Federal Court of Appeal  Cour d'appel fédérale

Date: 20171201

Docket: A-174-16

Citation: 2017 FCA 236

CORAM: **NADON J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

THE TORONTO REAL ESTATE BOARD

Appellant

and

COMMISSIONER OF COMPETITION

Respondent

and

THE CANADIAN REAL ESTATE ASSOCIATION

Intervener

Heard at Toronto, Ontario, on December 5, 2016.

Judgment delivered at Ottawa, Ontario, on December 1, 2017.

REASONS FOR JUDGMENT BY: NADON J.A.
RENNIE J.A.

CONCURRED IN BY: NEAR J.A.

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REASONS FOR JUDGMENT

NADON and RENNIE JJ.A.

I. Introduction

[1] This is a statutory appeal from two decisions of the Competition Tribunal (the Tribunal) which held that certain information sharing practices of the Toronto Real Estate Board (TREB)

prevented competition substantially in the supply of residential real estate brokerage services in the Greater Toronto Area (GTA): *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7 (Tribunal Reasons, TR) and *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 8 (the Order).

[2] TREB maintains a database of information on current and previously available property listings in the GTA. TREB makes some of this information available to its members via an electronic data feed, which its members can then use to populate their websites. However, some data available in the database is not distributed via the data feed, and can only be viewed and distributed through more traditional channels. The Commissioner of Competition says this disadvantages innovative brokers who would prefer to establish virtual offices, resulting in a substantial prevention or lessening of competition in violation of subsection 79(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (*Competition Act*). TREB says that the restrictions do not have the effect of substantially preventing or lessening competition. Furthermore, TREB claims the restrictions are due to privacy concerns and that its brokers' clients have not consented to such disclosure of their information. TREB also claims a copyright interest in the database it has compiled, and that under subsection 79(5) of the *Competition Act*, the assertion of an intellectual property right cannot be an anti-competitive act.

[3] For the reasons that follow, we would dismiss the appeal.

II. Background and Procedural History

[4] TREB, the appellant, is a not-for-profit corporation incorporated under the laws of Ontario. With approximately 46,000 members, it is Canada's largest real estate board. TREB itself is not licensed to trade in real estate and does not do so.

[5] TREB operates an online system for collecting and distributing real estate information among its members. This "Multiple Listing Service" or MLS system is not accessible to the general public. Part of the MLS system is a database (the MLS database) of information on properties, including, *inter alia*: addresses, list prices, interior and exterior photographs, length of time for sale, whether the listing was withdrawn or expired, etc. The information is entered by TREB's member brokers into the system and appears almost instantly on the MLS database. When inputting information, some fields are mandatory and others are optional. The MLS database contains both current listings and an archive of inactive listings going back to 1986. TREB's members have full access to the database at any time.

[6] Many brokers operate sections of their websites where their clients can log in and view information, called "virtual office websites" or VOWs. TREB's data feed delivers information to brokers to populate these sections of their websites. Importantly, not all information in the MLS database is included in the data feed. Certain data is excluded (the "disputed data"). However, TREB's VOW Policy contains no restriction upon how its members can communicate the same disputed data to their clients through other delivery mechanisms. Consequentially, some information cannot be shared with clients in a VOW, but can be shared with them by other methods, such as in person, by email, or by fax.

[7] In May 2011, the Commissioner first applied to the Tribunal, under subsection 79(1) of the *Competition Act*, for an order prohibiting certain behaviours related to TREB's restrictive distribution of digitized data. The Commissioner alleged that TREB's policies excluded, prevented, or impeded the emergence of innovative business models and service offerings in respect of the supply of residential real estate brokerage services in the GTA.

[8] In April 2013, the Tribunal dismissed the Commissioner's application, finding that the abuse of dominance provisions of the *Competition Act* could not apply to TREB because, as a trade organization, TREB did not compete with its members (*The Commissioner of Competition v. The Toronto Real Estate Board*, 2013 Comp. Trib. 9). However, on appeal in February 2014, this Court set aside the Tribunal's order and referred the matter back for reconsideration, finding that subsection 79(1) of the *Competition Act* could apply to TREB (*Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29, 456 N.R. 373, leave to appeal to S.C.C. refused, 35799 (24 July 2014) (*TREB FCA 1*)).

[9] The matter was reconsidered by a different panel of the Tribunal in the fall of 2015. On April 27, 2016, the Tribunal issued its reasons on the merits and made an order granting, in part, the Commissioner's application (*The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7). The issue of remedy was the subject of a further hearing and order of the Tribunal on June 3, 2016 (*The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 8). Those two decisions are now on appeal before this Court.

[10] The intervener in this case is the Canadian Real Estate Association (CREA), a national organization representing the real estate industry in Canada. TREB is a member of CREA. CREA owns the MLS trademarks. The MLS system is operated by local boards (in this case, by TREB) under license from CREA.

III. The Tribunal Decision

[11] The Tribunal first addressed the abuse of dominance issue by defining the relevant market to be "the supply of MLS-based residential real estate brokerage services in the GTA" (Tribunal Reasons (TR) at para. 161). The Tribunal then addressed the three part test in subsection 79(1) of the *Competition Act*. For ease of reference, we reproduce the provision here:

Prohibition where abuse of dominant position	**Ordonnance d'interdiction dans les cas d'abus de position dominante**
79 (1) Where, on application by the Commissioner, the Tribunal finds that	**79** (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :
(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,	*a*) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and	*b*) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;
(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,	*c*) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.	le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

[12] The Tribunal found that TREB "substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA" and therefore the terms of paragraph 79(1)(*a*) were met (TR at para. 162).

