

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT Date: December 4, 2012 CT- 2011-003 Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
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CT-2011-003

COMPETITION TRIBUNAL

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

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

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

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

AND

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

Intervenors

CLOSING ARGUMENT OF THE TORONTO REAL ESTATE BOARD

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TABLE OF CONTENTS

- OVERVIEW 6
- THE FACTUAL BACKGROUND 10
 - A. The Toronto Real Estate Board..... 10
 - B. The TREB MLS® System 12
 - (i) MLS® Database 13
 - (ii) Inputting Listings to the MLS® 14
 - (iii) Searching Listings on MLS® Database 15
 - (iv) Ensuring the Security and the Quality of MLS® Information 16
 - C. Technology and TREB before the VOW datafeed 17
 - (i) Sharing of Listings Prior to the VOW feed 17
 - (ii) Other TREB Tools, Services, and Information available to Members... 20
 - D. VOWs and TREB’s VOW Task Force 22
 - (i) VOWs Generally 22
 - (ii) History of TREB and VOWs..... 23
 - (iii) CREA’s Task Force..... 24
 - (iv) TREB’s 2010-2011 Task Force 25
 - (a) Meetings and Discussions of the Task Force..... 27
 - (b) Approval Process 35
 - (v) Recent Task Force Activities..... 38
 - E. The GTA Real Estate Market is Highly Competitive 40
 - (i) Competition Generally..... 40
 - (ii) Commissions in the Real Estate Industry Vary Widely; there is no “Status Quo” 41
 - (iii) Rebates are common-place in the real estate brokerage industry..... 45
 - F. Technology in the Real Estate Industry 46
 - (i) Innovation is not limited to VOWs..... 46
 - (ii) VOWs are not unique to what the Commissioner deems to be “innovative brokerages” 48
 - (iii) The content of “innovative brokerage” websites come primarily from non VOW-feed sources 48
 - (iv) Rebates were offered by “innovative brokerages” in the GTA prior to adoption of the VOW feed, and with the current VOW feed..... 50
 - (v) Websites are used for promotion and lead generation 51
 - (vi) Not all VOW visitors become clients of the VOW-based brokerage 52
 - G. VOWs are not the panacea the Commissioner represents them to be..... 54
 - (i) VOWs require an investment of time and money, which may not be warranted given the American experience..... 54
 - (ii) Other business models can also provide the efficiencies that supposedly come from the use of VOWs..... 56
 - (iii) Even with a VOW, providing real estate brokerage services requires a significant amount of time 57

- H. The American Experience with VOWs..... 60
 - (i) Disclosure/Non-Disclosure States 60
 - (ii) Rebates once offered by U.S. VOWs have been eradicated or substantial reduced 61
 - (iii) RedFin’s potential entry into Canada 61
- I. Privacy..... 62
 - (i) TREB and Privacy (Generally)..... 62
 - (ii) Consent to use information on TREB’s MLS® 62
 - (iii) Display of sold information on ViewPoint.ca 63
 - (iv) Consent to advertise sold information – Century 21 64
 - (v) TREB’s Members respect the confidential nature of sold information . 66
- NO ABUSE OF DOMINANT POSITION 68
- THE COMMISSIONER’S APPLICATION 69
- THEORY OF HARM #1: REDUCTION IN DYNAMIC COMPETITION..... 70
 - A. TREB Does Not Control the Relevant Markets 70
 - (i) Test for Market Control 71
 - (ii) Market power in an upstream market by a supplier does not grant that supplier market power in the downstream market 73
 - (iii) The market at issue is the market for the Confidential Data, and TREB does not have market power in the market for the Confidential Data 74
 - (iv) TREB does not exercise market power 80
 - B. TREB’S VOW Policy Is Not An Anti-Competitive Act 83
 - (i) The Test for an Anti-Competitive Act..... 83
 - (ii) TREB’s conduct is not directed at a competitor..... 85
 - (iii) TREB’s VOW policy was not enacted with a predatory, exclusionary, or disciplinary purpose 86
 - (iv) Efficiency justifications 93
 - (a) MLS® Liquidity 94
 - (b) Preservation of Incentives to Invest in the MLS® 95
 - (c) Prevention of Unauthorized Commercial Use 96
 - C. TREB’s VOW Policy does not substantially lessen or prevent competition 96
 - (i) The Test for a Substantial Lessening or Prevention of Competition 97
 - (ii) No Creation, Enhancement, or Preservation of Market Power 98
 - (iii) The Relevant Markets Would Not Be More Competitive in the Absence of TREB’s VOW Policy..... 102
 - (a) The Relevant “But For” World..... 102
 - (b) There is virtually no evidence that VOWs result in lower costs or sustained lower commissions 106
 - (c) No evidence of a significant benefit to lead generation..... 112
 - (d) No evidence of significant benefit in the search phase or the offer phase
118
 - (e) Pending solds 122
 - (f) “WEST” listings 123

(g) Concluding observations on the substantial lessening and prevention of competition..... 124

THEORY OF HARM #2: BUYER STEERING 126

 A. Buyer steering is a regulatory issue, not a competition law issue..... 126

 B. There is no evidence that buyer steering is a problem in the GTA..... 127

TREB’s VOW POLICY IS A MERE EXERCISE OF ITS INTELLECTUAL PROPERTY RIGHTS 129

 A TREB owns the copyright in the TREB MLS® database..... 130

 B The provisions of TREB’s VOW policy are a mere exercise of its intellectual property rights 134

IF A REMEDY IS GRANTED - THE NEED FOR INFORMED CONSENT..... 136

ORDER REQUESTED 142

OVERVIEW

1. This application by the Commissioner of Competition concerns the Virtual Office Website (“VOW”) policy of The Toronto Real Estate Board (“TREB”).
2. VOWs are but one way that brokerages can use the internet in providing real estate services to consumers and clients. American experience shows that VOWs are not necessarily the wave of the future in the real estate industry, and that the VOW concept may have lost its initial lustre. VOWs are not the only way to innovate in the real estate industry.
3. The Commissioner alleges that TREB’s VOW policy constitutes an abuse of dominant position pursuant to section 79 of the *Competition Act*.
4. TREB’s conduct in this case must be measured against the provisions of section 79 of the *Competition Act*, not the contents of the settlement between the National Association of Realtors (“NAR”) and the U.S. Department of Justice.
5. The Commissioner has three fundamental problems with this application against TREB; one for each of the three branches of the abuse of dominance test: TREB does not participate in the relevant markets, TREB does not compete with its members, and TREB’s VOW policy does not create, maintain, or enhance market power. Each of these problems, in isolation, are fatal to the Commissioner’s application. Taken together, these problems reveal the degree to which this application is completely misconceived.
6. Stated simply, the facts of this case do not fit with the abuse of dominance provisions of the *Competition Act*. The Commissioner is trying to fit a square peg into a round hole.

7. Even if the Commissioner were able to overcome the foregoing fundamental problems with her application, the application still fails on each branch of the abuse of dominance test. TREB does not control the relevant markets, TREB's VOW policy is not an anti-competitive act, and TREB's VOW policy does not substantially lessen or prevent competition in the relevant market(s).

8. TREB's argument is summarized as follows:

The abuse of dominance test is not met for the Commissioner's "dynamic competition" theory of the case

TREB does not control the relevant markets

(a) TREB does not participate in the relevant markets – the appropriate test concerns an examination of control in a market, not control over "how competition occurs in a market"

(b) TREB is not dominant in the supply of confidential data

(c) There is a difference between the potential and the actual exercise of market power. Even if TREB does have market power, TREB does not exercise market power against its members

TREB's VOW policy is not an anti-competitive act

(a) TREB's conduct is not directed at competitors (TREB does not compete in the markets or with its members)

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

(c) There are efficiency justifications geared at ensuring TREB and its members are compliant with *PIPEDA* and RECO's *Code of Ethics*, and there are also efficiency justifications geared at preserving the utility of the MLS.

TREB's VOW policy does not substantially lessen or prevent competition

(a) TREB's VOW policy does not create, enhance or maintain market power, and as a result does not substantially lessen or prevent competition.

(b) The relevant markets would not be substantially more competitive in a world with "full information VOWs" bearing in mind **the incremental value of including the withheld data from the VOW feed**

(i) There is no compelling evidence of lower commissions

(ii) There is no compelling evidence of cost savings to brokerages

(iii) There is no compelling evidence of an increased ability to generate leads

The abuse of dominance test is not met for the Commissioner's "buyer steering" theory of the case

(a) Buyer steering is not a competition law issue, it is a regulatory issue (the conduct does not affect competitors; harm, if any, is purely consumer harm).

- (b) In any event, there is no evidence that buyer steering is a problem in the GTA.

Intellectual property defence

- (a) TREB owns the copyright in the TREB MLS database.
- (b) TREB's VOW policy is a mere exercise of its copyright.
- (c) The Tribunal does not have the jurisdiction to order the mandatory licence of a copyright pursuant to section 79 of the *Competition Act*.

The Tribunal should consider Privacy and RECO concerns if a remedy is granted

- (a) *PIPEDA* and RECO require consent to disclose certain information about real estate transactions, including the sold price.
- (b) The current consents in the listing agreements and buyer representation agreements are not broad enough to allow TREB to post sold property information on the internet
- (c) Clients should be given an express opportunity to indicate "yes or no" to having sold information included in the VOW feed, as opposed to sneaking any such consent into the general consent provision. The use of the MLS should not automatically require people to have their sold information displayed on a VOW.

THE FACTUAL BACKGROUND

A. The Toronto Real Estate Board

9. TREB is a member based, not-for-profit corporation. TREB is the largest real estate board in Canada, with more than 35,000 real estate broker and salesperson members (“Members”). Though TREB’s membership is principally concentrated in the GTA, TREB accepts Members located across Ontario and from other jurisdictions.

Exhibit R 95, TREB’s Request to Admit, at para. 1.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 3 and 7.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1168, lines 1-11.

10. With a few exceptions (e.g., Honorary Members), in order to be eligible for membership in TREB, applicants must be licensed by the Real Estate Council of Ontario (“RECO”). Accordingly, by virtue of their registration as real estate professionals in the province of Ontario, TREB’s Members are subject to the provisions of the *Real Estate and Business Brokers Act* (“REBBA”) and its regulations, including the *Code of Ethics*.

Exhibit R 39, Witness Statement of Donald Richardson at para. 8.

Real Estate Business Brokers Act 2002, S.O. 2002, c. 30, Sch C, s.1(1).

11. TREB is governed by a 16 Member Board of Directors. Directors are elected by TREB’s Members during regularly scheduled elections. All of the Directors are licensed and practising REALTORS®, and undertake their directorial duties on a volunteer basis.

Exhibit R 39, Witness Statement of Donald Richardson at para. 18.

12. TREB’s mandate is to assist its Members in the provision of real estate brokerage services to consumers, and to advance and promote the interests of those engaged

in real estate, such as brokers, agents, valuers, appraisers and examiners. One of the most important services that TREB provides to its Members is the administration and access to real estate data, listings, and information through TREB's MLS® System.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 4, 5, and 15.

13. TREB Members pay annual dues. New Members pay an initiation fee to reflect the fact that new Members get immediate access to years' worth of data that has been contributed by the other Members. TREB views the initiation fee as equivalent to purchasing an "equity stake" in the organization.

Exhibit R 39, Witness Statement of Donald Richardson at para. 11.

Richardson Evidence, Hearing Transcript, September 27, 2012 at page 1741, lines 5-9.

14. TREB is not a participant in the markets for residential real estate brokerage services in the GTA (buy side or sell side). TREB is not licensed to trade in real estate and it does not trade in real estate.

Exhibit R 39, Witness Statement of Donald Richardson at para. 22.

15. TREB has no interest, financial or otherwise, in how competition occurs among its members. TREB accords equal rights of membership and equivalent levels of service to all of its members, regardless of their business model.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 14 and 25.

16. TREB has no involvement or influence in determining the commission rates charged by its Members to buyers and sellers of real estate. TREB does not set or suggest commission rates, nor does it track the commissions received by its Members.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 23-24.

B. The TREB MLS® System

17. The TREB MLS® System is a computerized system consisting of network links, information, and resources available to Members. The TREB MLS® System is provided through a platform called Stratus, but the content of the system is inputted, maintained and operated by TREB. The MLS® *Database* (i.e. where the property and listing information is stored, compiled and made searchable to the Members) is a significant and important component of the MLS® System.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 29 and 31.

Exhibit R 41, STRATUS Screenshots

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1171, lines 21-25; page 1172, lines 1-5; and page 1177, lines 18-25.

18. The TREB MLS® is TREB's most costly undertaking; for the fiscal year ending June 30, 2011, TREB spent [REDACTED] in direct costs and [REDACTED] in total costs (including indirect cost) in the operation and maintenance of this system.

Exhibit R 39, Witness Statement of Donald Richardson at para. 29, and Exhibit C (Estimated Cost to Provide TorontoMLS® Service) at page 142.

19. CREA owns the MLS® and REALTOR® trademarks and associated logos, and licenses these marks to TREB and various other real estate boards across Canada. Only licensed real estate agents are permitted to use these trademarks in the provision of the real estate brokerage services. These trademarks serve as an assurance of integrity and identify a certain standard of brokerage services and professionalism.

Exhibit R 39, Witness Statement of Donald Richardson at para 28.

Exhibit IC 84, Witness Statement of Gary Simonsen at paras. 8-10.

20. The credibility of the MLS® comes from adherence to the standards associated with the trademark and from the MLS® Rules of the Board. TREB's MLS® Rules and Policies are geared toward to promoting the quality and value of the MLS® and contain strict rules about the way in which data is reported in order to ensure that the MLS® data and information is the most current and reliable.

Exhibit IC 84, Witness Statement of Gary Simonsen at paras. 12 and 14.

Exhibit R 39, Witness Statement of Donald Richardson at para. 34.

(i) MLS® Database

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 30 and 44.

22. Individual listings inputted to TREB's MLS® are proprietary to the brokerage that uploads the listing. This has several implications. For example, it means that in order for any other Member to advertise that listing, he or she needs to obtain consent of the Member or brokerage who "owns" the listing. It also means that the Member who uploads the listing is responsible for the accuracy of the information provided on the listing.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 30, 40 and 44, and Exhibit D (MLS® Rules), R-301 at page 147.

(ii) **Inputting Listings to the MLS®**

23. Property or listing information to be inputted into the TREB MLS® is collected by way of an MLS® Data Information form. This is a fill in the blanks form which is completed by the seller in consultation with a Member. Certain fields are mandatory (such as list price, number of rooms), while others are optional. The form also contains areas in which remarks can be entered in “free form” (i.e. descriptive text).

Exhibit R 39, Witness Statement of Donald Richardson at paras. 37-39 and Exhibit F (MLS® Data Information Form) at page 183.

24. Certain remarks that are included on the Data Information Form often contain information that is private or sensitive to the seller. For example, there may be details about the seller’s mortgage or financial situation, details about lockbox access, and remarks about when the house may be vacant or occupied and by whom.

Exhibit R 39, Witness Statement of Donald Richardson at para. 39.

25. The seller has to expressly consent to the posting of the listing on the MLS® system, and can direct, to some degree, the use of the information. For example, the seller can decide whether the listing will go on the internet (i.e. to realtor.ca, or as part of a Virtual Office Website (“VOW”) feed), or whether it will remain internal to the TREB MLS® system. The seller can also grant permission to the listing brokerage to allow other brokerages to advertise the property.

Exhibit R 39, Witness Statement of Donald Richardson at para. 40.

(iii) Searching Listings on MLS® Database

26. Members are able to conduct searches on the TREB MLS® using specific search parameters (such as price range, neighbourhood, number of rooms, etc.) that match the needs of their clients. From the search results, which are displayed in a list, Members are able to generate more comprehensive reports about properties of interest to the client.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 49-51.

Exhibit R 41, STRATUS Screenshots, slides 7-9 and 11-12.

Richardson Evidence, Hearing Transcript September 24, 2012, page 1206, lines 7-25; page 1207, lines 1-25; page 1208, lines 1-25; and page 1209, lines 1-9.

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

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1207, lines 7-11; page 1234, lines 4-25 and 1235, lines 1-20.

Exhibit R 41, STRATUS Screenshots, slides 10 and 15-16.

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 54.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1198, lines 6-25.

(iv) Ensuring the Security and the Quality of MLS® Information

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 32.

Evidence, Hearing Transcript, September 24, 2012, at page 1179, lines 9-25 and page 1180, lines 1-17.

30. The completeness and accuracy of the information associated with properties listed on the MLS® is critical to maintaining the value and usefulness of the MLS® Database. For that reason, TREB's MLS® Rules require, among other things, that updates and new information be reported to the system in a timely fashion. TREB engages a company called iCheck to check listings for identifiable inaccuracies and inconsistencies, which if found are flagged for follow up action by the brokerage.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 34 and 43 and Exhibit D (MLS® Rules), Section R 300 – MLS® Listings, at pages 147-152.

Richardson Evidence, Hearing Transcript, September 27, 2012 at page 1616, lines 12-20.

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 98-100.

32. TREB has experienced problems with data scraping. TREB used to offer a “bulk download” function which enabled a user of the MLS® System to copy a large volume of the contents of the MLS® Database onto his or her own computer.

Exhibit R 39, Witness Statement of Donald Richardson at para. 101.

33. In 2007, Fraser Beach and Bell New Ventures took advantage of the bulk data offering and scraped the data, which Mr. Beach then used to create his own online listing database. Several months later, Stephen Moranis and Realtysellers did the same thing to create a Realtysellers database. As a result, TREB disabled the bulk download feature and has made changes to the way in which it provides data electronically to its Members. TREB also monitors the MLS® activity of individuals with higher than normal use patterns in order to detect possible misuse.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 102-104, and 107.

C. Technology and TREB before the VOW datafeed

34. VOWs are one technological tool that real estate professionals can use in delivering real estate services. In addition to the VOW datafeed recently implemented by TREB, TREB has a demonstrated history of innovation. In the years preceding the VOW, TREB spent considerable time and effort developing a variety of systems to facilitate the sharing of listings and to provide better and more comprehensive electronic tools and services to its Members.

(i) Sharing of Listings Prior to the VOW feed

35. Prior to the introduction of VOW or IDX technology, listing data was shared between brokers (for the purpose of being displayed to the public) by virtue of a Data License

Agreement (also known as a Data Transfer Agreement). TREB implemented the DTA system during the years of 2003-2005. These agreements permit a Member to direct TREB to send listing data to a Member's own website or to a third party website or service. Using these agreements, Members are able to share and advertise each other's listings, while honouring the ownership rights in the listing information.

Exhibit R 39, Witness Statement of Donald Richardson at para. 55 and Exhibit N (TREB Data License Agreement), at page 207.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1239, lines 1-16 and 1240, lines 1-23.

36. An Internet Data Exchange (or "IDX") is an agreement between separate brokerages (or groups of brokerages) to advertise each other's listings on each other's websites. TREB's IDX was another pre-cursor to the VOW and was developed in the years following the creation of DTA system. TREB's IDX functions as a centralized version of the DTA system; the IDX is one large shared pool of listings and participation is optional and reciprocal: brokers opt in to receive all listings from all participants, but they must share their own as well. In this way it is different from the DTA system wherein brokers have independent relationships and agreements among one another.

Exhibit R 39, Witness Statement of Donald Richardson at para. 69.

37. IDX is characterized as having revolutionized real estate websites and is considered to be a benefit to brokers, buyers and sellers. It benefits brokers because it allows brokers to easily advertise the listings of all other participating brokers. IDX benefits sellers because they get more exposure for the property they are trying to sell, and it benefits buyers because they are exposed to a larger inventory of listings than they be would without the sharing of listings.

Prochazka Evidence, Hearing Transcript, September 18, 2012 at page 897, lines 7-25.

38. TREB's frameable IDX feed was made available in January 2010 at no additional cost to the Members (beyond the annual membership fee). A frameable IDX is where the portion of the Member's website containing the IDX is framed and static, and the Member puts his or her proprietary information and branding around the edge of the frame. Visitors to a Member's IDX do not need to register in order to browse properties that have been advertised for sale.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 71-72.

39. More recently, in November of 2011, TREB introduced a downloadable IDX, which allows the Member to control how the display of information provided through the IDX feed appears on that Member's website. The data provided in framed environment is the same as that provided in the downloadable environment. Information about sold or pending sold properties is not provided through the IDX feed.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 71, 73-74.

40. Currently there are 445 firms representing 29,062 individual TREB Members who are part of the IDX program. Despite the availability of the VOW feed, IDX remains very popular; there are approximately three IDXs being opened up for every VOW. Mr. Richardson attributes this to the fact that establishing a VOW requires a bigger commitment in terms of initial design and function. Conversely, establishing an IDX is quicker, easier, and less expensive to use and operate.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1164, lines 15-20.

