰³ As a result, such automatic valuation tools caution that their estimates do not replace CMAs prepared by a real estate professional.⁴⁰⁴ In other words, appraisal data produces inferior results as compared to the Historical MLS Data. In these circumstances, it is hardly likely that anyone would switch from the Historical MLS Data in response to a small but significant price increase.

350. For all these reasons, Dr. Vistnes conclude than *none* of Dr. Church's five "potential" replacement information sources was a close substitute for TREB's MLS data.

351. Critically, even if there was *some* evidence that any of Dr. Church's five potential substitutes were functionally interchangeable, there is no evidence of any actual switching. Instead, the best evidence is that when agents lose access to MLS data (e.g., BNV) or are restricted in how they provide Historical MLS Data to customers because of the inefficient way it is provided (e.g., ViewPoint), they do not provide brokerage services at all in the GTA. They do not substitute to other information sources as Dr. Church speculates that they could. Indeed,

⁴⁰² Exhibit A32, Reply Vistnes Report, para 102, p. 48.

⁴⁰³ Exhibit A32, Reply Vistnes Report, para 57, p. 29.

⁴⁰⁴ Exhibit A32, Reply Vistnes Report, para 57, p. 28.

one would expect that large, well-funded corporations like BNV (affiliated with Bell) and Zoocasa (affiliated with Rogers) would be well positioned to substitute to alternative data. But there is no evidence that either corporation, or any other, has substituted TREB's Historical MLS Data with data from any other source.

352. Just like the lack of evidence of switching from home buyers and sellers away from MLS-based services, the lack of switching by agents to non-MLS information sources confirms the functional evidence that non-MLS information sources are not close substitutes for the TREB's MLS Data. Dr. Church's speculation in this regard is insufficient to rebut the overwhelming evidence that TREB's MLS offers unique functionality, and information, and has no close substitute. Home buyers and sellers are not likely to switch away from MLS-based services to other services that rely on inferior information.

d) Dr. Church's Product Market is Too Narrow and His Analysis is Flawed

353. Dr. Church rejected the Commissioner's product market. His alternative market revolved around what he labeled the MLS confidential price data (WEST, pending, and sold listings).

354. In support of his narrow product market, Dr. Church argues that "In abuse of dominance cases, the relevant markets for establishing dominance and competitive effects must be informed by the nature of the alleged exclusionary practices".⁴⁰⁵ But even if this is true, the "nature of TREB's exclusionary practices" confirms that the relevant market is the market for residential real estate brokerage services, not the narrower market Dr. Church proposes.

355. The Commissioner's Amended Application alleged conduct related to TREB's MLS and its rule-making powers generally. TREB's restrictions on the search and display of the Historical

⁴⁰⁵ Exhibit R79, Church Report, para 201, p. 81.

MLS Data and offers of commission are one manifestation of TREB's anticompetitive conduct. But the Commissioner also put in issue TREB's pre-2011 conduct, when TREB denied all MLS data to VOW operators. Evidence in this proceeding also revealed that TREB further discriminates against VOWs in the post-2011 period by restricting the manner in which VOWs can use the MLS data currently in the VOW datafeed. Both of these restrictions apply to the TREB's MLS data generally, and restrict how it is used and how services are provided in the residential real estate brokerage services market. Dr. Church is wrong to suggest a narrower product market in the circumstances of this case.

356. The residential real estate brokerage services market is the only product market that makes sense in all of the circumstances. These include that:

- (a) TREB is the embodiment of its members who operate in and comprise at least 88% (and probably more) of the participants in the residential real estate brokerage services market;
- (b) TREB's MLS links the "confidential price data" to a wealth of other information about homes, such as their history of price changes, days on market, the number of bedrooms, and interior photos. Agents use *all* of this information in conjunction with the "confidential price data" in providing residential real estate brokerage services;
- (c) the conduct at issue is directed at how services can be provided in the residential real estate brokerage services market;

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- (d) the conduct has an exclusionary effect on competitors in the residential real estate brokerage services market; and
- (e) the conduct creates, maintains, or enhances market power in the residential real estate brokerage services market.

357. Dr. Vistnes considered Dr. Church's product market in his reply report and rejected it for the above reasons. Given TREB's conduct, Dr. Church's product market lacks an air of reality. According to Dr. Vistnes, the Commissioner's product markets better applies in an inquiry into the competitive effects of or harm caused by TREB's conduct:

There is no allegation that TREB's conduct is having any effect in some market for confidential information (even if one assumed that such a market existed), and no allegation that TREB's market power is being used to maintain prices or market power in that "market for confidential information." Thus, by focusing on a "market for confidential information," one loses sight of the more important inquiry: does TREB's conduct reduce competition among brokers relative to the but-for world? For that inquiry, one needs to focus on the market for buy-side and sell-side real estate services.⁴⁰⁶

358. Dr. Flyer agreed that the relevant product market is brokerage services. However, in his opinion, Dr. Vistnes' distinction between the buy and sell-side markets was not necessary because agents serve both buyers and sellers.⁴⁰⁷ Instead, Dr. Flyer would place both in the same market:

DR. FLYER: [...] It wasn't part of my report, but I think [Dr. Vistnes] is right that it is a brokerage service market, in that there is a market for brokerage services. But I think it includes both buy side and sell side services.

⁴⁰⁶ Exhibit A32, Reply Vistnes Report, para 79, p. 37.

⁴⁰⁷ October 10 Transcript, pp. 2527-2528.

MADAM JUSTICE SIMPSON: All right. So that when, then, I look at the top of page 5 of your report, the first line, and you're talking about anticompetitive effects across the entire market, that would be the market for buying and selling brokerage services in the GTA?

DR. FLYER: Correct.⁴⁰⁸

359. As is apparent by his answer, Dr. Flyer did not consider the relevant product market to be "confidential price data", as Dr. Church proposed.

360. Cross-examination also revealed deep flaws in Dr. Church's product market analysis, including that he never actually defined the relevant product market at all. Instead, Dr. Church testified that "[e]vidence suggests that the relevant markets(s) may be wider than the MLS confidential price data".⁴⁰⁹

361. When counsel put to him what he understood Dr. Church had concluded with respect to the product market, Dr. Church demurred and suggested bizarrely that the relevant market(s), should be defined *around* the confidential price data:

MR. ROOK: What I am asking you is simply this. You posit or hypothesize that there is a relevant product market for confidential data, correct?

DR. CHURCH: I'm saying that the relevant market in this case should be defined around, or relevant markets should be defined around the confidential data.⁴¹⁰

362. Further questioning revealed that Dr. Church could give no better answer because he had not himself conducted the relevant analysis to determine what the product market was. He was merely speculating about what he *may* have found and what substitutes *might* exist had he done

⁴⁰⁸ October 10 Transcript, p. 2528 (emphasis added).

⁴⁰⁹ Exhibit R82, Summary of Expert Report, p. 29.

⁴¹⁰ October 2 Transcript p. 2092 (emphasis added).

any analysis. The following exchange with counsel regarding WEST listings demonstrated Dr. Church's lack of analysis:

MR. ROOK: All right. So that it remains the case that subject to whatever information brokers may have, there is no other source of WEST listings?

DR. CHURCH: So I think that is true that there may not be any other sources of WEST listings, but if you are still trying to define the market around WEST listings, the WEST listings may not be a market.

MR. ROOK: I thought you told me before the break that each one of these individual items in a WEST listing was potentially a product market?

DR. CHURCH: Potentially, but you may find that there may be substitutes for WEST data, which is other data. So solds and pendings may substitute for the WEST data.⁴¹¹

363. Then later, when counsel asked whether substitutes existed for sold information, Dr. Church simply replied "And so the answer in my report is there might well be."⁴¹² When questioned further about whether sold information from Teranet was in fact a substitute for the Historical MLS Data given its many different qualities, Dr. Church admitted that

all my report says is that this is something that is not considered by Dr. Vistnes, and it is something that should be considered before we decide that any of the confidential data, the solds in this particular case, define a market. Maybe there are substitutes.⁴¹³

364. Of course Dr. Vistnes considered and rejected Teranet data as a substitute in his reply report, among other reasons because of the untimeliness of Teranet's information. Dr. Church admitted that he had not even considered the timeliness issue and whether it was relevant to his

⁴¹¹ October 2 Transcript p. 2108 (emphasis added)

⁴¹² October 2 Transcript pp. 2110-2111.

⁴¹³ October 2 Transcript p. 2115.

analysis of Teranet as a substitute for his "confidential price data".⁴¹⁴ Likewise, Dr. Church did not assess the quality of the other information sources he proposed as potential substitutes, like Zoocasa's Zoopraisal service.⁴¹⁵

365. This exchange with counsel concluded with Dr. Church's remarkable admission that he did not know whether *any* of his proposed substitutes were effective:

MR. ROOK: And what I am trying to suggest to you is that when one goes through this exercise, whether one looks at Teranet, MPAC, Zoocasa, or even this large corporate brokerage that you mentioned, that when one goes through that exercise and when one applies the hypothetical monopolist test, what emerges from that sausage, if I can put it that way, is that there are no effective substitutes, even if one applies the hypothetical monopolist test?

DR. CHURCH: I don't know the answer to that.⁴¹⁶

366. Dr. Church did not know the answer because his mandate was not to provide answers, but to advocate against Dr. Vistnes' conclusions by pointing out "flaws" in Dr. Vistnes' analysis. Cross-examination revealed that this was not the first time Dr. Church had advocated in favour of a position.

367. When testifying on behalf of Apotex, Gauthier J. (as she then was) held that much of the "expert" evidence given by Dr. Church and Apotex's other economists, "was really no more than arguments presented in the form of expert evidence."⁴¹⁷ Her Honour continued, "The three economists testifying on behalf of Apotex seemed particularly anxious to ensure that this be the first case substantively putting into play the Intellectual Property Enforcement Guidelines

⁴¹⁴ October 2 Transcript p. 2113.

⁴¹⁵ October 2 Transcript p. 2119.

⁴¹⁶ October 2 Transcript, p. 2119 (emphasis added).

⁴¹⁷ October 2 Transcript, p. 2042.

recently developed by the Competition Bureau."⁴¹⁸ Dr. Church agreed that Gauthier J. was critical of his evidence in that case.⁴¹⁹

368. Similar to his approach in Apotex, in this proceeding, Dr. Church advocated for an essential facilities framework through which to analysis the issues in this case. In his testimony he categorically described the proceeding saying "This is an Essential Facilities Case".⁴²⁰ But he neglected to advise the Tribunal that the essential facilities framework he proposed had not been accepted by the CRTC when the Competition Bureau (with Dr. Church's assistance) proposed it in 2007-2008. In particular, the CRTC had not accepted the proposed requirement that the owner of the essential facility have market power in the upstream and downstream markets. The CRTC adopted a test which required only upstream dominance.

369. During cross-examination, Dr. Church explained he thought the CRTC had done so for political reasons.⁴²¹ But the fact remained that he had not informed the Tribunal any time before cross-examination that another decision-maker had not accepted the very framework he urged upon the Tribunal in this case. Remarkably, Dr. Church did not think the Tribunal needed to know:

MR. ROOK: Thank you. And do you not think it would have been important, as an independent expert, to inform this Panel that the very essential facilities framework that you proposed in this case had been rejected, for whatever reason, by the CRTC?

⁴¹⁸ October 2 Transcript, p. 2042.

⁴¹⁹ October 2 Transcript, p. 2044.

⁴²⁰ Exhibit R82, p. 14.

⁴²¹ October 2 Transcript, p. 2061-2062.

DR. CHURCH: No. I don't think that is the case.⁴²²

Geographic Market

370. "Throughout Canada or any area thereof" in s. 79(1)(a) means the geographic market.⁴²³

To identify the geographic market, the Tribunal asks "what are the boundaries of the geographic area within which competitors must be based if they are to provide effective competition"?⁴²⁴

371. Those boundaries may not be precisely defined because, as the Tribunal acknowledged in *Laidlaw*, "[o]ne does not expect to be able to define the geographic dimensions of a market with precision. The boundaries will necessarily overlap with adjacent markets and be indistinct from those adjacent markets at many points."⁴²⁵

372. Trade views, strategies and behaviour of market participants are highly relevant in defining the relevant geographic market. For example, in *Laidlaw*, the Tribunal relied on evidence that, because of the cost of operating at further distances, market participants did not service customers located more than 50 kilometres from their base of operations. Accordingly in that case, the Tribunal concluded that markets more than 50 kilometres apart were distinct geographic markets.⁴²⁶

373. In this case, the evidence establishes that the relevant geographic market is the area covered by TREB's MLS, which is primarily the geographic area covered by the five municipal

⁴²² October 2 Transcript, p. 2063.

⁴²³ *D & B, supra*, p. 231g, Commissioner's Book of Authorities, vol. 1, tab 1.

⁴²⁴ *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (1992), 40 CPR (3d) 289, p. 316g [*Laidlaw*], Commissioner's Book of Authorities, vol. 2, tab 6.

⁴²⁵ *Laidlaw, supra*, p. 324a, Commissioner's Book of Authorities, vol. 2, tab 6.

⁴²⁶ *Laidlaw, supra*, p. 324b-c, Commissioner's Book of Authorities, vol. 2, tab 6.

regions, Halton, Peel, Toronto, York and Durham, which comprise the GTA. There are four relevant pieces of evidence.

374. *First*, TREB and its MLS focus on GTA agents and GTA home buyers and sellers. Mr. Richardson admits that TREB's membership is principally drawn from the GTA,⁴²⁷ its directors are drawn from across the GTA,⁴²⁸ and it maintains a catalogue of photographs of the exteriors of GTA homes for use by its members.⁴²⁹ Market Watch, TREB's monthly sales report, describes TREB MLS sales as those of "Greater Toronto Realtors" and TREB as "The Toronto Real Estate Board – Serving Greater Toronto Realtors".⁴³⁰

375. The number of GTA listings on the TREB MLS confirms TREB's GTA focus. GTA properties represent 93% of listings on TREB's MLS.⁴³¹ Given that agents operate locally, the high percentage of GTA listings indicates that the TREB MLS consists primarily of listings posted by GTA agents to advertise their GTA listings to other GTA agents. The low number of non-GTA listings indicates that very few non-GTA agents list on the TREB MLS. As Dr. Church described in his report, "One of TREB's main tasks is to maintain and operate the MLS® for the GTA on behalf of its members."⁴³²

376. *Second*, statistical analysis of market activity confirms that market participants provide real estate brokerage services locally. Dr. Vistnes analyzed the MLS Data to determine where agents provide their services. He found that 69% of buy-side agents' transactions occurred

⁴²⁷ Exhibit R39, Richardson Statement, para 7, p. 2.

⁴²⁸ Exhibit R39, Richardson Statement, para 19, p. 5.

⁴²⁹ Exhibit R39, Richardson Statement, para 42, p. 9.

⁴³⁰ Exhibit R39, Richardson Statement, Exhibit Q p. 276.

⁴³¹ Exhibit A30, First Vistnes Report, para 26 & footnote 18, p. 12.

⁴³² Exhibit R79, Church Report, para 45, p. 23 (emphasis added).

within 10 kilometres of the agents' principal base of operations. The percentage was even higher for sell-side agents: 76% of their transactions occurred within 10 kilometres of their principal base of operations.⁴³³ These high percentages held across all GTA regions. In other words, no matter where agents operate across the GTA, most of their transactions occur within a short distance of their home base.⁴³⁴ Relying on this analysis Dr. Vistnes concluded that the relevant geographic markets are local and no larger than the GTA.⁴³⁵

377. Dr. Flyer agreed with Dr. Vistnes that "if there is an allegation of harm to brokerage services, I agree it is local."⁴³⁶ Dr. Church also agreed with Dr. Vistnes that real estate markets are local⁴³⁷ and he does not reject the GTA as the relevant geographic market. Instead, he asserts that local markets may influence the product market analysis. But he does not conduct any analysis to show how local markets influence the product market. His evidence in this regard is complete speculation.

378. *Third*, anecdotal evidence from industry participants confirms Dr. Vistnes' conclusion that real estate markets are local. Home buyers and sellers demand neighbourhood knowledge and experience. To meet consumer demand, agents specialize in a neighbourhood or local area. As Mr. Gidamy of TheRedPin testified, new agents spend significant time "networking to meet new people and reinforce relationships with people in their target neighbourhood or niche

⁴³³ Exhibit A30, First Vistnes Report, para 112, p. 38.

⁴³⁴ Exhibit A30, First Vistnes Report, para 113, p. 39.

⁴³⁵ Exhibit A30, First Vistnes Report, para 110, p. 38.

⁴³⁶ October 10 Transcript p. 2526.

⁴³⁷ Exhibit R79, Church Report, para 245, p. 95. Elsewhere in his report he states that "[c]ompetition in the real estate business is essentially competition at the local level." (para 137, p. 58) and "real estate services are supplied at the local level" (para 103, p. 47).

market."⁴³⁸ Mr. Pasalis of Realosophy noted that traditional agents must "rely on their knowledge of a handful of neighbourhoods to advise clients."⁴³⁹ Mr. Enchin testified that his 2001 VOW had "many Realtor clients in the GTA in part because I did not compete with these Realtors in their local market. I worked as a Realtor in Guelph, whereas they worked in their local areas in the GTA."⁴⁴⁰ Mr. Prescott testified about agents generating new business by having a presence in their *local* community.⁴⁴¹

379. *Fourth*, there is no evidence that agents expand their operations beyond their local base in response to higher home prices in other markets (which would provide higher revenues because of static commission rates).⁴⁴² The strong inference is that barriers to entering a new geographic area are high because of the sunk costs associated with building knowledge of the local neighbourhood and developing a reputation for local knowledge in the new community.⁴⁴³

380. Given TREB's GTA-focus and the local nature of real estate brokerage services, the relevant geographic market is the GTA. TREB members (GTA agents) use the TREB MLS to provide brokerage services in respect of GTA properties to GTA home buyers and sellers. Because real estate markets are local, competition would have to occur locally in the GTA to be effective. And because TREB's influence extends to all local markets within the GTA, the GTA is the relevant geographic market for this proceeding.

⁴³⁸ Exhibit A15, Gidamy Statement, para 9, p. 3 (emphasis added).

⁴³⁹ Exhibit A10, Pasalis Statement, para 11, p. 4 (emphasis added).

⁴⁴⁰ Exhibit A20, Enchin Statement, para 24, p. 8 (emphasis added).

⁴⁴¹ September 28 Transcript p. 1809.

⁴⁴² Exhibit A30, First Vistnes Report, para 114, p. 39.

⁴⁴³ As John Pasalis testified, one of a VOW's several advantages is that it permits a broker to learn and provide neighbourhood specific information to customers quickly and efficiently: Exhibit A10, Pasalis Statement, para 11, p. 4. Presumably this would reduce barriers to entry facing brokers using VOWs when expanding to new neighbourhoods.

Control/Market Power

381. "Substantial or complete control" in s. 79(1)(a) means market power.⁴⁴⁴ In its recent merger decision in *The Commissioner of Competition v. CCS Corporation et al*, the Tribunal defined market power as "the ability to profitably maintain prices above the competitive level, or to reduce levels of non-price competition (such as service, quality or innovation), for an economically meaningful period of time".⁴⁴⁵

382. This definition succinctly captures Tribunal and Federal Court of Appeal jurisprudence, which defined market power as the "ability to set prices above competitive levels for a considerable period of time"⁴⁴⁶ but used "price" broadly. In *Southam*, the Tribunal defined "price" in this context as both price and non-price competition:

Market power is the ability of a firm or group of firms to maintain prices above the competitive level. Market power may also be exercised by offering, for example, poor service or quality or by restricting choice. When used in a general context, "price" is thus a shorthand for all aspects of firms' actions that bear on the interest of buyers. The following quotation neatly summarizes these points:

The modern concept of market power focuses on the potential for consumers to suffer injury through the actions of a single firm or a group of firms acting in concert. It has become traditional to think of the ability of a firm or group of firms to maintain prices above the competitive level, although the meaning of "price" can easily be expanded to take into account other forms of consumer injury such as inferior quality.

⁴⁴⁴ *NutraSweet, supra*, p. 28f-h, Commissioner's Book of Authorities, vol. 1, tab 2.

⁴⁴⁵ 2012 Comp. Trib. 14, para. 371, p. 86 [CCS], Commissioner's Book of Authorities, vol. 2, tab 7.

⁴⁴⁶ *NutraSweet, supra*, p. 28f-h, Commissioner's Book of Authorities, vol. 1, tab 2; see also *Commissioner of Competition v. Canada Pipe Company Ltd.* (2006), 49 CPR (4th) 286, para. 6, p. 290 [*Canada Pipe #2*], Commissioner's Book of Authorities, vol. 3, tab 8.

The aspects of market power that are of concern in a particular case will depend on the allegations of the Director and the evidence brought forward by both parties.⁴⁴⁷

383. Four applicable principles emerge from the jurisprudence. *First*, competitive prices do not preclude a finding that a respondent has market power. A respondent may not control prices but instead may control levels of non-price competition in the market, such as service, quality, choice, and innovation. That respondent has market power.

384. *Second*, market power does not require proof of supra-competitive prices or poor quality or service. Market power is *ability*. A respondent has market power when it *can* maintain prices or reduce levels of non-price competition.

385. *Third*, when evaluating whether a respondent has market power, the Tribunal considers both direct and indirect indicators of market power. Direct indicators include actual evidence of supra-competitive prices. Indirect indicators include market share and barriers to entry. The indicators are not set in stone. The Tribunal considers a wide variety of indicators as suits the circumstances of each matter. The Tribunal summarized this approach in *NutraSweet*:

Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period. While this is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control or market power will vary from case to case.⁴⁴⁸

⁴⁴⁷ *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* (1992), 43 CPR (3d) 161 at p. 177f-h (emphasis added), Commissioner's Book of Authorities, vol. 3, tab 9; cited with approval in *Canada Pipe #2*, *supra*, para 6, p. 290, Commissioner's Book of Authorities, vol. 3, tab 8.

⁴⁴⁸ *NutraSweet*, *supra*, p. 28g, Commissioner's Book of Authorities, vol. 1, tab 2.

386. *Fourth*, the power to exclude competitors from the market is a strong direct indicator of market power. The US Supreme Court has placed the power to exclude alongside the power to control prices holding that, "[m]onopoly power is the power to control prices or exclude competition."⁴⁴⁹

387. The Quebec Court considered the power to exclude in *Eddy Match Company et al. v. The Queen*.⁴⁵⁰ In appealing its conviction under then s. 32 of the *Combines Investigation Act*,⁴⁵¹ Eddy Match argued that the power to "substantially or completely control" meant "having the *de facto* or *de jure* power to exclude others from the particular field controlled".⁴⁵² The Quebec Court rejected Eddy Match's argument that the power to exclude was necessary to establish "control" for the purposes of the *Combines Investigation Act*. Instead, it held that "Parliament has not attached any special or restrictive meaning to the term "control" and for this reason I am unable to see why it should be given any meaning other than that which it normally connotes."⁴⁵³ That meaning might include the power to exclude, but was not limited to it.

388. The power to exclude as an indicator of market power aligns with the Tribunal's long-standing definition of market power. Excluding competitors is an effective way to maintain high prices or reduce levels of non-price competition by creating complete barriers to entry. Viewed in that manner, the power to exclude is a direct indicator of market power.

⁴⁴⁹ *United States v. E.I. du Pont Nemours & Co.* (1956), 351 US 377, para. 392 (emphasis added), Commissioner's Book of Authorities, vol. 3, tab 10.

⁴⁵⁰ (1953) 20 CPR 107 [*Eddy Match*], Commissioner's Book of Authorities, vol. 3, tab 11.

⁴⁵¹ RSC 1927, c. 26.

⁴⁵² *Eddy Match*, *supra*, p. 121, Commissioner's Book of Authorities, vol. 3, tab 11.

⁴⁵³ *Eddy Match*, *supra*, p. 122, Commissioner's Book of Authorities, vol. 3, tab 11.

389. The evidence before the Tribunal indicates that TREB has market power in the relevant residential real estate brokerage markets (both the buy-side and sell-side markets). It has the *ability* to maintain supra-competitive prices or to reduce levels of non-price competition. Direct and indirect indicators of TREB's market power are:

- (a) TREB owns and operates the TREB MLS, a key input of residential real estate brokerage services. Agents require access to the TREB MLS to compete in the market;
- (b) TREB enacts and enforces rules and policies which govern many aspects of how its members compete in the market, including how they advertise, what agreements they use with their clients, how they use TREB MLS data, and how they offer each other commissions. Members who do not follow TREB's rules risk discipline, expulsion, and losing access to the TREB MLS;
- (c) TREB excludes participants from the market by restricting access to the TREB MLS and controlling how its members use the MLS data;
- (d) Barriers to entry of a competing MLS are high;
- (e) TREB's members comprise the vast majority of participants in the residential real estate brokerage services market, and market shares of major participants have remained static over time; and
- (f) Barriers to *success* as an agent are high.

390. Discussion of each of these indicators of market power follows.

a) TREB Controls a Key Input: the MLS

391. TREB's MLS is the key to TREB's power over and control of the GTA residential real estate industry. The MLS is a key input of residential real estate brokerage services. Agents require MLS access to compete. The MLS gives TREB the power to force its members to comply with its dictates.

392. Canadian courts have already recognized the critical importance of MLS access to GTA agents' ability to provide services. In 2009, Justice Brown of the Ontario Superior Court heard the trial of Mr. Beach's action against TREB. After Mr. Beach and BNV had used Mr. Beach's MLS access to display MLS data on BNV's VOW, TREB had terminated Mr. Beach's MLS access. According to Justice Brown, without MLS access, Mr. Beach could not compete in the market. He held that it was "a practical reality of the market that a realtor who wishes to trade in resale residential properties in the GTA requires access to the MLS database to carry on an effective business and, therefore, needs to be a member of TREB."⁴⁵⁴ In upholding Brown J.'s decision, the Court of Appeal for Ontario noted that without access to TREB's MLS, Mr. Beach "was not able to carry on business as a real estate broker."⁴⁵⁵

393. The evidence before the Tribunal in this proceeding confirms the conclusions of Justice Brown and the Court of Appeal (neither of which TREB appealed). The overwhelming majority of agents provide MLS-based services and thus rely on access to the MLS and MLS data to service their clients.

⁴⁵⁴ *Beach v. Toronto Real Estate Board*, [2009] OJ No. 5227, para. 10, Commissioner's Book of Authorities, vol. 3, tab 12.

⁴⁵⁵ *Beach v. Toronto Real Estate Board*, [2010] OJ No. 5541, para 3, Commissioner's Book of Authorities, vol. 3, tab 13.