Richardson Evidence, Hearing Transcript, September 27, 2012 at page 1744, lines 8-25.

41. Five years ago, TREB developed a project called Connect, which was designed to permit its Members to view and share listings with brokers from other *boards*. Connect was initiated by TREB, along with the three other largest boards in the province (Ottawa, Hamilton, and London). Connect functions with the use of a special server that allows Members from one board to see listing and MLS® information from another board. Connect has been received extremely positively by boards across Ontario; 92 percent of the province's Realtors are currently part of the program.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1195, lines 16-25; page 1196, lines 1-25; and page 1197, lines 1-23.

42. TREB, in conjunction with CREA, also facilitates the provision of some listing information directly to consumers. For years TREB has been uploading MLS® information to CREA for display on CREA's public website, REALTOR.ca. This data is uploaded to CREA once every 24 hours and consumers can access REALTOR.ca without the assistance of a Member.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 64-65.

(ii) Other TREB Tools, Services, and Information available to Members

43. In addition to sharing property data and listing information, the TREB MLS® System is robust with services and information that provide Members with tools to better service their clients and supplement Members' knowledge and awareness of the industry.

44. TREB offers its Members a tool called Property Match, which is an efficient, electronic means for brokers to provide their clients the most up-to-date listings. Property Match lets Members sign their clients up to automatically, and on a nightly basis, receive

information about a new or changed listing that has been uploaded on the TREB MLS® database that may be of interest to the client based on a set of pre-set search parameters. Brokers also get a record of the information that was provided to their clients.

Exhibit R 39, Witness Statement of Donald Richardson at para. 52 and Exhibit L (Property Match Sample Report), at page 203.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1199, lines 11-25 and page 1120, lines 1-20.

45. Another example of an electronic service offered by TREB through the MLS® System is Touchbase. Touchbase is a product that facilitates communication between Members or brokerages, electronically, and is used to arrange showings and set up other appointments.

Richardson Evidence, Hearing Transcript, September 24, 2012, page 1194, lines 1-14.

46. TREB also provides its Members with access to information from third parties engaged in the real estate industry. For example, TREB has a contract with Teranet, an online service which provides access to Land Registry information, and MPAC, a company that provides access to tax assessment information. Under this contract, TREB provides limited direct Member access to the Teranet and MPAC databases. These databases provide demographic information about neighbourhoods and tax assessment tools. Members can also contract directly with Teranet to upgrade their access and receive more services.

Exhibit R 39, Witness Statement of Donald Richardson at para. 56 and Exhibit O (Geowarehouse Real Estate Board Agreement), at page 215.

Richardson Evidence, Transcript Hearing, September 24, 2012 at page 1191, lines 24-25; page 1192, lines 1-25; and page 1193, lines 1-17.

47. Additionally, TREB provides information and access to information from RealNet. RealNet collects information on new build homes. TREB has purchased some of these services for its Members, and Members can receive additional access to information by contracting directly with RealNet.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1194, lines 15-25 and page 1195, lines 1-15.

48. Every month TREB puts out a publication called Market Watch, which contains a variety of statistics on transactions processed through TREB's MLS®, including year to date statistics, year over year comparison statistics, and aggregated statistics which are broken down by home type and by TREB designated region (i.e. C1, C2). Market Watch is available to the public on TREB's public website.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 59-61 and Exhibit Q (Market Watch, December 2011) at page 276.

D. VOWs and TREB's VOW Task Force

(i) VOWs Generally

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 109-110.

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

50. TREB first became aware of VOWs as a concept in 2002, as a result of the activities of certain Realtors in the United States. TREB began monitoring the concept by sending members to attend conferences, such as Inman (a technology oriented conference) and NAR conferences, and made a point to stay up to date on relevant developments in the U.S.

Exhibit R 39, Witness Statement of Donald Richardson at para. 111.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1237, lines 1-18

51. It was evident to TREB that problems or issues associated with VOWs were complex, because in 2005 the U.S. Department of Justice commenced anti-trust proceedings against NAR with respect to its VOW policy. This created a climate of uncertainty for TREB on the VOW issue, and TREB was reluctant to proceed further with the development of a VOW Policy while the issues in the U.S. remained unresolved.

Exhibit R 39, Witness Statement of Donald Richardson at para. 112

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1238, lines 3-10.

52. In the meantime, TREB focused its efforts toward establishing its system of Data Transfer Agreements, the creation of Connect, and sometime around 2003 or 2004, TREB created an IDX/VOW Task Force to specifically and monitor the IDX/VOW concepts and keep track of the developments.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1237, lines 19-24 and page 1239, lines 1-22.

53. After the NAR litigation settled in 2008, the Competition Bureau approached TREB and indicated that TREB should have a VOW policy. In July of 2008, TREB began the process of establishing a formal VOW Task Force. A list of Task Force members was ratified later that month. TREB asked the Competition Bureau to provide a representative, but the Bureau declined.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 113-114 and Exhibit X (Board of Director Meeting Minutes, July 8, 2008) at page 442.

Richardson Evidence, Hearing Transcript, September 24, 2012, at page 1243, lines 1-21.

Exhibit CR 96, TREB's Request to Admit, at para. 48.

54. TREB believed that the VOW issue was a national issue, and would benefit from participation of a CREA representative and CREA's counsel. The Bureau's representatives agreed that this was a national issue and indicated that they would turn their attention to CREA. As a result, TREB ceased the workings of its own task force with the understanding that it would be CREA's undertaking.

Exhibit R 39, Witness Statement of Donald Richardson at para. 115.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1243, lines 22-25 and page 1244, lines 1-14.

(iii) CREA's Task Force

55. In October of 2008, CREA established its own VOW Task Force. This Task Force met several times and produced a recommendation and report. However, CREA's Task Force stalled after reaching a point of impasse with the Competition Bureau in 2009 regarding the issue of mandatory brokerage participation.

Exhibit A 87 CREA VOW Task Force Meeting Minutes (October 15th & 16th, 2008)

Exhibit R 39, Witness Statement of Donald Richardson at para. 116.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1244, lines 19-25 and page 1245, lines 1-11.

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 117.

(iv) TREB's 2010-2011 Task Force

57. In July of 2010, TREB's Board of Directors engaged in its yearly strategic planning exercise and decided to revive the efforts to establish a VOW Policy as one its goals for the 2010-2011 fiscal year.

Exhibit R 39, Witness Statement of Donald Richardson at para. 118 and Exhibit AA (TREB's 2010/2011 Strategic Plan), at page 449.

Richardson Evidence, Hearing Transcript, September 24, 2012, page 1245, lines 12-24.

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

Richardson Evidence, Hearing Transcript, Septmeber 24, 2012 at page 1245, line 25; page 1246, lines 1-21 and page 1248, lines 5-17.

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 119 and 120.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1247, lines 12-25.

60. The mandate of the Task Force was to investigate and recommend the feasibility of adopting a VOW policy, and in particular to consider the areas of concern raised by the Competition Bureau.

Exhibit R 39, Witness Statement of Donald Richardson Richardson at para. 122.

61. In March of 2010 TREB received correspondence from counsel to the Commissioner indicating that TREB had until the end of August to create its VOW policy. **The Task Force's process and progress was highly dictated by the pressure TREB was receiving from the Commissioner of Competition.**

Richardson Evidence, Hearing Transcript, September 27, 2012 at page 1669 lines 6-25, and page 1670, lines 1-21.

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

Exhibit R 39, Witness Statement of Donald Richardson at Exhibit LL
(Procedures to Amend TREB's MLS® Rules and Policies) at page 561.

Richardson Evidence, Hearing Transcript, September 27, 2012 at page 1672, lines 13-15;
page 1677, lines 2-25; page 1678, lines 1-5.

Syrianos Evidence, Hearing Transcript (in camera), September 28, 2012 at page 112, lines 16-20.

Exhibit R-039, Witness Statement of Donald Richardson at Exhibit CC (Minutes of the VOW Task Force, March 31, 2011), at page 494.

(a) Meetings and Discussions of the Task Force

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 123

64. On March 31, 2011 the VOW Task Force held its first meeting. At this meeting the Task Force members were educated about VOWs, and each member shared his or her

knowledge and experiences with VOWs and emerging technology. Also, John DiMichele provided a presentation on the evolution of IDX and VOWs in the U.S. market.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 123-124 and Exhibit CC (Minutes of the VOW Task Force, March 31, 2011), at page 494.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1255, lines 5-12.

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 123-124 and Exhibit CC (Minutes of the VOW Task Force, March 31, 2011), at page 494.

Richardson Evidence, Hearing Transcript, September 24, 2012, at page 1253, lines 15-25; page 1254, lines 1-12.

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

- (a) the terms of use;
- (b) the requirement for a consumer or a client relationship;
- (c) the requirement for a "sign-in";
- (d) the type of information permitted to be displayed, (in particular with respect to consumers as opposed to clients);
- (e) advertisements on VOWs;
- (f) the ability of brokers/sellers to opt-out;
- (g) FINTRAC considerations;

- (h) issues surrounding anonymity and the ability to validate the identity of a VOW user;
- (i) data mining;
- (j) PIPEDA concerns;
- (k) the possibility of creating CMAs online;
- (l) issues if members belong to more than one board; and
- (m) potential RECO involvement.

Exhibit R 39, Witness Statement of Donald Richardson at para. 126.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1255, lines 13-18.

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 127-128 and Exhibit DD (Minutes of the VOW Task Force, April 21, 2011) at page 497.

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 129 and Exhibit DD (Minutes of the VOW Task Force, April 21, 2011) at page 497.

69. The issue of a sign-in requirement went hand-in-hand with the discussion as to how, if possible, a client-agent relationship could be established through a VOW. Task Force

members identified concerns with respect to the level of information that could be provided to a client as opposed to a consumer based on RECO regulatory concerns as well as privacy law concerns. It was suggested that publicly available information could be provided to a consumer, whereas a more detailed subset of information could be provided to a client as one way to address these concerns.

Exhibit R 39, Witness Statement of Donald Richardson at para. 129 and Exhibit DD (Minutes of the VOW Task Force, April 21, 2011) at page 497.

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 130 and Exhibit DD (Minutes of the VOW Task Force, April 21, 2011) at page 497.

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 131 and Exhibit DD (Minutes of the VOW Task Force, April 21, 2011) at page 497.

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

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 132 and Exhibit DD (Minutes of the VOW Task Force, April 21, 2011) at page 497.

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 133-134 and Exhibit EE (Minutes of the VOW Task Force, May 12, 2011) at page 501.

74. At the third meeting, the Task Force reached a consensus that pending sold information should not be provided, as this was a privacy and consumer rights issue: disclosing the details of a potential sale were revealed before the sale was complete could result in harm to the seller in the event the transaction did not close.

Exhibit R 39, Witness Statement of Donald Richardson at para. 135 and Exhibit EE (Minutes of the VOW Task Force, May 12, 2011) at page 501.

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 135 and Exhibit EE (Minutes of the VOW Task Force, May 12, 2011) at page 501.

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

PIPEDA Case Summary #2009-002, [2009] C.P.C.S.F. No. 2 at 3 (of QL), TREB's Brief of Authorities at Tab 1.

77. The Task Force reviewed its position on providing sold information in the context of a CMA or AVM, and Task Members were favourable to providing this information, provided it could be possible from a technological standpoint (for example, whether a specific RETS servers could be used, and whether it may be possible for a VOW operator to develop their own front-end interface for consumers to plug in information to do a CMA, and for a third party vendor service to make that query). However, the Task Force felt that before any technology could be put into place, it required further clarification as to the specifics about what restrictions, if any, (i.e. the exclusion of specific pieces of data such as seller's name or the property address) would be required if a CMA service was offered or enabled through a VOW.

Exhibit R 39, Witness Statement of Donald Richardson at para. 136 and Exhibit EE (Minutes of the VOW Task Force, May 12, 2011) at page 501.

Syrianos Evidence at page 110 (in camera), lines 21-25 and page 11 lines 1-2.

Richardson Evidence, Hearing Transcript, September 27, 2012 at page 1674, lines 1-16.

78. At the third meeting the Task Force also analyzed the NAR policy on a line-by-line basis and modified it in light of changes required for TREB standards and existing rules and policies.

Exhibit R 39, Witness Statement of Donald Richardson at para. 137; Exhibit EE (Minutes of the VOW Task Force, May 12, 2011) at page 501, and Exhibit FF (Task Force Report including revisions to NAR Policy) at page 514.

79. As a result of the meetings held on March 31, 2011, April 21, 2011 and May 12, 2011 the Task Force reached a consensus on a number of issues and a Task Force report was circulated to the Board of Directors on May 18, 2011 for consideration at the next Board meeting. This report was also provided to members of the Task Force.

Exhibit R 39, Witness Statement of Donald Richardson at para. 138 and Exhibit FF (Task Force Report including revisions to NAR Policy) at page 509.

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 141-143 and Exhibit GG (Minutes of the VOW Task Force, May 20, 2011) at page 537.

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 142 and 144, and Exhibit GG (Minutes of the VOW Task Force, May 20, 2011) at page 537.

Syrianos Evidence, Hearing Transcript (in camera), September 28, 2012 at page 112, lines 21-25 and page 113 lines 1-6.

82. The Task Force discussed the differences with respect to privacy concerns when a customer or client meets with a broker in an office setting as compared to the privacy concerns associated with VOW users. In an office setting, the broker can act as an intermediary and is able to safeguard how the information is distributed, and to whom, in accordance with the requirements of *PIPEDA* and *RECO*. Conversely, in a VOW setting, any sensitive information contained in the feed would be widely available to anyone with an Internet connection. With limited abilities to monitor and trace the use of the information, it makes it harder for TREB ensure accountability and prevent unauthorized or improper use or distribution.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 145-147 and Exhibit GG (Minutes of the VOW Task Force, May 20, 2011) at page 537.

83. Furthermore, based on privacy concerns, concerns about *PIPEDA* and *RECO*, concerns about potential legal liability for TREB and its Members, and considering the NAR VOW Policy (which had apparently been satisfactory to the US Department of Justice), the

Task Force felt that it would be prudent to refrain from including information about solds, pending solds, expired, terminated, suspended or withdrawn listings as part of the VOW feed.

Exhibit R 39, Witness Statement of Donald Richardson at para. 148 and Exhibit GG (Minutes of the VOW Task Force, May 20, 2011) at page 537.

(b) Approval Process

84. TREB needed to amend its MLS® Rules and Policies in order to implement the VOW Policy and Rules. TREB's internal rule change policies required that TREB follow a set process for the approval of the VOW Policy and Rules.

Exhibit R 39, Witness Statement of Donald Richardson at para. 151 and Exhibit LL (Procedures to Amend TREB's MLS® Rules and Policies) at page 561.

Richardson Evidence, Hearing Transcript, September 27, 2012 at page 1716, lines 2-24.

85. This process provides that:

- a) Any proposed change to MLS® Rules or Policies will be examined first by the MLS® Committee;
- b) Proposed changes will be approved in principle by the Board of Directors;
- c) Proposals will then be sent for legal review;
- d) Proposals will then be sent to CREA for review to ensure Rules are in adherence to Competition Law;
- e) Comments and feedback will be considered by the MLS® committee before finalizing changes to be considered by the Board of Directors;
- f) The proposed changes will then be published for Member input. Members will have 60 days from publication to comment in writing to the Board of Directors or make a presentation to the Board of Directors;
- g) After the 60 day expiry, the Board of Directors will give final approval prior to publication to the Membership.

Exhibit R 39, Witness Statement of Donald Richardson at Exhibit LL (Procedures to Amend TREB's MLS® Rules and Policies) at page 561.

86. On May 26, 2011 the Board of Directors considered the report of the VOW Task Force, and gave initial approval for the MLS® Committee to review to the VOW Policy and Rules. **Despite being aware of the work that the VOW task force was undertaking, the Commissioner of Competition commenced this Application on May 26, 2011.**

Exhibit R 39, Witness Statement of Donald Richardson at paras. 149-150 and Exhibit HH (Memo of the MLS® Committee, May 26, 2011) at page 540.

87. On June 1, 2011, the MLS® Committee met to consider the VOW Policy and Rules. The MLS® Committee reviewed the VOW Policy and Rules on a clause by clause basis, in part to ensure that brokerages operating in a VOW setting be able to operate in the same manner as a brokerage operating in a bricks and mortar environment. The MLS® Committee proposed several changes to the VOW Policy and Rules that were geared generally at ensuring clarity, accuracy, and consistency within the Policy and Rules. The MLS® Committee voted to approve the VOW Policy and Rules, as amended by the Committee.

Exhibit R-039, Witness Statement of Donald Richardson at paras. 151-152 and Exhibit II (Minutes of the MLS® Committee Meeting, June 1, 2011) at page 542.

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 153.

Richardson Evidence, Hearing Transcript, September 27, 2012 at page 1716, lines 13-24; page 1718, lines 23-25 and page 1719, lines 1-6.

89. The VOW Policy and Rules were approved by votes of the Board of Directors on June 9, 2011, and June 23, 2011. During the meeting on June 23, 2011, TREB's VOW Policy and Rules were subject to final modifications. These modifications were done in the presence of and at the suggestion of TREB's lawyers.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 154; and Exhibit JJ (Minutes of the Meeting of the Board of Directors, June 9, 2011) at page 545, and Exhibit KK (Minutes of the Meeting of the Board of Directors, June 23, 2011) at page 554.

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

Exhibit R 39, Witness Statement of Donald Richardson at paras. 155 and Exhibit MM (VOW News Release, June 24, 2011) at page 563.

91. None of the Commissioner's witnesses provided any feedback to TREB during this commentary period. Mr. Hamidi of the GTA brokerage TheRedPin was aware of the implementation of the VOW feed and the request from TREB for commentary, but did not make any comments or suggestion. Mr. Hamidi testified: "[W]e are pro what the TREB VOW policy is, obviously, we have zero objections."

Hamidi Evidence, Hearing Transcript, September 13, 2012 at page 644, lines 8-13.

92. The Board of Directors met again on August 25, 2011, after the expiry of the 60 day review period. At this meeting the Board of Directors approved the VOW Policy and

Rules and commenced the process of developing the technological infrastructure to implement the VOW datafeed.

Exhibit R 39, Witness Statement of Donald Richardson at para. 156 and Exhibit NN (Minutes of the Special Meeting of the Board of Directors, August 25, 2011) at page 587.

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

Exhibit R 39, Witness Statement of Donald Richardson at para. 157 and 168.

94. **TREB Members using the VOW data feed have access to the MLS® System on Stratus in the way that all Members do.** A single VOW feed can cover a brokerage with multiple offices and a number of sale persons, but each brokerage requires its own VOW datafeed.

Exhibit R 39, Witness Statement of Donald Richardson at paras. 164 and 175.

(v) **Recent Task Force Activities**

95. The VOW Task Force met again in late August 2012 to discuss improvements to the VOW feed and to respond specifically to feedback Mr. Pasalis provided in a letter of April 10, 2012. As a result of the meeting with Mr. Pasalis, and further discussion, the Board of Directors approved upgrades to the VOW data feed. In particular, and in response to items identified as important by Mr. Pasalis, the Board approved the inclusion of open house information, URLs to virtual tours, price changes, and days on market. The Board also approved the inclusion of the MLS number, the amount of additional monthly fees, lot size,

municipality, and parking and driveway information. This information is now available as part of the VOW feed.

Exhibit A 10, Witness Statement of John Pasalis at para. 29 and Exhibit B (Letter to Richard Silver of TREB, dated April 10, 2012) at page 21.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1166, lines 12-20.

Exhibit CA 9 Letter to John Pasalis re Changes to the VOW Data Feed, dated August 31, 2012.

96. Though TREB has received requests from Mr. Pasalis and complaints from the other Commissioner's witnesses regarding access to geomapping or geocoding information, TREB is unable to provide this through the VOW data feed because it receives this information under license from [REDACTED].

Exhibit A 10, Witness Statement of John Pasalis at Exhibit B (Letter to Richard Silver of TREB, dated April 10, 2012).

Exhibit A 22 Witness Statement of Sam Prochazka Statement at para. 24.

Exhibit A 12, Witness Statement of Shayan Hamidi at para. 38(g).

Exhibit CA 9 Letter to John Pasalis re Changes to the VOW Data Feed, dated August 31, 2012.

Exhibit CR 40, Witness Statement of Donald Richardson at para. 189.

97. Industry participants agree that today's data feed is more comprehensive than it was at the start of August.

Pasalis Evidence, Hearing Transcript, September 12, 2012 at page 584, lines 7-10.

Hamidi Evidence, Hearing Transcript, September 13, 2012 at page 647, lines 23-25 and page 648, lines 1-19.

E. The GTA Real Estate Market is Highly Competitive

(i) Competition Generally

98. A brokerage is a corporation, partnership sole proprietor, association or other organization or entity that trades in real estate for compensation or reward, typically on behalf of others. Salespersons and brokers work for brokerages. Salespersons are often independent contractors, working under the supervision of broker. Brokerages can be independent, but are often franchisees, operating under the banner of a corporate franchise and pay dues to the franchisor in exchange for the use of a corporate brand.

Real Estate and Business Brokers Act, 2002, SO 2002, c 30, Sch C, s. 1 “brokerage”.

Exhibit R 79, Expert Report of Jeffrey Church, p.10, para. 28.

99. Market shares in the real estate industry are incredibly small, both among brokerages and among individual brokers and salespeople. The GTA residential real estate market is highly competitive.

Exhibit R 79, Expert Report of Jeffrey Church, pp. 52-62.

Exhibit A 32, Reply Expert Report of Gregory Vistnes, p. 56, para. 126.

100. There is competition in the real industry at all levels. Brokerages compete against each other for business. Brokerages under the same franchise banner (e.g. Century 21) compete for the same listings and clients, and brokers and salespersons within the same brokerage compete for the same listings and clients. Many brokers and salespersons are independent contractors. There is also a high turnover rate in the GTA real estate market. Ms. Precott’s evidence was that within the past year, her brokerage has hired 100 new sales representatives, and 50 sales representatives have left the brokerage.

Vistnes Evidence, Hearing Transcript, September 18, 2012 at page 977, lines 16-18.

Exhibit R 62, Witness Statement of Pamela Prescott at paras.6 and 13-16.

Prescott Evidence, Hearing Transcript, September 28, 2012 at page 1788, lines 12-25, and page 1789, lines 1-14.

Exhibit R 70, Witness Statement of Timoleon Syrianos at para. 10.

101. Brokerages differ in the way in which their brokers and sales representatives are compensated. Often the salesperson will receive a percentage of the commission on a transaction and the brokerage will receive a percentage (e.g. 80% to the salesperson, 20% to the brokerage), however, some offices charge their agents a flat fee per transaction, or some combination of the two. Some brokerages charge desk fees from their brokers, others do not. The compensation arrangement between the brokerage and the salesperson depends on the specific agreement between the brokerage and the salesperson, and will also depend on the business model of the particular brokerage. In general, franchisees have the freedom to choose whichever business model they like and works best for them. Century 21, for example, does not have any input into the business model of its franchisees.

Exhibit R 62, Witness Statement of Pamela Prescott at paras 8-11 and 15.

Prescott Evidence, Hearing Transcript September 28, 2012 at page 1783, lines 20-25 and page 1784, lines 1-24.

Exhibit CR 71, Witness Statement of Timoleon Syrianos at para 5.

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

102. Generally speaking, both the listing brokerage and the cooperating brokerage will receive a commission payment arising from a residential real estate transaction. In the usual course, the entire amount of the commission will be paid by the home seller to their

brokerage (the listing brokerage). The listing brokerage will then pay a portion of that commission to the cooperating brokerage.

Exhibit R 62, Witness Statement of Pamela Prescott, p. 6, paras. 25-26.

103. Industry participants gave evidence that there is no “standard” rate of commission charged to clients for the sale of residential real estate in the GTA, on either side of the transaction.

Exhibit R 61, Witness Statement of Tung-Chee Chan at para. 6.

Exhibit R 64, Witness Statement of Evan Sage at paras. 18-19.

Exhibit CR 71, Witness Statement of Timoleon Syrianos at para. 9.

104. Furthermore, negotiation of commission between clients and their agents is common-place in the industry, both on the listing side, and the cooperating side of the transaction. As far as the offer of commission as posted on the TREB MLS® database, the offer is merely an offer, and negotiations can, and do, occur regarding the cooperating brokerage’s commission. Consequently, the initial offer of commission, which is displayed on the MLS, is not necessarily what the cooperating salesperson ultimately receives in the form of commission.

Exhibit R 61, Witness Statement of Tung-Chee Chan at para. 6.

Exhibit R 62, Witness Statement of Pamela Prescott at paras. 23, 25, 27 and 29.

Exhibit R 64, Witness Statement of Evan Sage at paras. 16 -17.

Sage Evidence, Hearing Transcript (in camera), September 28, 2012 at page 80 at lines 11-25 and page 81, lines 1-10.

Pasalis Evidence, Hearing Transcript, September 12, 2012 at page 569, lines 15-25 and page 570, lines 1-4.

105. The Buyer Representation Agreement between the buyer and the cooperating brokerage contains a clause that guarantees a minimum commission amount to be received by that brokerage. Any shortfall in the cooperating brokerages commission received from the listing brokerage is the responsibility of the buyer. The figure in the Buyer Representation Agreement is also something that can be, and is, negotiated.

Exhibit R 62, Witness Statement of Pamela Prescott at paras. 27 and 28.

Exhibit R 64, Witness Statement of Evan Sage at para. 20.

Pasalis Evidence, Hearing Transcript, September 12, 2012 at page 569, lines 15-25 and page 570, lines 1-4.

106. Due to subsequent negotiation on the offer of cooperating commission, there can be a discrepancy between the offer of commission to the cooperating brokerage posted on the TREB MLS® and the amount ultimately collected by that brokerage. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]

[REDACTED]

108. [REDACTED]

Prescott Evidence, Hearing Transcript, in camera, September 28, 2012, page 45, lines 22-25 and page 46, lines 1-3.

Exhibit CR 63 C21 Heritage Group Actual Commission

109. [REDACTED]

[REDACTED]

Exhibit CR 72 REMAX Ultimate – Commission Report (January 1 – January 31, 2011)

Exhibit CA 75 REMAX Ultimate Realty – Commission Report (June 1- June 30, 2011)

Exhibit CA 77 REMAX Ultimate Realty – Commission Report (June 1- June 30, 2012)

Syrianos Evidence, Hearing Transcript (IN CAMERA), September 28, 2012 at page 92, lines 4-14.

(iii) Rebates are common-place in the real estate brokerage industry

110. Industry participants testified that it is common place in the industry for clients to be offered a rebate of some kind [REDACTED]

[REDACTED]

[REDACTED]

111. The amount of the rebate is often not recorded because it comes out of the brokerage's pocket and is paid back to the client [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

112. Mr. Chan testified that there are circumstances in which his agents receive no cooperating commission, but they do the work to maintain good client relationships.

Chan Evidence, Hearing Transcript, September 28, 2012 at page 1773, line 6-25 and page 1774, lines 1-9.

F. Technology in the Real Estate Industry

(i) Innovation is not limited to VOWs

113. For many of TREB's Members, technology plays a significant role in promoting that Member and his or her services. Technology is also regularly used by TREB Members to advertise listings and inform consumers about the details of a particular property. Industry participants cited the following examples of the use of technology in their business model: broker websites, special websites created for each individual property or listing (e.g. www.52johnstreet.info), tracking capabilities on those websites (i.e. websites with the capability to track the use of the website and determine which photos or pieces of information are clicked on the most), Google optimization (i.e. ensuring that the property's website comes up near the top of the search results in Google), the use of professional photography, videos with voice over, virtual tours, special property "hotlines" designed to provide description and facilitate scheduling appointments, and QR Codes (a code recognized by cell phones which allows a website to automatically load on a cell phone).

Prescott Evidence, Hearing Transcript, September 28, 2012 at page 1973, lines 8-25; page 1794, lines 1-25; page 1795, lines 1-25; and page 1796, lines 1-14.

Exhibit R 64, Witness Statement of Evan Sage at para 7.

Sage Evidence, Hearing Transcript, September 28, 2012 at page 1835, lines 2-25, page 1836, lines 1-17.

114. In listing a home, agents will also advertise the property through third party websites, such as Kijiji, Craigslist, Zoocasa, Better Homes, YouTube, Pintersest, Slideshare, and Facebook, in order to ensure the listing receives maximum exposure.

Prescott Evidence, Hearing Transcript, September 28, 2012 at page 1796, lines 15-21.

Exhibit R 64, Witness Statement of Evan Sage at para 9.

115. Most real estate agents have websites and those websites are customized to meet the needs of the particular Member's business model and clientele. For example, Mr. Chan's website is in both English and Chinese and uses a variation of an IDX, which Trade World Realty uses to share listings within the Chinese Real Estate Professionals Society of Ontario.

Chan Evidence, Hearing Transcript, September 27, 2012 at page 1767, line 10, and page 1770, lines 8 -24.

Exhibit R 64, Witness Statement of Evan Sage at para.7

Syrianos Evidence, September 28, 2012 at page 1898, lines 15-25; page 1899, lines 1-25; and page 1990, lines 1-5.

116. With a wide array of electronic and innovative tools available to Members, a VOW is only one example of innovation in the real estate industry. Mr. Sage's brokerage, Sage Real Estate, received the title of "most philosophically and technologically advanced brokerage in the city of Toronto", despite not having a VOW.

Exhibit R 64, Witness Statement of Evan Sage at para. 5.

117. Similarly, TheRedPin and Realosophy received significant media coverage for their innovation prior to the introduction of the VOW feed.

Exhibit A 13, Witness Statement of Shayan Hamidi at para. 3.

Exhibit A 7, Witness Statement of Urmi Desai at paras. 7 and 17.

Exhibit A 10, Witness Statement of John Pasalais at para. 16.

(ii) **VOWs are not unique to what the Commissioner deems to be “innovative brokerages”**

118. VOWs are not specific to what the Commissioner deems to be “innovative brokerages.” With Affiliated VOW Provider (“AVP”) service providers such as Sam and Andy Inc., any brokerage, regardless of how innovative it is, can have a high functioning and comprehensive website, with a VOW feed, and a litany other third party content such as statistics, neighbourhood information and mapping. These website providers are provided with TREB’s VOW datafeed at no cost once the Member has directed TREB to send the feed to the third party AVP, which is done using the VOW Datafeed Agreement.

Prochazka Evidence, Hearing Transcript, September 18, 2012 at page 866, lines 15-25; page 867, lines 1-22; page 888, line 25; and page 889, lines 1-2.

Exhibit R 39, Witness Statement of Donald Richardson at para. 173 and Exhibit PP (VOW Datafeed Agreement) at page 616.

Exhibit A 22, Witness Statement of Sam Prochazka at paras. 4, 17 and 10.

(iii) **The content of “innovative brokerage” websites come primarily from non VOW-feed sources**

119. VOWs are only one component to a brokerage’s webpage. The Commissioner’s industry witnesses in the GTA testified that they consider themselves full service brokerages, and conceded that the majority of content, for which they have been recognized and celebrated in the media, does not come from the VOW data feed. For example, the Commissioner’s GTA witnesses agreed that following information and content is offered and displayed on their website, but is not provided in the VOW feed:

- a) blogs;

- b) consumer guides (for example, “Defensive Home Buying”);
- c) original analysis (for example, Realosophy’s “Big Mac” index rating the purchasing power across Toronto neighbourhoods);
- d) school information;
- e) school profiles;
- f) EQAO scores;
- g) walk score;
- h) neighbourhood descriptions and history;
- i) points of interest;
- j) Neighbourhood Match;
- k) “coffee politics”;
- i) Information local amenities and entertainment;
- l) information from the TREB sponsored access to Geowarehouse
- m) demographics relating to family size, income, professions etc.; and
- n) information on local businesses

Exhibit A 7 Witness Statement of Urmi Desai at paras. 2, 5, 6, 7, 10, 11, 14, 16, 17 and 19-24, and Exhibit G (Defensive Home Buying publication) at page 45.

Desai Evidence, Hearing Transcript, September 11, 2012 at page 374, lines 3-8,; page 375, lines 23-25; page 376, lines 1-25; page 378, lines 1-16; page 382, lines 5-25; page 383, lines 1-25; page 384, lines 1-25; page 388, lines 2-13 and 21-25; page 389, lines 1-25; and page 390, lines 1-2. -

Exhibit A 10, Witness Statement of John Pasalais at paras. 2, 14, 15, 16, 19 and 20.

Pasalis Evidence, Hearing Transcript, September 12 at page 523, lines 16-25 and page 534, lines 1-2; page 531, lines 1-25.

Exhibit A 13, Witness Statement of Shayan at paras. 3, 6, and 16,

Hamidi Evidence, Hearing Transcript, September 13, 2012 at page 627, lines 3-14 and lines 17-25; page 628, lines 1-25; and page 631, lines 8-12.

120. Similarly, Mr. McMullin's VOW, ViewPoint, contains a wealth of information that comes from third parties as opposed to the MLS® datafeed. For example, the aerial views, gas pipelines maps, mortgage calculators, school information, historical tax information, and foreclosure information are pieces of information from third party sources.

Exhibit CA 1, Witness Statement of William McMullin at paras. 7, 45 and 46.

McMullin Evidence, Hearing Transcript, September 11, 2012 at page 170, line 1; page 171, lines 1-19; page 183, lines 8-11, and 14-22; page 205, lines 12-25; page 206, lines 1-14, page 272, lines 4-13.

(iv) **Rebates were offered by “innovative brokerages” in the GTA prior to adoption of the VOW feed, and with the current VOW feed**

121. It is clear that with respect to Realosophy, the innovation, success and corresponding ability to reduce fees and offer rebates **pre-dated** the VOW feed. Ms. Desai gave evidence in her statement: “because we reduce the cost of marketing to consumers, Realosophy is able to offer prices to sellers that are lower.” Clearly, these lower prices were offered in an environment that did not include the VOW feed, because while Ms. Desai signed her statement in June of 2012, as it was only just recently (late August 2012) that Realosophy made the VOW portion of its website accessible to consumers.

Exhibit A 7, Witness Statement of Urmi Desai at, para. 12 and Exhibit H (1.5% Home Selling Blitz) at p.76.

Exhibit A 10, Witness Statement of John Pasalis, at para. 17.

Evidence of John Pasalis, September 12, 2012, p.509, lines 3-10

122. TheRedPin also offers discounts/rebates to buyers and sellers with the current VOW datafeed.

Exhibit A 13, Witness Statement of Shayan Hamidi at para. 32.

(v) **Websites are used for promotion and lead generation**

123. Websites, including websites with a VOW, are used and considered by industry participants as a means of lead generation.

Prescott Evidence, Hearing Transcript, September 28, 2012 at page 1797 lines 4-15; page 1826 lines 11-16.

Gidamy Evidence, Hearing Transcript, September 13, 2012 at page 674, lines 3-21.

Syrianos Evidence, Hearing Transcript, September 28, 2012 at page 1901, lines 1-25.

Nagel Evidence, Hearing Transcript, September 12, 2012 at page 473, lines 14-17.

Exhibit A 7, Witness Statement of Urmi Desai at paras. 5, 7 and 10.

Exhibit A 10, Witness Statement of John Pasalis at para. 4 and 12 and 27.

Sage Evidence, Hearing Transcript, September 28, 2012 at page 1887, lines 1-17.

124. The Commissioner's witness, Mr. Enchin, expressed frustration at the use of the current VOW in this manner, because in his view, the VOW should be used to serve existing clients as opposed to generating new clients. Mr. Enchin testified:

MR. ENCHIN: ... Though TheRedPin and other VOWs today are not, in my opinion, what a real VOW is supposed to be.

Unfortunately, the terminology of using this "VOW" is very vague. The Virtual Office Website, as you call it, should be just that, it's an office online for the Realtor®. And I am not trying to use it to gain more clients or more business, I am using it for my present client base.

TheRedPins of the world, I have logged on to TheRedPin, I am using their -- I am looking at houses on TheRedPin. I am not really a client of theirs, because I am not really working, but I am using the system.

My system is designed for real clients, and that's sort of the difference. I am doing this for Realtors®. I am not doing this as a company to gain more market share or more business, I am doing this to give to the membership. There is a slight difference in how I am moving forward on this new system.

Enchin Evidence, Hearing Transcript, September 14, 2012, at page 760, lines 15-25 and page 761, lines 1-4.

(vi) Not all VOW visitors become clients of the VOW-based brokerage

125. Not every person that visits a VOW operator's webpage is going to register, and equally, not every consumer that registers is going to become a client of that brokerage. For example, ViewPoint had over 1.3 million total visitors, and 380,888 unique visitors from January 1, 2012 – May 31, 2012, only 28,000 visitors registered (a registration rate of approximately 7%). Mr. McMullin also gave evidence that during the months of September 2011 - May 2012 (a time frame that overlaps with the period for which the number of visitors and registrants were calculated (i.e. January 1- May 31, 2012), ViewPoint had represented or was presently representing 135** clients. This means that ViewPoint converted only 0.03% of its website visitors into clients, and only 0.4% of its registered users into clients.

Exhibit CA 1, McMullin Witness Statement at para. 27, and Exhibit A (Google Analytics report for Jan1 – May 31, 2012) at page 33.

** (The figure of 135 was reached by adding together the number of properties sold (37), conditionally sold (8), the number of properties currently for sale (49), the number of transactions closed (29) and the number of pending transactions (12), during the relevant time period (September 2011-May 2012), as described in para. 27 .

McMullin Evidence, Hearing Transcript, September 11, 2012, page 335, lines 13-25; page 336, lines 1-25; page 337, lines 1-7.

126. Furthermore, despite the fact that Mr. McMullin operates the only brokerage of its kind in Nova Scotia, and charges less than his competitors, his market share is estimated to be less than 1%.

Exhibit CA 1, Witness Statement of William McMullin at para. 54.

McMullin Evidence, Hearing Transcript, September 11, 2012 at page 337, lines 9-25 and page 338, lines 1-9.

127. Some users visit the ViewPoint website to seek information with no intention of ever retaining the brokerage. Mr. McMullin testified that some local agents direct their clients to use the ViewPoint website as an additional resource.

McMullin Evidence, Hearing Transcript, September 11, 2012, at page 194, lines 16-25.

128. [REDACTED]

[REDACTED] Mr. Nagel did not provide evidence as to how many of those registrants ultimately became clients of RedFin, though he testified that RedFin does track this information.

Exhibit CA 38, Confidential Letter from Scott Nagel [Redfin] to Madam Justice Simpson providing responses to questions from the Tribunal of September 12, 2012.

Nagel Evidence, Hearing Transcript, September 12, 2012, at page 477, lines 14-25 and page 478, lines 1-14.

129. There was no evidence provided by the VOW operators in the GTA with respect to the amount of traffic received by their website(s), the number of registrants on the website, and the number of clients ultimately retained.

G. VOWs are not the panacea the Commissioner represents them to be

(i) VOWs require an investment of time and money, which may not be warranted given the American experience

130. The alleged benefits of a VOW need to be considered in light of the investment of time and money required by the brokerage to implement a VOW. Some industry participants are delaying in making a decision on VOWs to see how VOWs are received in the marketplace.

Sage Evidence, Hearing Transcript, September 28, 2012 at page 1839 lines 21-25 and page 1840, lines 1-6.

Exhibit R 64, Witness Statement of Evan Sage at para. 11.

131. In response to a question from the Panel about why Mr. Sage had not adopted a VOW, Mr. Sage testified:

MR. SAGE: Primarily because our research and our conversations with contacts in the US haven't found it to be of value.

MADAM JUSTICE SIMPSON: Of value to who?

MR. SAGE: To their brokerages.

MADAM JUSTICE SIMPSON: All right.

MR. SAGE: That the consumers weren't using it.

MADAM JUSTICE SIMPSON: Sorry?

MR. SAGE: That the consumers weren't using them. Like, people were providing them, but they weren't being used. They weren't generating leads per se, so it wasn't worth it for the brokerage to invest further in it.

Sage Evidence, Hearing Transcript, September 28, 2012 at page 1887, lines 3-17.

132. Mr. Syrianos testified that he did not find evidence of value for a VOW on his website, however, consumers have responded well to the VOW feed as a mobile phone application, which Mr. Syrianos uses as a lead generator.

Syrianos Evidence, Hearing Transcript, September 28, 2012, page 1901. lines 1-25.

133. Ms. Prescott estimated that it would take a couple of years to fully develop a VOW and that in terms of cost, she would need to invest money to pay the salary of the programmers, as well as ongoing maintenance costs.

Prescott Evidence, Hearing Transcript, September 28, 2012 at page 1824, lines 16-25 and page 1825, lines 1-24.

134. Mr. Enchin's testified was that he invested \$400,000 developing his initial VOW and then spent another \$100,000 to improve software and another \$10,000 on marketing materials to distribute. Mr. Enchin's evidence was also that he and his partner have recently committed to a \$100,000 contract to complete a 2012 version of the VOW.