394. TREB's own economist, Dr. Church, relies on evidence that 87% of sellers and 89% of buyers in the United States use agents when buying or selling a home.⁴⁵⁶ An almost identical percentage of GTA home buyers and sellers use agents: in 2006, CREA reported that 87% of buyers and 89% of sellers in Toronto used the services of a Realtor during their last home transaction.⁴⁵⁷

395. These percentages align with what TREB and CREA have told home buyers and sellers for years: information in the MLS is critical to residential real estate brokerage services. TREB has described the MLS as "one of the most important tools used by virtually every REALTOR"⁴⁵⁸ that is "invaluable to REALTORS and their clients"⁴⁵⁹. CREA has described a board's MLS as and "the single most powerful tool for buying and selling a home".⁴⁶⁰

396. That so many agents rely on MLS access comes as no surprise because of the consequences of losing access. These consequences include:

- (a) Loss of the efficiencies associated with MLS services. Home buyers and sellers value these efficiencies and are unlikely to switch away from MLS-based services to non-MLS services.
- (b) Loss of access to information about the approximately \$40 billion of transactions that occur through the TREB MLS every year.⁴⁶¹

⁴⁵⁶ Exhibit R79, Church Report, at para 29, p. 16.

⁴⁵⁷ Exhibit A4, Document 869, p. 50.

⁴⁵⁸ Exhibit A4, Document 382, p. 1.

⁴⁵⁹ Exhibit A4, Document 278, p. 4.

⁴⁶⁰ Exhibit A30, First Vistnes Report, para 148, p. 49.

⁴⁶¹ Exhibit A30, First Vistnes Report, para 26, p. 12.

- (c) Sell-side agents cannot list their clients' properties on the TREB MLS. They lose access to the 35,000 TREB members who use the MLS to hunt for properties for potential buyers and other advertising vehicles like CREA's popular advertising website, Realtor.ca, which displays data uploaded from TREB's MLS.
- (d) Buy-side agents cannot search the full TREB MLS for properties of interest to home buyers.
- (e) Both buy and sell-side agents cannot access the comprehensive stable of Historical MLS Data in TREB's MLS. Without it, they cannot provide accurate CMAs to home buyers and sellers.

397. For these reasons, industry participants universally testify that MLS access is critical to the provision of real estate brokerage services.⁴⁶²

398. In response to the evidence about the prevalence of the MLS and its critical importance to agents, TREB asserts that some unspecified number of GTA agents are not TREB members and thus provide services without access to TREB's MLS. Its assertion rings hollow given that it has led no evidence about: (i) the specific number of GTA agents who provide brokerage services without MLS access; (ii) who these agents are that do not require MLS access to serve their clients (they could for example work exclusively for new home developers); or (iii) how successful these agents are.

⁴⁶² Exhibit A10, Pasalis Statement, para 6 p. 2, Exhibit A2, McMullin Statement, para 20, p. 6. Exhibit A20, Enchin Statement, para 34, p. 11.

399. TREB's unspecific and unsourced evidence cannot overcome the overwhelming evidence that agents require MLS access to provide residential real estate brokerage services. Given all of the evidence, TREB's MLS is a key input.

b) TREB's Rules and Policies Govern How Its Members Compete in the Market

400. If the MLS is the genesis of TREB's market power, TREB's rule-making function is the tool it uses to implement its control over the industry. TREB makes and enforces rules and policies which govern many aspects of how its members compete in the market, including how they advertise, what agreements they use with their clients, how they use TREB MLS data, and how they offer each other commissions. Should TREB members breach these rules they risk discipline, expulsion, and losing access to the TREB MLS.

401. Although the Commissioner's position is that TREB has used its rule-making function to restrict competition, proof that TREB has restricted competition is not necessary to find that TREB has market power. Rather, at this stage, TREB's *ability* to raise prices or reduce non-price competition in the market is at issue. TREB's control over the MLS and its rule making function combine to give TREB the ability to influence price and non-price competition, because TREB can make whatever rules it chooses and its members must follow them or risk discipline, expulsion, and losing access to the TREB MLS – access they cannot afford to lose.

402. TREB's rule-making function originates in its By-Law, section 15.01 of which permits TREB's Board of Directors to "pass rules and policies relating to the business and affairs of TREB".⁴⁶³ Such rules and policies may include rules governing TREB's MLS, the Code of

⁴⁶³ Exhibit R39, Richardson Statement, Exhibit B, p. 85 s. 15.01.

Ethics and the Standard of Business Practice of TREB.⁴⁶⁴ The rules and policies apply to TREB and all of its members.⁴⁶⁵

403. TREB's Board has used its rule-making ability to pass detailed, specific rules governing the MLS. But these rules go far beyond rules governing the proper use of an electronic database or regulatory requirements. Instead, TREB's rules govern many aspects of how its members carry on business in the real estate brokerage services market. For example, TREB's rules govern the following aspects of its members' business activities.

404. **How its Members Advertise:** Provincial legislation already governs how real estate professionals advertise, yet TREB has its own rules related to advertising. TREB prohibits members from advertising on a property until the commencement date of the member's MLS Listing Agreement with that client (Rule 411).⁴⁶⁶ It also requires members to receive specific permission before advertising another member's listing: "[m]embers other than the Listing Brokerage may advertise an MLS® Listing only when an MLS® Listing Agreement so indicates and Members have received specific written permission from the Listing Brokerage prior to each occasion of advertising." (Rule 430).⁴⁶⁷

405. **Relationships to Another Member's Clients:** TREB prohibits any member from soliciting another member's client (Rule 315(a) and (b)).⁴⁶⁸ It also imposes an affirmative obligation on its members to make reasonable efforts to determine whether the prospective client is subject to an exclusive agreement with another member (Rule 315(g)).

⁴⁶⁴ Exhibit R39, Richardson Statement, Exhibit B, p. 85 s. 15.01.

⁴⁶⁵ Exhibit R39, Richardson Statement, Exhibit B, p. 85 s. 15.01.

⁴⁶⁶ Exhibit R39, Richardson Statement, Exhibit D, p. 152-3.

⁴⁶⁷ Exhibit R39, Richardson Statement, Exhibit D, p. 153.

⁴⁶⁸ Exhibit R39, Richardson Statement, Exhibit D, p. 149-150.

406. **When Members Show MLS Listed Properties:** Upon posting a listing on the MLS, TREB requires its members to *immediately* make that property available to be shown by other members. Rule 345 provides that, "MLS Listings appearing on TREB's MLS System shall be immediately available (subject to applicable legislation, the right of and reasonable accommodation to the occupancy) for showings, inspections and registration of Offers."⁴⁶⁹

407. **What Members Must do When a Property Sells:** Within two days of the acceptance of an offer, Rule 610 requires TREB members to report the sale, whether conditional or firm, through the TREB MLS.⁴⁷⁰ Rule 601(a) requires members to report the sale price through the TREB MLS within two business day of a firm transaction or the removal of any conditions from the sale. Within two business days of a firm sale, Rule 421 requires members to remove physical "For Sale" signs, or place a "Sold" sign on the property.⁴⁷¹

408. **How Members Offer Each other Portions of the Total Commission:** TREB requires its members to disclose any offer of commission to cooperating agents as part of the MLS listing (Rule 705).⁴⁷² Rule 740 prohibits members from altering the offer of commission during certain periods: "[c]ommission offered to a Cooperating Brokerage on TREB's MLS System shall not be altered between the time of registration of an Offer and final acceptance of that Offer."⁴⁷³

409. **Under What Circumstances Data can be Changed in the MLS:** As noted, TREB requires its members to post the sale price of the property within two days of a firm sale (Rule 601(a)). TREB refuses to remove or change this historical data in its MLS except in very narrow

⁴⁶⁹ Exhibit R39, Richardson Statement, Exhibit D, p. 151.

⁴⁷⁰ Exhibit R39, Richardson Statement, Exhibit D, p. 155.

⁴⁷¹ Exhibit R39, Richardson Statement, Exhibit D, p. 153.

⁴⁷² Exhibit R39, Richardson Statement, Exhibit D, p. 156.

⁴⁷³ Exhibit R39, Richardson Statement, Exhibit D, p. 157.

circumstances. Policy 103 provides that TREB will only change historical data in instances of inaccuracy, and only upon satisfaction of several formal requirements, including written approval by TREB's CEO or Staff Director.⁴⁷⁴

410. **How TREB members provide MLS data to consumers over VOWs:** Of course, at issue in this proceeding are TREB's Rules related to VOWs and the restrictions TREB imposes on how its members provide MLS data to consumers over a VOW.

411. Should a TREB member breach any rule or policy, the consequences can be severe. Pursuant to Article 2, paragraph 12.01(a) of TREB's Bylaws, any breach of the Bylaws, Rules, or Policies may be dealt with by TREB's Arbitration and Professional Standards Steering Committee. The Arbitration and Professional Standards Steering Committee may recommend to TREB's Board that the offending member be expelled from TREB.⁴⁷⁵ Upon expulsion, the former TREB member will lose access to the MLS.

412. Similarly, TREB's Authorized User Agreement pursuant to which members receive permission to access the TREB MLS provides that agents "must comply with all the provisions in the TREB Requirements".⁴⁷⁶ The AUA defines TREB Requirements as any single or combination of TREB's MLS Policies, MLS Rules, Bylaws, or Standards.⁴⁷⁷ Thus, a violation of any TREB rule or policy is a breach of the AUA, upon which breach TREB may immediately terminate the AUA, severing the member's access to the MLS.

⁴⁷⁴ Exhibit R39, Richardson Statement, Exhibit D, p. 168.

⁴⁷⁵ Exhibit R39, Richardson Statement, Exhibit B, p. 127 s 17(b)(vi).

⁴⁷⁶ Exhibit R39, Richardson Statement, Exhibit E, p. 178 s. 10(d).

⁴⁷⁷ Exhibit R39, Richardson Statement, Exhibit E, p. 174.

413. Because members require MLS access to compete in the market, TREB holds a sword of Damocles over them. Members have no choice but to comply with TREB's rules and policies for fear of losing access to TREB's MLS. TREB has the *ability* to make rules (and has made rules) which govern how its members provide real estate brokerage services, including aspects of price and non-price competition.

c) TREB Excludes Participants from the Market

414. TREB's control over the MLS and its ability to make rules that govern access and use of the MLS (as well as other aspects of price and non-price competition), have enabled TREB to effectively exclude competitors and business models from the GTA residential real estate brokerage market.

415. In 2007, TREB effectively excluded BNV from the market when it terminated Mr. Beach's MLS access. When BNV later partnered with Realtysellers to regain MLS access, TREB terminated Realtysellers' MLS access. Without access to the MLS, BNV could not compete and ceased providing brokerage services. Likewise, without MLS access, Mr. Beach could not provide brokerage services (as found by both the Ontario Superior Court and Court of Appeal). When TREB terminated the "bulk" download feature from its Stratus system, it forced Mr. Enchin to cease providing his early VOW-product to his clients and other agents.

416. In 2008, TREB effectively excluded Mr. Hamidi and his TheRedPin prototype from operating a VOW in the GTA. TREB's MLS Rules and Policies required Mr. Hamidi to obtain permission from every listing brokerage in order to get a datafeed from TREB and display listings online. This was an overwhelming practical barrier to operating a VOW and Mr. Hamidi

and his partners chose to focus on new condominiums rather than VOW services based on TREB's MLS data.

417. In 2011, ViewPoint approached TREB regarding its successful VOW platform developed and operating in Nova Scotia. It became a TREB member and expressed an interest in offering its VOW and real estate brokerage services to GTA residents. However, because TREB has refused to include certain information in its VOW datafeed and because TREB continues to restrict how its members provide services through a VOW, ViewPoint does not offer its services to GTA home buyers and sellers. As ViewPoint's CEO, Mr. McMullin, testified:

ViewPoint would very much like to offer services in Toronto through a website in much the same manner as we do in Nova Scotia. But without the sold and pending sold data, it is not commercially viable to offer ViewPoint's "web-based" brokerage model in the Greater Toronto Area. ViewPoint's business model is based on access to and use of a comprehensive data feed from an MLS, which is not provided by TREB at this time, and on being able to be innovative in the presentation of that and other data to consumers (and/or customers) on our website (which we could do with the appropriate data feed). Our business is essentially excluded due to the absence of the sold and pending sold data in the feed. There is no other comprehensive source of residential properties for sale and sold in the Toronto area.⁴⁷⁸

418. TREB continues to effectively exclude ViewPoint, a potential competitor which offers home buyers and sellers a broad array of web-based services and features which are not currently available to GTA home buyers and sellers.

419. That TREB's conduct has effectively excluded competitors from the market confirms TREB's ability to raise prices above competitive levels or reduce levels of non-price competition.

⁴⁷⁸ Exhibit A2, McMullin Statement, para 104, p. 29 (emphasis added).

As Dr. Vistnes noted in his June 22 report, economists typically consider the ability to exclude or disadvantage competitors as evidence of market power.⁴⁷⁹

420. Again, the fact that TREB has actually reduced non-price competition in this manner is not necessary to demonstrate that it has market power. However, it further demonstrates TREB's ability to reduce non-price competition in the market for residential real estate brokerage services, and therefore its market power.

d) Barriers to Entry of a Competing MLS are High

421. There is no evidence of entry by a competing MLS. Dr. Vistnes noted that the failure of any one large brokerage to participate could leave significant gaps in the listings in large areas of the GTA.⁴⁸⁰ Likewise, his analysis showed that less comprehensive historical data, such as that potentially possessed by one large franchisor or even a group of franchisors was a poor substitute for the complete MLS data in TREB's MLS when producing accurate CMAs. Dr. Vistnes noted that an incomplete set of historical data would cost home buyers and sellers approximately \$1.4 billion per year. Given the barriers to success of a competing MLS, it is unrealistic to expect that an MLS would enter the market to compete with TREB.

e) TREB's Members Are the Vast Majority of Participants in the Residential Real Estate Brokerage Services Market and Market Shares Have Remained Static Over Time

422. The evidence indicates that TREB's members comprise at least 88% (and likely higher) of all residential real estate professionals operating in the GTA. Of TREB members generally, franchises of the five largest corporate franchisors earn the lion's share of revenues and

⁴⁷⁹ Exhibit A30, First Vistnes Report, para 142, p. 47, citing Carlton, D. and Salop, S., "You Keep on Knocking But You Can't Come In: Evaluating Restrictions on Access to Input Joint Ventures," Harvard Journal of Law & Technology, Summer, 1996, at page 332 and note 22.

⁴⁸⁰ Exhibit A30, First Vistnes Report, para 158, p. 51.

commissions. Dr. Vistnes analyzed TREB's MLS data and estimated that brokerages associated with the five largest franchisors received approximately 70% of annual commissions.⁴⁸¹

423. However, as prices for residential real estate brokerage services have risen, the market shares of the five largest corporate franchisors have remained static, indicating little effective pressure from competitors in the face of rising prices. And they were able to do so even though prices for residential real estate brokerage services had increased significantly since 2007. Despite what Dr. Vistnes calculated as a 22% price increase for residential real estate brokerage services,⁴⁸² the five largest franchisors maintained their total market shares.

f) Barriers to Success in the Real Estate Industry are High

424. One explanation for the static market shares of the incumbents corporate franchisors in the face of easy entry is the difficulty of *effective* entry over the long-term. Although barriers to becoming a real estate professional are low, barriers to success in the profession are high. Thus, while many agents may enter the market, they will have little impact on levels of price and non-price competition unless they succeed over the long-term, remain in the market, and build their business to the point that they begin to impact the *status quo*. The evidence indicates that while new agents enter the market they leave in high numbers in their first few years.

425. Mr. Gidamy, an agent with 15 years of experience, testified about the challenges new agents face. He noted that a "traditional brokerage has associated sales representatives, all of whom essentially run their own businesses as individuals and market and advertise their own

⁴⁸¹ Exhibit A30, First Vistnes Report, para 131-132, p. 44.

⁴⁸² Exhibit A30, First Vistnes Report, para 99, p. 35.

personal brand".⁴⁸³ Building their own business gives new agents significant freedom, but it brings significant challenges. Mr. Gidamy noted that

Sales representatives associated with traditional brokerages can potentially spend between 40-60% of their time, particularly in the early years, prospecting for new clients. This is known as lead generation. Even very experienced sales representatives will spend one-third to one-half of their time, and perhaps 30 - 50% of their revenues, on promoting and advertising themselves.⁴⁸⁴

426. Spending so much time to develop a client base and build a personal brand drains personal and financial resources from new entrants. These barriers to success mean that while many may enter the market, few succeed. As Ms. Prescott testified, in the past year, her brokerage hired 100 new agents to replace 50 that left.⁴⁸⁵

427. The economic analysis confirms this anecdotal evidence. While TREB has over 35,000 members, thousands of them are not very successful at what they do. Dr. Vistnes noted that approximately 7,000 of those members were not involved in a single home sale during 2011.⁴⁸⁶

428. Dr. Church looked at entry and exit from the residential real estate brokerage market. He described it as characterized by "turbulence".⁴⁸⁷ Indeed, it is. Because while thousands of new agents enter the market every year, thousands also leave. According to Dr. Church, since 2007, on average 4,545 agents entered the market and 3,694 exited the market.⁴⁸⁸

⁴⁸³ Exhibit A15, Gidamy Statement, para 8, p. 3.

⁴⁸⁴ Exhibit A15, Gidamy Statement, para 9, p. 3.

⁴⁸⁵ Exhibit R62, Prescott Statement, para 13, p. 4.

⁴⁸⁶ Exhibit A30, First Vistnes Report, para 26, p. 12.

⁴⁸⁷ Exhibit R79, Church Report, para 112, p. 50-51.

⁴⁸⁸ Exhibit R79, Church Report, para 149, p. 61-62.

429. But to determine whether these "exits" are relatively new entrants that are leaving or a previous generation of agents, one has to look to Dr. Church's analysis of MLS active users.⁴⁸⁹

The relevant portions of his chart are excerpted as follows:

Registration Year	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002
Percentage of Users Who Registered in Year that Are Active	99%	93%	80%	70%	64%	67%	64%	63%	58%	63%	51%

430. Dr. Church relies on his chart to show that MLS use is growing rapidly. However, these excerpted fields reveal how difficult success is in the residential real estate brokerage market because they show how quickly "active" users become "inactive" (i.e., exit the market). For example, 99% of all MLS users who registered to use the MLS in 2012 are active. However, only 67% of those users who registered for MLS access in 2007 remain active. And only 51% of all users who registered ten years ago in 2002 remain active. Thus, in a period of ten years, about half of all MLS users have exited the market. And this exodus happens alarmingly quickly. Three years after registering for MLS access, 30% of those agents will have exited the market.

431. Other studies of the real estate industry confirm Dr. Church's analysis. One study recorded in TREB's productions found that "76.7% of new licensees survived the first year in the business, 58% survived for two years and only 47.5% survived for three or more years."⁴⁹⁰

⁴⁸⁹ Exhibit R79, Church Report, Table 4.7, p. 145.

⁴⁹⁰ Exhibit A4, Document 210, p. 1.

432. The likely reason for such an exodus: while becoming a real estate professional may be easy, succeeding as one is very hard.

TREB's Acts Constitute a Practice Under 79(1)(b)

433. Market power alone does not offend section 79(1). Section 79(1)(b) provides that a dominant firm must "have engaged in" or is "engaging in a practice of anti-competitive acts". It has two elements. First, evidence of "a practice". Second, evidence of anti-competitive acts.

434. "Practice" is a broad term. It often connotes more than one isolated act. The Tribunal described "practice" in *NutraSweet* as follows:

The interpretation of "practice" must be sufficiently broad so as to allow for a wide variety of anti-competitive acts. Accordingly, the Tribunal is of the view that a practice may exist where there is more than an "isolated act or acts". For the same reasons, the Tribunal is also of the view that different individual anti-competitive acts taken together may constitute a practice.⁴⁹¹

435. But sometimes one act can have lasting impact in a market. Thus, where a single act is "sustained and systemic" or has a lasting impact in a market, it may constitute a "practice" for the purposes of s. 79(1)(b). As explained in the Bureau's Abuse of Dominance Guidelines:

While a "practice" normally involves more than one isolated act, the Bureau considers that this element may be satisfied by a single act that is sustained and systemic, or that has had or is having a lasting impact in a market. For example, a long-term exclusionary contract may effectively prevent the entry or expansion of competitors despite the fact that the contract itself could be viewed as a single act.⁴⁹²

⁴⁹¹ *NutraSweet, supra*, p. 35c, Commissioner's Book of Authorities, vol. 1, tab 2.

⁴⁹² Competition Bureau, *The Abuse of Dominance Provisions*, September 20, 2012, p. 10, Commissioner's Book of Authorities, vol. 4, tab 23.

436. The evidence before the Tribunal establishes that TREB's conduct constitutes a practice. The relevant evidence is as follows:

- (a) TREB's pre-2011 conduct constitutes a practice. Since at least 2007, TREB has enforced rules which have prohibited VOWs from operating in the GTA. It failed or refused to provide its members with a VOW-feed to permit them to operate a VOW. When an innovative agent attempted to operate a VOW, TREB terminated its MLS access.
- (b) TREB's conduct since 2011 constitutes a practice. In 2011, TREB adopted a VOW Policy and VOW Datafeed Agreement, and implemented a VOW datafeed. Together they operate to control and restrict how VOW operators use the MLS data. TREB does not impose similar restrictions on non-VOW operators.

437. A detailed explanation of these two points follows.

a) TREB's pre-2011 Anticompetitive Acts

438. Before 2011, TREB acted in three ways with respect to VOWs.

439. *First*, TREB enacted and maintained MLS Rules which effectively prohibited VOWs from operating. In order to obtain a datafeed of any Listing information, TREB members had to obtain the written consent of every each listing brokerage. This restriction prevented TREB members and others who are now members, such as TheRedPin and Realosophy, from offering VOW-based brokerage services with comprehensive MLS data. Obtaining the consent of every listing brokerage was a practical impediment to operating a VOW. As Mr. Hamidi testified, TheRedPin had a VOW platform ready to go in 2008, but as a result of the TREB rules, had to

wait until 2011 to bring their innovative, web-based services to the GTA market. Likewise on cross-examination, Mr. Pasalis testified that when Realosophy started, "we wanted to start as a VOW and we couldn't". Realosophy decided to take the approach of analyzing neighbourhoods as is now done on its website "partly because we felt it was valuable, but partly because there was really no other option for us online".⁴⁹³

440. *Second*, TREB took no action to enable VOWs for nearly a decade. It had every opportunity but simply failed to act. In 2003, Mr. DiMichele and Mr. Silver sat on CREA's EDU Task Force. In 2004, TREB recognized a burgeoning market for website services available to agents and Mr. DiMichele and TREB's President Ms. Lai became aware of Mr. Enchin's work on VOWs. In 2008, NAR and the DOJ settled their litigation over VOWs, which TREB had been monitoring.

441. Despite all these events, TREB did nothing to implement VOWs from 2003 to 2011. It was only in response to actions taken by the Commissioner that TREB finally created the VOW Task Force in March 2011. Five months later, in August, 2011, the TREB Board of Directors enacted the final VOW Rules and Policies.

442. *Third*, TREB suppressed innovation by cutting off two members from the MLS and riving them from the market in 2007. Whether or not TREB was justified in taking legal steps, it did nothing to solve the underlying problem that its rules were stifling innovation and the delivery of services on websites such as VOWs. And instead of enabling its members in this period, TREB disabled the bulk download feature of its Stratus system that allowed all TREB members, such as Mr. Pasalis, and others working for TREB members such as Mr. Enchin, to

⁴⁹³ September 12 Transcript p. 524.

obtain sold and other data in an efficient way to use in their brokerage business. This sent a chill through members such as Mr. Pasalis who feared losing access to the MLS himself after he received calls from TREB asking if he was "scraping" the MLS database (he was not).

443. These are not isolated acts but a pattern of conduct. They constitute a practice.

b) TREB's Anticompetitive Acts since 2011

444. TREB's conduct since 2011 comprises at least three acts, which constitute a practice.

445. *First*, TREB's VOW Rules and Policies are anticompetitive acts. When TREB finally enacted its VOW Rules and Policies at its Board of Directors meeting in August, 2011, TREB restricted the information that may be downloaded, searched and displayed on a VOW (see in particular, Rule 823 and Policies 15, 17 and 24). Specifically, its VOW Rules and Policies prohibit members who want to provide services using a VOW from having a website that makes available for search or display the Historical MLS Data and offers of commission, except in certain stated circumstances, and limits the contents of the VOW datafeed to "non-confidential" data, excluding "confidential" data as defined by TREB such as the Historical MLS Data and offer of commission data, again with certain stated exceptions.

446. Although technically adopted only once by TREB, they have ongoing exclusionary effects on VOW operators. They are sustained and systemic. As explained elsewhere in these submissions, they both raise VOWs' costs and reduce the attractiveness of VOWs to home buyers and sellers.

447. *Second*, TREB's insufficient VOW datafeed is an anticompetitive act. In November, 2011, TREB implemented a VOW datafeed that contained no Historical MLS Data (no sold,

pending sold, or WEST listings) and no offers of commission. Whatever the exceptions to the search and display restrictions in Rule 823 and Policy 24 of the VOW Rules and Policies, and whatever the exceptions to withholding "confidential" data from the datafeed in Policy 15, TREB simply did not include any of the information in the VOW datafeed to used by its members.

448. *Third*, terms in TREB's Datafeed Agreement are anticompetitive acts. Also in November, 2011, TREB imposed on all members who desired to use the VOW datafeed, a VOW Datafeed Agreement that limits the use of the MLS data in the datafeed "solely and exclusively" to a defined, specified, narrow "Purpose" – a purpose that is dramatically more narrow than the corresponding provision in the AUA that applies to members using the Stratus system. This provision currently restricts VOW operators from using data from Available listings that are already in the VOW datafeed, and, if left to apply in the future, would severely restrict the ability of VOW operators to use the Historical MLS Data to improve the efficiency of their operations and to provide enhanced service to their customers and clients through their VOWs.

Overall Character of the Anticompetitive Acts

449. "Anti-competitive acts" are identified by their purpose.⁴⁹⁴ In *Canada Pipe*, the Federal Court of Appeal adopted the Tribunal's working definition of "anti-competitive act" from *NutraSweet*:

A number of the acts [mentioned in section 78] share common features but... only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in paragraph

⁴⁹⁴ *Commissioner of Competition v. Canada Pipe Company Ltd.*, (2006) 49 CPR (4th) 241, para. 66, p. 72 (emphasis in original) [*Canada Pipe*], Commissioner's Book of Authorities, vol. 3, tab 14.