Exhibit A 21, Witness Statement of Mark Enchin at para. 28.

Enchin Evidence, Hearing Transcript, September 14, 2012, at page 789, lines 9-15.

135. Even when information is provided electronically via a VOW feed, it can take considerable time and effort to format the information so it can be displayed to consumers. Mr. Nagel testified to this in response to questions from the Panel:

MADAM JUSTICE SIMPSON: So I would take it, then, it's not a matter of great time or effort to take the information that comes in on a computer feed of that sort and put it on your website?

MR. NAGEL: You would be surprised. If you talk to our data engineers, every feed is different. So we are receiving feeds from multiple places that are in different formats and we have to make sure it is clean, that it all gets turned into the format we can use and put up on the website, it is a non-trivial matter. [...]

Nagel Evidence, Hearing Transcript, September 12, 2012 at page 492, lines 1-13.

136. ViewPoint has invested almost [REDACTED] in developing the technology that powers viewpoint.ca. The majority of this investment has been consumed by developing software to manage the receipt, filtering, and presentation of MLS® information.

Exhibit CA 1, Witness Statement of William McMullin at para. 83.

(ii) **Other business models can also provide the efficiencies that supposedly come from the use of VOWs**

137. The Commissioner asserts that the use of VOWs will result in efficiencies for the VOW-based brokerage and therefore the brokerage will be able to service more clients. However, these same efficiencies can be achieved with a variety of business models.

138. For example, the business model of Sage Real Estate is constructed in a way to maximize efficiencies in marketing and lead generation. Mr. Sage testified:

MR. SAGE: Yes. We don't feel that every agent out there excels at marketing. So my brother's background is in marketing, and specifically digital marketing. And one of the business models that we really liked in the US was one that they did all the marketing for their agents so that the agents can focus on their higher gain activities.

MR. ROOK: So does that translate, or at least is it the expectation that it will translate into greater productivity for individual agents?

MR. SAGE: That's the idea.

Sage Evidence, Hearing Transcript, September 28, 2012, page 1845, lines 21-25 and page 1846, lines 1-6.

139. Furthermore, the services that are being provided by way of a VOW in lieu of a real estate professional who may have otherwise provided those services himself or herself, may not be costly or highly important services. Mr. Hamidi conceded that most of the content on the TheRedPin website is directed at providing and offering the user property and listing information, and he also agreed that this (the provision of information) is on the lower end of importance with respect to services provided by a Realtor®.

Hamidi Evidence, Hearing Transcript, September 13, 2012 at page 649, lines 17-25, page 650; lines 9-25; page 651, line 1-25; and page 652, lines 1-13

(iii) Even with a VOW, providing real estate brokerage services requires a significant amount of time

140. Industry witnesses agreed that brokers and salespersons provide a number of services to their clients, and only a portion of these services can be completed with the use or assistance of VOW. A key example of a service that cannot be completed entirely online is the preparation of a comprehensive CMA.

141. Industry witnesses testified that knowing the sold price of a home (even in combination with other basic information such as number of square feet, or number of bedrooms) is not sufficient knowledge to be able to do a proper comparison for the purpose of doing a CMA, or for deciding what to offer a seller. The sold price is one piece of

information that needs to be analyzed and interpreted in the context of other factors that also impact the value of a home, for example, the condition of the home, or any current or planned development in the area.

Exhibit R 62, Witness Statement of Pamela Prescott at paras. 19, 21-22.

Prescott Evidence, Hearing Transcript, September 28, 2012 at page 1791, lines 24-25; page 1792, lines 1-25; page 1793, lines 1-7.

Pasalis Evidence, Hearing Transcript, September 12, 2012 at page 546, lines 9-25, and page 547, lines 1-25.

142. Industry participants agreed that CMAs require a considerable amount of effort because they involve an examination of the physical characteristics of the home itself, and a consideration of a variety of other factors that also are relevant to the value of home, such the location of the home (especially in relation to parks or busy intersections), whether there has been recent development in the area, whether there is future planned development, key neighbourhood features or drawbacks, and the trends for prices in the neighbourhood.

Exhibit R 62, Witness Statement of Pamela Prescott at 20.

.Prescott Evidence, Hearing Transcript, September 28, 2012 at page 1790, lines 3-12, page 1791 lines 1-7.

Exhibit A 10, Witness Statement of John Pasalis at paras. 36, 39.

143. Industry participants agreed that when assessing the physical characteristics of a home, visiting or inspecting properties of interest to their clients was a regular and necessary part of their role as an agent. Industry witnesses testified that an in person visit to subject and comparator properties is essential because the there are elements to a home that are impossible to detect from a description or photos on a website. Considerations of this nature include structural or foundation issues, potential damage to the interior of the home, the extent

of any upgrades, the flooring type or material, etc. There is both an art and a science to giving real estate advice.

Exhibit R 62, Witness Statement of Pamela Prescott at para. 20.

Chan Evidence, Hearing Transcript, September 27, 2012 at page 1765 at line 3-5.

Prescott Evidence, September 28, 2012 page 1814, lines 3-9; and page 1815, lines 2-25.

Enchin Evidence, Hearing Transcript, September 14, 2012, at page 820, lines 4-16

Pasalis Evidence, Hearing Transcript, September 12, 2012 at page 544, lines 16-25 and page 545, lines 1-13.

Exhibit A 10, Witness Statement of John Pasalis at para. 39.

144. Visiting properties regularly is also important for a Realtor® to become knowledgeable about the market place and the inventory, and this effort is continuous and ongoing throughout an agent's career.

Prescott Evidence, Hearing Transcript, September 28, 2012 at page 1811, lines 6-25.

145. Accordingly, because of the scope of the work, industry participants agreed that it can take considerable time to create a comprehensive, in depth CMA. For example, one industry participant indicated that it could take multiple hours; another indicated that it could take several days.

Nagel Evidence, Hearing Transcript, September 12, 2012, at page 441, lines 7-13.

Gidamy Evidence, September 13, 2012 at page 687, lines 8-25, and 688, line 1.

146. CMAs are only one tool in a suite of real estate brokerage services that full service brokerages provide to their clients. Clients also rely on their agents to take them to showings, decide on a price, put together an offer, and negotiate the deal.

Evidence of John Pasalis, September 12, 2012 at p. 539, lines 9-25 and 540, lines 1-11; p. 551, lines 24-25, and p.552, lines 1-16.

H. The American Experience with VOWs

(i) Disclosure/Non-Disclosure States

147. Certain states in U.S. (such as Texas) do not permit the display of sold information in any format, and as a result, this information is not provided as part of the VOW feed in those jurisdictions.

Exhibit A 8, Witness Statement of Scott Nagel at para. 34

Nagel Evidence, Hearing Transcript, September 12, 2012 at page 460, lines 18-25; page 461, lines 1-3.

148. Mr. Nagel testified that RedFin does business in Texas, in particular in Austin and Dallas. Mr. Nagel also testified that agents in those cities charge the same amount to sell homes as they do in other states where disclosure of sold information is permitted.

Exhibit A 8, Witness Statement of Scott Nagel

Nagel Evidence, Hearing Transcript, September 12, 2012 at page 460, lines 18-25; page 461 lines 1-10.

149. Additionally, Redfin does not display as part of its VOW feed information on pending solds – that is, homes that in which an agreement of purchase and sale (or equivalent) has been signed, but the transaction not yet closed, because that information is confidential. Similarly, and in accordance with NAR Policy and Rules, **Redfin does receive on its VOW feed the offered amount of cooperating commission but the majority of MLS@s do not allow this information to be displayed.**

Nagel Evidence, Hearing Transcript, September 12, 2012 at page 411, lines 20-25; page 314, lines 1-3; page 472 lines 6-25 and page 473, lines 1-10 and page 501 lines 4-10.

(ii) **Rebates once offered by U.S. VOWs have been eradicated or substantial reduced**

150. RedFin used to offer a significant rebate to its clients, but over the past three years, RedFin has reduced that rebate on two occasions. Though RedFin used to offer discounts of 66% in 2007, it reduced that amount to 50% percent in 2009-2010, and then reduced it again by another 16% in 2012.

Exhibit A 8, Witness Statement of Scott Nagel at para 52.

Nagel Evidence, Hearing Transcript, September 12, 2012 at page 445 lines 22-25, page 446, lines 1-25 and page 447 1-10.

151. ZipRealty and eRealty are two other American VOW operators that used to offer a rebate/discount. Although ZipRealty and eRealty used to offer commission rebates/discounts, both brokerages have ceased the practice.

Exhibit A 30, Report of Dr. Gregory Vistnes, at page 26, footnote 69.

Visntes Evidence, Hearing Transcript, September 18, 2012 at pages 1043-1044.

152. **There was no other evidence before the Tribunal as to the commission rates charged by American VOW-based brokerages.**

(iii) **RedFin's potential entry into Canada**

153. Redfin has not investigated in any detail whatsoever the feasibility of its contemplated entry into Canada. RedFin has not spoken with members of TREB, it has not it investigated whether the type of information it would need to in order to be competitive is available in Toronto, nor has it considered the differences between Canadian laws and American laws, in particular, federal and provincial privacy legislation.

Nagel Evidence, Hearing Transcript, September 12, 2012 at page 451, lines 3-15, page 452, lines 19-25, 453, lines 1-25, and page 454, 1-23.

154. The notion of RedFin's entry into Canada is, at best, in the idea phase.

I. Privacy

(i) TREB and Privacy (Generally)

155. TREB takes its privacy obligations very seriously. TREB maintains privacy policies, and provides privacy education and resources for Members to assist them in protecting the privacy of their clients and the integrity of the MLS information. One notable source of information is the "Privacy Compliance" section of the Stratus portal, which contains a number of resources, including answers to commonly asked questions related to the disclosure of sold information, updates and explanations of decisions of RECO and the Privacy Commissioner, brochures and other informational material that can be provided directly to clients, and access to complete versions of privacy policies for TREB, CREA and OREA.

Exhibit R 59, Privacy Compliance Materlas on www.torontomls.net.

(ii) Consent to use information on TREB's MLS®

156. TREB's members collect personal information from their clients and that information is used to populate the TREB MLS® database. For example, copies of Schedules that are attached to Agreements of Purchase and Sale are uploaded along with the listing information, usually to indicate that this Schedule should be attached to any offer that is made on the property. These Schedules often include floor plans, surveys or other documents related to the property or the ownership of the property.

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1232 lines 1-17.

Exhibit R 41, STRATUS Screenshots, slide 13.

157. Accordingly, members need to obtain informed consent from their clients before any personal information is uploaded to the TREB MLS®. TREB relies on its Members to obtain that consent, and this is achieved through OREA's standard form listing agreement.

Richardson para. 95-96

Richardson Evidence, Hearing Transcript, September 24, 2012 at page 1175, lines 6-20.

(iii) Display of sold information on ViewPoint.ca

158. ViewPoint is the only VOW in Canada that displays sold information. ViewPoint is also that only website receiving a VOW feed in the province of Nova Scotia. ViewPoint receives its VOW feed pursuant to one-off agreements with the two boards in Nova Scotia, the Annapolis Valley Real Estate Board and the Nova Scotia Association of Realtors. These agreements, which are the same in content, contain an extensive indemnity provision whereby ViewPoint agrees to indemnify the boards in the event of any liability arising from the provision of the VOW feed.

Exhibit R 93, TREB Read-ins, p. 2-4.

Exhibit A 2, Witness Statement of William McMullin at paras 6 and 54, and Exhibit J (Agreement with the Annapolis Valley Real Estate Board) at pages 58-59, and Exhibit K (Agreement with the Nova Scotia Association of Realtors) at pages 68-69.

McMullin Evidence, Hearing Transcript, September 11, 2012, at page 307, lines 20-25; pages 308, 309, 310 and 311, lines 1-21.

(iv) **Consent to advertise sold information – Century 21**

159. Century 21, as a franchise, displays sold prices of some properties on its corporate webpage. However, before this information is posted, Century 21 requires its agents to obtain the express written consent of both the buyer and the seller. This consent is contained in a Schedule to the Agreement of Purchase and Sale. Before the information is posted on the website, the agent is also asked to confirm (online) that the appropriate consent has been acquired.

Exhibit R 68, C21 Schedule B

Prescott Evidence, Hearing Transcript, September 28, 2012 at page 1785, lines 9- 21; page 1786, lines 7-17; and page 1803 lines 20-23.

160. Ms. Prescott testified as to her brokerage's experience with the Century 21 website display.

161. **Ms. Prescott testified that only 5-7% percent of Century 21 Heritage Group Ltd. transactions receive the necessary consent to be posted on the Century 21 website.** It was Ms. Prescott's evidence that while people are comfortable with sold price information being accessed by real estate professionals in the provision of real estate services, they have privacy and security concerns and there is a level of discomfort with that information being made widely available on the internet.

Evidence of Pamela Prescott, September 28, 2012, 2012 at p.. 1787, lines 3-25; p. 1788, lines 1-111; p. 1822, lines 11-25; and p. 1823, line 1.

162. Ms. Prescott testified that, in her view, the clause related to consent to use and disclosure provided for in section 8 of the Buyer Representation Agreement is not sufficient

for the display of sold information on the internet. Ms. Prescott's testimony suggests that the consent in clause 8 is not sufficient because clause 8 very is broadly worded, and it would be unfair to "lump in" the consent to display sold information in clause 8 when clients are so clearly adverse to the use of their information in that way. In response to questions from the Panel, Ms. Prescott testified:

MR. JUSTICE SCOTT:Do you not think that this clause permits you to list the sold information on the Century 21 site?

MS. PRESCOTT: No, I don't, because I feel I need something from the buyer and the seller in a transaction.

MR. JUSTICE SCOTT: Okay. And, therefore, your position is that you would not have the seller's consent?

MS. PRESCOTT: That's correct.

MR. JUSTICE SCOTT: Even though the seller listed on the MLS®?

MS. PRESCOTT: Okay. And I always take it, as I mentioned, a step further. I talk to our client, and you can put in something, a very blanket statement, but then in discussing it with your client, they can -- they have told me they don't want it on public websites, that they would -- for privacy reasons, that they would prefer it doesn't happen.

They don't mind it going onto a Realtor® website. They don't mind giving me the information. They don't mind me sending out a sold card; that sort of thing.

MR. JUSTICE SCOTT: Right.

MS. PRESCOTT: But they were not happy, and that is one of the reasons that only 5 percent of our listings, or I think it might be 7 percent of all of our listings, go on the Century 21 site.

(v) **TREB's Members respect the confidential nature of sold information**

163. Despite the commissioner's suggestion that sold information is being given away freely and without regard for consumer or client privacy, industry participants, including the Commissioner's witness, Mr. Gidamy, testified that sold information is not provided to public but only to clients. Moreover, Mr. Pasalis testified that he recognizes that there are privacy issues associated with the disclosure of sold data on a VOW.

Pasalis Evidence, Hearing Transcript, September 12, 2012, page 575, lines 3-25 and 576, lines 1-25 and page 577, lines 1-6..

Exhibit R 11, Email of August 2, 2011, including blog post co-written by Mr. PAsalis, entitled "The end of Realtor.ca?".

Exhibit A 15, Witness Statement of Tarik Gidamy at para 19.

Exhibit R 64, Witness Stateement of Evan Sage Statement at para. 12.

Chan Evidence, Hearing Transcript, September 27, 2012 at page 1776, lines 1-19.

Exhibit R 71, Witness Statement of Timoleon Syrianos at para. 8.

164. On this issue Ms. Prescott testified, in response to questions from the panel:

MR. JUSTICE SCOTT: You have information from Stratus on the actual sold data?

MS. PRESCOTT: That's correct.

MR. JUSTICE SCOTT: What is your policy, or do you have any policy, in terms of how you direct your agents into what they can disclose to the public on the sold data?

MS. PRESCOTT: Okay. So are you referring to: If they do a CMA, what can they disclose?

MR. JUSTICE SCOTT: Somebody from the public just phones and asks for information about a property that sold down the street.

MS. PRESCOTT: Oh, they wouldn't give it.

MR. JUSTICE SCOTT: They wouldn't give it?

MS. PRESCOTT: No.

MR. JUSTICE SCOTT: Those are your directives to all of your agents?

MS. PRESCOTT: Absolutely. And if they phoned into my staff and say, A property down on number 4 John Street just sold. What was the price? My staff would ask them if they're a Realtor®. If they say they are a Realtor®, they will check them on the website to make sure that they are a licensed Realtor® with that brokerage before they would give them any information.

Prescott Evidence, September 28, 2012 at page 1828 lines 13-25 and page 1829, lines 1-16.

165. Mr. Chan's also gave evidence that clients of TradeWorld Realty are invariably concerned that information involving any transaction entered into by them be kept private.

Exhibit R 61, Witness Statement of Tung-Chee Chan at para. 7.

166. The Commissioner's "evidence" on the alleged practice of listing information being "handed out the back door" is not compelling.

NO ABUSE OF DOMINANT POSITION

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

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

An abuse of dominant position occurs where the Competition Tribunal finds that:

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

Competition Act, R.S.C. 1985, c. C-34, s. 79(1)

169. Although a particular piece of supporting evidence may be considered under more than one element of the abuse of dominance framework, each element of the abuse of dominance framework must remain conceptually distinct.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 28, TREB's Brief of Authorities at Tab 3.

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

Competition Act, R.S.C. 1985, c. C-34, s. 79(1)

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

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 25, TREB's Brief of Authorities at Tab 3.

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

THE COMMISSIONER'S APPLICATION

173. The Commissioner's application involves two conceptually distinct theories of harm.

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

175. The second theory of harm put forward by the Commissioner (and the Commissioner's economist) is that by withholding information on the cooperating brokerage's offer of commission, TREB is facilitating "buyer steering" by cooperating brokerages away from homes with a low offer of commission.

176. The Commissioner has not met her burden to prove either theory of harm in this application.

177. Each of the Commissioner's theories of harm must be evaluated bearing in mind the test for abuse of dominance.

THEORY OF HARM #1: REDUCTION IN DYNAMIC COMPETITION

A. TREB Does Not Control the Relevant Markets

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

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

180. First, TREB is not a market participant, and its position as a supplier of an input to firms that do participate in the markets is not sufficient to grant it market power in the downstream markets that are at issue in this proceeding.

181. Second, TREB is not dominant in the markets for the provision of the Confidential Data. Based on the case as framed by the Commissioner, TREB would have to be dominant in the markets for the provision of the Confidential Data (the upstream market) in order for it

to be dominant in the market for the provision of real estate brokerage services (the downstream market).

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

(i) Test for Market Control

183. Section 79(1)(a) of the *Competition Act* provides that the Commissioner must prove that:

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

Competition Act, R.S.C. 1985, c. C-34, s. 79(1)(a)

184. This test has been interpreted to mean the Commissioner must prove a firm has market power within the relevant product market, and within a geographic market.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1028 (C.A.) at para. 10, TREB's Brief of Authorities at Tab 4.

185. Market power has been defined as the ability to set prices above competitive levels for a considerable period of time.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1028 (C.A.) at para. 6, TREB's Brief of Authorities at Tab 4

186. In order to determine whether a firm has market power, the Tribunal must first define the relevant product market.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1028 (C.A.) at para. 11, TREB's Brief of Authorities at Tab 4.

187. The purpose of defining the relevant product market is to identify the possibility for the exercise of market power.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1028 (C.A.) at para. 6, TREB's Brief of Authorities at Tab 4.

188. The definition of the product market begins by examining the product in respect of which the alleged abuse of dominance is occurring.

Competition Bureau of Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions*, September 20, 2012, p. 3, TREB's Brief of Authorities at Tab 5.

189. In defining the relevant product market, the Tribunal will consider substitutability: whether there exist sufficiently close substitutes to the product at issue, such that the market for the product at issue includes those substitutes.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1028 (C.A.) at para. 12, TREB's Brief of Authorities at Tab 4.

190. Products will be close substitutes if buyers are willing to switch from one product to another in response to a relative change in price.

Canada (Director of Investigation and Research) v. Southam Inc., [1995] 3 F.C. 557 (C.A.) at para. 161, TREB's Brief of Authorities at Tab 6.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1028 (C.A.) at para. 13, TREB's Brief of Authorities at Tab 4.

191. Substitutability can be proven either by direct evidence or by indirect evidence. Indirect evidence includes factors such as functional interchangeability.

Canada (Director of Investigation and Research) v. Southam Inc., [1995] 3 F.C. 557 (C.A.) at para. 161, TREB's Brief of Authorities at Tab 6..

(ii) **Market power in an upstream market by a supplier does not grant that supplier market power in the downstream market**

192. The purpose of the 79(1)(a) analysis is to determine whether a firm controls the relevant market(s).

193. TREB is not a participant in the relevant markets. None of TREB's members have a sufficient share of the market to grant them market power. The Commissioner is not relying on the theory of joint dominance in this application.