78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.⁴⁹⁵

450. Purpose in the context of s. 79(1)(b) refers to "the overall character of the act in question".⁴⁹⁶ The act's "overall character" must be an intended predatory, exclusionary or disciplinary negative effect on a competitor.⁴⁹⁷

451. The Tribunal determines the impugned conduct's "overall character" by weighing several factors, including the reasonably foreseeable or expected objective effects of the act, the circumstances surrounding the acts' commission, any business justifications, and any evidence of subjective intent, if available.⁴⁹⁸

452. Proof of the respondent's subjective intent to harm competitors may be helpful, but is not necessary. In *D & B*, the Tribunal held that "it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of the respondent. The respondent will be deemed to intend the effects of its actions."⁴⁹⁹ In *Canada Pipe #2*, the Court of Appeal held that "a respondent cannot disavow responsibility for the reasonably foreseeable consequences of its acts".⁵⁰⁰

453. Instead, if the Commissioner demonstrates that negative effects on a competitor were the reasonably foreseeable consequences of the respondent's conduct, the respondent may justify its

⁴⁹⁵ *NutraSweet, supra*, p. 34e, Commissioner's Book of Authorities, vol. 1, tab 2; *Canada Pipe, supra*, para 64, pp. 271-271, Commissioner's Book of Authorities, vol. 3, tab 14.

⁴⁹⁶ *Canada Pipe, supra*, para. 67, p. 272, Commissioner's Book of Authorities, vol. 3, tab 14.

⁴⁹⁷ *Canada Pipe, supra*, para. 68, pp. 272-273, Commissioner's Book of Authorities, vol. 3, tab 14..

⁴⁹⁸ *Canada Pipe, supra*, para. 68, pp. 272-273 and para. 78, p. 276, Commissioner's Book of Authorities, vol. 3, tab 14.

⁴⁹⁹ *D & B, supra*, p. 257d, Commissioner's Book of Authorities, vol. 1, tab 1.

⁵⁰⁰ *Canada Pipe, supra*, para 73, p. 274, Commissioner's Book of Authorities, vol. 3, tab 14.

conduct by demonstrating a valid business justification. The Court of Appeal described business justifications as follows:

In appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation as to why the impugned act was performed.⁵⁰¹

454. A respondent cannot rely on any business justification to immunize its anticompetitive acts. The justification must be credible, and it must enhance efficiencies or have a pro-competitive rationale.⁵⁰²

455. In addition, a valid business justification does not automatically exempt conduct from scrutiny. The Tribunal must consider business justifications alongside all of the evidence. In *Canada Pipe*, the Court of Appeal cautioned that "a valid business justification is at most a factor to be balanced within the paragraph 79(1)(b) determination".⁵⁰³

456. The evidence before the Tribunal establishes that the character of TREB's conduct is anticompetitive. The relevant evidence is as follows:

- (a) The exclusionary effect of TREB's restrictions on VOWs was readily foreseeable. TREB's restrictions have raised VOWs' costs and reduced their attractiveness to home buyers and sellers.

⁵⁰¹ *Canada Pipe, supra*, at para. 73, p. 274, Commissioner's Book of Authorities, vol. 3, tab 14.

⁵⁰² *Canada Pipe, supra*, at para. 73, p. 274, Commissioner's Book of Authorities, vol. 3, tab 14.

⁵⁰³ *Canada Pipe, supra*, at para. 91, p. 282, Commissioner's Book of Authorities, vol. 3, tab 14.

- (b) TREB was motivated to exclude competition from innovative VOW agents that promised to provide services more efficiently. More efficient competitors threaten TREB's members with price and non-price competition.

457. A detailed explanation of these two points follows.

a) TREB Could Foresee that its Acts Would Exclude VOW-Based Competitors

458. Dr. Church testified that exclusionary conduct raises a rival's cost or reduces the attractiveness of a rival's product.⁵⁰⁴ TREB's restrictions before and after 2011 have both raised the cost of operating a VOW and reduced their attractiveness to home buyers and sellers. These consequences were readily foreseeable since at least 2003 when TREB became aware of VOWs.

459. With respect to its pre-2011 conduct, TREB cut off MLS access of BNV, Mr. Beach, and Realtysellers. Given that MLS access is critical to competing in the residential real estate brokerage market, it was reasonably foreseeable that loss of MLS access would exclude these participants from the market. TREB's conduct reduced the attractiveness of the VOW product so much by cutting off MLS access, that it effectively excluded BNV's early VOW from the GTA market.

460. In response to the BNV situation, TREB also disabled the "bulk download" feature Mr. Enchin used to populate his VOW-product. In 2004, Mr. Enchin had explained how he used this feature to populate his VOW to TREB's Chief Technology Officer, Mr. DiMichele. It was thus reasonably foreseeable that terminating this feature would make it impossible for Mr. Enchin's VOW to continue.

⁵⁰⁴ October 3 Transcript p. 2143.

461. With respect to its post-2011 conduct, four areas of evidence demonstrate that TREB could reasonably foresee that restricting use and display of the Historical MLS Data on VOWs would both increase their costs and reduce their attractiveness.

462. *First*, TREB knew about VOWs in the US. It knew that about the settlement between NAR and the DOJ. Mr. Richardson testified that TREB had been following the US situation for years. TREB had a copy of the NAR VOW Policy, which included the critical non-discrimination language (i.e., that MLSs could only restrict display of MLS data on a VOW if it similarly restricted all delivery mechanisms). It knew that American VOWs could display sold information, and it could easily have investigated and discovered that they actually did display sold information. TREB also knew at least by March 2011, that the Commissioner considered the non-discrimination element of NAR's VOW Policy an essential element of any TREB VOW policy.

463. Despite knowing that non-discrimination was a key component of NAR's VOW Policy and the Commissioner's position in Canada, TREB proceeded to adopt a restrictive and discriminatory VOW policy. Mr. Richardson himself cut the critical non-discrimination language from the NAR VOW Policy when he created the May 18 Drafts.

464. TREB could reasonably foresee that its discriminatory VOW policy would disadvantage VOWs. Non-discrimination had been a key principle in the NAR/DOJ settlement and was a key principle for the Commissioner.

465. *Second*, TREB knows how important the Historical MLS Data is to its members and to home buyers and sellers. Its own documents describe the Historical MLS Data as "essential" to the MLS. Likewise, CREA advises home buyers and sellers that "[b]oth current and historical

data is essential to the operation of the MLS® system and by placing your listing information on the MLS® system, you are agreeing to allow this ongoing use of listing and sales information."⁵⁰⁵ Although Mr. Richardson tried to downplay the importance of CMAs, other witnesses unanimously testified about the value of CMAs to home buyers and sellers. TREB had every reason to expect that restricting use and display of the Historical MLS Data on a VOW would make VOWs less attractive to home buyers and sellers.

466. *Third*, TREB knows that realtor.ca displays all active listings in TREB's MLS on a free and publicly available website. Users do not have to register to view the listing information on realtor.ca. Likewise, TREB also knew that its IDX feed was growing more popular and that users do not have to register to view active listing information on an IDX website.

467. Whereas realtor.ca and IDXs are public and do not require registration, VOWs are password-protected. VOW users must register and provide contact information. Registration creates a barrier to access. Many home buyers and sellers are unlikely to provide contact information and take the time to register for a VOW when it displays the exact same information available to them on realtor.ca or an IDX. A VOW may be more comprehensive than an IDX feed, but it is not more comprehensive than realtor.ca, which displays all of the active listings on TREB's MLS.

468. In these circumstances, it was reasonably foreseeable that restricting VOWs to display of active listing information would reduce their attractiveness to home buyers and sellers. Without providing the Historical MLS Data, VOWs offer little more than what home buyers and sellers

⁵⁰⁵ Exhibit IC 84, Simonsen Statement, Exhibit 8, p. 350.

can find on realtor.ca. Yet home buyers and sellers are less likely to use VOWs because of the registration requirement, which realtor.ca does not have.

469. *Fourth*, TREB became aware of ViewPoint's website in Nova Scotia no later than December 2010 when Mr. McMullin telephoned and emailed Mr. DiMichele about ViewPoint. Mr. McMullin told Mr. DiMichele that ViewPoint's website displayed both current and historical MLS listing information to registered users.⁵⁰⁶ He proposed that ViewPoint work with TREB rather than entering independently as a member and hoped to discuss this possibility further. Unfortunately, Mr. McMullin did not receive a response to his email, from Mr. DiMichele or anyone else at TREB.

470. In August 2011, Mr. McMullin emailed Mr. DiMichele and TREB's then President, Mr. Silver. He reiterated ViewPoint's business model included the display of Historical MLS Data. Again, he received no response.⁵⁰⁷ In November 2011 when in Toronto on business on another matter, Mr. McMullin visited TREB's offices to see if he could meet with someone there. After waiting for some time, he met with Mr. Palmer, but the meeting, like the several earlier emails, was unproductive.⁵⁰⁸

471. By December 2010, TREB knew that ViewPoint displayed Historical MLS Data on its VOW. It could reasonably foresee that restrictions on the display of Historical MLS Data on VOWs operating in the GTA would exclude ViewPoint from the market, reduce the attractiveness of its VOW to home buyers and sellers, or increase ViewPoint's costs internally as its agents would have to work with TREB's Stratus software to provide services to customers and

⁵⁰⁶ Exhibit A2, McMullin Statement, para 93, p. 25.

⁵⁰⁷ Exhibit A2, McMullin Statement, paras 96-98, pp. 26-28.

⁵⁰⁸ Exhibit A2, McMullin Statement, para 101, pp. 28-29.

clients. In the end, ViewPoint decided not to even offer services in the GTA because of TREB's exclusionary conduct.

472. This evidence demonstrates that the exclusionary effect of TREB's restrictions on VOWs was readily foreseeable. TREB is deemed to intend the reasonably foreseeable consequences of its actions.

b) TREB Intended to Shield its Members from Price and Non-Price Competition From VOWs

473. The evidence demonstrates that the exclusionary effect of TREB's restrictions on VOWs was readily foreseeable. TREB must be deemed to intend the reasonably foreseeable consequences of its actions. But evidence also demonstrates that the overriding purpose of TREB's conduct was not to enable VOWs but to go only so far as necessary to "solve VOW issues" raised by the Commissioner. That sentiment manifested itself in permitting VOWs to display only Available listings and holding back the valuable Historical MLS Data from them.

474. Internal emails among TREB's board of directors provide an important window into the Board's otherwise opaque decision-making process with respect to VOWs. Two of TREB's directors openly criticized the Commissioner's application and reacted with vitriol to any suggestion that existing agents should be forced to share MLS data with VOWs. One described sharing with VOWs as "worse than a knee replacement" and stated that VOW operators should "not ask for the history of a board for 90 odd years and say you want it for nothing".⁵⁰⁹ Another

⁵⁰⁹ Exhibit CA56, p. 1. See also September 27 Transcript pp. 1689-1694.

likened sharing information with VOWs to a supermarket filling its shelves with food and giving it away for free.⁵¹⁰

475. TREB has produced no emails from any other director repudiating those comments. No director has testified at all in this proceeding. Instead, TREB relies on the testimony of its CEO who is not a director, did not vote on TREB's restrictive VOW policy and rules, and did not even attend the final hour-long discussion of the board at which it discussed and voted on the final VOW policy and rules. His evidence merely attaches the several minutes of the board meetings. But these minutes give no insight into the board's decision making process or reasoning because the board met with its lawyers, turned off the recording tapes, and the minutes to do reveal the substance of what TREB claims were privileged discussions about VOWs.

476. When confronted by the Chair to provide an explanation for the sentiments expressed by those board members, TREB's CEO had none. He described one email as "horrible"⁵¹¹ and suggested that some people "may be a little fearful of new technology".⁵¹²

477. But that is precisely the point. The people running TREB are afraid of sharing MLS data through technology, like VOWs, and the price and non-price competition that will bring. They did not want to enable VOWs at all (witnessed by their decade-long inaction), but pressure from the Commissioner forced their hand.

478. So instead of fully enabling VOWs as NAR did in the US, TREB took what it thought would be a "just enough" approach. Like CREA's President discussed in 2008, TREB's board

⁵¹⁰ Exhibit CA57, p. 1.

⁵¹¹ September 27 Transcript p. 1694.

⁵¹² September 27 Transcript pp. 1741-1742.

drew its own "line in the sand" at the point of permitting VOWs to display the Historical MLS Data. That line would reduce the threat from VOWs who could offer only active listings, just like realtor.ca and IDXs. But unlike realtor.ca and IDXs, VOWs came with an additional burden: the registration requirement. That requirement would reduce VOWs attractiveness over the long term, because as an EDU Task Force member had recognized in 2003, "Why would anyone use a password and jump through hoops [to access a VOW] when he can get the same information directly from mls.ca without going through it."⁵¹³

479. Concerns that VOWs would bring unwanted price and non-price competition are not new. Evidence shows Organized Real Estate's pattern of inaction on VOWs motivated at least in part by concern about forced sharing MLS data with VOWs.

480. Nor are concerns about VOW-based competition isolated to some of TREB's directors. Mr. Sage admitted on cross-examination that others have expressed concern that technology would bring put pressure on commission rates.⁵¹⁴ Another Task Force member and member of CREA's 2008 VOW Task Force, Chris Slightham expressed the view that "realtors built the systems & data, why should we be forced to share"?

481. TREB's efforts to justify a decade of delay on VOWs ring hollow. TREB tried to rely on a throw-away line in its 2010/2011 Strategic Plan about VOWs to show that it was already implementing a VOW Task Force before the Commissioner became engaged in November 2010. But the evidence revealed a pattern of reference to VOWs in the TREB's Strategic Plans since at least 2004, and a pattern of complete inaction by TREB. When the Chair asked TREB's CEO if

⁵¹³ Exhibit CA3, Document 53 p. 1 and Exhibit A4, Document 865, p. 1.

⁵¹⁴ September 28 Transcript pp. 1873-1874.

TREB had taken any action on VOWs from the Summer of 2010 to March 2011, which coincides with its Strategic Plan but before the pressure from the Commissioner, Mr. Richardson frankly admitted that it had not. TREB responded to the Commissioner's pressure. It needed to "solve VOW issues and implement".⁵¹⁵

482. TREB has tried to explain its conduct but it has failed to lead evidence from persons directly involved who could testify knowledgeably on these critical issues.

483. No TREB director testified to explain what occurred at TREB's Board of Directors' meetings on May 26, June 9, June 23 and August 25, 2011. At these meetings, TREB's Directors discussed and adopted the VOW Task Force's report and recommendations, including the VOW Rules and Policies. Perhaps TREB's Directors discussed the issues TREB now raises in its defence of this matter, such as privacy and the RECO guidelines on advertising. But no one testified about what the Board discussed, other than Mr. Richardson who did not even attend the final hour-long meeting. TREB has not suggested that any of TREB's Presidents in the critical period of early 2011 to 2012 – Mr. Johnston, Mr. Silver and current President Ann Hannah – are not available to testify. But none of them did.

484. TREB put forward its VOW Task Force to explain its restrictive VOW policy and rules. But TREB again relied on testimony from its CEO, who was not a Task Force member and did not vote on the issues discussed by the Task Force. TREB did not call the chair of the TREB VOW Task Force, Heather Fuller. She was not only a member of TREB's Board of Directors at the time, but was also chair of the TREB MLS Committee that reviewed the VOW Policy and Rules in June, 2011 after her VOW Task Force had proposed them to TREB's Directors.

⁵¹⁵ Exhibit CA3, Document 1211 p. 1 & Exhibit A4, Document 912.

485. Instead, TREB led evidence from two Task Force members, Mr. Sage and Mr. Syrianos, but remarkably neither one testified in his witness statement or in examination-in-chief about the Task Force or its deliberations. What evidence they could provide emerged on cross-examination and was confused. Mr. Sage testified that he could not remember much of the Task Force's meetings or deliberations because of personal medical issues around that time.⁵¹⁶ [REDACTED]

[REDACTED]

[REDACTED]⁵¹⁷ TREB chose not to call any other Task Force member.

486. With respect to data sharing issues and Organized Real Estate's experience with VOWs, TREB did not call Mr. DiMichele or Mr. Silver. Both sat on CREA's EDU Task Force in 2003. The EDU Task Force was the genesis of the approach of Organized Real Estate in Canada to VOWs, as apparently borrowed from NAR's rules. Mr Simonsen, testified about the EDU Task Force's report and its purported intentions. But cross-examination revealed that Mr Simonsen could not provide any personal knowledge of those issues and his evidence on this issue is not useful.

487. As TREB's Chief Technology Officer, Mr. DiMichele could also have testified to technical issues raised in this proceeding, and to his interactions with Mr. Enchin in 2004 and Mr. Hamidi in 2008. Instead, TREB chose to leave their evidence uncontradicted.

488. With respect to privacy issues, TREB did not call Mr. Palmer, its Chief Privacy Officer, nor did it call any expert on privacy law. Instead, TREB appears to rely on its educational publications for its members, without asking the authors to testify in person.

⁵¹⁶ September 28 Transcript p. 1855.

⁵¹⁷ [REDACTED]

489. With respect to RECO and its Advertising Guidelines, TREB did not call TREB Director and former President, Ms. Lai, even though she is a current member of RECO's Board of Directors. Again, TREB appears to rely on documents rather than testimony. Although Mr. Simonsen commented about RECO's advertising guidelines in his witness statement, he attached the out of date 2006 guidelines. On cross-examination, he admitted never having read the new 2011 guidelines and had no idea himself how they affect the issues in this proceeding.⁵¹⁸

490. In the absence of so much potentially meaningful testimony from so many people, the Tribunal may also look to other relevant evidence about TREB's purpose in adopting its restrictive VOW Rules and Policy. This evidence includes:

- (a) the Navigator report that wrote of the unfairness in TREB having to share MLS data with VOW operators;⁵¹⁹
- (b) TREB's public relations campaign which targeted the Commissioner personally in an apparent attempt to influence the public, and thereby the Tribunal; and
- (c) TREB's investigation of the Commissioner's personal relationships rather than seeking substantive answers to its purported privacy and RECO concerns. In September 2011, a TREB director asked in an email whether TREB had "asked officially what is the relationship between Melanie Aikens [sic] and Larry Dale? How long have they known each other? Did they work at the same law firm at the same time?"⁵²⁰ TREB's then President, Mr. Silver replied "We would love to

⁵¹⁸ October 9 Transcript p. 2265-2267.

⁵¹⁹ Exhibit A4, Document 675.

⁵²⁰ Exhibit A4, Document 754, p. 1.

know the answer to your second question and do have registered in the courts concerns about the Communication between the CB and Mr. Dale...please trust that we have been looking under all these rocks..."⁵²¹

491. As described in greater detail below, TREB took no action to address the privacy and RECO concerns it now claims motivated its restrictions. But it was apparently willing to "look under all these rocks" related to the Commissioner's dealings.

492. The evidence demonstrates that the overriding purpose of TREB's conduct was not to enable VOWs but to go only so far as necessary to "solve VOW issues" raised by the Commissioner. The strong inference is that sentiment manifested itself in:

- (a) permitting VOWs to display only Available listings (in an attempt to appease the Commissioner or undermine her Application); *but*
- (b) holding back the valuable Historical MLS Data from VOWs and imposing other restrictions (to reduce their competitive effectiveness and continue to shield members from effective price and non-price competition).

Business Justifications

493. TREB has asserted three business justifications to excuse its anticompetitive acts. To explain its conduct, these business justifications must be credible, and must enhance efficiencies or have a pro-competitive rationale credible. But the evidence demonstrates that they are not credible and cannot immunize TREB from the Tribunal's scrutiny. The evidence demonstrates that:

⁵²¹ Exhibit A4, Document 754, p. 1.

- (a) TREB's assertion that privacy laws motivated its conduct is not credible and not supported by the evidence.
- (b) TREB's assertion that provincial regulations motivated its conduct is not credible and not supported by the evidence.
- (c) TREB's assertion that acted to protect the integrity of its MLS is not credible. There is no evidence that agents (under pressure from their clients) would stop listing properties on the TREB MLS if TREB permitted VOW-based agents to display the full complement of MLS data.

494. A detailed explanation of each of these three points follows.

a) TREB's Privacy Justification is not Credible

495. A valid business justification must be credible to influence the "overall character" of the impugned conduct. TREB asserts that privacy laws motivated its conduct and therefore shield them from the Tribunal's scrutiny. TREB's assertion is not credible and not supported by the evidence.

496. Instead, the evidence demonstrates that TREB's purported reliance on privacy laws is a cloak to mask TREB's real motivation. It lays bare the hypocrisy of TREB's position on this issue. TREB's conduct on VOWs is not at all in keeping with an organization motivated by privacy concerns. Instead, it demonstrates that TREB identified privacy as a potential shield in its fight against the Commissioner. It cynically chose to rely on its privacy defence and take no action that might compromise it (such as getting an opinion from the Privacy Commissioner).

497. The hypocrisy of TREB's position is evident from a review of:

- (i) TREB's refusal to provide the Historical MLS Data to its members in the datafeed for internal statistical purposes;
- (ii) TREB's refusal to permit its members to display the Historical MLS Data to customers and clients on a VOW while enabling members to provide it by other delivery mechanisms;
- (iii) TREB's abject failure to "fix" the privacy issue by amending the consents provided by home buyers and sellers or by seeking clarity from the Privacy Commissioner's office; and
- (iv) Mr. Richardson's admissions at the hearing that privacy concerns either do not exist or could be addressed.

(i) TREB Provides the Historical MLS Data in Bulk to Third Parties for Statistical Purposes but Refuses to Provide the Same Data to its Members for the Same Purposes

498. Although TREB refuses to distribute the Historical MLS Data to its members through the VOW datafeed, the evidence indicates that TREB distributes the Historical MLS Data in bulk to third parties on a regular basis. If TREB relied on an exception to PIPEDA⁵²² to permit it to distribute personal information to be used for statistical purposes or relied on consent obtained from home buyers and sellers, that same exception or that same consent should permit TREB to distribute the Historical MLS Data to its own members for their internal use for analysis and statistical purposes.

⁵²² PIPEDA, *supra*, s. 7(3)(f).

499. The evidence confirms that TREB has provided and continues to provide all or part of the Historical MLS Data to third parties through bulk data transfers. Such transfers include:

- (a) A monthly transfer to CREA via email which includes the sold price and the sold date.⁵²³ CREA receives the sold information for "statistical purposes" and TREB claims that CREA does not publish it other than in an aggregated format.⁵²⁴

- (b) A transfer to Altus Group Limited to permit it to prepare a House Price Index to track property values within TREB's service area.⁵²⁵ The agreement provides [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵²⁶

- (c) A transfer of six years of sold and other data to the CD Howe Institute as part of a research project on the impact of the Toronto Land Transfer Tax (such analysis would require the sold price).⁵²⁷ In a March 26, 2008 email, TREB's Privacy Officer, Von Palmer, stated in relation to the data transfer to CD Howe that he was "not overly concerned about privacy since we are securing all of this under contract for specified uses"⁵²⁸ (i.e., the statistical research being conducted).

⁵²³ Exhibit CA3, Document 1099, p. 1. See September 27 Transcript p. 1612-1613.

⁵²⁴ Exhibit CA3, Document 1397, p. 40. See September 27 Transcript p. 1612-1613.

⁵²⁵ Exhibit CA3, Document 1414 & Exhibit A4, Document 1060. See September 27 Transcript p. 1615-1616.

⁵²⁶ Exhibit CA3, Document 1414 p. 7. See September 27 Transcript p. 1615-1616.

⁵²⁷ Exhibit CA3, Document 219 & Exhibit A4, Document 907. See September 25 Transcript p. 1414.

⁵²⁸ Exhibit A4, Document 254, p. 1.

- (d) A transfer to Interactive Mapping Inc. ("IMAPP"), of all of TREB's MLS data (including sold and pending sold data) to permit the use of IMAPP's MLS Data Verification Systems known as ICHECK.⁵²⁹ TREB claims that IMAPP retains the data for 180 days only.⁵³⁰

500. TREB not only transfers the Historical MLS Data to the above third parties, but TREB itself conducts statistical analysis using the Historical MLS Data and discloses the results on a monthly basis through its Market Watch reports. These reports provide detailed information about average sale prices across the GTA. For example, they break down information on a MLS area basis, indicate what the average sale price was, indicate how many sales occurred in each area, what the average sale to list price ratio was, and how many days on average homes stayed on the market before selling.⁵³¹

501. Although TREB (i) transfers its MLS data, including the Historical MLS Data, to the above third parties in bulk, (ii) permits some to disclose aggregated information (i.e., CREA), and (iii) discloses the aggregated information itself, TREB refuses to transfer the Historical MLS Data to its own members. Yet, TREB's members have testified that they wish to use the MLS data, including the Historical MLS Data, for statistical purposes and display the results in an aggregated form, just as TREB permits CREA and other non-members to do. Mr. Pasalis of Realosophy testified about aggregating MLS data to provide clients and potential clients with detailed aggregated information about different Toronto neighbourhoods.⁵³² He noted that such

⁵²⁹ Exhibit CA3, Document 1415 p. 1 & Exhibit A4, Document 1061. See September 27 Transcript p. 1616.

⁵³⁰ Exhibit CA3, Document 1397, p. 40. See September 27 Transcript p. 1616.

⁵³¹ See for example Exhibit R39, Richardson Statement, Exhibit Q.

⁵³² Exhibit A10, Pasalis Statement, paras 23-25, p. 7-8.

statistical analysis would be far more efficient, useful, and robust if TREB included the Historical MLS Data in the VOW datafeed. He testified that:

If Realosophy had more access to data (including solds and pending solds) we could provide a more complete and precise picture of a particular property by aggregating all information in much the same way we did with our neighbourhood profiles. We could also prepare different reporting tools to meet various client needs, for example, a different report could be programmatically developed for investors looking to invest in multi-unit properties which generally require more analysis than the average home purchase.⁵³³

502. Likewise, Mr. Hamidi of TheRedPin testified how "with access to sold data we will also be able to use aggregates to show trends to users in different formats, such as "heat" maps (which local areas are "hot"), graphs and charts so they can better understand the market and make better decisions."⁵³⁴

503. But instead of transferring the Historical MLS Data to its VOW-operating members as it does to third parties, TREB has failed to do so and has even imposed *additional* restrictions on how its members use information in the VOW datafeed. TREB prohibits VOW operators from using the information in the VOW datafeed for any purpose other than displaying the information to consumers. The contractual "Purpose" appears to prohibit VOW-operating members from using the MLS data in the VOW datafeed to conduct statistical analysis. In contrast, no such restrictions exist in the Authorized User Agreement which applies to non-VOW operating TREB members.

504. There is no reason why TREB could not transfer the Historical MLS Data to its members and secure the same contractual protections as it does from third parties in its VOW Datafeed

⁵³³ Exhibit A10, Pasalis Statement, para 21, p. 7.

⁵³⁴ Exhibit A13, Hamidi Statement, para 43, p. 10.

Agreement. Indeed, given how important continued MLS access is to TREB's members, TREB should take greater comfort in compliance on the part of its members since breach of any contract with TREB could result in TREB denying them MLS access.

(ii) TREB's Conduct Regarding the Historical MLS Data is Consistent with TREB Having the Consent of Home Buyers and Sellers to Distribute the Data

505. Like its refusal to transfer the Historical MLS Data in bulk to its members for statistical analysis purposes and aggregated display, TREB's conduct when it comes to disclosure of the Historical MLS Data to customers indicates that TREB believes it has obtained the necessary consents so that its members may disclose the Historical MLS Data to their customers. But rather than treating its VOW-operating members in the same manner, TREB restricts how VOWs may provide the Historical MLS Data to customers, purportedly on the basis that the Historical MLS Data is private.