Exhibit A 93, TREB Read-ins, p. 4

194. The Commissioner's theory of control is an indirect theory of control. The Commissioner contends that TREB controls the markets for residential real estate brokerage services because TREB controls an upstream input used by market participants (the TREB MLS®).

195. An upstream supplier that does not participate in the downstream market cannot control the downstream market.

196. TREB does not have the ability to set prices above competitive levels in the relevant markets, being the markets for residential real estate brokerage services in the GTA. TREB has no influence whatsoever over pricing levels in the markets at issue in this application. Because no one has market power in the relevant markets, no one has the ability to set prices above the competitive level.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1028 (C.A.) at para. 6, TREB's Brief of Authorities at Tab 4.

197. TREB has no financial, or other, interest in how competition occurs among its members. The manner in which TREB's members compete with each other do not affect TREB's business.

Exhibit R 39, Witness Statement of Donald Richardson, p. 6 para. 25.

Canadian Standard Travel Agent Registry (c.o.b. CSTAR) v. International Air Transport Assn. (c.o.b. IATA), [2008] C.C.T.D. No. 14, at para. 12, TREB's Brief of Authorities at Tab 7.

198. The Commissioner's economic expert has described TREB as being "able to control the manner in which competition occurs" in the relevant markets.

Exhibit A 30, Expert Report of Dr. Gregory Vistnes, p. 32 para. 85.

199. The section 79(1)(a) test is directed at determining whether a firm has substantial or complete control over a market, not whether a firm controls *how competition occurs* in a market.

200. The Commissioner is attempting to change the statutory test for market control.

201. A firm cannot control a market unless it is a participant in that market, and has market power by virtue of its participation in that market. Consequently, TREB does not control the markets for the provision of residential real estate brokerage services in the GTA. The Commissioner's application must fail for this reason.

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

202. In the alternative, the appropriate market to consider in this case is the market the Confidential Data, and TREB is not dominant in that market. In his report and in his evidence, Professor Church proposes that the Essential Facilities doctrine be considered in

determining whether TREB controls the markets for residential real estate brokerage services in the GTA.

Ex R 79, Expert Report of Jeffrey Church, p. 69, para. 168.

Ex R 82, Summary of Expert Report – Jeffrey Church, p. 14-15.

203. The Essential Facilities doctrine concerns a vertically integrated upstream supplier that also competes in a downstream market. For example, a transport shipping company that owns the only bridges entering into a city. The Essential Facilities doctrine proscribes the circumstances under which downstream competitors will be mandated access to the upstream product. In other words, whether the bridge-owning shipping company will be forced to allow its competitors in the shipping market to use its bridges.

204. In order for the essential facilities doctrine to apply, the vertically integrated upstream supplier must be dominant in both the upstream market, and the downstream market.

205. As pointed out by the Commissioner's expert, TREB does not compete with its members in the downstream markets, and accordingly this case is not about granting mandated access to competitors.

206. This case presents a very odd set of facts for the abuse of dominance framework. As noted several times in this argument, TREB's submission is that the facts of this case are not appropriate for the abuse of dominance framework for several reasons, not the least of which being that TREB does not participate in the markets in which has been alleged to be dominant.

207. The Commissioner is trying to fit a square peg into a round hole. In the face of this reality, Professor Church has proposed the essential facilities framework as being conceptually useful to determine the question of control of the relevant markets.

208. Although the essential facilities framework cannot be directly applied in the present case (because TREB does not compete with its members), the most critical take-away from the essential facilities framework is as follows: if it is conceptually possible for a supplier of an input to be dominant in a downstream market in which it does not compete, that supplier must at the very least be dominant in the upstream supply market. If the supplier were not dominant in the upstream market, then downstream participants could substitute away from the upstream supplier.

209. Therefore, the question that must be asked is: what is the relevant upstream/supply product market?

210. As noted above, the definition of the product market begins by examining the product in respect of which the alleged abuse of dominance is occurring.

Competition Bureau of Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions*, September 20, 2012, p. 3, TREB's Brief of Authorities at Tab 5.

211. In this proceeding, the Commissioner alleges that TREB is abusing its dominant position by withholding the Confidential Data from its VOW datafeed and imposing restrictions on the ability to search and display this data. The product in respect of which the alleged abuse of dominance is occurring is the Confidential Data. The Confidential Data is the product market.

212. The Commissioner's position is that TREB controls the markets for residential real estate brokerage services because it controls the MLS® for the GTA.

Exhibit A 30, Expert Report of Dr. Gregory Vistnes, p. 32 para. 85.

213. The conduct at issue in this proceeding does not concern access to the TREB MLS® generally. All of TREB's members have access to TREB's MLS®, including its members that operate a VOW. Furthermore, most of the data contained within the TREB MLS® database is already included in the VOW datafeed.

214. TREB only has the ability to affect competition in the downstream market by withholding the Confidential Data if it has market power in the Confidential Data. Otherwise full information brokers could and would substitute, in the face of TREB's VOW Policy to alternative sources without any effect on the downstream markets.

215. To assess TREB's market power in the upstream market requires an assessment of substitutes for the Confidential Data. Substitutability can be proven either by direct evidence or by indirect evidence. Indirect evidence includes factors such as functional interchangeability.

Canada (Director of Investigation and Research) v. Southam Inc., [1995] 3 F.C. 557 (C.A.) at para. 161, TREB's Brief of Authorities at Tab 6.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1028 (C.A.) at para. 13, TREB's Brief of Authorities at Tab 4.

216. In order to assess functional interchangeability with respect to the Confidential Data on a VOW, it is important to consider the purposes to which that Confidential Data would be

used on a VOW by home buyers and sellers at the two different points consumers would access a VOW: the incubation/search phase, and the valuation/offer phase.

Exhibit R 82, Summary of Expert Report – Jeffrey Church, p. 19.

217. At the search/incubation phase, consumers are becoming informed about the market. They are assessing factors such as the relative values of different communities, relative values of different home characteristics, and price trends.

218. At the valuation/offer phase, the consumer will need to receive advice as to the market value of the home they are selling (if a seller) or the home they are interested in making an offer on (if a buyer). The valuation of a home is not a mechanical exercise based solely on comparable sold home MLS® data. It is subjective exercise which requires the skill and judgment of a real estate professional.

Exhibit R 62, Witness Statement of Pamela Prescott, p. 5, para. 19.

Examination of John Pasalis, September 12, 2012, p. 545, lines 14-22.

Examination of Tarik Gidamy, September 13, 2012, p. 686, lines 23-25, and p. 687, lines 1-14.

219. In other words, even if the Confidential Data were available on a VOW, the Confidential Data would not be relied on by the consumer to determine the actual market value of a subject home. At best, the Confidential Data would be used to help provide a general ballpark on valuation. Accordingly, sold and pending sold information may not add incremental value to a VOW.

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

221. First, in the GTA, there is a stable 95% relationship between the list price of a property and the ultimate sale price. This relationship is stable across time and across communities. The list price of the property would provide a good general ballpark on the valuation of a subject property.

Exhibit R 82, Summary of Expert Report – Jeffrey Church p. 22

Examination of Professor Jeffrey Church, October 2, 2012, pp. 1952-1953.

222. Second, brokerages have their own supply of transactional data.

223. Third, there are third party appraisal services such as Zoocasa and Centract. In addition, Teranet apparently also offers an appraisal service. This potential substitute was noted in the Reply Witness Statement of Mark Enchin.

Exhibit A 21, Reply Witness Statement of Mark Enchin, p. 5, para. 11.

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

225. TREB has been embroiled in this litigation with the Commissioner since before the VOW policy was enacted. If the Commissioner is not granted the relief she seeks, other suppliers may emerge for the Confidential Data. Some possible suppliers include:

(a) Teranet

(b) MPAC

(c) A large corporate franchise group operating as a wholesale supplier

226. **There are several actual and potential substitutes for the Confidential Data.**

227. The Commissioner's expert focuses on the wrong market for the purposes of defining market power. The Commissioner has not discharged her burden to prove that TREB has market power in the market for the Confidential Data.

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

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

229. As noted in the *Canada Pipe* decision, the fundamental question that the Tribunal is trying to answer under the first branch of the abuse of dominance test is whether it is possible for the respondent to exercise market power.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1028 (C.A.) at para. 6, TREB's Brief of Authorities at Tab 4.

230. Based on the foregoing foundation, it stands to reason that if a respondent is unable or unwilling to exercise its market power (if any), then that respondent will not be seen as controlling the market.

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

232. TREB is a not for profit entity that is controlled by its "customers" (in other words, its members), TREB has no incentive to exercise market power against its members, and TREB's

governance structure provides a constraint on the exercise of any market power TREB could have. TREB has incentives to operate its MLS® in a manner that facilitates the buying and selling of real estate.

Exhibit R 82, Summary of Expert Report – Jeffrey Church, p. 30.

Exhibit R 79, Expert Report of Jeffrey Church, p. 96, para. 248.

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

Exhibit R 82, Summary of Expert Report – Jeffrey Church, p. 30.

Exhibit R 79, Expert Report of Jeffrey Church, p. 96, paras. 249-250.

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

235. The evidence before the Tribunal demonstrates that TREB's members are eager adopters of new technology generally, and of VOWs in particular.

236. As of September 24, 2012, 445 firms, representing 29,062 of TREB's salesperson and broker members, were subscribed to TREB's IDX feed.

Evidence of Donald Richardson, September 24, 2012, p. 1164, lines 15-20.

Exhibit R 39, Witness Statement of Donald Richardson, p. 16, para. 76.

237. As of September 17, 2012, 124 brokerages had signed up to receive the VOW datafeed. Of the brokerages that have signed up for the VOW datafeed, 31 brokerages operate under the banner of one of the “top 5” franchises identified in Dr. Vistnes’ report. The vast majority of the brokerages that have signed up for the VOW datafeed are incumbent brokerages.

Exhibit R 42, Updated List of VOWs and AVPs.

Evidence of Donald Richardson, September 24, 2012, p.1166, lines 1-4.

Exhibit R39, Witness Statement of Donald Richardson, p. 35, para. 176.

238. [REDACTED]

[REDACTED]

Examination of Dr. Gregory Vistnes, September 18, 2012 (IN CAMERA), pp. 21-22.

239. It is true that not all TREB members support VOWs, and a handful of e-mails from TREB members opposed to VOWs have been produced in this proceeding. However, there is a complete lack of evidence to make the leap that because a small handful of members do not support VOWs that this is the majority view among TREB’s membership. This is particularly so given the popularity of the VOW datafeed within its first year of operation.

Exhibit R 42, Updated List of VOWs and AVPs.

Examination of Timoleon Syrianos, September 28, 2012, p. 1900, lines 19-25.

Examination of Pamela Prescott, September 28, 2012, p. 1824, lines 16-19.

240. Considering the evidence before the Tribunal regarding innovation and the use of technology by TREB’s members, there is no basis to conclude that TREB’s members, collectively, are opposed to innovation or are opposed to VOWs.

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

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

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

(i) The Test for an Anti-Competitive Act

243. For an act to be anti-competitive, it must have been done for the purpose of achieving an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at paras. 64-66, TREB's Brief of Authorities at Tab 3.

244. The focus of the analysis is on the act itself: to discern the purpose of the act.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 77, TREB's Brief of Authorities at Tab 3.

245. In determining the purpose of an act as part of this analysis, reference should be made to any evidence of subjective intent, the reasonably foreseeable or expected objective effects of the act, and any business justification.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 67, TREB's Brief of Authorities at Tab 3.

246. In order to satisfy this branch of the abuse of dominance test, the impugned conduct must be targeted at a competitor:

to be considered "anti-competitive" under paragraph 79(1)(b), an act must have an intended predatory, exclusionary or disciplinary negative effect *on a competitor*. The paragraph 79(1)(b) inquiry is thus focused upon the intended effects of the act on a competitor. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(b), if these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(b). While, for the *Act* as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(b), "anti-competitive" refers to an act whose purpose is a negative effect on a competitor. [emphasis in original]

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 68, TREB's Brief of Authorities at Tab 3.

247. Even if the reasonably foreseeable consequences of an act are predatory, exclusionary, or disciplinary to a competitor, proof of a valid business justification for the conduct in question can demonstrate that the anti-competitive effects of the act are not the overriding purpose of the conduct in question.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 73, TREB's Brief of Authorities at Tab.

248. For the purposes of the section 79(1)(b) analysis, a business justification must provide an efficiency or pro-competitive rationale to counterbalance any anti-competitive effects.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 73, TREB's Brief of Authorities at Tab.

(ii) **TREB's conduct is not directed at a competitor**

249. The fundamental flaw in the Commissioner's case on the 79(1)(b) analysis is that TREB's VOW policy is directed at its members; not at its competitors.

250. TREB does not provide real estate brokerage services, TREB is not a participant in the relevant markets, and accordingly, TREB does not compete with its members.

251. In his evidence, Dr. Vistnes explains why he rejects the "Essential Facilities Framework" suggested by Professor Church under the market definition branch of the abuse of dominance test:

[E]ssential facilities has a very specific meaning. It is usually the notion that there is a facility, that for some reason there is a question: Should this facility, should the assets be made available to competitors? Should the competitors be able to use that facility in order to compete?

There is no question here that the MLS® is essential for brokers to compete, but, at the same time, there is no issue here about TREB or the MLS® being required to make these assets available to competitors. [emphasis added]

Examination of Dr. Gregory Vistnes, September 18, 2012, p. 1005.

252. TREB does not compete with its members. The logical consequence of this state of affairs is that TREB's VOW policy is not targeted at its competitors. Therefore, the Commissioner's case must fail on this branch of the abuse of dominance test.

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

253. In addition to not being targeted at a competitor, TREB's VOW policy was not enacted with a predatory, exclusionary, or disciplinary purpose.

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

255. Since the implementation of the VOW policy, VOWs have been adopted not only by market incumbents, but also by new entrants to the marketplace including TheRedPin and Realosophy, and a VOW operated by Mark Enchin has received expressions of interest from brokerages representing approximately 5,000 TREB members.

Exhibit A 13, Witness Statement of Shayan Hamidi, p.2, para. 6.

Exhibit A 10, Witness Statement of John Pasalis, p.8, para. 26.

Exhibit A 20 Witness Statement of Mark Enchin, p.13-14, paras. 40-41.

256. TREB's VOW policy was not enacted with a subjective intent to achieve a predatory, exclusionary, or disciplinary effect.

257. TREB's history with respect to VOWs and with respect to its VOW Task Force demonstrate that TREB approached the VOW issue as another potential technological tool that it could offer its members.

258. TREB's history with respect to VOWs is outlined in great detail above in the factual overview, and for the sake of brevity an exhaustive re-statement will not be provided here.

However, by way of a general overview, some key factors are:

- TREB was reluctant to proceed with the VOW issue while anti-trust proceedings were ongoing in the United States regarding NAR's VOW policy
- After the settlement of the NAR litigation, TREB took steps to initiate its own VOW Task Force, which ultimately resulted in the CREA VOW Task Force
- When the efforts of the CREA VOW Task Force stalled, TREB constituted its own VOW Task Force
- TREB populated its Task Force with young and "plugged in" members
- TREB in general, and the Task Force in particular, operated under tight time constraints imposed by counsel to the Commissioner of Competition
- The Task Force considered and debated a series of issues, including privacy and regulatory concerns associated with sold and pending sold data, ultimately concluding that sold and pending sold data should not be included in the VOW datafeed due in part to the massive reach of information posted on the internet
- The Task Force decided that there would be no option for a brokerage-opt out from the VOW datafeed, and that brokerage participation would be mandatory

Exhibit CR 40, Witness Statement of Donald Richardson, p. 24-29, paras. 118-148.

Evidence of Donald Richardson, September 24, 2012, p. 1236 -1256.

259. TREB's decision to withhold certain data from the VOW datafeed must be evaluated in light of the Privacy Commissioner's decision in *PIPEDA Case Summary #2009-002*. In that case, a real estate salesperson placed an advertisement in a real estate publication stating that the property has sold for "99.3% of asking price." Based on that figure, it was possible to calculate the amount received for the sale.

260. In her decision, the Privacy Commissioner considered that the sold price would likely be available in a public property registry. Although section 7(3)(h.1) of the *Personal*

Information Protection and Electronic Documents Act provides that an organization may disclose personal information without consent where that information is publicly available, the Commissioner's Office held that the exception did not apply on the facts of that case. She reasoned that:

[T]his Office interprets paragraph 7(3)(h.1) to apply in situations where the information is actually collected from a publicly available source. In the case at hand, the information would have been collected from purchase agreements that the salesperson was privy to in the course of his duties as sales agent for the seller.

PIPEDA Case Summary #2009-002, [2009] C.P.C.S.F. No. 2 "Realtor advertises purchase price of condominium in trade publication without buyer's consent" at para 10, TREB's Brief of Authorities at Tab 1.

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

Evidence of Sam Prochazka, September 18, 2012, p. 936, lines 1-25, and page 937, lines 1-2.

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

263. It is also important to bear in mind the evidence of Pamela Prescott with respect to the public display of sold information on the Century 21 website. It was Ms. Prescott's evidence that Century 21 does have an option whereby buyers and sellers of property may consent to the display of sold home information, including price, on the Century 21 website. This consent is achieved by express reference in Schedule B to the agreement of purchase and sale.

Exhibit R 62, Witness Statement of Pamela Prescott, p. 3, para. 12

Exhibit R 68, Century 21 – Schedule B – SALE 2011.

264. It is not mandatory that Century 21 clients consent to the display of sold home information on the internet, and this term of the standard Schedule “B” may be amended. Only 5-7% percent of Century 21 Heritage Group Ltd. transactions receive the necessary consent to be posted on the Century 21 website. It was Ms. Prescott’s evidence that while people are comfortable with sold price information being accessed by real estate professionals in the provision of real estate services, they have privacy and security concerns and there is a level of discomfort with that information being made widely available on the internet.

Evidence of Pamela Prescott, September 28, 2012, p. 1787, lines 11-25 and p.1788, lines 1-11; p. 1822, lines 11-25; page 1823, line 1.

265. The Commissioner has taken the position in this proceeding that members of the public may easily obtain copies of certain of the Confidential Data from a brokerage by hand, e-mail, or otherwise merely by contacting the brokerage and asking. Such a practice, in the face of TREB’s VOW policy, is said to discriminate against the VOW operator.

266. The Commissioner has failed to adduce sufficient evidence to prove that the foregoing practice is prevalent in the GTA. Such a practice is discouraged by TREB. In any event, TREB distinguishes this practice from the display of the Confidential Data on a VOW, where any member of the public with an electronic device could, in seconds, be able to access Confidential Data with respect to thousands of transactions. On a VOW, the Confidential Data would be accessible whether or not a VOW user had a legitimate interest in real estate, or is simply an inquisitive neighbour or angry ex-spouse.

267. Section 3 of *PIPEDA* provides that:

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

Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5, s. 3, TREB's Brief of Authorities at Tab 8.

268. On the facts of this proceeding, the individual's privacy interest must be evaluated bearing in mind the wide reach of the internet, so that the "practical obscurity" of the personal information is maintained.

U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749 (SCOTUS), at para. 489, TREB's Brief of Authorities at Tab 9.

Burnett v. County of Bergen, Supreme Court of New Jersey, A-43, September Term 2008, at para. 27, TREB's Brief of Authorities at Tab 10.

269. *PIPEDA* has carefully and rationally addressed a pressing societal concern – privacy of personal information – in this instance the price received and paid for a residential property by an individual. TREB's rules and policies are designed to maintain that practical obscurity.

270. In addition to the case noted above, the Privacy Commissioner's Office has also issued rulings that information about the market value of a home, and photographs of a home constitute personal information pursuant to *PIPEDA*.

PIPEDA Case Summary #349, [2006] C.P.C.S.F. No. 26, "Photographing of tenants' apartments without consent for insurance purposes", TREB's Brief of Authorities at Tab 11.

PIPEDA Case Summary #390, [2008] C.P.C.S.F. No. 2, "Residential property appraisal documents are owners' personal information", TREB's Brief of Authorities at Tab 12.

271. The VOW Task Force also considered regulatory concerns with respect to the disclosure of sold and pending sold information.

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

Code of Ethics, O Reg 580/05, s. 36(9), TREB's Brief of Authorities at Tab 2.

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

Code of Ethics, O Reg 580/05, s. 36(7), 36(8), TREB's Brief of Authorities at Tab 2.