506. But if disclosure of the Historical MLS Data by members to customers were truly a privacy issue, one would expect TREB:

- (a) To restrict access to the Historical MLS Data only to TREB members. But instead, TREB permits many non-TREB members from across Ontario to access the Historical MLS Data.
- (b) To prevent its members from disclosing the Historical MLS Data to their customers in any circumstances. Instead, TREB permits its members to provide the Historical MLS Data to customers by hand, fax, or email.

- (c) To discourage the dissemination of the Historical MLS Data by its members. Instead, TREB actively encourages its members to provide the Historical MLS Data to customers by hand, fax, or email in the context of a CMA and tells its members that they are complying with privacy laws when they do so.
- (d) To permit the removal of private MLS data from the TREB MLS upon request by a home buyer or seller. Instead, TREB narrowly circumscribes removal of MLS data and regularly refuses requests to remove data from its MLS.

507. *First*, although TREB claims privacy laws prohibit disclosure of the Historical MLS Data, it regularly permits thousands of non-TREB members to access the Historical MLS Data every day. For example, TREB regularly transfers Historical MLS Data from the western part of TREB's MLS to the Oakville, Milton, and District Real Estate Board for use by that board's members.⁵³⁵ Likewise, TREB permits members of most other Ontario real estate boards⁵³⁶ to access two-years worth of the Historical MLS Data through a data sharing program known as CONNECT. CONNECT offers members of the participating boards the ability to search and view active listings and recent sales history of all other participating boards. Mr. Richardson testified that 92% of Ontario realtors can use CONNECT.⁵³⁷ TREB also grants some appraisers access to the Historical MLS Data.⁵³⁸ Thus, rather than restricting access to the Historical MLS Data as one would expect if it were private and TREB did not have the proper consents, TREB provides wide access to thousands of non-TREB members. TREB's approach is inconsistent

⁵³⁵ See Exhibit CA3, Document 1412 & Exhibit A4, Document 1058; Exhibit CA3, Document 1397, p. 40. See September 27 Transcript p. 1614-1615.

⁵³⁶ Exhibit IC84, Simonsen Statement, pp. 445-446.

⁵³⁷ September 24 Transcript p. 1197.

⁵³⁸ September 25 Transcript pp. 1413-1414.

with a belief that the Historical MLS Data is private, cannot be disclosed, and must be closely guarded by TREB.

508. *Second*, although TREB claims that disclosure of the Historical MLS Data through a VOW presents a privacy issue, TREB does not prohibit its members from distributing the Historical MLS Data by hand, email, or fax. It does not prohibit such activity, even though it knows that some members distribute the Historical MLS Data to home buyers and sellers all the time. TREB's Stratus software permits its members to email links to report formats such as Broker Full and Client Full. When a home has sold, both the Broker Full and Client Full report formats display the sold price.

509. TREB even admits that it is aware of at least one TREB member providing an email subscription service that sends an email with current MLS sales data *each day* after it is posted on TREB's MLS.⁵³⁹ In many ways, an email subscription service mimics (through a less efficient medium) what VOW-operators want to do over their website.

510. The testimony of TREB's own witness, Mr. Sage, is even more revealing. His brokerage distributes monthly neighbourhood newsletters by email to hundreds and perhaps thousands of customers across the GTA. Each report includes Historical MLS Data by listing neighbourhood sales in the last month. The reports also provide some analysis and other trend information. In many ways, this is precisely what VOW-operators want to do through a VOW rather than through a much less efficient medium such as email. And Mr. Sage and his father believe that

⁵³⁹ Exhibits A26 & A28, TREB Admissions #159 and 160.

the *current* consents from home buyers and sellers are sufficient to permit them to provide this service.⁵⁴⁰

511. Mr. Sage testified that his reports are not secrets and have existed for well over a year, although he did not mention them when he sat on the VOW Task Force.⁵⁴¹ TREB permits Mr. Sage to distribute Historical MLS Data, but prohibits VOWs from displaying the very same information on a website.

512. That TREB has not stopped Mr. Sage from providing detailed sold information to consumers via email is not surprising because TREB admits that it has *never* taken disciplinary or enforcement action against a member for providing sold data or pending sold data by hand or by email. TREB simply says that it has referred such incidents to RECO and the Privacy Commissioner.⁵⁴²

513. Yet what an email subscription service offers or Mr. Sage offers through his reports is exactly the kind of service VOW-operators wish to offer in a more efficient way through their VOW. Rather than having a person manually search the sold listings, VOW operators can automate that process. Rather than consumers signing up to begin receiving daily emails, VOW operators can display this information immediately to registered VOW-users after they sign in with their password. And rather than providing sold information upon request simply to an email address without any terms of use or other protection, a VOW can display the same sold information only after a user has agreed to terms of use, and after the VOW operator has

⁵⁴⁰ September 28 Transcript p. 1868.

⁵⁴¹ September 28 Transcript p. 1868.

⁵⁴² Exhibits A26 & A28, TREB Admission #156.

implemented potential security options to prevent improper use of data.⁵⁴³ None of these safeguards exist in the email subscription or with Mr. Sage's reports. Yet TREB permits Mr. Sage's reports and the email subscription service to continue, and restricts VOWs from displaying the Historical MLS Data.

514. *Third*, perhaps even more telling than TREB's inaction to prevent its members from distributing the Historical MLS Data by hand, email, or fax is how TREB *encourages* its members to distribute the Historical MLS Data through these media, particularly as part of a CMA. TREB even tells its members that Section 11 of the Listing Agreement provides the necessary consents to permit them to use and distribute the Historical MLS Data in the context of a CMA. Yet at the same time as TREB encourages distribution by hand, email or fax, it restricts VOW operators from displaying the Historical MLS Data on a VOW.

515. TREB workbooks such as TorontoMLS Contacts & CMA⁵⁴⁴ and Appraisal for Superior Sales and Listings⁵⁴⁵ teach TREB members how to use the Historical MLS Data to create CMAs. TREB's Stratus software assists members prepare CMAs electronically. TREB members use CMAs in listing presentation (i.e., to pitch for business) as well as to advise on appropriate list and offer prices.

516. In the past, when questions arose about whether members could leave copies of CMAs with prospective clients, Organized Real Estate obtained legal advice that they could. TREB has since advised its members to impress upon prospective clients the confidentiality of CMAs, but nevertheless advises its members that they can continue to provide them:

⁵⁴³ Exhibit A21, Reply Enchin, paras. 5-6, pp. 2-3.

⁵⁴⁴ Exhibit A4, Document 1348.

⁵⁴⁵ Exhibit A4, Document 1345.

Although it cannot be said with absolute certainty given the lack of precedents or case law on the ultimate interpretation of many aspects of PIPEDA, a strong argument can be made that the words "conduct comparative market analyses" contained in the consent clause of the OREA standard for listing agreement can be interpreted broadly enough to include the essential part of "conducting a CMA", that is, providing that information to a prospective seller or prospective buyer.⁵⁴⁶

517. TREB promotes its members' use and disclosure of the Historical MLS Data, particularly in CMAs. It justifies continued use by relying on the consent provided in the Listing Agreement, which permits TREB to *distribute* MLS data to brokerages, including in electronic media. When members want to use the Historical MLS Data in CMAs, TREB considers the consent sufficient. When members want to provide copies of CMAs to prospective clients, TREB considers the consent sufficient. When members want to use pending sold data in CMAs and distribute pending sold information about a single home, TREB considers the consent sufficient.

518. But when members want to provide the Restricted Data to prospective clients on a VOW, TREB conveniently claims that the consent is insufficient. Quite simply there is a double standard. One for VOWs and one for everyone else.

519. *Fourth*, if TREB believed the Historical MLS Data was private it would remove personal data from its MLS upon request by home buyers and sellers. Instead, TREB refuses to remove information except when the information is inaccurate. And even when the information is incorrect, TREB creates barriers to discourage revision to MLS information.

⁵⁴⁶ Exhibit R39, Richardson Statement, Exhibit X pp. 425-426.

520. TREB Policy 102 states that as a general matter TREB will not *delete* listing information from its MLS. Two exceptions exist: the listing is invalid or the address is incorrect.⁵⁴⁷ Under no other circumstances will TREB remove listing information from its MLS.

521. Policy 103 governs the circumstances under which TREB will *revise* information in its MLS. It will only do so to correct inaccurate information, and only then upon receiving a written direction from the listing brokerage setting out sufficient reasons for the requested change. The CEO or Staff Director must review and approve the requested revisions.

522. Apart from this strict process, TREB is clear that "No other changes will be made in the historical data."⁵⁴⁸

523. TREB refuses to remove historical data from its MLS when requested by home buyers or sellers. Even when home buyers and sellers assert that this information is private, TREB refuses to remove it. In January 2004, TREB's Board refused to remove historical information from the TREB MLS upon request by home buyers and sellers. It concluded the data was too important to the integrity of the TREB MLS to remove. It noted that if home sellers wanted to keep their information private, they could list on an exclusive basis rather than listing through the TREB MLS. The Board stated that "retention of the MLS Listing history on the system is important and the retention of "expireds" is just as important as retaining "solds", especially in a quick moving market and the option of "exclusives" is available to those who do not wish to list on the MLS system."⁵⁴⁹

⁵⁴⁷ Exhibit R39, Richardson Statement, Exhibit D, p. 168.

⁵⁴⁸ Exhibit R39, Richardson Statement, Exhibit D, p. 168.

⁵⁴⁹ Exhibit A4, Document 89, p. 1.

524. TREB's "Questions and Answers" on privacy issues reflects this same position. It advises that TREB will not remove historical data from its MLS unless the address on the listing agreement is incorrect or the listing agreement is invalid. It justifies this position, in part, because:

Removal of the MLS listing information would seriously and adversely impact the usefulness of MLS historical information. Such historical information is essential to the operation of the MLS system so REALTOR Members can continue to provide comparative market analysis and valuations to customers and clients.⁵⁵⁰

525. Like all of TREB's privacy positions, this appears designed to serve its own purposes rather than those of home buyers and sellers.

(iii) Had Privacy Concerns Existed, TREB Could have Revised the Appropriate Consents or Sought Advice to Address its Concerns

526. If TREB identified legitimate privacy concerns related to disclosure of MLS data on a VOW, it could have recommended amendments to Section 11 of the Listing Agreement to obtain the seller's consent to display the MLS data on a VOW. TREB has taken steps to effect such revisions to Section 11 in the past in response to privacy concerns. But with respect to VOWs, it did not even *consider* amending the Section 11 consent. It simply refused to permit VOWs to display the data. TREB now raises privacy issues to excuse its anti-competitive conduct when it could have but failed to take action to address any privacy issues. TREB's failure to take any steps to adjust the Section 11 consent strongly suggests that TREB's privacy concerns are not legitimate, and instead support a tactical argument it wished to make in this proceeding.

⁵⁵⁰ Exhibit R39, Richardson Statement, Exhibit X p. 431.

527. Just months before TREB's VOW Task Force considered the privacy issues allegedly raised by VOWs, TREB's MLS Committee considered similar concerns about interior home photos that remained on the MLS after the property had sold. TREB had received legal advice that identified TREB's retention of interior photos in its MLS as "a privacy issue". Its lawyer recommended changes to Section 11 of the Listing Agreement to address any concerns.

528. Because of the importance of such photos to its members and their use in identifying comparable properties, in just one meeting, the MLS Committee recommended to TREB's Board of Directors that it [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]⁵⁵¹ Subsequent versions of section 11 of the Listing Agreement contained express language to address the retention and use of interior photos in TREB's MLS as recommended by counsel.

529. In contrast, TREB did not even try to revise the appropriate consents to permit distribution of the Historical MLS Data over a VOW. [REDACTED]

[REDACTED]
[REDACTED]⁵⁵² [REDACTED]

[REDACTED]⁵⁵³

530. Nor did the VOW Task Force obtain any legal advice with respect to privacy or RECO concerns. TREB admits that its VOW Task Force:

⁵⁵¹ Exhibit CA3, Document 1192 p. 2 & A4, Document 964.

⁵⁵² [REDACTED]

⁵⁵³ [REDACTED]

- (a) [REDACTED]
[REDACTED],⁵⁵⁴
- (b) [REDACTED]
[REDACTED]⁵⁵⁵ [REDACTED]⁵⁵⁶
- (c) [REDACTED]
[REDACTED]⁵⁵⁷ [REDACTED]⁵⁵⁸ [REDACTED]⁵⁵⁹ [REDACTED]
- (d) [REDACTED]
[REDACTED]⁵⁶⁰ [REDACTED]⁵⁶¹ [REDACTED]⁵⁶² [REDACTED]; and
- (e) [REDACTED]⁵⁶³ [REDACTED]
[REDACTED]⁵⁶⁴ [REDACTED]⁵⁶⁵ [REDACTED]
[REDACTED]

531. TREB seeks to excuse these fundamental oversights by blaming the Commissioner and saying that she rushed the VOW Task Force's deliberations. In its Response to the

554 [REDACTED]
555 [REDACTED]
556 [REDACTED]
557 [REDACTED]
558 [REDACTED]
559 [REDACTED]
560 [REDACTED]
561 [REDACTED]
562 [REDACTED]
563 [REDACTED]
564 [REDACTED]
565 [REDACTED]

Commissioner's Request to Admit, TREB repeated over and over that: "Time ultimatums by the Commissioner of Competition prior to the commencement of this Application led to the procedures adopted by the VOW Task Force..."

532. As cross-examination of Mr. Richardson revealed, TREB's claims in this regard lack merit. The evidence shows that in 2004 and 2009 when Organized Real Estate wanted advice on leaving copies of CMAs with prospective clients and providing pending sold data to clients, they obtained legal advice in a matter of days. TREB's VOW Task Force had four meetings over three months, yet it failed to take any of the steps one would expect. For example, although aware that Century 21 displays sold prices on its public website, TREB has never asked Century 21 about the take-up rate and how many buyers and sellers consent to having the sale price of their home displayed on the website.⁵⁶⁶

533. Remarkably, a year-and-a-half since this Application began, TREB has still *never* asked the Privacy Commissioner to comment on VOWs specifically. Instead, TREB asked its public relations firm, Navigator, to send a copy of its privacy "Questions and Answers" to the Privacy Commissioner.⁵⁶⁷ But these "Questions and Answers" say absolutely nothing about VOWs. So even if the Privacy Commissioner were to respond to Navigator's request and comment on TREB's "Questions and Answers", TREB will still not have an answer about whether its members can display the Historical MLS Data on a VOW.

534. Again, TREB's lack of action on this issue demonstrates the hypocrisy of TREB's position on privacy. It claims to want certainty from the Privacy Commissioner to permit it to

⁵⁶⁶ September 27 Transcript pp. 1737-1738.

⁵⁶⁷ Exhibit R39, Richardson Statement, para 92, p. 19.

provide its members with the Historical MLS Data in the VOW feed but it has taken absolutely no real steps to get such advice from the Privacy Commissioner. Evidence first disclosed at the hearing revealed that TREB's representatives had not even sent the "Questions and Answers" to the Privacy Commissioner as first thought.⁵⁶⁸ TREB only discovered this error months later in preparing for the hearing.⁵⁶⁹ In other words, TREB cared so little for the Privacy Commissioner's views that months went by without TREB even questioning why the Privacy Commissioner had not responded.

535. The explanation for TREB's inaction is simple. TREB recognized that it could attempt to defend this application by claiming a "business justification" that privacy laws tied its hands. Had it taken action to address the "privacy issue" it identified, it would have lost this purported shield.

(iv) Mr. Richardson Admitted that Existing Consents Are Likely Sufficient or If Not Could be Obtained

536. Mr. Richardson's answers to the Panel's questions at the end of his testimony revealed that despite all of TREB's arguments to the contrary, existing consents in Listing Agreements and BRAs either already address any privacy concerns, or additional consents could be obtained to address any remaining concerns.

537. With respect to WEST listings, and contrary to his previous testimony, Mr. Richardson admitted that Section 11 of the Listing Agreement permitted their distribution in the VOW datafeed:

⁵⁶⁸ September 25 Transcript p. 1488.

⁵⁶⁹ September 27 Transcript p. 1746.

MR. RICHARDSON: [...] With withdrawn, expired, suspended or terminated listings, you are dealing strictly with the seller side.

MADAM JUSTICE SIMPSON: You already have the consents you need for that in the listing form, as I read it?

MR. RICHARDSON: Yes. I think you will find some concerns or sensitivities from home owners about that status issue.

MADAM JUSTICE SIMPSON: But when you read section 11 of the listing agreement –

MR. RICHARDSON: It probably covers it from a legal point of view.

MADAM JUSTICE SIMPSON: Yes, all right. So that is an answer to putting that data in the VOW feed.⁵⁷⁰

538. With respect to pending and sold listings, Mr. Richardson testified that BRAs would be likely sufficient if everyone signed BRAs:

MR. ROOK: So that to the extent that there are these BRAs in effect, there really can't be any issue about the supply of sold information by your members to prospective purchasers in a CMA?

[...]

MR. RICHARDSON: If there was a prospective buyer, then I believe the answer would generally be "yes" to your question.⁵⁷¹

539. And then later in answering questions from the Chair of the Panel:

MADAM JUSTICE SIMPSON: [...] And with respect to sold and pending sold, what I started with and you properly corrected me, the offer of purchase and sale that Century 21 is using and anything in buyer agreements would cover that data, I take it, assuming you have proper informed language and proper consent?

⁵⁷⁰ September 27 Transcript pp. 1750-1751.

⁵⁷¹ September 25 Transcript pp. 1429-1430.

MR. RICHARDSON: That would assume that everybody signed a Buyer Representation Agreement. So it really needs to be done in some other fashion on a document that everybody is signing.⁵⁷²

540. Of course, the evidence of TREB's later witnesses was that *all* of their buyers sign BRAs, and that BRAs are a regulatory requirement. Mr. Richardson's concern appears manufactured.

541. However, even assuming BRAs are not as widespread as TREB's witnesses testified, Mr. Richardson still admitted that solutions exist to permit pending and sold listings to be included in the VOW datafeed:

MADAM JUSTICE SIMPSON: Well, I think that is why the offer to purchase and sale is the right place perhaps to put it, the way Century 21 is doing.

MR. RICHARDSON: Yes. Now, my understanding, at least, is that legal counsel indicates you can't build that into the agreement itself, because that's an agreement between the parties about that transaction. So using a separate document seems to be the way to go. I do know that there is some work -- and I don't know the details of that work -- that's ongoing right now at the Ontario Real Estate Association trying to resolve some of that.

MADAM JUSTICE SIMPSON: Because there is material in an offer that talks about the commission and doesn't -- you know, does address the role of the Realtor® in the process. It doesn't seem perhaps all that foreign to have a schedule or some other kind of agreement attached.

MR. RICHARDSON: Yes, yes.⁵⁷³

542. Mr. Richardson's admissions align with ViewPoint's experience in Nova Scotia. Mr. McMullin testified that the Privacy Commissioner has not contacted him or advised that he

⁵⁷² September 27 Transcript p. 1751.

⁵⁷³ September 27 Transcript pp. 1751-1752.

cannot display WEST, pending or sold listings on his VOW.⁵⁷⁴ Those few complaints he receives from home buyers and sellers almost all relate to interior photos, not sold prices.

b) VOWs are not Advertising and RECO's Advertising Guidelines are not Relevant

543. Like TREB's privacy arguments, TREB's assertion that RECO's Advertising restrictions motivated its restrictions lacks credibility. Five pieces of evidence demonstrate this.

544. *First*, although TREB asserts that "it wants to make sure that the VOW feed is being provided in a way that does not create any legal liability for it or its members",⁵⁷⁵ TREB has not asked RECO to comment on VOWs at all. Mr. Richardson claims that it "is incredibly difficult to get definitive statements from RECO or *PIPEDA* on some issues" in an apparent attempt to justify TREB's inaction. But the evidence before the Tribunal shows the exact opposite. RECO has been very responsive to Organized Real Estate's many requests for advice and interpretation of its regulations. Indeed, it did so most recently in June 2011 in response to CREA's questions about its proposed DDF platform.

545. Such responses from RECO include:

546. **IDXs in 2001:** A CREA memorandum from 2001⁵⁷⁶ records that CREA's AEC Task Force met with RECO's President and Executive Officer, and Registrar to discuss IDXs. The memorandum states that "[since] RECO regulates advertising and IDX is fundamentally, an advertising issue, consulting with RECO was an obvious first step."⁵⁷⁷ The memorandum also

⁵⁷⁴ September 10 Transcript pp. 153-154.

⁵⁷⁵ Exhibit R39, Richardson Statement, para 177, p. 35.

⁵⁷⁶ The date on the face of the document appears to be wrong, which is obvious from the comments on p. 1.

⁵⁷⁷ Exhibit A4, Document 13, p. 3 (emphasis added).

records that RECO approved the IDX concept and that it was left to *members* not *boards* to ensure regulatory compliance:

Our regulatory body appears to have no problem with IDX as long as it doesn't negatively impact the public. Moreover, RECO has jurisdiction over registrants but not over Boards. It, therefore, follows that Boards are free to offer IDX as a Member Service, provided they ensure that the Members are aware of those provisions of REBBA that deal with advertising and the RECO Code of Ethics.⁵⁷⁸

547. **Competition Bureau Study in 2006:** On July 14, 2006, the Competition Bureau wrote to RECO in connection with the Bureau's survey of Canadian regulated professional groups, including the real estate industry. RECO completed the survey and returned it to the Bureau on September 28, 2006.⁵⁷⁹ RECO again corresponded with the Bureau in 2010 regarding the Bureau's follow up to its study.⁵⁸⁰

548. **Virtual tours and Prospect Match in 2007:** On March 26, 2007, Allan Johnston, RECO's Registrar, wrote to Mr. Foy from TREB and responded to two questions Mr. Foy had asked.⁵⁸¹ First, whether a TREB rule that would prohibit any information on a virtual tour other than the pictures pertaining to the subject property would violate REBBA or its regulations. Mr. Johnston replied that RECO had no problem with this proposed rule.

549. Second, Mr. Foy asked whether REBBA and its regulations required the listing brokerage name and phone number to appear on the information accompanying TREB's Prospect Match formats when sent by members to prospective clients. Mr. Johnston replied that omitting the

⁵⁷⁸ Exhibit A4, Document 13, p. 3.

⁵⁷⁹ Exhibit R83, Tab 36.

⁵⁸⁰ Exhibit R83, Tab 37.

⁵⁸¹ Exhibit A4, Document 10065 pp. 1-2.

listing brokerage's name and replacing it with the contact information of the cooperating agent would be misleading and should not be done.⁵⁸²

550. **CREA's DDF in 2011:** On March 3, 2011, CREA wrote to RECO asking four questions related CREA's proposed DDF, including whether display of listing information online would violate applicable provincial legislation:⁵⁸³

1. Would it be a violation of the licensing legislation in your province/territory if a broker licensed in your province/territory displayed listing information for properties located outside of your jurisdiction on their website?
2. Would it be a violation of the licensing legislation in your province if a broker that was not licensed in your province displayed listing information for properties located in your jurisdiction on their website in the manner contemplated in this initiative (i.e. with the listing agent information displayed with each listing)?
3. If the operator of this website were contacted by a consumer regarding one of the listings on his site, and the listing was in your jurisdiction, could the broker refer the consumer to a real estate professional in the jurisdiction and collect a referral fee without violating your legislation?
4. On a related matter, we wish to ensure that the display of the name and contact information of the listing agent complies with provincial legislation. To that end, could you please advise as to what listing agent information is required in your jurisdiction to meet the regulatory obligation.⁵⁸⁴

⁵⁸² See also September 25 Transcript p. 1563-1566.

⁵⁸³ Exhibit A4, Document 858.

⁵⁸⁴ Exhibit A4, Document 858, p. 2.

551. RECO responded on March 30, 2011 and asked for additional information about the proposed DDF.⁵⁸⁵ CREA provided more information by email later that same day. RECO then provided very detailed responses to CREA's four questions on June 1, 2011 as follows:

1) No. *The Ontario Real Estate and Business Brokers Act, 2002*, (hereafter, the "Act") does not prevent a brokerage registered in Ontario from displaying listing information for properties located outside of Ontario. However, we cannot speak to what may be the positions of regulators in other provinces if the Ontario brokerage is marketing out-of-province properties including to consumers from that province.

2) To avoid ambiguity, we considered two non-exclusive scenarios. Scenario #1 is a non-Ontario brokerage that lists a property located in Ontario and markets that property including to Ontario consumers, which is displayed and accessible including through the websites of Ontario brokerages. The answer to Scenario #1 is yes, the non-Ontario brokerage and would be in breach of the Act if not registered in Ontario. Scenario #2 is a non-Ontario brokerage that displays on their website a property listed by an Ontario brokerage and is also displayed on the Ontario brokerage's website. The answer to Scenario #2 is no.

3) Yes, as long as the activity for which the referral fee is paid is not one that requires registration in Ontario under Section 30 of the Act (e.g. is not a trade in real estate in Ontario).

4) A registrant must comply with Section 36 of Ontario Regulation 580/05 (Code of Ethics) Real Estate and Business Brokers Act, 2002 - O. Reg. 580/05. Please also see Section 8 of Ontario Regulation 567/05 for registration requirements respecting names Real Estate and Business Brokers Act, 2002 - O. Reg. 567/05 as well as Section 29 of the Act.⁵⁸⁶

552. On cross-examination, Mr. Simonsen agreed that RECO had responded to CREA in a reasonably timely fashion.⁵⁸⁷

⁵⁸⁵ Exhibit A4, Document 858, p. 3.

⁵⁸⁶ Exhibit A4, Document 858, p. 6.

⁵⁸⁷ October 9 Transcript p. 2273.

553. **TREB's VOW Policy in 2011:** On August 25, 2011, Mr. Palmer, TREB's Privacy Officer, emailed copies of TREB's newly approved VOW Rules and other information on VOWs to Susan Greensword. He asked her to "send this to all the boards using AEC emails and directly to the "key" CEO's such as OREA, CREA & RECO using the subject line above for the email and the blurb below..."⁵⁸⁸

554. As it turned out, later that day, Mr. Richardson *himself* emailed a copy of the TREB's newly approved VOW Rules directly to RECO's CEO, Tom Wright.⁵⁸⁹ Yet despite sending its VOW Rules *directly to RECO's CEO*, TREB never bothered to ask RECO's advice or position on VOWs generally, and the implications of them under RECO's advertising regulations.⁵⁹⁰

555. A month later, Mr. Silver noted in an email that TREB had not formally asked RECO for its position on VOWs, but he said "they are very aware of every step that has been taken."⁵⁹¹

556. The evidence does not support TREB's assertion that it is "incredibly difficult to get definitive statements from RECO".⁵⁹² In fact, the evidence shows the exact opposite. RECO has been very responsive to Organized Real Estate's requests for advice and interpretation of its regulations. When TREB or CREA have wanted RECO's position on key issues, they have sought it. Moreover, TREB very clearly had the ability to get RECO's position on VOWs: it sent its VOW Rules directly to RECO's CEO.

⁵⁸⁸ Exhibit A4, Document 730, p. 1.

⁵⁸⁹ September 24 Transcript p. 1300.

⁵⁹⁰ September 25 Transcript p. 1400-1401. See also Exhibits A26 & A28, TREB Admissions #388 ("TREB has not requested any guidance from RECO concerning whether these contractual clauses [the consents in Listing Agreements and BRAs] are sufficient to fulfill the requirement of REBBA and any associated regulations or guidelines"), & #391 ("TREB has not requested any guidance from the RECO concerning the display of sold data to customers online.").

⁵⁹¹ Exhibit A4, Document 754, p. 1.

⁵⁹² Exhibit R39, Richardson Statement, para 178 p. 35.

557. Perhaps most remarkably, Cynthia Lai, one of TREB's current directors is also a RECO director.⁵⁹³ Yet TREB has still never asked RECO for its position on whether VOWs are advertising.

558. That TREB chose not to ask RECO for its position on VOWs speaks volumes about TREB's real motives with respect to VOWs. It did not ask RECO because it did not want its answer. With RECO's silence TREB could defend the Commissioner's application by blaming RECO, rather than taking responsibility for its anticompetitive conduct.

559. *Second*, VOWs are not advertising vehicles, like a newspaper or a flyer. They are a means by which agents provide real estate services to home buyers and sellers. Accordingly, RECO's advertising rules do not apply.

560. Although Mr. Richardson claims that the application of RECO's advertising rules to VOWs is uncertain, he neglects to mention that Justice Brown *already decided that VOWs are not advertising* in his 2009 decision involving TREB and Mr. Beach. In that proceeding, TREB argued that the website operated by Mr. Beach and BNV advertised listings without permission and as such violated TREB's Rules and RECO's Code of Ethics. After reviewing RECO's Code of Ethics, RECO's advertising guidelines, TREB's MLS Rules, statements by a TREB executive about advertising, and the evidence that agents provide Broker Full format MLS listings at open houses, Justice Brown disagreed with TREB. He held that BNV and Mr. Beach had not "advertised" listings as that term is used in TREB's Rules or RECO's Code of Ethics:

While I have found that the mechanism BNV used to access and download listing information from the MLS Database breached the AUA, the end product that it published to the public – the listing information – did not

⁵⁹³ September 24 Transcript p. 1299.

differ in kind from the listing information handed out by agents at the open houses referred to by Mr. Beach. As a result, I find that BNV and Mr. Beach did not breach Rule 430.

As to Rule 431, the same conclusion results. The information about a listing published by BNV on its website did not differ in kind from many aspects of that provided by agents at open houses when they gave out copies of broker full format MLS listings. Under those circumstances, I see no breach of Rule 431.

[...]

Since I have found that BNV's publication of listing information on its website did not constitute advertising, BNV did not violate either section 36(8) or (9) of the *Code of Ethics*.⁵⁹⁴

561. Justice Brown's decision aligns with RECO's own views on "advertising". According to RECO's 2011 Advertising Guidelines, to constitute advertising, the communication must be "directed at the public".⁵⁹⁵ Thus, in a disciplinary decision involving Elias Lafazanos and Octagon Realty Inc., the RECO disciplinary panel distinguished between providing listing and sales information *in* an office (i.e., not to the public) and providing that same information *outside* of an office to attract business (i.e., to the public). In finding that the member violated the Code of Ethics by distributing a catalogue of listings, the disciplinary panel held that:

While it is true that the same information could be given out by Octagon Realty if the individuals visited Octagon Realty's office that is not the point. These advertisements are bundled as a package, and promote Octagon Realty. The fact remains that Octagon Realty is using the listings of other brokers and, perhaps more importantly, the seller's property without their permission. While we acknowledge Mr. Lafazanos made a compelling argument that that same information would be available on the MLS system and he would be free to distribute it to anybody that came into his office, these publications were purposely left at the Chambers of

⁵⁹⁴ Exhibit A4, Document 363, Decision of Brown J., paras. 109-110 & 112, pp. 38-39.

⁵⁹⁵ Exhibit R85, Tab 33, p. 3.

Commerce in an attempt to attract individuals that otherwise would not have come to Octagon Realty's office.⁵⁹⁶

562. It is important to remember that VOWs are "virtual office websites" meant to replicate what occurs in an agent's office. By the time a user accesses the full complement of MLS listings including Historical MLS Data, the user has already "come into" the agent's virtual office by registering and obtaining a password. They are no longer the "public".

563. Other websites, such as IDXs are advertising vehicles because they are open to the public and do not require registration. In his presentation to the VOW Task Force on March 31, 2011,⁵⁹⁷ Mr. DiMichele reported the American experience with VOWs that "In theory the public must first register, establish a lawful relationship with the Broker and agree to "Terms of Use" before getting access to the data, therefore this is NOT considered advertising."⁵⁹⁸ He then showed the Task Force the main differences between VOWs and IDXs in the US:⁵⁹⁹

<i>IDX</i>	<i>VOW</i>
<ul style="list-style-type: none"> • The Consumer is a Visitor • Advertising • Permission is required • Data displayed is limited • Legal and Regulatory rules apply • IDX policy applies 	<ul style="list-style-type: none"> • Registration and Acknowledgement • Service provider • Permission is NOT required (opt outs) • Data displayed is consistent to MLS (Parity) and only publicly available sold data

⁵⁹⁶ Exhibit R85, Tab 39, p. 3.

⁵⁹⁷ Exhibit A4, Document 1221.

⁵⁹⁸ Exhibit A4, Document 1221 p. 12.

⁵⁹⁹ Exhibit A4, Document 1221 p. 18.

	<ul style="list-style-type: none">• Legal and Regulatory rules apply• VOW Rules apply and sites policed by
--	---

564. TREB's own VOW Rules confirm the same VOW-IDX distinction in Canada, and support the conclusion that VOWs are not advertising. Like American VOWs, VOWs in the GTA:

- (a) require users to register before accessing any MLS data through a VOW;
- (b) require users to agree to "Terms of Use" whereby:
 - (i) the user acknowledges entering into a lawful agent-consumer relationship;
 - (ii) agrees that the information provided is only for the user's personal, non-commercial use;
 - (iii) the user has a bona fide interest in the purchase, sale or lease of real estate of the type being offered through the VOW; and
 - (iv) that the user will not, directly or indirectly, display, post, disseminate, distribute, publish, broadcast, transfer, sell or sublicense any Listing Information to another individual or entity; but
- (c) do not require the permission of the listing brokerage to display listings on the VOW (in contrast TREB's IDX requires such permission, and agents must opt-into the IDX program).

565. TREB Rule 430 prohibits members from advertising another members' listing absent written permission of the listing brokerage. TREB requires brokerages to "opt-in" to its IDX program. In contrast, TREB Rule 804 does not require separate permission from other TREB members whose listings will be displayed on a VOW.⁶⁰⁰ The difference is critical. By not obtaining permission from listing brokerages to have VOWs display their listings, TREB implicitly acknowledges that VOWs are not advertising vehicles. If they were, the permission of each and every listing brokerage would be necessary under TREB's own rules before the listing could be displayed on a VOW.

566. TREB further acknowledges the essential character of a VOW that differentiates it from advertising (i.e., that a VOW is a means of service provision rather than an advertising vehicle) in its description of a VOW to its own members. TREB's VOW FAQ states that:

What is a VOW?

A VOW gives brokers the opportunity to operate a secure, password-protected website (or a feature of a website) that is capable of supplying real estate services to consumers. This is provided that the Member has a properly established broker-consumer relationship, which includes satisfying agency and disclosure obligations, and executing any required agreements. A VOW can offer consumers the ability to view MLS® data for a designated period of time, with the Member's oversight, supervision, and accountability.⁶⁰¹

567. Likewise, TREB's technical documents regarding VOWs and IDXs demonstrate the services (VOWs) v. advertising (IDXs) distinction:

⁶⁰⁰ Exhibit R39, Richardson Statement, Exhibit OO, p. 595.

⁶⁰¹ Exhibit R39, Richardson Statement, Exhibit MM, p. 583.

VOWs (Virtual Office Website) RETS (Real Estate Transaction Standard) ⁶⁰²	IDX (Internet Data Exchange) RETS (Real Estate Transaction Standard) ⁶⁰³
A VOW or Virtual Office Website is a secure password-protected Internet website, or a feature of a Member's website, <u>through which a Member is able to provide real estate brokerage services</u> (like a listings search) to their consumers.	Internet Data Exchange (IDX) allows Brokerages, through reciprocal agreements, <u>to advertise</u> their active listings on each other's websites.

568. By its conduct and Rules, TREB itself demonstrates that it does not consider VOWs advertising. It does not lie in its mouth to claim that they might offend RECO's rules with respect to advertising.

569. *Third*, TREB overstates the discipline facing its members if RECO decided that VOWs should not display the Historical MLS Data. RECO's Questions and Answers inform registrants about the discipline they face if they violate section 36 of the Code of Ethics which prohibits certain kinds of advertising. RECO is not quick to condemn registrants. Instead, it will give registrants a chance to correct their behaviour before sanctioning them:

What happens if my advertisement is non-compliant?

You will receive a letter from the Registrar advising you of the non-compliance and describing the specific issues. You will be asked to correct or remove the advertising and provide confirmation. No formal action will be taken if the issues are addressed promptly.⁶⁰⁴

570. Thus, even if RECO was of the view that VOWs should not display sold data, TREB is not protecting its members from RECO's wrath by withholding the Historical MLS Data from them. The most likely result if members displayed the Historical MLS Data on a VOW is that

⁶⁰² Exhibit A4, Document 815, p. 1 (emphasis added).

⁶⁰³ Exhibit A4, Document 816, p. 1 (emphasis added).

⁶⁰⁴ Exhibit R85, Tab 35, p. 1.

RECO would ask them to stop. At that point, TREB and its members would have the certainty that Mr. Richardson claims they want (but have not asked RECO for). TREB members could promptly stop displaying the Historical MLS Data on VOWs and, according to RECO, it would not take disciplinary action, other than asking the member to correct or remove the information.

571. Even though RECO's position on VOWs may not be clear to TREB at this time, TREB could provide the Historical MLS Data to its members in the VOW feed but caution that RECO's position on the display of the Historical MLS Data is uncertain. TREB could tell its members "display at your own risk". In fact, this is exactly the approach a CREA task force recommended in 2001 with respect to IDXs:

RECO has jurisdiction over registrants but not over Boards. It, therefore, follows that Boards are free to offer IDX as a Member Service, provided they ensure that the Members are aware of those provisions of REBBA that deal with advertising and the RECO Code of Ethics.⁶⁰⁵

572. *Fourth*, with respect to offers of commission, RECO's *Code of Ethics* requires agents to provide this information to their clients:

18(4) A registrant shall disclose in writing to a client, at the earliest practicable opportunity, any direct or indirect financial benefit that the registrant or a person related to the registrant may receive from another person in connection with services provided by the registrant to the client, including any commission or other remuneration that may be received from another person.⁶⁰⁶

⁶⁰⁵ Exhibit A4, Document 13, p. 3.

⁶⁰⁶ Section 18(4), Code of Ethics, O. Reg 580/05.

573. Thus, TREB's assertion that the offer of commission to a cooperating agent "is a Member to Member contractual issue"⁶⁰⁷ and cannot be disclosed is simply wrong.

574. *Finally*, like with PIPEDA, if *displaying* sold information on a VOW violated RECO's Code of Ethics, TREB could resolve the situation by requiring members to have buyers sign BRAs, tracking those signatures, revising the consent in the Listing Agreements or BRAs, or otherwise obtaining the consent of buyers and sellers. Section 36(9) of the RECO Code of Ethics permits an advertisement that includes the sold price of the home *if the parties have consented to disclosure in writing*.⁶⁰⁸ Thus, like PIPEDA, TREB could resolve any issue with RECO compliance by obtaining the consent of the parties.

575. But just like with PIPEDA, TREB did not even consider revising its consents to address any concerns as they relate to VOWs. Its inaction on this issue when it has taken action on other issues speaks volumes about its true motives in this case.

c) There is No Evidence of Harm to the MLS

576. In his July 27 Report and his testimony, Dr. Church advocated for three business justifications that from an economic perspective might justify TREB's restrictions on VOWs. They were:

- (a) **Free-riding:** The idea that agents have invested in MLS listings and will not invest going forward if they have to share with "full information" VOWs.
- (b) **Loss of liquidity in the MLS:** The idea that agents and their clients will flee the MLS without TREB's restrictive practices.

⁶⁰⁷ Exhibit CR40, Richardson Statement, para 186, p. 36. See also September 27 Transcript p. 1753-1754.

⁶⁰⁸ Section 36(9), Code of Ethics, O. Reg 580/05.

- (c) **Intellectual Property Protection:** The idea that TREB may have to take extreme action to protect the MLS database from misuse.

577. These are Dr. Church's theoretical musings rather than fact as no TREB document records TREB having been motivated by these concerns. Even TREB's CEO did not assert that these concerns guided TREB's conduct when it restricted VOWs. As such, Dr. Church's theories lack both a factual foundation and any sense of reality. They cannot inform the overall character of TREB's acts, when there is no evidence that these concerns actually motivated TREB at all.

578. But even if TREB did rely on these justifications, cross-examination revealed serious inadequacies in Dr. Church's analysis of these three issues.

579. *First*, with respect to free-riding, counsel noted in questioning Dr. Church that any new TREB member gets immediate access to the full MLS database upon membership. He asked whether all new entrants are free-riding on the investments made by other agents who have built the stable of listings in the MLS database. Remarkably, Dr. Church said no. Only agents (like VOWs) who can out compete the incumbents would be free-riding. According to Dr. Church, "full information" VOWs violate the (anticompetitive) "rules of the game" that agents have established with respect to the MLS data:

MR. ROOK: So if I understand the distinction that you are drawing, if you and I enter, as I have described in my hypothetical, and compete in a traditional manner, that is okay. But if we want to do it in a more sophisticated, arguably, manner than others are doing, that raises the possibility of free riding?

DR. CHURCH: Because we can only enter and compete in that more sophisticated way with the cooperation of the existing brokers, because we are using their assets.

MR. ROOK: I see. But we're also using their assets in a traditional –

DR. CHURCH: Right. But everyone made the investment knowing that that was the rules of the game.

MR. ROOK: Oh, I see. So that the rules are immutable?

DR. CHURCH: Well, I am just -- the free riding argument and the preserving incentives for investment argument is that if people make investments under certain rules, and you go and change the rules, you should anticipate that those may well have effects on incentives.

MR. ROOK: All right.⁶⁰⁹

580. Dr. Church appears to support a perverse view of competition in which it is acceptable to exclude competitors but only if they can compete better than the incumbents!

581. Even more remarkable than Dr. Church's tortured answer on free-riding was his admission that there is no evidence of agents "taking their listings and going home" in response to free-riding. His one exception was a footnote in Dr. Flyer's report.⁶¹⁰ That footnote indicates that a handful of agents left an MLS in California in 2004.⁶¹¹ What relevance Dr. Church believes that isolated incident has is unclear. That there is no other evidence to support Dr. Church's speculation that free-riding issues might arise speaks volumes about the legitimacy of this proposed justification.

582. *Second*, Dr. Church speculated that "full information" VOWs might reduce MLS liquidity as agents or their clients decided not to use TREB's MLS anymore. But like his free-

⁶⁰⁹ October 3 Transcript pp. 2167-2168.

⁶¹⁰ October 3 Transcript p. 2169.

⁶¹¹ Exhibit IC88, Flyer Report, footnote 29, p. 18.

riding argument, on cross-examination Dr. Church admitted that this was pure speculation because "full information" VOWs did not yet exist in the GTA.⁶¹²

583. Dr. Church also admitted that there was no evidence that TREB had attempted to measure the effects of liquidity loss from "full information" VOWs, as one would expect it to have done if this was a legitimate concern:

MR. ROOK: [...] In deciding on whether there is going to be free riding or reduction in liquidity, do we not have to have some information to make that determination, or do we just sit there and say, Well, this might happen; therefore, we ought not to do anything?

DR. CHURCH: And so I was going to finish, but I was too slow and I apologize for that. I would think that when making that decision, we would try and get whatever information we can to have some idea about what the magnitude of some of these effects would be.

MR. ROOK: And are you aware of any study or any report that was commissioned by the Toronto Real Estate Board to attempt to measure the effects?

DR. CHURCH: No.⁶¹³

584. This theoretical second justification therefore has no factual foundation.

585. *Third*, Dr. Church speculated that concern over misuse of the MLS database might justify TREB's restrictive practices. He reasoned that TREB might be unable to stop its 35,000 members from improperly sharing the MLS data with third parties. According to Dr. Church, the best way to prevent such misuse might be to reduce the incentives for third parties to obtain the information in the first place by holding back valuable parts of the MLS database (i.e., the Historical MLS Data).

⁶¹² October 3 Transcript p. 2172.

⁶¹³ October 3 Transcript pp. 2172-2173.

586. But when questioned by the Chair about his apparent concession of the Historical MLS Data's value, Dr. Church qualified his answer in an astonishing way. He testified that he did not mean to suggest that the Historical MLS Data was valuable to home buyers and sellers.⁶¹⁴ Instead, he meant that it was valuable to third parties such as moving companies or "someone selling reports to the Globe and Mail". Of course, this suggestion contradicts TREB's own policies and documents, which describe the Historical MLS Data as "essential" to the operation of the MLS, as well as a multitude of testimony from actual market participants.

587. In the face of all of the evidence about how agents use the Historical MLS Data to provide valuable services to customers, for Dr. Church to suggest that the Historical MLS Data is valuable to moving companies but not to home buyers and sellers simply defies credulity and lacks any evidentiary foundation.

588. Dr. Church's cross-examination revealed that there is neither an evidentiary foundation for his theories, nor a reliable basis to rely upon his opinions. In these circumstances, the Tribunal should reject the pure speculation that "full information" VOWs could harm the MLS. There is no evidence of such harm in any jurisdiction in which VOWs operate, such as the U.S. or Nova Scotia. Dr. Church's unsupported theories cannot justify TREB's anticompetitive conduct.

⁶¹⁴ October 3 Transcript p. 2187.

Substantial Prevention or Lessening of Competition**a) The Legal Framework**

589. Paragraph 79(1)(c) requires the Tribunal to determine whether the respondent's practice of anticompetitive acts has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

(i) The Comparative "But-For" Test for Substantial Prevention or Lessening

590. In *Canada Pipe*, the Court of Appeal described and applied the "but for" question that has emerged from the case law: would the relevant market(s) – in the past, present or future – be substantially more competitive but for the impugned practice of anti-competitive acts?⁶¹⁵ The question is not an absolute evaluation of the level of competition in the market, but a relative comparison: did the impugned practice result in a preventing or lessening of competition as compared to the conditions governing in the absence of the practice, and was this lessening of a degree sufficient to be considered substantial?⁶¹⁶

591. Desjardins J.A. concluded that paragraph 79(1)(c) mandates an approach that accentuates the "comparative and relative aspects" in the past, present and future but emphasized that the "but for" approach is not necessarily the only correct approach. Having recognized the "but for" language in the Competition Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions*⁶¹⁷ and the centrality of relative comparison in previous Tribunal cases including *Laidlaw, D&B* and *NutraSweet*,⁶¹⁸ Desjardins J.A. observed:

⁶¹⁵ *Canada Pipe, supra*, paras. 36-38, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶¹⁶ *Canada Pipe, supra*, paras. 36-37 and 43, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶¹⁷ *Canada Pipe, supra*, para 39, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶¹⁸ *Canada Pipe, supra*, paras. 42-43, Commissioner's Book of Authorities, vol. 3, tab 14.

I must emphasize, however, as the Tribunal rightly implied in the passage from *Laidlaw* quoted in paragraph 39 above, that the “but for” test is not necessarily the only correct approach. I therefore expressly leave open the possibility that the Tribunal might in a future abuse of dominance case find evidence corresponding to a different test sufficient to discharge the burden placed upon the Commissioner by virtue of paragraph 79(1)(c). However, as the “but for” test describes an approach that corresponds to the requirements mandated by the statutory language of paragraph 79(1)(c), it is one that the Tribunal must consider in all cases—although it may in future cases choose to consider other appropriate tests as well.⁶¹⁹

592. The Court of Appeal also emphasized that there is "no particular type of evidence" that is necessarily required. Desjardins J.A. referred to the construction of a "hypothetical comparator" model and to comparing the competitiveness of the market "across time" and treating the market conditions before and after the introduction of the impugned practice as proxies for the market with and without the practice of anti-competitive acts.⁶²⁰ With the burden on the Commissioner, the evidence must be considered by the Tribunal on a case by case basis, with flexibility and having regard to the purposes set out in section 1.1 of the *Competition Act*.⁶²¹

593. In *Canada Pipe*, the impugned practice related to a "stocking distributor program" or SDP. Applying the law to the facts, the Court of Appeal reversed the Tribunal's decision on substantial lessening or prevention. The court held that

the Tribunal was required to also consider whether the evidence on record demonstrated that the SDP had the effect of substantially lessening competition in the past, present or future, as compared to the markets' *likely* competitiveness in the absence of the practice.⁶²² [Original emphasis.]

⁶¹⁹ *Canada Pipe, supra*, para. 44, p. 263, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶²⁰ *Canada Pipe, supra*, para. 46, p. 264, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶²¹ *Canada Pipe, supra*, paras. 46-48, pp. 264-265, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶²² *Canada Pipe, supra*, para. 55, p. 263, Commissioner's Book of Authorities, vol. 3, tab 14.

594. The court held that the proper approach was to consider not a standard of prevention in an absolute sense, but instead a "more relative standard such as that implied by the words 'impeding' or 'lessening'. That is, rather than employing a "narrow, absolute perspective of preventing entry and competition", the correct approach is to use a "broader, relative and comparative perspective of 'impeding' or 'lessening'".⁶²³

595. Desjardins J.A. summarized that the correct approach was to ask

whether, in each of the relevant markets, competitiveness was substantially lessened in the presence of the SDP, as compared to the likely state of competition in the absence of this practice. In other words, the Tribunal should have considered whether, without the SDP, the relevant product market would be substantially more competitive.⁶²⁴

596. It follows that the absolute level of competition in the current market is irrelevant except to the extent that in some markets anticompetitive conduct may have less impact on an already competitive landscape. In these unusual circumstances, the difference between the current world and the "but for" world may be less likely to be substantial. However, that conclusion will depend on the facts, particularly both on the nature of the market and the exclusionary conduct. Even in a highly competitive market, exclusionary conduct may substantially prevent or lessen competition. That determination must be done on a case-by-case basis. The Tribunal has described the analysis under s. 79(1)(c) as determining "the degree of success [the respondent] achieved or is likely to achieve, if any" in excluding competitors.⁶²⁵

⁶²³ *Canada Pipe, supra*, para. 57, p. 269, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶²⁴ *Canada Pipe, supra*, para. 58, pp. 269-270, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶²⁵ *D & B, supra*, p. 266g, Commissioner's Book of Authorities, vol. 1, tab 1.

597. As the Court of Appeal held in *Canada Pipe*, evidence to be considered in an analysis of substantial prevention or lessening may include:

- (a) whether entry or expansion might be substantially faster, more frequent or more significant without the anticompetitive conduct;
- (b) whether switching between products and suppliers might be substantially more frequent;
- (c) whether prices might be substantially lower; and
- (d) whether the quality of products might be substantially greater.⁶²⁶

(ii) To "Lessen" or "Prevent" Competition

598. In *NutraSweet*, the respondent's practices included exclusivity provisions in agreements and financial inducements for customers. The Tribunal held that the practices lessened or prevented competition substantially.⁶²⁷ It reasoned that the exclusivity provisions "impede[d] 'toe-hold entry' into the market and inhibit[ed] the expansion of other firms in the market".⁶²⁸

599. As exclusive use and supply clauses appeared in virtually all of the agreements and covered 90% of the market for aspartame in Canada, it was clear in *NutraSweet* that during the currency of the agreements there was "little room for entry by a new supplier".⁶²⁹ While there was opportunity to obtain contracts each year, the Tribunal concluded there were significant

⁶²⁶ *Canada Pipe, supra*, para. 58, p. 269, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶²⁷ *NutraSweet, supra*, p. 52*h*, Commissioner's Book of Authorities, vol. 1, tab 2.

⁶²⁸ *NutraSweet, supra*, p. 48*h*, Commissioner's Book of Authorities, vol. 1, tab 2.

⁶²⁹ *NutraSweet, supra*, pp. 48*h*-49*a*, Commissioner's Book of Authorities, vol. 1, tab 2.

differences in the position of the incumbent and the entrant in doing so⁶³⁰ and the effect of those differences were relevant in evaluating whether the practices had the effect of substantially lessening competition.⁶³¹ Further considerations leading to the conclusion of a substantial lessening or prevention included the starting position, a change in market power and other considerations.⁶³²

600. In *Laidlaw*, the linchpin of Laidlaw's maintenance of its dominant position was standard form contracts of adhesion which it used to lock in its consumer base. The Tribunal held that the substantial lessening to be assessed need not be proved by weighing the competitiveness of the market in the past with its competitiveness in the present. "Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anticompetitive acts and its likely competitiveness in their absence."⁶³³

601. Counsel for Laidlaw argued that the evidence disclosed that competitors could still enter the market easily and grow. The Tribunal analyzed the evidence and concluded:

There is no reason to doubt that based solely on the economics of lift-on-board service that these should be highly competitive markets. The evidence shows, however, that the effect of the contracts is to make entry sufficiently difficult so that it no longer effectively polices the market. The evidence demonstrates that a new firm can acquire a certain number of customers but that it cannot establish a customer base with sufficient rapidity to make entry attractive. In the markets in question there is no doubt that acquisition practices of Laidlaw buttressed by the creation of

⁶³⁰ *NutraSweet, supra*, p. 49b, Commissioner's Book of Authorities, vol. 1, tab 2.

⁶³¹ *NutraSweet, supra*, p. 50f-h, Commissioner's Book of Authorities, vol. 1, tab 2.

⁶³² *NutraSweet, supra*, pp. 50-52, Commissioner's Book of Authorities, vol. 1, tab 2.

⁶³³ *Laidlaw, supra*, p. 346a, Commissioner's Book of Authorities, vol. 2, tab 6.

artificial barriers to entry through the contracts have resulted in a substantial lessening of competition.⁶³⁴

602. In *D & B*, the exclusivity terms in the respondent's agreements with retailers were at issue. Nielson argued that there was no substantial lessening or prevention of competition because entrants could compete for the contracts when they were renewed. The Tribunal considered the conditions of entry without the exclusivity terms and then determined how the anti-competitive acts altered the prospects for economically feasible entry. There were four necessary elements to entry into the market (production of a scanner-based market tracking service), one of which was the scanner data.