274. RECO defines advertising as:

Any notice, announcement or representation directed at the public that is authorized, made by or on behalf of a registrant and that is intended to promote a registrant or the business, services or real estate trades of a registrant in any medium including, but not limited to, print, radio, television, electronic media or publication on the internet (including websites and social media sites). Business cards, letterhead or fax cover sheets that contain promotional statements may be considered as "advertising." [emphasis added]

Exhibit R 83, List of RECO documents entered on consent of all parties, "Advertising Guidelines – September 2011 (Trib #10217), p. 3.

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

Exhibit R 94, Self Regulated Professions – Balancing Competition and Regulation, Competition Bureau 2007, p. 126.

276. One of the central functions of a VOW, according to the Commissioner’s expert and some of the Commissioner’s witnesses, is to help generate leads. By definition, then, a VOW is an advertising tool. Just because a VOW might also be a method of delivering real estate services does not mean it is not also an advertisement. These are not mutually exclusive concepts.

277. Just as consent would be required to disclose sold home information on a VOW in order to remain compliant with *PIPEDA*, consent would also be required for such disclosure in order for TREB’s members to remain compliant with the requirements imposed by RECO.

278. The VOW Task Force, and TREB generally, were not acting with an anti-competitive intent in passing the VOW Policy and Rules.

279. TREB’s conduct since the VOW feed was introduced also demonstrates that TREB has not been operating with an anticompetitive intent.

280. In less than one year, TREB has listened to feedback from its members, and has made changes to the VOW datafeed as a result of that feedback. This has included the addition of data fields such as: days on market, original price, virtual tours, and open house information.

Evidence of Donald Richardson, September 24, 2012, p.1166, lines 12-20.

281. Furthermore, **TREB is presently working on a technological solution to offer comparative market analysis functionality through a VOW without disclosing certain pieces of personal information such as the identity of comparator properties.**

Evidence of Donald Richardson, September 27, 2012, p. 1673, lines 9-13 and p. 1674, lines 1-16.

282. Finally, as noted in the discussion above on market power, TREB's membership on the whole is supportive of new technology and innovation. Many established market participants have been early adopters of the VOW technology. As a service-provider to its members, TREB has no incentive to put anti-competitive restraints on the VOW datafeed.

(iv) Efficiency justifications

283. Compliance with *PIPEDA*'s requirements and *RECO*'s regulatory requirements, as discussed above, are valid efficiency justifications in this matter. Surely TREB is permitted to act in compliance with the law.

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

285. As noted by the Commissioner's expert:

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

Examination of Dr. Gregory Vistnes, September 18, 2012, p. 1007

286. The TREB VOW policy: promotes liquidity of the MLS® system, preserves incentives for investment in the MLS® by TREB members, and it prevents the unauthorized commercial exploitation of the MLS® database. These points will all be briefly addressed below, and are more fully canvassed in the Expert report of Dr. Jeffrey Church at pages 110-130.

(a) MLS® Liquidity

287. TREB's VOW policy promotes MLS® liquidity in three ways: protecting privacy, preventing strategic advantage, and preventing potential interference with contractual relations.

Exhibit R 82, Summary of Expert Report – Jeffrey Church, p. 63.

288. The most important of these factors is protecting privacy.

289. As demonstrated by the evidence of Pamela Prescott, a vast majority of the public are comfortable with sold home information residing in the TREB MLS®, but they are not comfortable with that information being widely available on the internet.

Evidence of Pamela Prescott, September 28, 2012, p. 1787, lines 6-25 and p.1788, lines 1-11.

See also Exhibit R 61, Witness Statement of Tung Chee Chan, p. 3, para. 7.

290. The use of the TREB MLS® to sell a property should not be tied with automatic inclusion of sold information in a VOW datafeed. If these two notions are tied together, this will place the public in a difficult position, as they will have to choose between their privacy, and being able to access the Multiple Listing Service® to sell their property.

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

292. In addition, the display of pending sold information invites home owners and sellers to be targets of unsolicited approaches to provide services, and even unsolicited offers to sellers that are already under contract with a purchaser.

(b) Preservation of Incentives to Invest in the MLS®

293. The core of the Commissioner's theory of the case is that operators of "full-information VOWs" will be able to erode the market share of incumbent brokerages by using superior technology. As noted below in the analysis on "substantial lessening or prevention of competition," this position is unfounded. However, if the Commissioner's theory were correct, TREB would be justified in enacting rules to preserve the utility of the MLS®.

294. Incumbent brokerages would have no incentive to make further investments in the MLS® database (by way of contributing listings), if "full information VOWs" would then use those listings to erode incumbent market share. This would amount to free-riding on the investments of incumbent brokerages made in securing listings. If the Commissioner's theory of the case were true (which it is not), this would amount to an expropriation of sunk investments by incumbent brokerages. In the face of this scenario, large brokerages, and franchise groups, would have an incentive to leave TREB's MLS® and establish a rivalrous multiple listing system.

Exhibit R 82, Summary of Expert Report – Jeffrey Church, p. 60-62

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

(c) Prevention of Unauthorized Commercial Use

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

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

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

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

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

300. Second, even if a substantial lessening or prevention of competition is conceptually possible in the absence of the creation, enhancement, or maintenance of market power, the relevant markets would not be substantially more competitive in a world with “full information VOWs”.

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

301. In determining whether a firm has substantially lessened or prevented competition in a market, the Tribunal will determine whether that firm’s impugned conduct has created, enhanced, or maintained its market power.

Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co., [1990] C.C.T.D. No. 17 at p. 32 (of Q.L.), TREB’s Brief of Authorities at Tab 13.

Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd., [1995] C.C.T.D. No. 20 at 37 (of Q.L.), TREB’s Brief of Authorities at Tab 14.

Competition Bureau of Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions*, September 20, 2012, p. 13, TREB’s Brief of Authorities at Tab 5.

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

Canada (Commissioner of Competition) v. CCS Corp., [2012] C.C.T.D. No. 14., per Chief Justice Crampton (concurring) at paras. 367-368, TREB’s Brief of Authorities at Tab 15.

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

the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial".

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 37, TREB's Brief of Authorities at Tab 3.

304. Put another way, the Tribunal must determine whether the relevant markets would be substantially more competitive but for the impugned practice of anti-competitive acts.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 38, TREB's Brief of Authorities at Tab.

(ii) No Creation, Enhancement, or Preservation of Market Power

305. In his opening statement, the Commissioner's counsel advised the Tribunal that the Commissioner is not taking the position that TREB's VOW policy creates, enhances, or maintains TREB's market power.

Opening Statement of the Commissioner of Competition, September 10, 2012, transcript p. 52.

306. In addition, the Commissioner's expert admits that TREB's conduct "is *not* likely to have a significant effect on any individual agent's or broker's market power."

Exhibit A-32, Reply Expert Report of Gregory S. Vistnes at para. 30 (emphasis in original).

307. These admissions are fatal to the Commissioner's case.

308. As noted in the Bureau's enforcement guidelines: "in enforcing section 79, the Bureau is concerned with the creation, enhancement, or preservation of market power resulting from a practice of anti-competitive acts."

Competition Bureau of Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions*, September 20, 2012, p. 6, TREB's Brief of Authorities at Tab 5.

309. Counsel to the Commissioner stated in his opening statement that TREB's conduct has caused a substantial lessening or prevention of competition, even though TREB's conduct does not create, enhance, or maintain market power. It was suggested that a substantial lessening or prevention of competition could be made out instead by reference to the concept of "abuse of market power."

310. The approach suggested by the Commissioner is not consistent with jurisprudence from the Tribunal, from the Federal Court of Appeal, or with the Bureau's own enforcement guidelines.

311. Even the Commissioner's expert acknowledges the need to prove that the impugned conduct preserves, enhances, or maintains market power:

Does TREB's conduct increase/enhance/maintain market power relative to the but for world in the relevant markets?

- Are prices higher, or is quality lower, in the markets for brokerage services relative to the but-for world in which TREB did not restrict brokers' use of VOWs to provide MLS® information to their customers?

Exhibit A 33, Presentation of Dr. Vistnes, p. 4.

312. It can be an abstract inquiry to consider the question: "has a practice created, enhanced, or preserved market power?" In order to bring the question from the abstract to the

concrete, the Federal Court of Appeal in *Canada Pipe* enumerated several indicia that market power has been created, enhanced, or preserved by a practice. Some of these factors are: whether the practice impedes entry or expansion in the market, whether prices might be substantially lower in the absence of the practice, or whether the quality of products might be substantially greater in the absence of the practice.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at para. 58, TREB's Brief of Authorities at Tab 3.

313. Two of these factors (price and quality) are picked up by Dr. Vistnes in the above excerpt from his slide presentation.

314. The foregoing factors, as well as the other factors enumerated in *Canada Pipe*, are geared at answering the fundamental question of whether a practice creates, enhances, or maintains market power. The ability to quickly enter and expand in a market, the ability to offer low prices, and the ability to offer a better quality product are factors that can threaten a dominant incumbent's market power. For such an incumbent, hampering entry, impeding price competition by competitors, and impeding innovation by competitors could create, enhance, or maintain its market power.

315. A peculiar feature of the case at bar, as noted several times already, is that TREB is not actually a participant in the markets in which it is alleged to be abusing its dominant position. In cases where a respondent *is* a participant in the relevant market, then the factors enumerated in *Canada Pipe* will be analytically useful in determining the fundamental question of whether the conduct of that respondent has created, enhanced, or preserved its

market power. It is this question that is at the core of determining whether a practice substantially lessens or prevents competition in a market.

316. The reason that the “but for” test is applied in abuse of dominance cases is to determine whether market power has been created, maintained, or enhanced. If there is no possibility that market power has been created, maintained, or enhanced, then there is no need to conduct the “but for” analysis, and the Commissioner’s case is defeated as a preliminary matter. Examining matters such as pricing or quality in the market is a meaningless exercise.

317. The fundamental mistake that the Commissioner and Dr. Vistnes make is that they examine pricing and quality levels in the relevant markets **without regard to the purpose for which these factors are examined in abuse of dominance cases: to determine whether market power has been created, maintained, or enhanced.**

318. The Commissioner seems to suggest that the factors enumerated in *Canada Pipe* can be considered as part of a free-standing inquiry into competitive levels within the market. The Commissioner seeks to divorce the factors enumerated by the Federal Court of Appeal in *Canada Pipe* from the underlying purpose of the inquiry: “has a practice created, enhanced, or preserved market power?” As explained above, this approach is incorrect.

319. The approach suggested by the Commissioner would result in a radical departure from the current test for substantial lessening or prevention of competition. Under the Commissioner’s approach, any time an upstream supplier exercised its market power, there would be a resulting lessening or prevention of competition in the downstream market, because that exercise of market power would have an impact on competitiveness in the

downstream market. As indicated in the Bureau's enforcement guidelines, this is not the type of conduct intended to be caught by the abuse of dominance provisions: "in enforcing section 79, the Bureau is concerned with the creation, enhancement, or preservation of market power resulting from a practice of anti-competitive acts." The facts of this case simply do not fit the abuse of dominance framework.

Competition Bureau of Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions*, September 20, 2012, p. 6, TREB's Brief of Authorities at Tab 5.

320. As conceded by the Commissioner's expert and counsel, there is no creation, enhancement, or maintenance of market power on the facts of this case. As a result, there is no lessening or prevention of competition within the meaning of section 79(1)(c), and the Commissioner's application must fail.

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

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

(a) The Relevant "But For" World

322. TREB approved its VOW Policy and Rules on August 25, 2011, and TREB's VOW datafeed became active on November 15, 2011.

Exhibit R 39, Witness Statement of Donald Richardson, at p. 30, paras. 156-157.

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

Exhibit R 39, Witness Statement of Donald Richardson, at p. 29, para. 148, p. 36 para. 186.

324. As counsel to the Commissioner stated to the Tribunal on the argument of the intervention motions in this matter:

The narrow issue before the Tribunal is simple: Are these ongoing restrictions appropriate or do they contravene, as the Commissioner alleges, section 79 of the Competition Act? That is the issue.

Commissioner of Competition v. Toronto Real Estate Board, 2011 Comp. Trib. 22 at para. 22, TREB's Brief of Authorities at Tab 16.

325. In evaluating whether TREB's VOW policy, as enacted, substantially lessens or prevents competition, the appropriate analysis compares a but-for world in which the information withheld from the VOW datafeed is available to a world in which that information is not available.

Exhibit A 32, Reply Expert Report of Gregory S. Vistnes at para. 15.

326. In considering whether TREB's conduct with respect to VOWs substantially lessens or prevents competition, the relevant "but for" comparison is between TREB's current VOW policies, and the "full information VOWs" advocated for by the Commissioner. In other words, **the Tribunal must consider the incremental value of the withheld data being available for search and display on a VOW.**

327. The incremental benefit of the withheld data is directly tied to the usefulness of that data:

MR. VAILLANCOURT: Right. So if these excluded pieces of data were not useful, there would be no incremental benefits to including the data in the VOW feed, correct, as a general proposition?

DR. VISTNES: If nobody finds them to be of value, then including them in the VOW feed wouldn't -- I'm not sure how that would provide any value.

MR. VAILLANCOURT: Okay. And if the excluded data fields were only marginally useful, then they would only provide a marginal incremental benefit, by definition?

DR. VISTNES: That is true. You need to be careful about the magnitude of marginal, but, true.

Cross-Examination of Dr. Gregory Vistnes, September 19, 2012, pp. 1070-1071.

328. The Commissioner claims that a "full information VOW" would result in significant cost savings to the brokerage, and these cost savings may be passed on to the clients of these brokerages. In evaluating this claim, it is important to remember that the vast majority of consumers want to access the full suite of brokerage services when they buy or sell a home.

Evidence of John Pasalis, September 12, 2012 at p. 539, lines 9-25 and 540, lines 1-11; p. 551, lines 24-25, and p.552, lines 1-16.

329. In other words, brokers and salespeople need to spend time completing tasks such as producing CMAs, taking prospective buyers from property to property, staging a home for sale, drafting agreements of purchase and sale, and negotiating offers.

330. The overall universe of tasks performed by a broker or salesperson is great, and it is not clear how full information VOWs would "substantially" increase the efficiency of a VOW-based brokerage. This is particularly so when considering the issue from an

incremental point of view: **having a “full information VOW” would not result in a substantial benefit to a VOW-based broker as compared with VOWs in their present form.**

331. The Commissioner’s expert did not conduct any quantitative or statistical analysis that directly examined the incremental value of the withheld data fields, comparing a VOW under TREB’s current rules to a “full information VOW.”

Examination of Dr. Gregory Vistnes, September 19, 2012, p. 1084

332. TREB’s VOW datafeed in its current form has been popular amongst its members. Mark Enchin, who is not a member of TREB, has received expressions of interest from brokerages representing approximately 5,000 TREB members. In addition, 124 TREB members are currently signed up for the VOW datafeed, and other members are considering offering a VOW.

Exhibit A 20, Witness Statement of Mark Enchin, p. 14, para. 41.

Exhibit R 42, Updated list of VOWs and AVPs.

Examination of Timoleon Syrianos, September 28, 2012, p. 1900, lines 19-25.

Examination of Pamela Prescott, September 28, 2012, p. 1824, lines 16-19.

333. The evidence of Sam Prochazka is particularly illuminating on the issue of the incremental value of the withheld data. Mr. Prochazka testified that the real estate boards of Greater Vancouver, Fraser Valley, Chilliwack & District, and Edmonton used to offer sold data in their VOW feeds. Mr. Prochazka’s company does business in all of these regions. In about 2009, sold data was taken out of the VOW feed of those regions. As an immediate

response to this change, Mr. Prochazka's company lost less than 5 of its clients. However, once brokerages realized that Mr. Prochazka's competitors also did not have this data, there were no long term effects on his business.

Evidence of Sam Prochazka, September 18, 2012, p. 936, lines 1-25; p. 937, lines 1-12; p. 938, lines 12-18 and page 939, lines 11-19.

334. Realosophy and The Red Pin both offer commission discounts with the current VOW datafeed. **There was no evidence led that either of these brokerages would reduce their commissions further if they were able to operate a "full information VOW."**

Exhibit A 7, Witness Statement of Urmi Desai, p.4, para. 12 and Exhibit H (1.5% Home Selling Blitz) at p.76.

Exhibit A 10, Witness Statement of John Pasalis, p.6, para. 17.

Exhibit A 13, Witness Statement of Shayan Hamidi, p. 8, para. 32.

335. TREB's VOW policy does not substantially lessen or prevent competition in the markets for residential real estate brokerage services in the GTA. The data that is withheld from the VOW datafeed would not provide a significant incremental benefit to VOW-based brokerages. The Commissioner has not provided evidence to prove that the withheld data would result in lower costs for VOW-based brokerages, whether that be at the lead generation phase, the incubation phase, or the offer phase.

(b) There is virtually no evidence that VOWs result in lower costs or sustained lower commissions

336. In different parts of his report, the Commissioner's expert theorizes that VOWs have lower costs, and as a consequence can pass on those cost savings to clients by way of lower commissions as compared with a brokerage without a VOW. In one part of his initial report, he notes that VOW operators "often" offer significant financial discounts to clients, in his

reply report he states that VOW operators would “likely” offer lower commissions, and in another part of his reply report he states that VOW operators would “possibly” offer lower commissions.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 6 para. 11.

Exhibit A 32, Reply Report of Dr. Gregory Vistnes, pp. 17, 18 paras. 29, 32.

337. Of course, for the purposes of the current proceeding, the appropriate question is not “do VOWs result in lower prices than no VOWs?”, but rather “do ‘full information VOWs’ result in lower prices than VOWs operating under TREB’s current VOW policy?” The Commissioner has presented limited evidence that VOWs result in sustained lower prices as a general concept (VOWs vs. no VOWs), **and has presented no evidence that “full information VOWs” result in lower prices than VOWs operating under TREB’s current VOW policy.**

338. The notion that VOWs will lead to lower prices is a relative concept. In order to evaluate the claim, one needs to know what pricing levels are in the current marketplace.

339. In his report, the Commissioner’s expert conducts an analysis as to current commission levels in the GTA. His methodology was to take offers of commission to the cooperating brokerage, assume that the cooperating broker actually received the amount of commission that was offered, and make a further assumption that the listing brokerage received an equal amount of commission to the cooperating brokerage.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 19, para. 45

340. Based on the foregoing methodology, the Commissioner's expert concluded that "the overall commission rate for the vast majority of properties in the GTA is 5%." According to one of the exhibits in his report, the number of transactions with a commission rate of 5% is in excess of 80%.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 19, para. 45

Exhibit A 30, Report of Dr. Gregory Vistnes, Exhibit 2b, p. 102.


341. As demonstrated by the industry witnesses called by TREB, both of Dr. Vistnes' assumptions are incorrect.


342. The offer of commission to the cooperating broker is just that; an offer. This figure can be, and is, negotiated.

Exhibit R 61, Witness Statement of Tung-Chee Chan, p.2, para. 6.

Exhibit R 62, Witness Statement of Pamela Prescott, p.6, paras. 23, 25, 27-29.

Exhibit R 64, Witness Statement of Evan Sage, p.4-5, paras. 16 -17.

343. Evidence from industry participants demonstrates 






Exhibit CA 34, Percentage Component of Buy-Side Offered Commissions, Summary

Exhibit CR 72, ReMax Ultimate; Exhibit CA 75, ReMax Ultimate Realty – Commission Report (June 1- June 30, 2011); Exhibit CA 77 Ultimate Realty – Commission Report (June 1- June 30, 2012)

Exhibit CR 65, Sage Real Estate Commission Table

Exhibit CR 63, C21 Heritage Group Actual Commission

Exhibit CR 60, T-C Chan Commission Tables

344. The amount of commission paid to the cooperating brokerage from the listing brokerage is not necessarily the commission actually retained by the cooperating brokerage as revenue. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

345. Furthermore, two of the industry participant witnesses provided data for not only the amount of commission received by the cooperating brokerage, but also the amount of commission received by their brokerage when they acted as the listing brokerage. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

346. The foregoing evidence demonstrates that both of Dr. Vistnes' assumptions about commission rates were incorrect. The amount of commission offered to the cooperating brokerage is not the same as the amount of commission actually retained by the brokerage, and the amount of commission retained by the listing brokerage is not the same as the amount

of commission paid to the cooperating brokerage. The foregoing evidence also demonstrates

347. Consequently, Dr. Vistnes' conclusions about commission rates, and amount of commission paid, in the GTA should be disregarded.

348. Dr. Vistnes points to the American experience as evidence of commission rebating programs by VOW-based brokerages. However, his report only discusses 3 such brokerages: ZipRealty, eRealty, and RedFin.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 67 para. 216.

349. Although ZipRealty and eRealty used to offer commission rebates/discounts, both brokerages have ceased the practice.