603. The Tribunal analyzed the evidence and concluded that there was a substantial lessening or prevention as follows:

... we conclude that it is manifest that the only prospects for competition in the market for scanner-based market tracking services are found where there are no exclusives. Nielsen's exclusive contracts and the inducements that led to them have resulted in the prevention or lessening of competition substantially in the Canadian market for scanner-based market tracking services.⁶³⁵

604. The Tribunal immediately went on to observe, with respect to prevention of competition:

Its long-term contracts with its customers also prevent competition by significantly reducing the volume of business available to a would-be entrant. This latter consideration, however, assumes importance only in a context where the barriers resulting from the exclusive contracts with retailers have been eliminated. If an entrant cannot get access to the necessary input for providing a scanner-based market tracking service, namely, the scanner data, it is irrelevant at that point that the entrant would

⁶³⁴ *Laidlaw, supra*, pp. 347h-348a, Commissioner's Book of Authorities, vol. 2, tab 6.

⁶³⁵ *D & B, supra*, p. 277f, Commissioner's Book of Authorities, vol. 1, tab 1.

also be precluded by long-term contracts from obtaining sufficient customers to survive.⁶³⁶

605. As will be developed below, the data required to enter and compete effectively was ordered to be produced by Nielson (which was not a trade association with members) to its competitor, IRI.

606. In *Tele-Direct*, the Tribunal concluded that the "competitive effectiveness" of consultants has been reduced as a result of Tele-Direct's practice of discriminatory acts. On the facts, there were two key practical concerns:

- (a) consultants incurred higher costs as a result of being forced to defend themselves before customers and by having to seek the aid of the courts in enforcing their contracts. These activities require time and expense that could otherwise be spent in attracting and serving customers; and
- (b) the consultants' ability to attract new business was negatively affected when their customers were inconvenienced or harmed by Tele-Direct's discriminatory acts. Customers so affected were unlikely to be repeat customers or to recommend the services of consultants to others.

607. Although consultants serviced a small portion of the total telephone directory advertising revenue, the Tribunal concluded that they were "competitively significant". The Tribunal found it "difficult to arrive at a numerical determination of the effect on consultants of the practice of

⁶³⁶ *D & B, supra*, p. 277g-h, Commissioner's Book of Authorities, vol. 1, tab 1.

discriminatory acts" but that "the consultants' ability to compete is limited and fragile as compared to Tele-Direct's virtual monopoly through its control of publishing".⁶³⁷

608. In a passage critical to the outcome in *Tele-Direct*, the Tribunal held:

Where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with. In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial. Of course, in the future, in the absence of any order by the Tribunal, there would be no constraint on Tele-Direct intensifying discriminatory acts against consultants and exacerbating an already substantial effect on them. We have no difficulty concluding that Tele-Direct's proven practice of anti-competitive acts has had, is having or is likely to have the effect of lessening competition substantially in the market. [Emphasis added.]⁶³⁸

609. The Court of Appeal's remarks in *Canada Pipe* relating to prevention not being absolute, but comparative or relative, are also consistent with the existing, albeit relatively limited, case law on prevention under section 92 of the *Competition Act*.

610. Prevention of competition was considered under section 92 in *Superior Propane* and *Canadian Waste Services*.⁶³⁹ In both cases, the acquired asset (ICG and the Ridge Landfill, respectively), was a crucial source of competition in the relevant market.

611. In *Superior Propane*, the Tribunal concluded that there was a substantial prevention of competition in Atlantic Canada as a result of the merger.⁶⁴⁰ Prior to its acquisition by Superior,

⁶³⁷ *Tele-Direct, supra*, p. 247, Commissioner's Book of Authorities, vol. 1, tab 3.

⁶³⁸ *Tele-Direct, supra*, pp. 247-248, Commissioner's Book of Authorities, vol. 1, tab 3.

⁶³⁹ *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, (2001), 11 CPR (4th) 425 [Canadian Waste Services], Commissioner's Book of Authorities, vol. 4, tab 21.

ICG had "plans to vigorously expand its activities" in Atlantic Canada by establishing branch operations in Nova Scotia. The Tribunal noted that the Supreme Court considered "prevent" to mean "hinder or impede" in contrast to absolute elimination in *Howard Smith Paper Mills* (1957), 8 DLR (2d) 449 (SCC).⁶⁴¹

612. The Tribunal concluded in *Canadian Waste Services* that the merger prevented competition. The Tribunal accepted that the pre-emptive acquisition by CWS of the Ridge Landfill site, and control of its excess market capacity, would enable CWS to prevent prices from falling.⁶⁴²

613. In *Canadian Waste Services*, the acquirer had significant market power and the acquisition provided the opportunity to obtain or maintain a practical monopoly in the relevant markets. In *Canadian Waste Services*, the Tribunal concluded that where the acquirer's expected share of excess capacity would increase under the merger, the acquisition of the asset enhanced its market power over such capacity and prevented competition substantially. [para 204] Where the acquisition of the asset gave the acquirer ownership of the only two waste disposal sites serving a market, the acquisition would lead to a likely substantial prevention of competition. The Tribunal held that freeing up the excess capacity would lead to greater competition and lower prices.⁶⁴³

⁶⁴⁰ *Superior Propane, supra*, paras. 240-246, pp. 449-451, Commissioner's Book of Authorities, vol. 2, tab 5.

⁶⁴¹ *Superior Propane, supra*, para. 244, p. 450, Commissioner's Book of Authorities, vol. 2, tab 5.

⁶⁴² *Canadian Waste Services, supra*, paras. 204-205, Commissioner's Book of Authorities, vol. 4, tab 21.

⁶⁴³ *Canadian Waste Services, supra*, para. 205, Commissioner's Book of Authorities, vol. 4, tab 21.

(iii) Relationship of Substantial Lessening or Prevention to Market Power

614. In previous abuse of dominance cases, the Tribunal has also noted the connection between substantial prevention or lessening of competition and the creation, enhancement, or maintenance of market power. In *NutraSweet*, the Tribunal stated that:

The factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that [NutraSweet] has market power. In essence, the question to be decided is whether the anti-competitive acts engaged in by [NutraSweet] preserve or add to [NutraSweet's] market power. [Emphasis added.]⁶⁴⁴

615. As is apparent from the discussion above, the Tribunal has considered the degree to which the anticompetitive acts preserve or add to entry barriers such that entry no longer effectively polices the market.⁶⁴⁵ As the Tribunal explained in *D&B* when speaking of the respondent's exclusive contracts to scanner data, that the Tribunal "must establish what the conditions of entry would be without the exclusives and, then, determine how the anti-competitive acts altered the prospects for economically feasible entry."⁶⁴⁶ The Tribunal engaged in a similar analysis of exclusive contracts and the barriers to entry they created in both *NutraSweet* and *Laidlaw*.

616. Barriers to entry may either exclude market participants completely, or may reduce their success and thereby their effectiveness in the market. In *Tele-Direct*, discussed above, Tele-

⁶⁴⁴ *NutraSweet*, *supra*, p. 47a, Commissioner's Book of Authorities, vol. 1, tab 2. See also *Director of Investigation and Research v. Hillsdown Holdings (Canada) Inc.* (1992), 41 CPR (3d) 289, at 314b-e, Commissioner's Book of Authorities, vol. 4, tab 22.; *D&B*, at pages 266-267, Commissioner's Book of Authorities, vol. 1, tab 1.; and *Canada Pipe*, at para 43, Commissioner's Book of Authorities, vol. 3, tab 14.

⁶⁴⁵ *Laidlaw supra*, p. 347h, Commissioner's Book of Authorities, vol. 2, tab 6.

⁶⁴⁶ *D & B, supra*, p. 267a, Commissioner's Book of Authorities, vol. 1, tab 1.

Direct's discriminatory acts both raised the consultants' costs and also reduced the attractiveness of their services.⁶⁴⁷

617. In its recent decision in *CCS* (May 29, 2012), the Tribunal addressed the methodology for determining substantial prevention in a merger case. The Tribunal characterized prevention of competition in a merger case as the maintenance of market power.⁶⁴⁸

618. The Tribunal evaluated substantiality by considering whether new entry or expansion would occur in a timely fashion to result in (i) a material reduction of price or a material increase in non-price competition, (ii) in a significant (i.e., non-trivial) part of the relevant market, and (iii) for a period of approximately two years.⁶⁴⁹ Specifically, the Tribunal stated:

[123] In assessing cases under the “prevent” branch of section 92, the Tribunal focuses on the new entry, or the increased competition from within the relevant market, that the Commissioner alleges was, or would be, prevented by the merger in question. In the case of a proposed merger, the Tribunal assesses whether it is likely that new entry or expansion would be sufficiently timely, and occur on a sufficient scale, to result in: (i) a material reduction of prices, or in a material increase in non-price competition, relative to prevailing price and non-price levels of competition, (ii) in a significant (i.e., non-trivial) part of the relevant market, and (iii) for a period of approximately two years. If so and if the entry or expansion likely would occur within a reasonable period of time, the Tribunal will conclude that the prevention of competition is likely to be substantial.

619. In his additional, concurring reasons, Crampton C.J. (who also participated in the Tribunal's decision) also equated lessening of competition with the creation or enhancement of

⁶⁴⁷ *Tele-Direct, supra*, p. 246*f-h*, Commissioner's Book of Authorities, vol. 1, tab 3.

⁶⁴⁸ *CCS, supra*, para 122, p. 32, Commissioner's Book of Authorities, vol. 2, tab 7.

⁶⁴⁹ *CCS, supra*, para 123, p. 32, Commissioner's Book of Authorities, vol. 2, tab 7.

market power.⁶⁵⁰ Crampton C.J. labeled this methodology as a tripartite test of magnitude, duration, and scope.⁶⁵¹

b) The Present Case

620. TREB's anticompetitive acts substantially prevent or lessen competition. They create, maintain, or enhance market power by shielding TREB's non-VOW members from price and non-price competition from VOWs.

621. *Before August 2011*, TREB's conduct completely excluded VOWs from the GTA. Dr. Vistnes reviewed the many competitive advantages of VOWs in his June 22 report. He concluded that TREB substantially prevented or lessened competition before 2011 by excluding VOWs. But for TREB's exclusionary acts during this period, agents would likely have used VOWs to compete in the GTA market, to their benefit and the benefit of home buyers and sellers. There is no contrary economic evidence as Dr. Church admitted on cross-examination that he had not been asked to opine on the pre-2011 period.⁶⁵²

622. *Since August 2011*, TREB has shielded its non-VOW members from effective competition from VOWs, whether from existing TREB members who would like to offer enhanced website services (TheRedPin, Realosophy, and members served by Mr. Enchin and Mr. Prochazka's company), from TREB members who have not yet entered the market (ViewPoint), or from new members such as Redfin.

⁶⁵⁰ CCS, *supra*, para 370, p. 86, Commissioner's Book of Authorities, vol. 2, tab 7.

⁶⁵¹ CCS, *supra*, para 375, p. 87, Commissioner's Book of Authorities, vol. 2, tab 7.

⁶⁵² October 3 Transcript p. 2145-2146.

623. Today's GTA VOW cannot provide Historical MLS Data and offers of commission to customers over the Internet. If a VOW-operator wants to provide this critical information to its customers, it must do so by less efficient delivery mechanisms (by email, hand, or fax). In other words, it must replicate the model used in a non-VOW environment, where home buyers and sellers must reach out to an agent by email, phone, or in person to get the Historical MLS Data that they use to understand market conditions, identify desirable neighbourhoods, find good months in which to sell or buy, and value properties.

624. But less efficient delivery mechanisms destroy VOWs' critical value proposition, that distinguishes them from non-VOW brokerages. VOWs permit agents to provide (i) more information and better services, (ii) to more customers, (iii) in a more attractive and efficient way, than in a non-VOW setting.

625. In VOW models outside the GTA, such as Redfin or ViewPoint, home buyers and sellers do not have to email, phone or physically interact with an agent early in their search or sale process to get the Historical MLS Data they need. Once they register, they can educate themselves about neighbourhoods and the market using the Historical MLS Data and the technology the VOW offers.

626. Harnessing the power of a website and technology in this way means that VOW-based brokerages can serve more customers at the "top of the funnel" (i.e., those buyers and sellers that are looking but remain uncertain about which home, or whether or when to buy or sell). They can maintain a large network of customers, and serve them in an effective but very efficient way, through their VOW. As home buyers and sellers move to the "bottom of the funnel", agents can then engage with them in a more direct way. This model creates efficiencies and lets operators

pass on cost savings in the form of rebates. As Mr. Nagel testified, Redfin compensates its clients for the effort they put in on the front end by rebating some of the commission.

627. But a new business model using technology and transparency to bring price and non-price competition scares some TREB members. And because of their fear, TREB has withheld the Historical MLS Data from VOWs. This disadvantages GTA VOWs in two fundamental ways. First, it increases their costs because they cannot serve customers or generate leads as efficiently as if they had the Historical MLS Data in a datafeed without prohibition on its display. Second, it reduces the attractiveness of the VOW business model by preventing home buyers and sellers from accessing the Historical MLS Data online and by impairing VOW-operators' ability to innovate new and better services using the Historical MLS Data.

628. These disadvantages perpetuate the *status quo* – traditional ways of doing business and generating leads through personal networks and other common methods. Home buyers and sellers must continue to contact agents by email, phone, or in person to obtain the Historical MLS Data that they want and need.

629. A detailed review of these issues and the evidence of increased costs and reduced advantages facing GTA VOW operators follows.

(i) TREB's Conduct Increases VOWs' Costs

630. VOW operators testified about three main ways that TREB's conduct increases their costs.

631. *First*, witnesses testified about how they could deliver Historical MLS Data to customers more efficiently than via other delivery mechanisms. This would let them "download" some

agent services onto home buyers and sellers, such as education about market conditions using the Historical MLS Data. Mr. Nagel testified how Redfin asks home buyers and sellers "to do some of the research on their own" and "so we compensate them for their efforts" through commission rebates.⁶⁵³

632. Mr. Sage's monthly market report newsletter demonstrates the amount of time and resources VOW operators could save "but for" TREB's restrictions relative to the current world. Mr. Sage testified that his brokerage must manually copy Historical MLS Data from TREB's Stratus system every month and then prepare its monthly newsletters. The entire process requires about 40 hours of work every month. Mr. Sage's brokerage only publishes reports for a small segment of the GTA, around 40 GTA neighbourhoods.⁶⁵⁴ In contrast, Realosophy has divided the GTA into 175 neighbourhoods.⁶⁵⁵ Thus, providing a similar service on a GTA-wide scale would likely require significantly more than 40 hours per month. And even if this could be done, the resulting product would not be as timely as if displayed in real-time on a VOW. Mr. Sage's reports circulate up to 45 days after some of the homes they list have sold.⁶⁵⁶ Ms. Desai testified that Realosophy's neighbourhood analyses are already nearly two years out of date because of the time and cost of manually extracting and manipulating the data.⁶⁵⁷

633. *Second*, VOW operators testified that they could use technology and the information in the VOW datafeed to develop time saving tools that would reduce agents' workload. For example, Mr. Hamidi described how TheRedPin could perform CMAs more efficiently and for a

⁶⁵³ September 12 Transcript p. 401.

⁶⁵⁴ September 28 Transcript p. 1836.

⁶⁵⁵ Exhibit A7, Desai Statement, para 20, p. 6.

⁶⁵⁶ September 28 Transcript pp. 1892-1893.

⁶⁵⁷ September 11 Transcript p. 386.

greater number of listings than is currently possible.⁶⁵⁸ On cross-examination, he described the time TheRedPin has spent internally studying CMAs to understand how it can improve them using technology.⁶⁵⁹ He testified that "instead of taking an hour or more to research and gather information, with the help of our technology, it would be minutes."⁶⁶⁰

634. Likewise, Mr. Enchin testified that the CMA/appraisal tool he developed before 2007 saved him considerable time compared to preparing a CMA manually. He testified that before when clients would ask him for a CMA, he would return to his office, spend hours or days preparing it, and then present it to his client. With the software he developed, he could perform CMAs immediately with his clients, saving him significant time and improving his quality of service.⁶⁶¹

635. *Finally*, witnesses testified about how they could allocate agents more efficiently and increase their productivity, both by "downloading" some tasks to buyers and sellers, but also by developing leads through their websites. Without having to prospect for leads, per agent productivity increases and agents can focus on customer-service.

636. The evidence demonstrates that for most agents, prospecting for new leads takes a considerable amount of their time. Mr. Gidamy testified about how most brokerages rely on individual agents to prospect their own leads "whether it be through door knocking or however

⁶⁵⁸ September 13 Transcript p. 620.

⁶⁵⁹ September 13 Transcript p. 635.

⁶⁶⁰ Exhibit A13, Hamidi Statement, para 47, p. 11.

⁶⁶¹ September 14 Transcript p. 761-762.

they like to generate business."⁶⁶² This can take a "significant amount" of agents' time, especially in the early years.⁶⁶³

637. Non-GTA VOWs that display Historical MLS Data demonstrated how productive agents can be because of the three main efficiencies VOWs create. In its first full year operating as a brokerage, ViewPoint completed 117 transactions with 8 or fewer agents (only 6 agents for most of that time). On average each agent completed between 14 and 20 transactions over ViewPoint's first year.

638. Likewise, Mr. Nagel testified about the productivity of Redfin's agents compared to traditional brokerages. Whereas traditional agents may complete 6-8 deals per year, Redfin expects its agents to complete approximately 36.⁶⁶⁴ They can do so many because Redfin's technology improves their efficiency and its website generates leads for them. But to generate enough leads, Mr. Nagel testified that Redfin's website had to be the best and provide information that home buyers and sellers cannot get elsewhere. For Redfin, that includes displaying sold information.⁶⁶⁵

639. [REDACTED]
[REDACTED]⁶⁶⁶ [REDACTED]
[REDACTED]
[REDACTED]

⁶⁶² September 13 Transcript p. 674.

⁶⁶³ September 13 Transcript p. 674.

⁶⁶⁴ September 12 Transcript pp. 403 & 436.

⁶⁶⁵ September 12 Transcript p. 403-405.

⁶⁶⁶ [REDACTED]

640. Neither Redfin nor ViewPoint has entered the GTA market. If either thought that they could deliver the same efficiencies to GTA customers as they can in the U.S. or Nova Scotia, one would expect them to have entered in the year since TREB's VOW datafeed launched. Instead, Mr. McMullin has testified that ViewPoint will not enter the GTA because of TREB's restrictions.

641. Dr. Vistnes considered the efficiencies VOWs create. In his June 22 report, he examined how VOWs can increase agent productivity on both the buy and sell-side. Dr. Vistnes considered three phases on the buy-side: "developing that buyer as a lead; working with that buyer during the "incubation" process in which the buyer is learning about the market but is not yet ready to make an offer on a home; and working with the buyer during the "active" phase in which the buyer is ready to make an offer."⁶⁶⁷ He reviewed each phase in detail, considering several efficiencies including:

- (a) **More efficient lead generation:** "By reducing the amount of effort agents require to develop leads, VOWs increase agent productivity and allow them to spend more time providing real estate services to customers."⁶⁶⁸
- (b) **Better service:** "Increased productivity also increase agents' capacity to serve customers, thereby creating incentives for agents to compete more vigorously through lower prices and better service."⁶⁶⁹

⁶⁶⁷ Exhibit A30, First Vistnes Report, para. 202, p. 62.

⁶⁶⁸ Exhibit A30, First Vistnes Report, para 203, p. 64-65.

⁶⁶⁹ Exhibit A30, First Vistnes Report, para 209, p. 209.

- (c) **Ability to service more clients:** "VOWs free up substantial amount of the agent's time and allow agents to accept additional customers that would otherwise be turned away or not given adequate levels of support."⁶⁷⁰

642. Dr. Vistnes also considered that VOWs can save listing agents' time and improve the quality of service they offer.⁶⁷¹ He concluded that VOWs enable efficiencies on both the buy-side and sell-side. These efficiencies enure to the benefit of the VOWs competing in the market (i.e., help them perform better than their competition) and to home buyers and sellers because VOWs will have incentives to pass on savings to home buyers and sellers to make themselves even more attractive to consumers.⁶⁷²

643. Last year alone, Redfin rebated an average of US \$5,386 to home sellers and US \$6,188 to home buyers, for aggregate rebates of over US \$24,000,000.⁶⁷³

644. But without a datafeed that includes the Historical MLS Data, GTA VOWs cannot achieve these efficiencies internally, and thus cannot pass on the same amount of cost savings to their clients.

(ii) TREB's Conduct Reduces VOWs' Ability to Provide Services and Attract Customers

645. The Commissioner's witnesses testified that TREB's restrictions reduce the attractiveness of their businesses to customers relative to the "but for" world in two ways. First, the information on their websites is less attractive to home buyers and sellers, particularly because

⁶⁷⁰ Exhibit A30, First Vistnes Report, para 211, p. 209.

⁶⁷¹ Exhibit A30, First Vistnes Report, para 214-215, p. 66-67.

⁶⁷² Exhibit A30, First Vistnes Report, para 201, p. 62.

⁶⁷³ Exhibit A8, Nagel Statement, para 54, p. 15.

the active listing data is already available on public websites such as realtor.ca. Second, their agents cannot use information in the VOW datafeed internally to offer attractive services to home buyers and sellers.

646. *First*, with respect to the attractiveness of their websites, only Available listings appear on GTA VOWs. Witnesses described their inability to provide Historical MLS Data on a VOW as a "serious competitive disadvantage".⁶⁷⁴ Mr. Hamidi said that the Historical MLS Data "would attract a greater number of people to our brokerage and it would allow innovation and more information to be used by our customers and our agents."⁶⁷⁵ He testified about the innovative services TheRedPin could offer customers if the Historical MLS Data was in the VOW datafeed. These included large-scale trending information, like "heat maps", and more detailed analysis, like sophisticated comparisons between resale properties and new developments.⁶⁷⁶

647. Mr. Enchin testified about the popularity of the appraisal feature he built for his VOW-product in the early 2000s.⁶⁷⁷ He also testified about the disadvantages his current VOW faces because of TREB's restrictions on the use and display of Historical MLS Data. He believes his 2012 VOW would be more popular with agents and their clients if it could offer the appraisal feature using the Historical MLS Data.⁶⁷⁸

648. Mr. Prochazka testified about how attractive tools would develop over time that had not yet even been anticipated: "I think, as time went on and the competitive forces were applied, I

⁶⁷⁴ Exhibit A15, Gidamy Statement, para 22, p. 7.

⁶⁷⁵ Exhibit A13, Hamidi Statement, para 44, p. 10.

⁶⁷⁶ September 13 Transcript p. 620.

⁶⁷⁷ Exhibit A20, Enchin Statement, para 22, p. 7.

⁶⁷⁸ Exhibit A20, Enchin Statement, paras 37-38, p. 13.

think that, you know, there would be some very interesting tools that would result from it, from being able to process that data."⁶⁷⁹

649. On cross-examination, Mr. Pasalis testified that Realosophy provides far more "information" than analysis and statistics, primarily because they do not have the Historical MLS Data in the datafeed.⁶⁸⁰ Providing public information is a less attractive work-around because they do not have any other choice.

650. Suggestions that home buyers and sellers do not value receiving Historical MLS Data on a website do not withstand scrutiny. Those VOW operators with experience displaying Historical MLS Data to customers all testified about how valuable it is to attracting home buyers and sellers. For example, Mr. Nagel testified that home buyers and sellers "love the fact that they get updated every 15 minutes about what just changed, what went pending, what was its price, what just sold, what was its price, so that they can go in to the next round of negotiations where there may be two, three or sometimes 30 offers on a home and know that they are in a better position than most people who aren't using Redfin."⁶⁸¹

651. Mr. McMullin testified that distributing MLS data to customers and clients online provides a competitive advantage over other brokerages who do not do so.⁶⁸²

The rationale for using the MLS data was also that viewpoint.ca could provide a key service, the provision of information, that is very important to consumers' education about, and understanding of, the real estate market, as well as particular homes and neighbourhoods. This information provided through a website allows the potential buyer or seller to self-

⁶⁷⁹ September 18 Transcript p. 873.

⁶⁸⁰ September 12 Transcript p. 524.

⁶⁸¹ September 12 Transcript p. 411 (emphasis added).

⁶⁸² Exhibit A2, McMullin Statement, para 33, p. 9.

educate at a point in time where he or she may not yet be ready to enter a transaction but instead needs to understand more about the market. [...]

In the case of both potential buyers and potential sellers, convenience and transparency are key ingredients in being able to use viewpoint.ca to attract customers. We have to be able to compete for consumers' business with traditional brokerages. Unless we can provide the same MLS information through our website as those traditional brokerages can through conventional means (in person, by phone, email, etc.), then we will rarely succeed to convince a customer to list or buy with ViewPoint. Without a full dataset from the MLS system, we would be unable to compete effectively. With access to the same information and the ability to display it on our website, the consumer can compare and choose between the convenience and transparency of using our website to obtain information about their potential purchase or sale, and the personal relationship of a traditional Realtor to obtain that same information.⁶⁸³

652. He testified that ViewPoint has no realistic basis for competing in the GTA without the Historical MLS Data in the VOW datafeed.⁶⁸⁴

653. Mr. Enchin explained that the appraisal feature on his VOW-product and its display of Historical MLS Data "impressed home buyers and sellers" and other agents. Mr. Enchin testified that his VOW-product was very popular with his clients and with the agents who used it.⁶⁸⁵ In contrast, he believes that his 2012 VOW suffers from not being able to display Historical MLS Data through the appraisal feature, and that it would be more popular with agents and their clients if that feature were available.⁶⁸⁶

654. Dr. Vistnes reviewed the many reasons why consumers are likely to prefer receiving Historical MLS Data over a VOW rather than via email or other delivery mechanisms. These

⁶⁸³ Exhibit A2, McMullin Statement, paras 77-78, pp. 21-22.

⁶⁸⁴ Exhibit A2, McMullin Statement, para 10, p. 4.

⁶⁸⁵ Exhibit A20, Enchin Statement, paras 22-23, pp. 7-8.

⁶⁸⁶ Exhibit A20, Enchin Statement, para 38, p. 13.

include speed, convenience, burdening the agents less, and increasing the interaction with the information as compared to the "snapshot" in an email.⁶⁸⁷

655. To suggest that a VOW without Historical MLS Data will prove just as popular with home buyers and sellers also does not withstand scrutiny. VOWs require buyers and sellers to register and provide contact information before accessing the MLS data behind the registration "wall". Registration is a barrier. Mr. Pasalis testified that users dislike providing their contact information. Mr. Simonsen testified that "even an additional click is something that deters a consumer from use of a site."⁶⁸⁸

656. Thus, only a narrow segment of website users choose to register on "full information" VOWs, such as Redfin and ViewPoint. But without Historical MLS Data, GTA VOWs offer only Available listings, what home buyers and sellers can already get via public advertising websites such as CREA's realtor.ca. It is unlikely that VOWs without Historical MLS Data will attract customers in the same numbers when those customers can use public websites and obtain the same information. To be effective and distinguish themselves from public websites, VOWs need to offer home buyers and sellers something more (i.e., Historical MLS Data and the innovation they can build on it).

657. In his June 22 report, Dr. Vistnes recognized this issue and concluded that TREB's restrictions turned VOWs into a less attractive version of other data sharing websites:

Many of the data fields that TREB has agreed to provide as part of its VOW data feed are already available through its IDX data feed. Thus, in making those data fields available to VOWs, TREB did little to increase

⁶⁸⁷ Exhibit A32, Reply Vistnes Report, para 110, pp. 50-51.

⁶⁸⁸ October 9 Transcript p. 2200.

the amount of data that brokers could provide to consumers. In contrast, the data fields that TREB continues to exclude from its VOW data feed remain some of the most difficult data fields for consumers to access outside the context of an MLS.⁶⁸⁹

658. ViewPoint's success in Nova Scotia demonstrates how effective VOWs can be when able to provide Historical MLS Data to customers through the VOW. In just one year, ViewPoint has grown to occupy at least 1% of the entire Nova Scotia residential real estate brokerage services market. And it has done so with fewer than 10 agents. To put ViewPoint's success into perspective, if ViewPoint achieved the same level of success in the GTA, for example, 1% of the buy-side market, it would be in the top 15 buy-side brokerages in the *entire* GTA in the first year of operation. It would complete over 1,000 transactions for annual revenues of over \$10 million (using the average estimated cooperating commission amount).⁶⁹⁰

659. On cross-examination, Dr. Church refused to admit that such growth could show the attractiveness of a "full information" VOW. Instead, he suggested that such a high ranking among GTA brokerages with such a small market share showed how much competition exists in the GTA market. But once again, Dr. Church missed the point. ViewPoint's one-year growth story shows how popular a "full information" VOW can be. Many businesses would be very satisfied with revenues of over \$10 million in their first year. Apparently, Dr. Church considers that insignificant.

660. TREB has tried to downplay the value of displaying the Historical MLS Data by marginalizing online CMAs or home valuations. It relies on evidence that agents do more than simply use Historical MLS Data to arrive at a value. For example, Ms. Prescott testified that she

⁶⁸⁹ Exhibit A30, First Vistnes Report, para 249, p. 75 (emphasis added).

⁶⁹⁰ October 3 Transcript p. 2171. See also Exhibit R79, Church Report, Table 4.4, p. 136.

visits comparable homes and views them from the side-walk, or perhaps looks at maps to find about the home's location.

661. But the evidence contradicts TREB's attempts to downplay the value and attractiveness of online tools such as CMAs. Nothing prevents home buyers and sellers from visiting comparable homes in person. Mr. Nagel says Redfin encourages such visits, but leaves the decision up to the customer.⁶⁹¹ On cross-examination, Mr. Nagel confirmed Redfin's experience that home buyers and sellers are well positioned to make important decisions based on online CMAs powered by Historical MLS Data:

MR. AFFLECK: No, no, no requirement, but let's be frank with one another, Mr. Nagel, most consumers driving by a property are not going to be able to assess its value. Are they going to look at the roof to tell whether it needs a new roof? They see a beautiful green park behind it, do they know that that park is going to be turned into a shopping plaza that's just been passed by council, city council? How do they glean any of these things? Are you not misleading them?

MR. NAGEL: Not at all. If we are being frank, let's be frank: Consumers are smart people, they can drive a neighbourhood and determine, does this home seem like it's situated in a similar neighbourhood of a similar type of the home I am interested in, and they can draw conclusions from that.

Can they tell the impact of whether or not the view from the back right corner is worth \$5,000 or \$3,000? No, they can't, but that is not what this is designed to do. It's designed to let them exclude properties that they know are not a good fit. And I think consumers are smart enough to make that distinction.⁶⁹²

662. TREB's apparent position on CMAs also contradicts the evidence of all VOW operators, who may agree that agents can add value to a CMA, but who nevertheless want to offer a CMA tool to their customers on a VOW.

⁶⁹¹ September 12 Transcript p. 443.

⁶⁹² September 12 Transcript p. 444 (emphasis added).

663. Mr. Enchin testified at length about the utility, functionality, and popularity of his pre-2007 appraisal tool. Of all of the witnesses who testified, he had by far the most experience with online CMAs. TREB did not even cross-examine him on this topic.

664. TREB's position even contradicts its own VOW Task Force who encouraged online CMAs. Its minutes record that "AVMs/CMAs and creative use of sold information to provide consumer services encouraged".⁶⁹³ Of course, TREB has not furthered this objective.

665. Witnesses also rejected the idea that active listings could substitute for the Historical MLS Data when identifying comparable properties. On cross-examination, Mr. Gidamy rejected the suggestion that information in the VOW datafeed (i.e., data on available listings) was sufficient to permit him to determine comparable properties and conduct a CMA:

MR. VAILLANCOURT: The information that is presently contained in VOW data feed is sufficient to meet the task of figuring out what is comparable versus what is not comparable?

MR. GIDAMY: Not entirely, because those are properties that are active, they haven't been sold, so a value hasn't been attached to that as of yet. So you could ask for whatever you want, but what it's sold for, and then its characteristics would be my first and best comparable.⁶⁹⁴

666. *Second*, witnesses also testified about how using the Historical MLS Data internally could improve their agents' quality of service and help them attract home buyers and sellers. In their witness statements, Ms. Desai and Mr. Pasalis explained in detail the importance of a constant, live datafeed for the "analytics" on Realosophy's website and for timely, accurate and

⁶⁹³ Exhibit CR40, Richardson Statement, Exhibit EE p. 503. These minutes were made public at the hearing. See September 24 Transcript, p. 1249-1252.

⁶⁹⁴ September 13 Transcript p. 685.

data-based (rather than "anecdotal") information and advice to customers.⁶⁹⁵ Both commented on the importance of such data to Realosophy's business model of attracting buyers and sellers to their brokerage using their website realosophy.com and their blog.⁶⁹⁶

667. Mr. Pasalis also described the "dashboard" he could build for his agents using technology so that his agents could quickly "look at the last time [a home] was sold, the last time it was listed on the MLS®, whether it was terminated." He noted that with "statistics internally, our Realtor®s are a lot more informed when they are showing houses. And it really just speeds up this process of becoming familiar with a particular house's history every time they are going to show it."⁶⁹⁷ This would enable his agents to be more prepared and give much better advice. Better advice and service mean happier clients who are more likely to become repeat customers and recommend Mr. Pasalis' brokerage to others.

668. Likewise, Mr. Hamidi described how TheRedPin could use technology and the Historical MLS Data to help its agents better understand market trends and communicate this information to their clients.⁶⁹⁸ They could also prepare much more sophisticated CMAs than they can now that better account for small but important differences between comparable homes.⁶⁹⁹

669. Mr. Gidamy described using the Historical MLS Data and automating significant aspects of TheRedPin's internal education programs and client service "to ensure that the service our sales representatives and I provide is simply better than our competitors. We can simply do

⁶⁹⁵ Exhibit A7, Desai Statement, paras 4, 7, 9, 13 and 30, p. 2-4, 9 & Exhibit A10, Pasalis Statement, paras 5, 9, 13, 32, 35, 37 and 39, p. 2-5, 9-13.

⁶⁹⁶ Desai Witness Statement at para 8-13, p. 3-4 & Exhibit A10, Pasalis Statement, paras 5, 8, 12, 13, 31, 33, p. 2-5, 9-13.

⁶⁹⁷ September 12 Transcript pp. 520-521.

⁶⁹⁸ Exhibit A13, Hamidi Statement, para 49, p. 12.

⁶⁹⁹ September 13 Transcript p. 620.

better ourselves due to our technology capabilities at TheRedPin."⁷⁰⁰ At the hearing, he elaborated on one way technology improved quality of service:

And having the information in its raw form and being able to get as close as possible to an automated way to be able to look at different statistics, to look at different sold prices in the area to come up with more accurate -- as opposed to assumptions, come up with more accurate ways to give buyers the information that they need in order to make a better decision, I would call it, in their home-buying or selling experiences, I think is key in this industry.⁷⁰¹

670. Mr. Gidamy also described how TheRedPin could use the offers of commission data to automatically calculate commission rebates.⁷⁰²

671. Dr. Vistnes recognized that VOWs need more than what TREB permits today to compete effectively: "[b]y denying brokers full MLS access for their VOWs, TREB reduces the competitive viability and likely success of VOWs."⁷⁰³ Similarly, Dr. Vistnes noted that: "Forcing VOW-based brokers to rely upon an inferior data feed disadvantages those brokers and reduces their ability to compete. Inasmuch as those VOW-based competitors would have offered improved services that consumers value, TREB's disadvantaging of competitors in this way has the effect of substantially reducing competition."⁷⁰⁴

(iii) TREB's Restrictions Impact VOWs and Home Buyers and Sellers Across the GTA and Show No Signs of Stopping

672. Where VOWs effectively compete they often do so across entire metropolitan areas. Mr. Nagel testified that Redfin operates in 20 metropolitan areas across the U.S., not just in a few

⁷⁰⁰ Exhibit A15, Gidamy Statement, para 15, p. 5.

⁷⁰¹ September 13 Transcript pp. 676-677.

⁷⁰² Exhibit A15, Gidamy Statement, para 23, p. 8.

⁷⁰³ Exhibit A30, First Vistnes Report, para 271, p. 83.

⁷⁰⁴ Exhibit A30, First Vistnes Report, para 258, p. 78.

neighbourhoods in Seattle. Likewise, ViewPoint operates across Nova Scotia, not just in a few neighbourhoods in Halifax. Competing across an entire metropolitan area increases a VOW's competitive reach and informs the scope of competition prevented or lessened by TREB's anticompetitive conduct.

673. This can occur in part because technology permits VOWs to "level the playing" field against incumbent brokerages that have greater neighbourhood expertise and referral networks. As Dr. Vistnes explained, by "reducing the importance of building a referral base through past customers, VOWs can also put less established agents on a more competitive footing vis-à-vis more established incumbents."⁷⁰⁵ This helps VOWs to become "viable competitors" and "compete more quickly" with incumbents.⁷⁰⁶

674. The evidence demonstrates that new entrants need the best tools available to challenge incumbents. Although entry to the real estate profession may be easy, success in the profession is challenging. At least thirty percent of agents leave the profession after their first few years. In these circumstances, it is critical that new entrants can innovate and operate more efficiently to achieve elusive success. TREB's restrictions have entirely the opposite effect. They exclude new and innovative agents wishing to offer services online through a "full information" VOW.

675. Quantitative data confirms the impact VOWs could have on the GTA market as a whole if permitted to compete on effective terms. On cross-examination, CREA's counsel directed Dr. Vistnes to NAR's 2011 Survey of Home Buyers and Sellers. Counsel asked whether it was "fair to look to the US experience to see what it can tell us about the effect of VOWs with sold

⁷⁰⁵ Exhibit A30, First Vistnes Report, para 204, p. 63.

⁷⁰⁶ September 19 Transcript p. 1074.

information".⁷⁰⁷ According to NAR's survey, 10% of buyers⁷⁰⁸ and 3% of sellers⁷⁰⁹ found their agent through the Internet.

676. These percentages translate into significant market shares and revenues for "full information" VOWs when applied to the GTA. Approximately 90,000 residential transactions occurred over TREB's MLS in 2011. If 10% of buyers and 3% of sellers found their agent through a "full information" VOW, VOWs would attract 9,000 buyers and 2,700 sellers every year. With average commission payments for one end of a transaction around \$10,000, "full information" VOWs would have annual revenues of approximately \$117 million. If they rebated a quarter of those revenues to home buyers and sellers, consumers would save \$29 million *every year*.

677. These rebates could have a significant impact on commissions, particularly on the cooperating agent (buy) side. The vast majority of GTA listings offer cooperating commissions of 2.5%. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷¹⁰ [REDACTED]

[REDACTED]⁷¹¹ [REDACTED]

[REDACTED]

[REDACTED]

⁷⁰⁷ September 19 Transcript p. 1118.

⁷⁰⁸ September 19 Transcript p. 1127.

⁷⁰⁹ September 19 Transcript pp. 1128-9.

⁷¹⁰ [REDACTED]

⁷¹¹ [REDACTED]

681. The evidence also confirms that TREB is not likely to relax its restrictions. Although Mr. Richardson testified that TREB might make the Historical MLS Data available if it obtained clarity on privacy and RECO issues, his assertion is not credible. TREB has done nothing to obtain such clarity since it formed its VOW Task Force in March 2011. It cares so little for an answer from the Privacy Commissioner that it did not even follow up to ask why the Privacy Commissioner was taking so long to respond to TREB's communication regarding its privacy "Questions and Answers". TREB followed up only in August 2012 when diligencing for this litigation.

(iv) TREB and CREA's Responses Lack Merit

682. In response to the Commissioner's evidence, TREB and CREA appear to be preparing to argue that:

- (a) Buyer steering issues do not exist, and even if they did, this is not a barrier to "full information" VOWs and thus is not an anticompetitive act.
- (b) Dr. Vistnes concluded TREB's conduct did not create, maintain, or enhance market power.
- (c) The current market is very competitive and VOWs will have little impact.

683. None of these arguments has merit.

684. *First*, TREB has tried to downplay the prevalence of buyer steering. Dr. Church asserted that Dr. Vistnes' buyer steering theory revealed no anticompetitive act because harm accrued to home buyers and sellers, not to competitors like "full information" VOWs. Indeed, Dr. Church

argued that "full information" VOWs would benefit from continued buyer steering. Both of these positions are flawed.

685. There is evidence of the prevalence of buyer steering. Mr. Pasalis testified that Realosophy recommends "that sellers offer the typical 2.5% to cooperating brokerages, in order to maximize the chances that the home will be sold through the MLS."⁷¹⁷ On cross-examination, he described his experience with a particular client who had been steered. He also testified about his interactions with agents over the years and how "you see these types of things happen, and you hear about them".⁷¹⁸

686. Even if buyer steering occurs only rarely, it presents an important way for VOWs to distinguish themselves from competitors. By displaying all MLS listings and the corresponding offers of commission online, a VOW can offer the consumer-focused transparency that Mr. Hamidi testified is at the core of TheRedPin's business model. As such, the prevalence of buyer steering may be less relevant than the opportunity displaying offers of commission present to VOWs who want to showcase their transparency to buyers and sellers.

687. As Dr. Vistnes explained in his report, to the extent that buyer steering does occur, more transparency is likely to reduce it. His analysis grounds evaluation of how competitively significant "full information" VOWs are likely to be, because the more prevalent buyer steering, or the more widely it is perceived to occur, the more attractive transparency will be.

688. Prohibiting display of offers of commissions on a VOW and excluding it from the VOW datafeed are anticompetitive acts. They both increase VOWs costs and reduce their

⁷¹⁷ Exhibit A10, Pasalis Statement, para 17, p. 6.

⁷¹⁸ September 12 Transcript p. 567.

attractiveness, just like the exclusion of the Historical MLS Data. For example, Mr. Nagel testified about how Redfin uses offer of commission data internally to calculate its rebates automatically. Mr. Gidamy and Mr. Hamidi testified that TheRedPin would like to do the same. Instead, TheRedPin currently advertises rebates based on an assumption of a 2.5% cooperating commission. Imprecision reduces the quality of TheRedPin's service, but greater precision would currently require manually entering the offers for every active listing added to Stratus, which would be prohibitively expensive and time consuming.

689. In addition, as described above, VOW-operators testified about how they wish to improve transparency and professionalism in the industry. Displaying offers of commission may be very attractive to home buyers and sellers and help VOWs distinguish themselves from competitors.

690. TREB's counsel sought an admission from Mr. Pasalis on cross-examination that the offer of commission data was not commercially valuable. Mr. Pasalis rejected counsel's assertion. He noted that it may be valuable depending on the business model adopted.⁷¹⁹

691. During cross-examination, TREB's counsel suggested to Dr. Vistnes that VOWs could also steer users to higher commission homes by filtering out low commission homes from customer searches. As Dr. Vistnes responded, a VOW which displayed only listings with high offers of commission could not advertise that it displayed "all MLS listings" which would likely be a significant competitive failing.⁷²⁰

692. Whether VOWs could even discriminate in favour higher commission homes under TREB's VOW Policy and Rules is uncertain. Rule 820 strictly limits a VOW's ability to exclude

⁷¹⁹ September 12 Transcript p. 568.

⁷²⁰ September 19 Transcript p. 1110.

listings from display, "A VOW may exclude Listings from display based only on objective criteria, including but not limited to, factors such as geography, list price, and type of property."⁷²¹ It is arguable that discriminating based on offer of commission amounts would not be an "objective" criterion.

693. *Second*, Dr. Church asserted that Dr. Vistnes had concluded that TREB's conduct has no impact on the market power of its members. Dr. Church's conclusion is wrong and his characterization of Dr. Vistnes' statements are out of context.

694. A contextual reading of Dr. Vistnes' reply report indicates that Dr. Vistnes concluded that TREB's conduct was unlikely to have a significant effect on the market power of any *individual* agent. But it does not follow that Dr. Vistnes concluded that TREB's conduct did not create, enhance, or maintain market power of TREB's non-VOW members as a whole. Dr. Vistnes titled that section of his reply report "TREB's conduct maintains prices above, and service levels and innovation below, competitive levels".⁷²² The very title implies market power: the ability to maintain supra-competitive prices or infra-competitive service levels.

695. Throughout that section, Dr. Vistnes distinguishes between the market power of an *individual* agent, and what would occur in the market more generally, but for TREB's conduct. Elsewhere in his reply report, Dr. Vistnes writes of TREB's conduct maintaining prices above competitive levels, and services and innovation below competitive levels.⁷²³ Interestingly, TREB's counsel did not cross-examine Dr. Vistnes on the paragraphs of his reply report relied upon by Dr. Church to give him any opportunity to explain his position and conclusion.

⁷²¹ Exhibit R39, Richardson Statement, Exhibit OO p. 599.

⁷²² Exhibit A32, Reply Vistnes Report, p. 17.

⁷²³ Exhibit A32, Reply Vistnes Report, para 18, p. 13.

696. Perhaps that is because throughout both his reports, Dr. Vistnes focuses on TREB's exclusionary conduct, how it disadvantages VOWs and discourages effective entry (i.e., the conditions precedent for market power). For example, at paragraph 245 of his June 22 report, he concluded that:

by denying VOW-based brokers full access to MLS data for their VOWs, TREB discourages entry of VOW-based brokers and reduces those brokers' ability to compete, and thereby continues to engage in exclusionary conduct that has the effect of substantially reducing competition relative to what would otherwise be the case.⁷²⁴

697. At paragraph 251, Dr. Vistnes wrote that, "prohibiting brokers from showing this information on VOWs effectively discriminates against, and disadvantages, VOW-based brokers in their attempt to compete."⁷²⁵

698. Likewise at paragraph 273, "absent TREB's conduct, there may have been even more entry or even greater investment in that entry. Moreover, those excluded entrants would likely have offered even more attractive products to GTA consumers than what is currently available."⁷²⁶

699. On cross-examination, Dr. Church agreed that the factors Dr. Vistnes reviewed in his analysis – barriers to entry, efficiencies, and the possibility of lower prices – are all considerations "that you look at to see if there is going to be a change in market power".⁷²⁷

⁷²⁴ Exhibit A30, First Vistnes Report, para 245, p. 74.

⁷²⁵ Exhibit A30, First Vistnes Report, para 251, p. 76.

⁷²⁶ Exhibit A30, First Vistnes Report, para 273, p. 84.

⁷²⁷ October 3 Transcript p. 2159-2160.

700. Dr. Vistnes looked at those factors. His analysis was thorough and not challenged on cross-examination. There is simply no merit in Dr. Church's assertions, which take minor comments from two paragraphs of Dr. Vistnes' reply report completely out of context.

701. *Finally*, some of TREB's witnesses testified in their witness statements about the competitiveness of the residential real estate brokerage market. The argument appears to be that the market is "competitive enough", so the Tribunal should not issue an order. But this argument relates to an absolute level of competition – what is "competitive enough" – exactly what the Federal Court of Appeal rejected in *Canada Pipe*. The question is not whether the market is "competitive enough", but whether there would be more and better competition "but for" TREB's anticompetitive acts. The evidence demonstrates that, when permitted to compete effectively, VOWs can grow quickly, attract thousands of customers, and offer rebates to home buyers and sellers. Competition between existing market participants cannot immunize TREB's anticompetitive acts to exclude and reduce the competitive effectiveness of new business models, such as VOWs.

Copyright Issues

702. Although TREB pleaded that its anticompetitive conduct is only the mere exercise of its intellectual property rights in the MLS database,⁷²⁸ this argument fails for two reasons. First, TREB has not led sufficient evidence to establish the copyright of the MLS database. Second, even if the MLS database is protected by copyright, TREB's conduct is more than the "mere exercise" of its intellectual property rights under s. 79(5).

⁷²⁸ TREB Response paras 44-46.

a) TREB Has Not Established Copyright in the MLS Database

703. Copyright is a creature of statute. The rights and remedies provided by the *Copyright Act*⁷²⁹ are exhaustive. The *Copyright Act* defines a "compilation" as (i) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (ii) a work resulting from the selection or arrangement of data.

704. Copyright applies to a database only if the "selection or arrangement of data" is original. As the Supreme Court of Canada held in *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁷³⁰ originality is not a trivial standard. It requires skill and judgment:

This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.⁷³¹

705. A compilation, like a database, may not be copyright when its author fails to establish the requisite degree of skill, judgment, and labour. In rejecting Tele-Direct's alleged copyright in the YellowPages, the Federal Court of Appeal held that some compilations simply do not meet the test:

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. If it were otherwise, all types of selections or arrangements would automatically qualify, for they all imply some degree of intellectual effort, and yet the Act is clear:

⁷²⁹ RSC 1985, chapter C-42.

⁷³⁰ (2004) 30 CPR (4th) 1 [*CCH*], Commissioner's Book of Authorities, vol. 4, tab 15.

⁷³¹ *CCH, supra*, para. 16, p. 15, Commissioner's Book of Authorities, vol. 4, tab 15.

only those works which are original are protected. There can therefore be compilations that do not meet the test.⁷³²

706. In the court below, McGillis J. had found as a fact that Tele-Direct "arranged its information, the vast majority of which is not subject to copyright, according to accepted, commonplace standards of selection in the industry. In doing so, it exercised only a minimal degree of skill, judgment, and labour in its overall arrangement which is insufficient to support a claim of originality in the compilation so as to warrant copyright protection."⁷³³

707. The Court of Appeal upheld McGillis J.'s decision finding that the "compilation of the in-column listings is of such an obvious and commonplace character as to be unworthy of copyright protection. Certain compilations of routine data are so mechanical as to be devoid of a creative element."⁷³⁴ It rejected Tele-Direct's assertion that the YellowPages were copyright.

708. In its later decision in *Étudile Inc. v. Automobile Protection Assn. ("Étudile")*,⁷³⁵ the Federal Court of Appeal held that "it is not easy in compilation situations to draw a line between what signifies a minimal degree of skill, judgment and labour and what indicates no creative element".⁷³⁶

709. In this case, sufficient evidence must exist to permit the Tribunal to make that determination and fairly draw a line. This is particularly the case where, as here, the party

⁷³² *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* (1997) 76 CPR (3d) 296 at p. 307 [*Tele-Direct #2*], Commissioner's Book of Authorities, vol. 4, tab 16.

⁷³³ *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, (1996) 74 CPR (3d) 72 at p. 97, Commissioner's Book of Authorities, vol. 4, tab 17.

⁷³⁴ *Tele-Direct #2, supra*, p. 309, Commissioner's Book of Authorities, vol. 4, tab 16.

⁷³⁵ (2000) 6 CPR (4th) 211 [*Étudile*], Commissioner's Book of Authorities, vol. 4, tab 18.

⁷³⁶ *Étudile, supra*, p. 219, Commissioner's Book of Authorities, vol. 4, tab 18.

asserting copyright does not benefit from the presumptions in the *Copyright Act*, which apply only to actions for infringement.⁷³⁷

710. TREB has not adduced sufficient evidence to demonstrate that its MLS database is the product of sufficient skill, judgment, and labour to ground copyright. Instead, it has baldly asserted the database's copyright without establishing a sufficient factual foundation.

711. As in *Tele-Direct*, much of the information in the MLS database is not itself subject to copyright. Like the names, addresses, and phone numbers in the YellowPages, a home's features are facts (e.g., list price, sold price, days on market, dimensions). While copyright may exist in photographs taken or listing descriptions written by TREB's members, the Historical MLS Data and offers of cooperating commission are in the "factual" rather than the "created" category.

712. Thus, to establish copyright in these "home facts", TREB must demonstrate some skill, judgment and labour in their arrangement. It has not done so. None of TREB's witnesses testified about how TREB arranges the facts it receives from its members, the effort that takes, or the skill or judgment involved in determining what arrangement is appropriate. At best, Mr. Richardson testified that TREB contracts with a third-party to "check" certain mandatory fields for errors.⁷³⁸ But making sure data is correct is not equivalent to exercising skill or judgment in its arrangement.

713. Mr. Richardson did demonstrate the functionality of TREB's intranet system. But he went to great lengths in his witness statement to distinguish that *system* from the MLS *database*. What Mr. Richardson demonstrated to the Tribunal was not TREB's MLS database. Rather it

⁷³⁷ *Copyright Act, supra*, section 34.1.

⁷³⁸ September 27 Transcript p. 1616.

was software leased from Stratus that permits TREB members to interact with the MLS database and retrieve information from it.

714. Like its pleading, TREB's contracts with third parties *assert* its copyright, but that is not the same as *proving* skill, judgment or labour to show originality and satisfy TREB's evidentiary burden in this proceeding. The fact that third parties have acknowledged TREB's copyright is not probative of the actual question: has TREB exercised sufficient skill, judgment and labour in arranging the facts in the MLS database such that the database is original?

715. Rather than proving originality, the evidence demonstrated the opposite. In discovery, Mr. Richardson testified that once members upload information to TREB's MLS by completing the Data Information Form, the listing appears on TREB's intranet system almost instantaneously.⁷³⁹ Such speed does not suggest TREB's skill, judgment or labour in arranging the information in the database.

716. In fact, real estate boards across Canada operate MLS databases full of "home facts". According to Mr. Simonsen, these boards upload certain MLS data to CREA for display on realtor.ca.⁷⁴⁰ CREA maintains a list of mandatory fields. Far from being original, TREB simply collects "home facts" in the same way that board across Canada do. There is no evidence that TREB's MLS database is original in comparison to those of other boards. Rather, like the YellowPages, TREB's MLS database is little more than information, the vast majority of which is not subject to copyright, arranged according to accepted, commonplace standards of selection in the industry. Copyright cannot exist in these circumstances.