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 26, footnote 69.

Examination of Dr. Gregory Vistnes, September 18, 2012, p. 1043-1044.

350. The other brokerage, RedFin, has reduced the amount of its rebate/discount twice within since 2007. In 2007, Redfin offered rebates of 66%; it then reduced that amount to 50% percent in 2009-2010, and then again by 16% in 2012.

Exhibit A 8, Witness Statement of Scott Nagel, p.14, para. 52.

Evidence of Scott Nagel, September 12, 2012, p. 445, lines 22-25; p. 446, lines 1-25 and p. 447, lines 1-10.

351. There is also no consideration in Dr. Vistnes' reports about the prevalence of commission rebating by brokerages that do not operate a VOW, which would be a relevant consideration in evaluating the claim that VOWs offer commission savings in comparison to the existing marketplace.

352. Although Dr. Vistnes speaks about how VOW-based brokerages are able to operate with lower costs (by way of an increase in broker/salesperson productivity), his report does not take into account the actual expenses required to operate either a VOW-based brokerage, or a brokerage that does not operate a VOW, including the ongoing increased technology costs that may be incurred by a brokerage that operates a VOW.

Examination of Dr. Gregory Vistnes, September 18, 2012, p. 1054-1055.

353. The actual expenses of running a brokerage would be another important consideration in comparing the ability of a VOW-based brokerage to offer lower commissions than a brokerage that does not operate a VOW.

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

Examination of Dr. Gregory Vistnes, September 18, 2012, p. 1071-1073

355. There is little evidence to support the argument that, in the long-term, a VOW-based brokerage has lower costs, or provides lower commission rates, than a brokerage that does not operate a VOW. More importantly, there is no evidence before the Tribunal that a “full information VOW” would have lower costs, or would provide lower commission rates, than would a brokerage offering a VOW under TREB’s current VOW policy. The incremental value of the Confidential Data has not been proven in this respect.

(c) **No evidence of a significant benefit to lead generation**

356. In conducting the “but for” analysis in this matter, it is critical to bear in mind the markets at issue in the proceeding: the markets for residential real estate brokerage services. Accordingly, it is not sufficient that a VOW-based brokerages might receive significantly more traffic to their websites if the VOW datafeed included the withheld data. Rather, the appropriate inquiry is to ask whether a VOW-based brokerage would be hired by significantly more clients as a real estate brokerage as a result of being able to display the withheld data on their VOWs.

357. As the Commissioner’s expert testified:

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

DR. VISTNES: I would agree with that.

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

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

And so ultimately it would not be competitively significant.

Examination of Dr. Gregory Vistnes, September 19, 2012, pp. 1077-1078

358. VOWs are permitted to exist, and do exist, under TREB's current VOW policy. These VOWs can display not only MLS® data, but also third party data that the brokerage has aggregated from various sources.

Exhibit R 39, Witness Statement of Donald Richardson, VOW Rules and Policies, pp. 594-614.

359. A website with a VOW does more than just display MLS® data. It brings together a wealth of third party information and analysis. A VOW-operator's website provides value beyond just the display of MLS® data, and **it is this additional value that drives traffic to their website.**

Exhibit A 7 Witness Statement of Urmi Desai at paras. 2, 5, 6, 7, 10, 11, 14, 16, 17 and 19-24, and Exhibit G (Defensive Home Buying publication) at page 45.

Desai Evidence. Hearing Transcript, September 11, 2012 at page 374, lines 3-8,; page 375, lines 23-25; page 376, lines 1-25; page 378, lines 1-16; page 382, lines 5-25; page 383, lines 1-25; page 384, lines 1-25; page 388, lines 2-13 and 21-25; page 389, lines 1-25; and page 390, lines 1-2. -

Exhibit A 10, Witness Statement of John Pasalais at paras. 2, 14, 15, 16, 19 and 20.

Pasalis Evidence, Hearing Transcript, September 12 at page 523, lines 16-25 and page 534, lines 1-2; page 531, lines 1-25.

Exhibit A 13, Witness Statement of Shayan Hamidi at paras. 3, 6, and 16,

Hamidi Evidence, Hearing Transcript, September 13, 2012 at page 627, lines 3-14 and lines 17-25; page 628, lines 1-25; and page 631, lines 8-12.

360. Realosophy and TheRedPin both enjoy a significant media presence operating their VOWs under TREB's existing VOW policy.

Exhibit A-013, Witness Statement of Shayan Hamidi at para. 3.

Exhibit A-007, Witness Statement of Urmi Desai at paras. 7 and 17.

Exhibit A-010, Witness Statement of John Pasalais at para. 16

361. With access to the current VOW datafeed, The Red Pin was nominated as one of the most innovative brokerages in the world by Inman, the “Oscars of the Industry.” Many nominees for this award were brokerages from the United States.

Evidence of Shayan Hamidi, September 13, 2012, p. 646, lines 18-25; p. 647, lines 1-25; and p. 648, lines 1-18.

Exhibit R 14, RedPin News Release.

362. The Commissioner has failed to meet the burden to prove that the Confidential Data’s inclusion on a VOW would assist a brokerage in generating leads.

363. There is extremely limited evidence before the Tribunal of a VOW’s ability to convert website users into clients. There is some evidence regarding the ability of RedFin and ViewPoint to convert website visitors into registered users, however, certainly not all registered users of a VOW ultimately retain a brokerage. There is no evidence of RedFin’s ability to generate website users into clients, and the evidence from Mr. McMullin suggests that ViewPoint only converts 0.03% of its website visitors into clients, and only 0.4% of its registered users into clients.

Exhibit CA 38 Confidential Letter from Scott Nagel [Redfin] to Madam Justice Simpson providing responses to questions from the Tribunal of September 12, 2012.

Exhibit CA 1, McMullin Witness Statement at para. 27, and Exhibit A (Google Analytics report for Jan1 – May 31, 2012) at page 33.

McMullin Evidence, Hearing Transcript, September 11, 2012, page 335, lines 13-25; page 336, lines 1-25; page 337, lines 1-7.

See para 125 herein re: the mathematics for ViewPoint.

364. On this point, the Commissioner’s expert gave the following evidence:

MR. VAILLANCOURT: You would agree with me that not everyone that visits a VOW-based website becomes a registered user?

DR. VISTNES: So visits the website, but doesn't click the agreement part? They don't follow through?

MR. VAILLANCOURT: Correct.

DR. VISTNES: That's correct.

MR. VAILLANCOURT: You would agree with me that not everyone that registers for a VOW ultimately hires that VOW's brokerage as their Realtor®?

DR. VISTNES: That's true.

[...]

MR. VAILLANCOURT: Your report doesn't contain any analysis on the ability of a VOW-based brokerage to convert website users into clients, does it?

DR. VISTNES: No, it does not.

Examination of Dr. Gregory Vistnes, September 19, 2012, p. 1080-1081.

365. There is also no evidence to suggest that VOWs that display sold information would increase the number of visitors to a brokerage's website.

366. Mr. McMullin gave evidence that from January 1, 2012 – May 31, 2012, Viewoint.ca (which displays sold information) had a total of 1,306,713 visits. During the same time period, Realtor.ca (which does not display sold information) had 1,659,482 visitors from Nova Scotia (i.e. visitors whose IP address identified them as being located in Nova Scotia).

Exhibit CA 1, Witness Statement of William McMullin, Exhibit A (Google Analytics, Jan 2012 – May 2012), p.33.

Exhibit IC-005, Nova Scotia visits January – May 2012.

Evidence of William McMullin, September 11, 2012, p. 325, lines 8-25; p. 326, lines 1-25; p. 327, lines 1-2; and 328, lines 1-9

367. It was also the evidence of William McMullin that he is aware that some visitors to his website are using his information without the intention of becoming a client of ViewPoint; Mr. McMullin gave evidence that some brokerages in Nova Scotia recommend to their clients that they use ViewPoint Realty's website as a resource during the home search process.

Evidence of William McMullin, September 11, 2012, p. 194, lines 16-25.

368. It takes seconds to sign up for a VOW, and signing up for a VOW creates no obligation on the consumer to ultimately hire the VOW operator as their broker/salesperson. Just as people use Realtor.ca to browse information about homes, it stands to reason that there will be many instances where members of the public will use a VOW as a tool in their home buying or selling experience, yet not hire the brokerage behind the VOW as their broker or agent. Website traffic statistics, and even registered user statistics, are not particularly helpful in evaluating the ability of a VOW to convert website users into clients.

369. The Commissioner has presented no evidence of the incremental effect of the Confidential Data in increasing a VOW's ability to generate clients, let alone website traffic.

370. It was the evidence of Scott Nagel that in the United States, certain States prohibit the display of a home's sold price in any format. One of these States is Texas. Mr. Nagel's brokerage, RedFin, operates in Texas, as well as in other States where the disclosure of sold prices is permitted. In Texas, RedFin's VOW does not display sold home prices, while in other jurisdictions, sold home prices are displayed. The exclusion of sold prices from

RedFin's Texas VOW apparently has no impact on the rate of commission charged by RedFin in Texas versus other markets.

Evidence of Scott Nagel, September 12, 2012, p. 460, lines 21-24, and page 461, line 1-10.

371. The Commissioner's expert acknowledges that because of the prevalence of VOWs in the United States, the American market provides an "actual experiment" to test theoretical arguments that are raised with respect to the potential impact of VOWs in the GTA.

Examination in Chief of Dr. Vistnes, September 18, 2012, p. 1008.

372. In spite of the possibility of looking at the American experience, the Commissioner's expert failed to consider whether RedFin, or any other VOW brokerage, is any less successful at generating leads in Texas than in States where the disclosure of sold prices is permitted:

MR. VAILLANCOURT: Well, it was Mr. Nagel's evidence that Texas does not permit the disclosure of sold prices, and it was also his evidence that Redfin operates in Texas.

Your report does not compare Redfin's ability to generate leads in Texas compared with other jurisdictions in which it operates, true?

DR. VISTNES: That's correct. I didn't have that information available.

MR. VAILLANCOURT: And, in fact, your report doesn't take -- doesn't undertake such a comparison with any American VOW operating in a state like Texas versus other states where sold price information is available?

DR. VISTNES: The information wasn't available, so I didn't conduct the comparison.

Cross-Examination of Dr. Vistnes, September 19, 2012, pp. 1081-1082.

373. The Commissioner has not proven that the inclusion of the Confidential Data in the VOW datafeed would have any incremental impact on a VOWs ability to generate more clients, let alone a significant incremental impact.

(d) No evidence of significant benefit in the search phase or the offer phase

374. VOWs containing the Confidential Data would not provide a significant benefit over VOWs under TREB's current VOW policy at either the incubation/search stage, or the valuation/offer stage.

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

Exhibit R 82, Summary of Expert Report – Jeffrey Church p. 35.

376. Sold home data is not self-interpreting. Valuing a home is a subjective exercise. In order to complete a proper comparative market analysis, a real estate professional will visit the subject home, as well as the homes that are being compared to the subject home. None of the Commissioner's witnesses suggested that consumers would be able to determine the market value of a home if consumers were provided with sold home information.

Exhibit R 62, Witness Statement of Pamela Prescott, p. 5, paras. 19, 21-22.

Prescott Evidence, Hearing Transcript, September 28, 2012 at p. 1791, lines 24-25; p. 1792, lines 1-25; p. 1793, lines 1-7.

Pasalis Evidence, Hearing Transcript, September 12, 2012 at p. 546, lines 9-25, and p. 547, lines 1-25.

Exhibit A 10, Witness Statement of John Pasalis, p. 11-12, paras. 36 and 39.

377. A Realtor®'s analysis is needed in order to determine an appropriate value for a property, because assessing the value of a property requires the application of the Realtor®'s expertise and experience in considering the physical characteristics of a home in conjunction with a variety of other factors that also are relevant to its value. These factors include the location of the home (especially in relation to parks or busy intersections), whether there has been recent development in the area, whether there is future planned development, key neighbourhood features or drawbacks, and the trends for prices in the neighbourhood. Then, all of this information needs to be interpreted in light of the particular needs, priorities, and circumstances of the client. There is both an art and a science to giving real estate advice.

Exhibit R 62, Witness Statement of Pamela Prescott, p.5, paras. 19-22.

Evidence of Pamela Prescott, September 28, 2012 at page 1790, lines 3-12, p. 1791 lines 1-7; p. 1814, lines 3-9; and p. 1815, lines 2-25

Exhibit A 10, Witness Statement of John Pasalis, p.11-12,paras. 36, 39.

Evidence of John Pasalis, September 12, 2012 at p. 544, lines 16-25 and p. 545, lines 14-22.

378. The price of apparently comparable homes can vary widely. In his witness statement, Scott Nagel provides an example of a RedFin's computerized "nearby similar sales" for a particular property listed for sale in Seattle, Washington. The results that come back as "similar" in this example range from \$500,000 to \$1,600,000. This wide range provides little, if any, assistance to a home buyer in determining the market value of the home they are considering.

Exhibit A 8, Witness Statement of Scott Nagel, at Exhibit B (Sample Listing and CMA) at p. 23.

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

Exhibit R 82, Summary of Expert Report – Jeffrey Church, p. 22

Examination of Professor Jeffrey Church, October 2, 2012, pp. 1952-1953.

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

381. In addition to the list price, individuals in the incubation/search stage might receive sufficient “general ballpark” ideas about home prices in an area with summary statistics such as community averages, or the district analysis in TREB’s MarketWatch.

Exhibit R 82, Summary of Expert Report – Jeffrey Church p. 35

382. Finally with respect to the incubation/search phase, as admitted by one of the Commissioner’s witnesses, there is nothing prohibiting a VOW operator from installing a button on their VOW allowing a consumer to request a comparative market analysis from the brokerage.

Evidence of John Pasalis, September 12, 2012, p.593, lines 10-25; p. 594, lines 1-14.

383. Where appropriate, any broker or salesperson (whether or not they operate a VOW), can provide MLS® information to customers and clients by e-mail, fax, or by hand. This ability is the same regardless of the business model employed by the member (i.e., VOW operator or non-VOW operator).

Exhibit R 39, Witness Statement of Donald Richardson, p. 33, para. 164.

384. Although the Confidential Data is valuable to clients during the valuation/offer stage, there is no significant incremental value to that data being available on a VOW.

385. Even well-informed consumers prefer to hire a broker or salesperson to complete a real estate transaction. As John Pasalis stated:

Real estate transactions are complex and high risk and while there are a few consumers who are comfortable doing transactions on their own, most prefer to engage professional help, no matter how well-informed they are.

Exhibit A 10, Witness Statement of John Pasalis, p. 3 para. 7.

386. Sold price information is no easier for clients to interpret at the valuation/offer stage than it is at the incubation/search stage. This information must be interpreted by a real estate professional in order to determine the market value for a property that a buyer wishes to buy, or a seller wishes to sell.

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

388. It takes time to properly perform a comparative market analysis. One of the Commissioner's witnesses testified that sometimes it can take days to properly complete this exercise.

Evidence of Scott Nagel Evidence, September 12, 2012, p. 441, lines 7-13.

Evidence of Tarik Gidamy, September 13, 2012, p. 687, lines 8-25, and p.688, line 1.

389. Considering a broker or salesperson is going to have to take the time to complete their own comparative market analysis in any event before they either list a property for sale for their selling clients, or recommend an offer price to their buying clients, it is not entirely clear how the inclusion of sold (or pending sold) data on a VOW would save any time/cost for the brokerage.

390. A comparative market analysis is only one of many tasks performed by a real estate professional as part of the full suite of brokerage services provided to clients. As noted by Mr. McMullin: “there is a very long list of things that only humans can do.”

Evidence of William McMullin, September 11, 2012, p. 239, lines 8-11.

391. VOW-based brokerages are unlikely to experience any savings in costs with the inclusion of the Confidential Data in the VOW feed, taking into account the full suite of brokerage services that are performed with each transaction.

392. The Commissioner has not proven that the inclusion of the Confidential Data would result in any incremental cost savings for a brokerage operating a VOW, let alone a significant incremental impact.

(e) Pending solds

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

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

395. As noted by Scott Nagel, RedFin's website does not contain pending sold data; sold data is available for search and display only at the time a transaction closes:

MR. NAGEL: [...] I told, I believe it's Ms. Forbes, that the sale price was available at the time of sale, and that, to the best of my recollection, is where it does come up.

MR. LITTLE: And "sale" in the context means?

MR. NAGEL: The close.

Evidence of Scott Nagel, September 12, 2012, p. 501, lines 4-10.

396. There has been no evidence presented by the Commissioner that the lack of pending sold data impedes RedFin's ability to compete in the United States.

397. An additional justification for withholding pending sold data would be the prejudice potentially caused to the seller if the pending sale falls through, as it signals a reservation price to future buyers.

(f) "WEST" listings

398. None of the Commissioner's fact witnesses provide a compelling explanation as to how "WEST" listings would provide any incremental value whatsoever to a VOW. This stands in sharp contrast to the arguments put forward by the Commissioner's fact witnesses regarding sold and pending sold data.

399. The only fact witness to provide any type of explanation on the potential value of WEST listings is Mr. McMullin, whose witness statement speculates that consumers might be curious as to why a house that was available yesterday is no longer available today. In turn,

and in the absence of the information on the VOW, the consumer might call the brokerage to ask why the property is no longer available.

Exhibit A 2, Witness Statement of William McMullin, p. 30, para 105.

400. The foregoing justification is not particularly compelling, and in TREB's submission does not rise to the level of a substantial lessening or prevention of competition.

401. Intuitively, WEST listings seem to offer no value to consumers; by definition, a "WEST" listing does not contain transactional data. These are listings that did not result in a sale.

402. WEST listings seem to have just been thrown into the "shopping cart" by the Commissioner as she went through the data fields enumerated in Rule 823 of TREB's VOW Policy, without any real regard for why these listings were being included.

403. The exclusion of WEST listings from the VOW datafeed has no bearing on the ability of brokerages to compete in the markets for residential real estate brokerage services in the GTA.

(g) Concluding observations on the substantial lessening and prevention of competition

404. The Commissioner's expert is an economist with no direct experience in the real estate brokerage industry (whether in Canada or the United States). The conclusions in his report must be considered in this light.

405. The Commissioner's position as framed in her expert's report, particularly on the issue of substantial lessening and prevention of competition, is based heavily on theory with no relevant empirical evidence to back up those theories.

406. As noted by Dr. Vistnes, the American experience on VOWs presents an "actual experiment" to test theoretical arguments that are raised with respect to the potential impact of VOWs in the GTA.

Evidence of Dr. Vistnes, September 18, 2012, p. 1008.

407. In spite of the foregoing observation, and as noted above, there were numerous areas where Dr. Vistnes could have empirically tested his theories regarding the substantial lessening or prevention of competition, yet these tests were not done.

408. One of the few areas where the Commissioner's expert does consider empirical evidence is with respect to real estate brokerage commission paid in the GTA. As noted above, this analysis is based on two incorrect assumptions, and his results are completely inaccurate.

409. The weight to be given to Dr. Vistnes' theories about the real estate brokerage industry should also be considered in light of the following facts:

- He has never visited the VOWs of Realosophy or The Red Pin

Evidence of Dr. Gregory Vistnes, September 19, 2012, p. 1135

- He has only looked at 2 or 3 American VOWs since NAR's settlement with the Department of Justice

Evidence of Dr. Gregory Vistnes, September 19, 2012, p. 1131

- He is not familiar with the notion of disclosure and non-disclosure States in the United States

Evidence of Dr. Gregory Vistnes, September 19, 2012, p. 1129-1130

410. The Commissioner's argument on the substantial lessening and prevention of competition rests largely on the theoretical ruminations of an economist with, at best, a loose grasp of the American real estate brokerage experience. His theories should be treated with caution.

THEORY OF HARM #2: BUYER STEERING

411. Buyer steering is another academic theory of Dr. Vistnes; a theory that is not raised in the pleadings.

412. There is no evidence that buyer steering is a problem in the GTA. In any event, buyer steering is a regulatory issue, not a competition law issue.

A. Buyer steering is a regulatory issue, not a competition law issue

413. Buyer steering is a regulatory concern. This is a topic that is appropriately in the sphere of the Real Estate Council for Ontario ("RECO"), the provincial regulator.

414. Buyer steering is prohibited by the *Code of Ethics*, which is enforced by RECO:

Properties that meet buyer's criteria

19. If a brokerage has entered into a representation agreement with a buyer, a broker or salesperson who acts on behalf of the buyer pursuant to the agreement shall inform the buyer of properties that meet the buyer's criteria without having any

regard to the amount of commission or other remuneration, if any, to which the brokerage might be entitled.