⁷³⁹ Exhibit A92, p. 2.

⁷⁴⁰ Exhibit IC84, Simonsen Statement, para 28, p. 10.

b) Even if TREB Has IP Rights, TREB's Conduct is More than a "Mere Exercise"

717. Copyright issues arise in abuse of dominance cases by virtue of section 79(5), which immunizes some anticompetitive conduct from scrutiny in limited circumstances. Section 79(5) provides that:

For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

718. Section 79(5) attempts to balance the extraordinary statutory monopoly rights of intellectual property with the public interest in competition. To strike the right balance, the Tribunal and Federal Court of Appeal have interpreted section 79(5) narrowly.

719. In *Tele-Direct*, the Tribunal held that s. 79(5) immunized Tele-Direct's refusal to license its trade-mark to consultants. However, the Tribunal distinguished a refusal to license from other conduct, such as attaching conditions to the license. It held that “the refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark.”⁷⁴¹ Thus, where a respondent attaches anticompetitive conditions to the use of its intellectual property, section 79(5) will not immunize it from scrutiny.

720. Likewise, the Federal Court of Appeal dealt with the intersection of intellectual property rights and the *Competition Act* in the decade-long litigation between Eli Lilly and Apotex over Apotex's production of cefaclor. That case involved section 45 and whether patent assignments could lessen or prevent competition *unduly*. Twice the Federal Court found that a patent

⁷⁴¹ *Tele-Direct, supra*, p. 32f, Commissioner's Book of Authorities, vol. 1, tab 3.

assignment could not lessen competition unduly, and twice the Federal Court of Appeal overturned.

721. In the first instance, Rothstein J.A. (as he then was), who also sat on the Tribunal panel that decided *Tele-Direct*, held that where "there is evidence of something more than the mere exercise of patent rights that may affect competition in the relevant market, *Molnlycke*, does not purport to completely preclude application of the *Competition Act*."⁷⁴²

722. When the matter returned to the Federal Court of Appeal a year later, Evans J.A. distinguished between the market power enjoyed by Lilly by virtue of its patent rights, and the increased market power it obtained through the assignment of other patents for the manufacture of cerfactor:

The Court's reference to "something more" must mean, in this case, the anti-competitive effects of the assignment, namely the increased power of Lilly in the market for bulk cerfactor, as a result of its existing ownership of the patents for the other known, commercially-viable processes for manufacturing the medicine.

Hence, *Molnlycke* must be distinguished on the basis that it was dealing with a situation where the only market power created by the assignment was that inherent in the patent assigned.⁷⁴³

723. Thus, a holder of intellectual property cannot act to prevent or lessen competition with impunity. A limited scope exists within which it may exercise its intellectual property rights. Should it stray too far from that "mere exercise", the *Competition Act* engages to protect the public interest in competition from abuse.

⁷⁴² *Eli Lilly and Co. v. Apotex Inc.* (2004), 32 CPR (4th) 195, para. 15, p. 200, Commissioner's Book of Authorities, vol. 4, tab 19.

⁷⁴³ *Eli Lilly and Co. v. Apotex Inc.* (2005), 44 CPR (4th) 1, paras. 18-19, p. 12, Commissioner's Book of Authorities, vol. 4, tab 20.

724. Assuming TREB's MLS database is protected by copyright and assuming that its conduct is an exercise of its rights, the evidence in this case reveals that TREB's anticompetitive conduct is more than the "mere exercise" of whatever intellectual property rights it may have.

725. *First*, TREB's conduct is analogous to attaching anticompetitive conditions to the use of intellectual property (prohibited in *Tele-Direct*) rather than the denial of access to intellectual property (acceptable according to *Tele-Direct*). TREB's VOW Policy and Rules and its VOW Datafeed do not restrict members' *access* to the MLS database. TREB grants all of its members access to the MLS database, including the Historical MLS Data and offers of commission, through its Stratus-powered intranet. TREB even grants access to the information to thousands of non-members across Ontario through the CONNECT program.

726. Rather than restricting *access*, TREB's VOW Policy and Rules and its VOW Datafeed agreement control *how* members use information from sourced from the MLS database, and *how* they use that information to deliver services to their customers. Members cannot make available the Historical MLS Data or offers of commission for search or display on a VOW. Likewise, members have access to Available listing information in the VOW datafeed, but cannot use it for any purpose other than display on their VOW. They still have access to all of the MLS data, but they cannot use it in certain ways to serve their customers.

727. For this reason, TREB's restrictions are akin to anticompetitive terms attaching to its intellectual property. TREB grants its members a license, but the conditions of that license (i.e., prohibition on search and display on a VOW, limited use) are anticompetitive. TREB members who wish to provide MLS data to customers by any other means than a VOW are unaffected. As TREB's CEO testified, TREB continues to enable its members to email Available and

Unavailable listing information to customers directly from Stratus. In practice, TREB's anticompetitive conditions on use apply only to VOW operators who cannot provide the same information to customers over a website as their competitors provide via email.

728. These discriminatory conditions on use are more than the "mere exercise" of TREB's intellectual property rights.

729. *Second*, TREB is a trade association. It has used its intellectual property rights to shield some of its members from competition from new entrants. In doing so, it has created, maintained, or enhanced their market power to the detriment of VOW-operators, and home buyers and sellers. As Lilly used statutory rights to increase its market power beyond the initial power arising from its original patent rights, so too TREB has used its rights to create, maintain, or enhance the market power of its non-VOW members. This goes beyond a "mere exercise". TREB cannot discriminate against some members in favour of others.

Requested Remedy

730. The Commissioner seeks remedies (i) to prohibit TREB from continuing its ongoing restrictive and discriminatory practice of anticompetitive acts that prevent TREB members from using VOWs to compete effectively in the markets, and (ii) to restore competition to the relevant markets.

731. In this case, many of the terms of an Order that prohibit TREB from continuing certain anticompetitive acts – such as enforcing provisions in its VOW Rules and Policies and its VOW Datafeed Agreement – should, of necessity, be married with provisions that solve the problem

and allow competition to flourish, by enabling TREB members who seek to use the Historical MLS Data to expand their businesses and compete in the market using a VOW.

732. The reason is simple: merely prohibiting TREB from enforcing its rule that a member cannot offer the Historical MLS Data for search and display on a VOW is ineffective unless TREB is also required to include that information in the VOW datafeed. Merely prohibiting TREB from enforcing its rules and policies on what is "downloaded" in the VOW datafeed – so called "non-confidential" information – is impotent if TREB is not required to "download" what TREB currently considers "confidential". Merely prohibiting TREB from enforcing the narrow, restrictive Purpose for which the Historical MLS Data may be used in the VOW Datafeed Agreement could imply that the data may be used for *any* purpose – even a purpose not relevant to the trading of real estate. None of these circumstances meets the objectives of the remedial provisions in section 79 of the *Competition Act*.

733. The objectives in section 79 are to stop a respondent's practice of anticompetitive acts and to restore competition in the market. That can only be achieved by both prohibiting what TREB is currently doing, and by enabling TREB's members to have access to and use of unavailable listings that contain Historical MLS Data and offer of commission data in the VOW datafeed for the purpose of trading in real estate – not for the limited purpose currently imposed by TREB.

734. In addition, the remedy ordered by the Tribunal should ensure that TREB does not use its rule-making powers or exercise its discretion under its existing rules and policies, or under the VOW Datafeed Agreement, in a manner that is discriminatory or that undermines the objective of restoring competition in the markets.

a) Jurisdiction of the Tribunal

735. Where the Tribunal finds that paragraph 79(1)(a) to (c) of the *Competition Act* have been satisfied, the Tribunal may make an order prohibiting TREB from engaging in the practice of anticompetitive acts. The Tribunal may prohibit existing or future anticompetitive acts.⁷⁴⁴

736. Under subsection 79(2), where the Tribunal finds that a practice of anti-competitive acts has had, or is having, the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may

[...] in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market. [Emphasis added.]⁷⁴⁵

737. Subsection 79(3) provides as follows:

In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

738. In all cases, the Tribunal maintains flexibility to make an Order that is effective, to achieve the objective stated in subsection 79(2) of the *Competition Act*. In previous cases, the Tribunal has made a variety of Orders, both prohibitory and mandatory, to ensure that the effect of a respondent's anticompetitive practices is remedied and competition is restored to the market.

⁷⁴⁴ *Laidlaw, supra*, p. 351c, Commissioner's Book of Authorities, vol. 2, tab 6.

⁷⁴⁵ *Laidlaw, supra*, p. 351e, Commissioner's Book of Authorities, vol. 2, tab 6.

739. There are numerous examples of the Tribunal making both prohibitory and restorative Orders, including requiring a respondent to provide data to a competitor.

740. In *Laidlaw*, the Tribunal ordered Laidlaw not to enforce certain terms of its standard form agreements, and to amend them (in some cases with Laidlaw's agreement). The Orders included requirements that Laidlaw:

- (a) amend its standard form agreements (defined as "Container Service Agreements"), both already in force and implemented after the Order, to remove certain terms and not to reintroduce them;⁷⁴⁶
- (b) not enforce those same clauses in agreements already entered;⁷⁴⁷
- (c) To notify its customers in the market of the foregoing;⁷⁴⁸
- (d) To amend its Container Service Agreements, to have a term not exceeding one year, to renew for not more than one year, and to be terminable at any time upon 30 days notice;⁷⁴⁹
- (e) To amend its Container Service Agreements to state "clear and unequivocally" certain matters;⁷⁵⁰
- (f) To amend its Contain Service Agreements such that they not contain a specified requirement of product exclusivity;⁷⁵¹

⁷⁴⁶ *Laidlaw, supra*, pp. 354d and 359, para 3(a), Commissioner's Book of Authorities, vol. 2, tab 6.

⁷⁴⁷ *Laidlaw, supra*, p. 359, para 3(b), Commissioner's Book of Authorities, vol. 2, tab 6.

⁷⁴⁸ *Laidlaw, supra*, p. 359, para 3(c), Commissioner's Book of Authorities, vol. 2, tab 6.

⁷⁴⁹ *Laidlaw, supra*, pp. 354b-c and 359-60, para 4(a), Commissioner's Book of Authorities, vol. 2, tab 6.

⁷⁵⁰ *Laidlaw, supra*, p. 360, para 4(b), Commissioner's Book of Authorities, vol. 2, tab 6.

- (g) To provide the customer with a written statement clearly explaining the difference between the new version and the former version of a standard form agreement, if Laidlaw proposes to make changes and the customer agrees;⁷⁵²
- (h) To provide to its customers and to all of its managerial staff and sales employees engaged in the provision of the product, within 45 days of the Order, a statement approved by the Director of the terms of the Order and that it is Laidlaw's policy is to comply with the *Competition Act*⁷⁵³

741. In addition, Laidlaw was ordered not to withdraw from any or all of the markets for the supply of the product, for a period of 3 years from the date of the Order, without first providing 60 days notice to the Director and reasonable details thereof; and that that either party may be at liberty to apply to the Tribunal with respect of any agreement or conduct for further orders as necessary with a view to the objects of subsection 79(2).⁷⁵⁴

742. In *D & B*, the Tribunal's order concerned the terms of existing and future contracts, and with the provision of certain data. The respondent was prohibited from entering into any future contracts that restricted or precluded a retailer from supplying its scanner data and causal data necessary for the provision of a scanner-based market tracking service to someone other than Nielson and from offering a retailer inducements to restrict or preclude access in that way.⁷⁵⁵ The Tribunal also prohibited Nielson from entering into future contracts containing Most Favoured Nation clauses for a period of 24 months from the date of its order, because competition would

⁷⁵¹ *Laidlaw, supra*, pp. 354d-e and 360, para 4(c), Commissioner's Book of Authorities, vol. 2, tab 6.

⁷⁵² *Laidlaw, supra*, pp. 356 and 360, para 6), Commissioner's Book of Authorities, vol. 2, tab 6.

⁷⁵³ *Laidlaw, supra*, pp. 356, 357e and 360, para 7(a), Commissioner's Book of Authorities, vol. 2, tab 6.

⁷⁵⁴ *Laidlaw, supra*, pp. 355e-g and 361, para 8 and 9, Commissioner's Book of Authorities, vol. 2, tab 6.

⁷⁵⁵ *D & B, supra*, p. 280b, Commissioner's Book of Authorities, vol. 1, tab 1.

not be restored to the market if Nielson were permitted to use that type of clause in future contracts.⁷⁵⁶

743. On the evidence, the Tribunal concluded that access to causal data in retailer contracts was "essential to produce a scanner-based market tracking service and therefore, to restore competition in the market".⁷⁵⁷ As a result, the Tribunal stated that it would be "irresponsible for us to fail to ensure that this information, along with scanner data, is freed from the exclusive control of Nielson".⁷⁵⁸ Although Nielson had not been enforcing exclusivity clauses in those contracts, its "interests in enforcing such provisions would undoubtedly change once there was as possibility of a competitive struggle with another supplier of scanner-based market tracking services".⁷⁵⁹

744. The Tribunal also prohibited Nielson from enforcing provisions in existing retailer contracts that restrict or preclude a retailer from supplying its scanner data and causal data necessary for the provision of scanner-based market tracking services to someone other than Nielson.⁷⁶⁰

745. With respect to the provision of scanner data, the Tribunal concluded as follows at page 286:

In order to enter the market for the supply of scanner-based market tracking services in Canada, a potential competitor of Nielson needs not only access to current and future scanner data but also to historical scanner data. In our view, an order for the provision of historical data by Nielson

⁷⁵⁶ *D & B, supra*, p. 280d –f, Commissioner's Book of Authorities, vol. 1, tab 1.

⁷⁵⁷ *D & B, supra*, pp. 280h-281a, Commissioner's Book of Authorities, vol. 1, tab 1.

⁷⁵⁸ *D & B, supra*, p. 281a, Commissioner's Book of Authorities, vol. 1, tab 1.

⁷⁵⁹ *D & B, supra*, p. 281b, Commissioner's Book of Authorities, vol. 1, tab 1.

⁷⁶⁰ *D & B, supra*, p. 282a, Commissioner's Book of Authorities, vol. 1, tab 1.

where the data are not available directly from the retailers is essential to restore competition in the market.

746. In the result, Nielson was ordered to provide 15 months of historical data.

747. In *Tele-Direct*, the competitive effectiveness of consultants had been reduced as a result of Tele-Direct's practice of anti-competitive acts. As noted above, the Tribunal concluded that the constants were competitively significant and that even a small impact on the volume of consultants' business must be considered substantial given the market power of Tele-Direct. The Tribunal stated:

Of course, in the future, in the absence of any order by the Tribunal, there would be no constraint on Tele-Direct intensifying discriminatory acts against consultants and exacerbating an already substantial effect on them. We have no difficulty concluding that Tele-Direct's proven practice of anti-competitive acts has had, is having or is likely to have the effect of lessening competition in the market.⁷⁶¹ [Emphasis added.]

748. The Tribunal then turned to remedies, noting that Tele-Direct "cannot use its market power to impede consultants' activities and to disadvantage consumers who wish to retain the services of consultants".⁷⁶²

749. In concluding that it should prohibiting Tele-Direct's discriminatory practices, the Tribunal stated:

We have found that Tele-Direct engaged in a practice of discriminatory acts against consultants and consumers who use consultants resulting in a substantial lessening of competition. While many of the acts in evidence occurred more than three years before the filing of the Director's application, the practice continues. The practice of these acts is prohibited.

⁷⁶¹ *Tele-Direct, supra*, pp. 247f-248a, Commissioner's Book of Authorities, vol. 1, tab 3.

⁷⁶² *Tele-Direct, supra*, p. 248b, Commissioner's Book of Authorities, vol. 1, tab 3.

Consumers using consultants must be treated by Tele-Direct no differently than customers who do not use consultants.⁷⁶³

750. The Tribunal then elaborated on its prohibitory remedy in careful detail for more than a page in the reported version of its reasons.⁷⁶⁴

b) The Present Case

751. The remedies requested by the Commissioner in the Amended Notice of Application were Orders as follows under subsections 79(1) and 79(2):

- (a) prohibiting TREB from directly or indirectly enacting, interpreting or enforcing any restrictions, including the TREB MLS Restrictions [as defined in the Amended Application], that exclude, prevent or discriminate against TREB member agents who wish to use the information in the TREB MLS system to offer services over the Internet, such as through a VOW as described in this Application;
- (b) directing TREB to implement such resources and facilities as the Tribunal deems necessary to ensure the operation of VOWs or similar services by, or on behalf of, member agents;
- (c) directing TREB to pay the costs and disbursements of the Commissioner and the Tribunal in relation to this Application;

⁷⁶³ *Tele-Direct, supra*, p. 248d-e, Commissioner's Book of Authorities, vol. 1, tab 3.

⁷⁶⁴ *Tele-Direct, supra*, pp. 248e- 250a, Commissioner's Book of Authorities, vol. 1, tab 3.

- (d) all other orders or remedies that may be required to give effect to the foregoing prohibitions, or to reflect the intent of the Tribunal and its disposition of this matter; and
- (e) an order granting such further and other relief as this Tribunal may consider appropriate.

752. The Commissioner has proven a number of clear restrictions in this hearing that exclude, prevent or discriminate against TREB members who want to use the information in the TREB MLS system to provide services over a website such as a VOW. These anticompetitive acts have been outlined above. They relate to both the period before 2011 and after 2011, and concern TREB's MLS Rules and Policies, its exclusionary acts and inaction on VOWs, its VOW Rules and Policies enacted in 2011 and its actions in implementing them through the VOW datafeed and the VOW Datafeed Agreement. The remedies requested below are in substance the same as, or the same in kind, as the remedies sought in the Amended Application.

c) Remedies Requested

753. The Commissioner submits, first, TREB should be prohibited from enforcing certain terms of its VOW Rules and Policies and its VOW Datafeed Agreement, namely:

- (a) Terms that prevent and restrict TREB members from using the Historical MLS Data and offers of commission in their businesses and specifically on their websites, including on VOWs:

VOW Rules and Policies, Rule 823 a), b), and e)

VOW Rules and Policies, Policy 24 a), b) and c)

- (b) Terms in TREB's VOW Datafeed Agreement that restrict the Purpose to which the information in the VOW datafeed may be "solely and exclusively" used to the mere "display" of the information on a website, such as a VOW:

VOW Datafeed Agreement, section 3.2 (definition of "Purpose") and section 4.1 (provision of the VOW datafeed "solely and exclusively" for the Purpose) and section 6.2(i)

- (c) Terms that limit the download and contents of the downloaded information in the VOW datafeed:

VOW Rules and Policies, Policies 15 and 17 (see definition of "confidential information and references to downloading of of "non-confidential MLS data")

VOW Datafeed Agreement, section 3.2 (definitions of "Listing Information" and "Purpose") and section 4.1 (provision of the VOW datafeed and a limited license to use "Listing Information" in the VOW datafeed "solely and exclusively" for the Purpose)

And

- (d) Terms that give TREB absolute discretion to change the nature, format and means of delivery of the information in the VOW datafeed.

VOW Rules and Policies, Policy 15 and 22(d)

VOW Datafeed Agreement, section 5.1

754. The prohibitions requested above are not likely by themselves to restore competition to the market for the provision of residential real estate brokerage services in the GTA. In order to restore competition, TREB should be ordered to include in its datafeed unavailable listings containing additional data fields that are currently not included – the sold listings, pending sold

listings, WEST listings and offers of commission for active listings. Without that information in the datafeed, TREB members who desire to deliver services through a VOW model of brokerage, or to deliver services more efficiently through a mixed-model brokerage, will be unable to do so.⁷⁶⁵ TREB must include the disputed information in the VOW datafeed.

755. TREB should also be ordered to permit those who receive the datafeed to store, use and display that information. TREB's current restrictions, through restrictions on the "sole and exclusive" use to which the data may be put and the definition of "Purpose" in the VOW Datafeed Agreement, clearly constitute a discriminatory and unnecessary restraint on TREB members who would like to use the datafeed information to offer services through their websites.

756. Because the Commissioner recognizes that the datafeed information should not be opened up to use for any purpose at all, the terms of the VOW Datafeed agreement need to be amended. The amendments should enable recipients to store, use and display the data in the course of operating their brokerage businesses. A limitation on use that is tied to trading in real estate, as defined under REBBA, is a reasonable limitation and accords with the manner in which the same MLS information may be used when accessed by TREB members using Stratus under the Authorized User Agreement. The following definition of Purpose is proposed for the VOW Datafeed Agreement:

"Purpose" means to permit a Member to store, use, and display on a Member's VOW, Listing Information that is transmitted through a VOW Datafeed to Member, for the purpose of carrying on a Member's business of trading in real estate under REBBA;

⁷⁶⁵ At the moment under TREB's restricted regime, such services cannot be provided to a full client who has executed a Listing Agreement or BRA and agreed to work exclusively with one agent.

757. The VOW Rules and Policies also require amendment to carry out the proposed restoration of competition to the market. The restrictive provisions of the VOW Rules and Policies should be amended to remove the provisions that have been prohibited and to replace them, where appropriate, with provisions that ensure that TREB members can offer services through their websites, including VOWs.

758. The TREB Policies that restrict the contents of the data feed to the download of "non-confidential MLS information" should be amended (in Policies 15 and 17), as should the definition of "confidential information" (in Policy 15), to ensure that the download includes unavailable listings including the Historical MLS Data and offer of commission data. The Commissioner submits the Tribunal's Order should require TREB to provide the downloading of "Listing Information" or "MLS data", and a datafeed containing "Listing Information" or "MLS Data", with that term amended for the purposes of the VOW Rules and Policies to be clear that it includes both available and unavailable listings and specifically, listings that contain the Historical MLS Data and offer of commission data.⁷⁶⁶

759. More generally, the Commissioner submits that the Tribunal should ensure that TREB does not backtrack from what modest changes it has made to enable its members to offer services through websites such as VOWs. All of the progress that will finally occur for VOWs in the GTA should not be lost through TREB actions in the future. TREB should therefore not be able to simply repeal all its rules and policies that enable VOWs to exist. Nor should TREB be able to repeal particular rules that would have the same or a discriminatory effect. For example, consider VOW Policy 4, which provides that the display of Listing Information on a VOW does

⁷⁶⁶ "Listing Information" and "MLS data" are currently defined in the same entry in the Glossary to TREB's MLS Rules and Policies.

not require separate permission from the Member whose Listings will be available on a VOW. Without Policy 4 and VOW Rule 832 (precedence of VOW Rules and Policies over any other MLS Rules and Policies), it is possible that TREB members would be forced to revert to the "bad old days" of having to obtain consents from all brokerages in order to receive listings in the data feed. That antediluvian approach should not be resurrected.

760. Given TREB's actions (and inaction) over the past 10 years and particularly in 2011, and the obvious existing and future incentives of TREB and its traditional members to take additional steps to discriminate against and undermine VOWs and the members that seek to offer services through such websites, a prohibition order against such repeals and changes is appropriate.

761. Closely associated is an Order that prevents TREB from cutting off or changing the data feed, changing the manner in which the data is transferred, or undermining the datafeed through lack of technological support, funding or other neglect. As numerous witnesses indicated, the datafeed is the lifeblood of alternative service offerings by TREB members through their websites. From a technology perspective, having continuous "live" updates and a transfer of the comprehensive raw data, in "persistent", "bulk" or similar format that can be stored and organized for use by the recipient (the member or a service provider such as an "AVP"), is critical to the member's ability to innovate and deliver new and better services as described above and in the witnesses' statements.⁷⁶⁷ However, TREB has already reserved itself the

⁷⁶⁷ See: Exhibit A2, McMullin Statement, paras 14 to 16, 21, 25, 65-66, 68-69 (bulk, comprehensive feed); at 53 to 55, 65, 68-69, 71 (live feed); at 71, 102 to 105 (effect on operations); and 72-73 (ability to innovation). See also Exhibit A8, Nagel Statement, paras 30, 34; Exhibit A10, Pasalis Statement, at paras 23, 27 to 29, 31, 32, 36, 37 and 40 (live), 42; Exhibit A13, Hamidi Statement, paras 18, 40, 41, 42, 50, 53; Exhibit A15, Gidamy Statement, para 13 to 15, 21 to 23; and see generally, Exhibit A20, Enchin Statement and Exhibit A22, Prochazka Statement as service providers of VOWs.

discretion to provide a datafeed "in such format as may be determined by TREB from time to time": see Policy 15, line 11 and Policy 22(d) of TREB's VOW Rules and Policies.

762. While the Tribunal's Order should not preclude changes that reflect technological advancement, TREB should not be able to emasculate VOWs using its control over the technology – or, for that matter, its control over the MLS system, its rule-making ability, the contractual terms and the infrastructure. TREB should be prohibited (i) from withdrawing the data feed, (ii) from reducing its contents from the fields it currently offers and (iii) from offering the data on a basis that is other than a persistent feed of all available and unavailable listing data, all on the basis that the data may be stored, used and displayed by TREB members on their websites in association with a member's trading in real estate. The existing VOW Rules and Policies should be amended to address those concerns. An Order should also direct TREB to devote sufficient resources to ensure that VOWs and the VOW datafeed remain fully operational and well supported so that the service provided to recipients of the VOW datafeed is no less consistent and robust than the services provided to all TREB members through the Stratus interface.

763. Further, the Commissioner submits that general prohibitions should be entered to prevent TREB from enacting any new rules or policies, or interpreting its existing rules or policies, in a manner that discriminates against members who choose to deliver services using a VOW or the TREB VOW datafeed, and from exercising its discretion under its MLS Rules and Policies and under its VOW Datafeed Agreement, in a manner that is inconsistent with the terms of its Order or that is discriminatory.

764. For example, under Article 12 of the TREB Datafeed Agreement, TREB has the "sole discretion" to suspend a member's access to and use of the VOW datafeed. TREB's may also "immediately terminate" the VOW Datafeed Agreement and the member's access to and use of the VOW datafeed, *inter alia* for breach of any term of the agreement (if not cured within 10 days of notice) and for breach of any provision in REBBA, the TREB By-laws or any other applicable laws. While there may well be reasons why TREB should suspend or terminate a member's use of the datafeed or terminate the agreement, it should not be able to do so for reasons that undermine the Tribunal's Order or that discriminate against members who offer VOWs.


765. Finally, the Commissioner respectfully requests an Order requiring TREB to pay the Commissioner's costs of this proceeding and to do so on a basis and in a quantum to be determined either by agreement of the parties or by Order of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 15, 2012

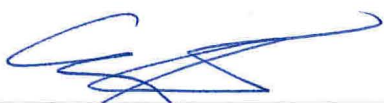
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File No. CT-2011-003

THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

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

Intervenors

**CLOSING SUBMISSIONS OF THE COMMISSIONER
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