Code of Ethics, O. Reg. 580/05, TREB's Brief of Authorities at Tab 2.

415. The *Code of Ethics* does not impose any obligation on a brokerage to notify a buyer of the cooperating broker's offer of commission for properties that meet that buyer's criteria.

416. Even if buyer steering were a problem in the GTA, which in the submission of TREB it is not, withholding the cooperating broker's offer of commission from the VOW datafeed is not an anticompetitive act.

417. For an act to be anti-competitive, it must have been done for the purpose of achieving an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.

Canada (Commissioner of Competition) v. Canada Pipe Co., [2006] F.C.J. No. 1027 (C.A.) at paras. 64-66, TREB's Brief of Authorities at Tab 3.

418. Buyer steering, if it occurs, is a harm caused to consumers, not competitors in the markets for the provision of real estate brokerage services in the GTA. By definition, buyer steering is not reachable under the abuse of dominance framework.

419. The "buyer steering" theory of the case is subject to the same fundamental criticisms raised in the "dynamic competition" theory of the case: the facts of this case do not fit the abuse of dominance framework.

B. There is no evidence that buyer steering is a problem in the GTA

420. In the alternative, the Commissioner has presented no evidence to prove that buyer steering is a problem in the GTA.

421. As a general proposition (i.e., not just pertaining to the GTA), Dr. Vistnes recognises that buyer steering is a theoretical concern, without strong statistical support:

On the buyer side, the statistical evidence on the consequences of misaligned incentives between buyer and agent is less direct, though the theoretical arguments are clear, with suspicions that traditional agents steer customers away from homes listed on the MLS® at flat fees or by discount brokers. [emphasis added]

Exhibit A 30, Report of Dr. Gregory Vistnes, p. 18, footnote 39.

422. The prior academic work on buyer steering is weak and inconsistent

Exhibit R 82, Summary of Expert Report – Jeffrey Church, p. 50.

423. In the GTA, there are several safeguards to protect against buyer steering.

424. First, as noted above, the practice is prohibited by the RECO *Code of Ethics*.

425. Second, the cooperating brokerage's rate of commission is set in a Buyer Representation Agreement. If there is a shortfall from the amount of commission received from the listing brokerage to the cooperating brokerage, the cooperating brokerage is entitled to be paid that shortfall from the buyer (their client). There is no incentive to steer a buyer away from a low commission house when a floor commission rate has been guaranteed.

Exhibit R 62, Witness Statement of Pamela Prescott, p. 7, paras. 27 and 28.

Exhibit R-064, Witness Statement of Evan Sage, p.5, para. 20.

426. Third, buyers are increasingly using the internet to educate themselves about the housing market. Homes listed for sale in the GTA are available for review on Realtor.ca, among other sources (including VOWs). The buyer's knowledge of houses available for sale reduce any theoretical incentive of the cooperating brokerage to steer a buyer. The whole

concept of steering is premised on the notion that the buyer does not know what houses are available for purchase.

427. The empirical evidence does not support the existence of buyer steering in the GTA. Professor Church's analysis showed that houses with a higher commission rate had more days on market, and were less likely to sell; results that are not consistent with a buyer-steering hypothesis.

Exhibit R 82, Summary of Expert Report – Jeffrey Church, p. 52.

428. Dr. Vistnes' statistical analysis on buyer steering focuses only on instances of dual agency. However, the sample size of instances of dual agency examined by Dr. Vistnes was very small, and Dr. Vistnes does not take into consideration explanations for dual agency unrelated to buyer steering. In other words, Dr. Vistnes assumed that dual agency transactions are harmful, with no basis for doing so.

Exhibit R 82, Summary of Expert Report – Jeffrey Church, p. 52.

Exhibit R 79, Expert Report of Jeffrey Church, p. 116, para. 303

429. The Commissioner has not proven that buyer steering is a problem in the GTA.

TREB's VOW POLICY IS A MERE EXERCISE OF ITS INTELLECTUAL PROPERTY RIGHTS

430. TREB's conduct in this proceeding is not anti-competitive, because its conduct is the mere exercise of its copyright in the TREB MLS®.

431. The mere exercise of a right under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, or *Trade-marks Act* is not an anti-competitive

act for the purposes of section 79 of the *Competition Act*. If an act is a mere exercise of copyright, this serves as a complete defence to an application alleging an abuse of dominance – **even if the act is exclusionary in effect.**

Competition Act, R.S.C. 1985, c. C-34, s. 79(5)

Canada (Competition Act, Director of Investigations and Research) v. Tele-Direct (Publications) Inc., [1997] C.C.T.D. No. 8 at para. 65, TREB’s Brief of Authorities at Tab 17.

432. In any event, the Tribunal does not have jurisdiction to order TREB to grant a compulsory licence of its intellectual property in this proceeding.

A. TREB owns the copyright in the TREB MLS® database

433. TREB owns the copyright in the TREB MLS® database.

434. Copyright in relation to a work means the sole right to produce or reproduce the work in any form. The copyright owner has the right to assign or licence the work.

Copyright Act, R.S.C. 1985, c C-42, s. 3(1), 13(4), TREB’s Brief of Authorities at Tab 18.

435. Copyright subsists in an original literary work, which includes tables, computer programs, and compilations of literary works. Compilations are defined in the *Copyright Act* to mean a) a work resulting from the selection or arrangement of literary, dramatic, musical, or artistic works or parts thereof, or b) a work resulting from the selection or arrangement of data.

Copyright Act, R.S.C. 1985, c C-42, s. 2 “compilation”, s. 2 “literary work”, s. 5, TREB’s Brief of Authorities at Tab 18

436. For a work to be sufficiently “original” to qualify for copyright protection, the work must have been the subject of skill and judgment.

CCH Canadian Ltd v. Law Society of Upper Canada, [2004] S.C.J. No. 12 at para. 16, TREB’s Brief of Authorities at Tab 19.

437. The Supreme Court has recently described copyright in a compilation as follows:

Copyright protects originality of form or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. "It is not the several components that are the subject of the copyright, but the overall arrangement of them which the plaintiff through his industry has produced"

CCH Canadian Ltd v. Law Society of Upper Canada, [2004] S.C.J. No. 12 at para. 33, TREB’s Brief of Authorities at Tab 19.

438. In *Tele-Direct (Publications) Inc. v. American Business Information, Inc. (C.A.)*, Justice Décaré of the Federal Court of Appeal discussed the “originality” requirement with respect to compilations of data:

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.

Tele-Direct (Publications) Inc. v. American Business Information, Inc. (C.A.), [1998] 2 F.C. 22 (C.A.) at para. 28, TREB’s Brief of Authorities at Tab 20.

439. To determine whether copyright subsists in a compilation, the overall arrangement must be considered, not the individual fragments that make up the compilation.

Tele-Direct (Publications) Inc. v. American Business Information, Inc. (C.A.), [1998] 2 F.C. 22 (C.A.) at para. 5, TREB’s Brief of Authorities at Tab 20.

440. Applying the above principles, the Federal Court found that there was copyright in the telephone listings in Italian-Canadian phone books - phone books in British Columbia and Alberta that contained the names of individuals of Italian background.

ITAL-Press Ltd v. Sicoli, [1999] F.C.J. No. 837 (T.D.) at para. 110, TREB's Brief of Authorities at Tab 21.

441. A recent American case held that an MLS® operator owned the copyright in its MLS® database, because the compilation met the test for originality. In particular, by way of efforts made by the MLS® operator in the creation and ongoing maintenance of that database.

Metropolitan Regional Information Systems Inc. v. American Home Realty Network Inc., 2012 U.S. Dist. LEXIS 121352 at 22-23 (of Lexis), TREB's Brief of Authorities at Tab 22.

442. It is outrageous for the Commissioner to, on the one hand, take the position that TREB's MLS Rules and Policy are sufficiently robust and comprehensive to grant them control over the market for residential real estate services in the GTA (a market in which they do not participate), while on the other hand taking the position that the MLS database does not demonstrate sufficient skill and judgment to grant TREB copyright protection of that database. The Commissioner's submissions on the issue of copyright are completely inconsistent with the Commissioner's submissions on the issue of market power.

443. The record is replete with evidence as to TREB's skill, judgment, and labour with respect to the TREB MLS® database. Some of the more important elements of this evidence are:

- Use of the TREB MLS® is governed by a comprehensive set of rules that are enacted and administered by TREB. Among other things, these rules ensure the accuracy and

quality of the information contained in the database, and the orderly operation of the database.

Exhibit R 39, Witness Statement of Donald Richardson, p. 144-171 (MLS® Rules)

Exhibit R 39, Witness Statement of Donald Richardson, p. 7, para. 34.

- TREB provides its members with a Data Information Form to be used as part of the data entry process in order to ensure certain characteristics of properties are entered into the database for any listing

Exhibit R 39, Witness Statement of Donald Richardson, p. 183 (Data Information Form)

Exhibit R 39, Witness Statement of Donald Richardson, p. 8-9, paras. 37-39.

- TREB ensures the accuracy of the listings in the TREB MLS® database by way of proprietary software, and also encourages its members to report any inaccuracies found in listings

Exhibit R 39, Witness Statement of Donald Richardson, p. 9-10, para. 43

444. TREB's Authorized User Agreement provides that the MLS® database is proprietary to TREB, and also provides that TREB's members grant TREB a content licence with respect to the listings they upload into the TREB MLS® database.

Exhibit R 39, Witness Statement of Donald Richardson, p 175-176 (clause 5 of AUA).

445. TREB's MLS® database satisfies the test for a copyright in a compilation. TREB owns the copyright in the TREB MLS® database.

B. The provisions of TREB's VOW policy are a mere exercise of its intellectual property rights

446. The Tribunal considered the scope of the section 79(5) defence in the *Tele-Direct* decision, which involved trade-marks. In that case, the Tribunal held that the selective refusal to license a trade-mark was the mere exercise of the respondent's statutory right, and was not an anti-competitive act.

Canada (Competition Act, Director of Investigations and Research) v. Tele-Direct (Publications) Inc., [1997] C.C.T.D. No. 8. at paras. 60, 65, 70, TREB's Brief of Authorities at Tab 17.

447. The Tribunal held that:

The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence. [emphasis added]

Canada (Competition Act, Director of Investigations and Research) v. Tele-Direct (Publications) Inc., [1997] C.C.T.D. No. 8. at para. 66, TREB's Brief of Authorities at Tab 17.

448. The foregoing passage was adopted by the Tribunal with respect to copyright in its decision in *Warner Music*, which was a "refusal to deal" case.

Canada (Competition Act, Director of Investigations and Research) v. Warner Music Canada Ltd., [1997] C.C.T.D. No. 53 at para. 32, TREB's Brief of Authorities at Tab 23.

449. The Tribunal in *Tele-Direct* held that **the motivation for the decision to refuse to licence its intellectual property was irrelevant for the application of section 79(5):**

While the evidence suggests that Tele-Direct is motivated, at least in part, by competition in its decision to refuse to license its trade-marks, the fact is that the Trade-marks Act allows trade-mark owners to decide to whom they will license their trade-marks. The respondents' motivation for their decision to refuse to license a competitor becomes irrelevant as the Trade-marks Act does not prescribe any limit to the exercise of that right. [emphasis added]

Canada (Competition Act, Director of Investigations and Research) v. Tele-Direct (Publications) Inc., [1997] C.C.T.D. No. 8. at para. 68, TREB's Brief of Authorities at Tab 17.

450. TREB has decided not to licence the Confidential Data as part of the VOW feed. By selectively refusing to grant a licence with respect to this data, TREB is squarely within the reasoning of the Tribunal in *Tele-Direct*. TREB's intention or motivation with respect to this licensing decision is irrelevant.

451. Furthermore, the Tribunal does not have jurisdiction to order TREB to grant a compulsory licence with respect to its intellectual property, because section 79 of the *Competition Act* does not expressly grant the Tribunal jurisdiction to order the compulsory licensing of intellectual property.

452. Section 79 of the *Competition Act* can be contrasted with section 32 of the *Competition Act* which is exclusively geared at intellectual property-related remedies that the Attorney General of Canada can seek from the Federal Court. This provision affords a respondent with a defence based on treaty provisions, and requires the Attorney General to meet a competition impact test in order to obtain a remedy.

Competition Act, R.S.C., 1985, c. C-34, s. 32, TREB's Brief of Authorities at Tab 24.

453. In the absence of clear language, it would be wrong to conclude that the Tribunal has been given the power to ignore intellectual property rights and order the respondent to grant what are, in effect, compulsory licences, when the Federal Court can make such an order only after the applicant meets a competition impact test and only after defences based on international treaty rights are considered.

454. The foregoing argument was considered by the Tribunal in the *Warner Music* case, and was accepted with respect to the proper interpretation of the "refusal to deal" provisions of the *Competition Act*.

Canada (Competition Act, Director of Investigations and Research) v. Warner Music Canada Ltd., [1997] C.C.T.D. No. 53 at paras. 26-28, 31, TREB's Brief of Authorities at Tab 23.

455. The Tribunal does not have the jurisdiction to grant the remedy sought by the Commissioner.

IF A REMEDY IS GRANTED - THE NEED FOR INFORMED CONSENT

456. If, in spite of the foregoing arguments, the Tribunal finds that TREB's VOW policy is an abuse of dominant position for which a remedy can be granted, the Tribunal should exercise care in crafting a remedy that will respect the privacy interests of people that have used, and will use, TREB's MLS® to buy or sell property. In particular, the remedy should ensure that the personal information of these individuals is not widely disclosed on the internet without their informed consent.

457. Informed consent is important because a) TREB and its members are subject to the application of *PIPEDA*, which requires an organization to obtain informed consent before personal information is disclosed; b) TREB's members must obtain informed consent in order to include transactional information in advertising in accordance with RECO rules; and c) the interests of home buyers and home sellers (the consumers in the relevant markets) ought to receive serious consideration with respect to any remedy that is granted by the Tribunal.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5, s. 5, Schedule 1, Principle 4.3, TREB's Brief of Authorities at Tab 8.

Code of Ethics, O Reg 580/05, s. 36(9). TREB's Brief of Authorities at Tab 2.

458. **In considering the issue of informed consent, the Tribunal should carefully consider the evidence of Pamela Prescott that only 5-7% of Century 21 Heritage Group Ltd clients allow sold transaction information to be posted to the Century 21 website.** It was Ms. Prescott's evidence that while clients are comfortable with their transactional information being included on the TREB MLS®, clients are generally not comfortable with that information being made widely available over the internet.

Evidence of Pamela Prescott, September 28, 2012, 2012 at p.. 1787, lines 3-25; p. 1788, lines 1-11; p. 1822, lines 11-25; and p. 1823, line 1.

459. In other words, when the issue is expressly raised, and requires express acknowledgement, the vast, vast majority of people choose to withhold their transactional information from a public website.

460. The form of consents currently obtained by way of the listing agreement and buyer representation agreement are not sufficient to permit the disclosure of the Confidential Data on a VOW.

461. The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5, Schedule 1, Principle 4.3, TREB's Brief of Authorities at Tab 8.

462. Knowledge and consent in the foregoing context means informed consent:

Organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used. To make the consent meaningful, the purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5, Schedule 1, Principle 4.3.2, TREB's Brief of Authorities at Tab 8.

463. In determining the scope of a consent, one relevant consideration is the reasonable expectations of the individual that gave the consent.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5, Schedule 1, Principle 4.3.5, TREB's Brief of Authorities at Tab 8.

464. An organization might not obtain meaningful consent if it uses an overly broad consent provision.

PIPEDA Case Summary #385, [2007] C.P.C.S.F. No. 21 "Insurance broker asked to amend privacy language" at preamble and paras. 2, 11, TREB's Brief of Authorities at Tab 25.

PIPEDA Case Summary #2002-83, "Alleged disclosure of personal information without consent for secondary marketing purposes by a bank" http://www.priv.gc.ca/cf-dc/2002/cf-dc_021016_1_e.asp. at p 2, 3, TREB's Brief of Authorities at Tab 26.

465. The operative portion of the consent in the 2012 listing agreement reads as follows:

The Seller further acknowledges that the real estate board(s) may: [...] during the term of the listing and thereafter, compile, retain and publish any statistics including historical MLS® data [...] 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. [emphasis added]

Exhibit R 39, Witness Statement of Donald Richardson, at Exhibit Y (Listing Agreement), p. 436.

466. The operative portion of the consent in the 2012 buyer representation agreement reads as follows:

The Buyer agrees that the sale and related information regarding any property purchased by the Buyer through the Brokerage may be retained disclosed by the Brokerage and/or real estate board(s) (if the property is an 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. [emphasis added]

Exhibit R 39, Witness Statement of Donald Richardson, p. 440 (Buyer Representation Agreement)

467. Both of the foregoing agreements enumerate several specific uses to which their personal information may be used, including the creation of comparative market analyses, and also contain a broad general “catch-all” consent clause for the use of the data.

468. Signatories of the listing agreement or buyer representation agreement have not given informed consent for their personal information to be widely distributed over the internet for anyone to see after their transaction closes, because the disclosure of this information over the internet is so far beyond the examples enumerated within the consent clause. Posting of this transactional information on the internet is not within the reasonable expectation of buyers and sellers. There is no meaningful consent to distribute transactional information over the internet.

469. Clients of Century 21 Heritage Realty would have signed agreements with similar language, yet as noted above, only 5-7% agreed to allow their transactional data to be displayed on the internet.

470. In addition, the listing agreement and the buyer representation agreement have been modified over time. There was little evidence as to the content of prior listing/buyer representation agreements, or whether such former agreements contained appropriate consent clauses.

Evidence of Donald Richardson, September 25, 2012, p. 1447, lines 2-17.

471. Furthermore, not all purchasers will have signed a buyer representation agreement, for example, purchasers who did not retain a broker or salesperson and who acted independently. In addition, although the *Code of Ethics* requires that a buyer's brokerage present to the buyer a Buyer Representation Agreement, **there is no requirement that the buyer actually sign the agreement:**

Buyer representation agreements

14. If a brokerage enters into a buyer representation agreement with a buyer and the agreement is not in writing, the brokerage shall, before the buyer makes an offer, reduce the agreement to writing, have it signed on behalf of the brokerage and submit it to the buyer for signature.

Code of Ethics, O Reg 580/05, s. 14, TREB's Brief of Authorities at Tab 2.

472. For the foregoing reasons, the current form of consents granted by buyers and sellers is not sufficient to permit a retroactive "opening of the floodgates" regarding the Confidential Data.

473. With respect to a going forward remedy, TREB's submission is that the preferable approach would be to allow buyers and sellers to expressly opt out of VOWs by way of a "Participate in VOWs Yes/No" option. This would be in line with the suggestion of Evan Sage during his evidence.

Evidence of Evan Sage, September 28, 2012, p. 1841, lines 14-25 and p.1842, lines 1-21.

474. The foregoing approach is preferable to a mere "beefing up" of the current consent provisions in the listing agreement and buyer representation agreement for several reasons.

475. First, *PIPEDA* prohibits an organization from, as a condition of supplying a product or service, requiring an individual to consent to the collection, use, or disclosure of information beyond that required to fulfill the explicitly specified, and legitimate purpose(s) for which the information is being collected.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5, Schedule 1, Principle 4.3.3, TREB's Brief of Authorities at Tab 8.

476. The "use and distribution" clause in the listing agreement cannot be altered from the standard form, pursuant to TREB's MLS® Rules, so as to ensure that sellers are actually consenting to have their information included in the TREB MLS®.

Exhibit R 39, Witness Statement of Donald Richardson, Exhibit D (MLS® Rules) at p. 151 (MLS® Rule R 340).

477. The use of the TREB MLS® system to buy or sell a home should not be tied with mandatory VOW participation.

478. Second, as a stand-alone consent, consumers will be able to grant a more informed consent than if the provision were buried in the fine print of the listing or buyer representation agreements. As demonstrated by the evidence of Pamela Prescott, there is a general discomfort with the wide dissemination of transactional information, and consumers should have the express opportunity to consider whether they wish their transactional information to be shared on VOWs.

479. Third, not all purchasers will have signed a buyer representation agreement, for example, purchasers who did not retain a broker or salesperson, so consent would not be achieved for these transactions.

480. For the foregoing reasons, TREB submits that the appropriate remedy, if any, would be for buyers and sellers to have an express, and separate, opt out option with respect to VOW participation.

ORDER REQUESTED

481. The Toronto Real Estate Board requests that the Commissioner's Application be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of October, 2012.

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CT-2011-003

COMPETITION TRIBUNAL**THE COMMISSIONER OF COMPETITION****Applicant****- and -****THE TORONTO REAL ESTATE BOARD****Respondent****- and -****THE CANADIAN REAL ESTATE ASSOCIATION AND
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