[13] With respect to paragraph 79(1)(*b*), the Tribunal found that TREB had engaged in, and continued to engage in a practice of anti-competitive acts (TR at para. 454). TREB took the position that its actions were motivated by concern for the privacy of real estate buyers' and sellers' information, and that this concern constituted a legitimate business justification for the VOW restrictions which had to be balanced against the evidence of anti-competitive intent (TR at paras. 21, 285 - 287, 321).

[14] In this context, the Tribunal found TREB's concern with privacy to be unpersuasive. We will turn to this issue in greater detail later in these reasons; suffice to say at this point that, looking at the record before it, the Tribunal found little evidence that TREB's VOW committee had considered or acted upon privacy concerns before establishing TREB's VOW Policy (TR at paras. 321, 360, 390).

[15] Turning to paragraph 79(1)(*c*), the Tribunal found that the VOW restrictions prevented competition substantially in the market. After describing this branch of the test (TR at paras. 456 - 483), the Tribunal adopted a "but for" approach to this analysis, comparing the real world with

the hypothetical world in which the VOW restrictions did not exist. Thus, in the Tribunal's view, it was the burden of the Commissioner to adduce evidence to prove "a substantial difference between the level of actual or likely competition in the relevant market in the presence of the impugned practice and the level of competition that likely would have prevailed in the absence of that practice" (TR at para. 482).

[16] In describing the applicable test, the Tribunal made the point that the Commissioner could bring either quantitative or qualitative evidence, or both, to meet his burden. Because of its view that "dynamic competition is generally more difficult to measure and to quantify", there may be a greater need for the Commissioner to rely on qualitative evidence. This is particularly so in innovation cases. However, the Tribunal also recognized "that it may be more difficult to meet this burden when the Commissioner relies largely on qualitative evidence" (TR at paras. 471, 470).

[17] After reviewing the parties' submissions on the evidence with respect to a lessening of competition (TR at paras. 484 - 499), the Tribunal noted that "there is a high degree of competition in the Relevant Market, as reflected in considerable ongoing entry and exit, a significant degree of discounting activity with respect to net commissions, and a significant level of ongoing technological and other innovation, including with respect to quality and variety and through Internet-based data-sharing vehicles" (TR at para. 501).

[18] Nonetheless, in addressing the "but for" question, the Tribunal found that the VOW restrictions prevented competition in five ways: by increasing barriers to entry and expansion; by

increasing costs imposed on VOWs; by reducing the range of brokerage services available in the market; by reducing the quality of brokerage service offerings; and by reducing innovation (TR at paras. 505 - 619).

[19] However, the Tribunal found that the Commissioner had failed to prove that the VOW restrictions were preventing competition in three other manners: by reducing downward pressure on broker commission rates; by reducing output; and by maintaining incentives for brokers to steer clients away from inefficient transactions (TR at paras. 620 - 638).

[20] After satisfying itself that the VOW restrictions were preventing competition in five ways, the Tribunal then addressed the substantiality of those anti-competitive effects. Turning first to magnitude and degree, the Tribunal framed the question as whether "full-information VOW brokerages likely would be hired by significantly more clients as a real estate brokerage but for the aggregate impact of the three components of TREB's anti-competitive acts" as a result of being able to display the disputed data (TR at para. 646).

[21] TREB had argued that without conversion of website viewers into clients, the popularity of a website was irrelevant (TR at paras. 645, 648). However, the Tribunal found that website innovation could also be relevant if it spurred other competitors to compete (TR at para. 649).

[22] After noting that the Commissioner had failed to conduct an empirical assessment with regard to local markets where sold information (the final price at which a house sold) was available through VOWs and other local markets where such information was not available

through VOWs, the Tribunal declined to draw the adverse inference against the Commissioner which TREB argued it should draw. The Tribunal noted that "as a statutory authority, the Commissioner has to be prudent with, and make difficult decisions regarding the allocation of, the limited public funds available for administering and enforcing the Act at any given time" (TR at para. 656).

[23] The Tribunal also considered, in refusing to draw the inference, the fact that the Commissioner's expert, Dr. Vistnes, had advised the Commissioner that an empirical assessment would be costly, difficult, and of little value. Notwithstanding its refusal to draw the adverse inference sought by TREB, the Tribunal made it clear that the Commissioner continued to bear the burden of proving that the required elements of his application were met which "may well be a more challenging task in the absence of quantitative evidence" (TR at para. 656).

[24] The Tribunal then stated that it was prepared to draw an adverse inference against the Commissioner in regard to the testimony of two of its witnesses, Messrs. Nagel and McMullin, whose brokerages (respectively Redfin Corporation and Viewpoint Realty Services Inc.) conducted business in areas where the disputed data was available and in other areas where such data was not available (Nova Scotia and parts of the United States). Because neither witness presented evidence with regard to these other markets, the Tribunal inferred that the conversion rates of those websites would not be helpful to the Commissioner's case. However, the Tribunal then noted that it would not give much weight to its inference because of Dr. Vistnes' opinion that the low conversion rates could be the result of local differences in the relevant markets.

[25] The Tribunal also commented that "even a limited comparison between one local U.S. market where sold information is available and one local U.S. market where such information is not available may have been at least somewhat helpful", adding that the same comment applied to Nova Scotia with respect to pending sold prices. The Tribunal also commented that the absence of such a comparison made its task with regard to the "substantiality" element of paragraph 79(1)(*c*) much more difficult. The Tribunal concluded by saying that the absence of such comparison "resulted in this case being much more of a 'close call,' than it otherwise may have been" (TR at para. 658).

[26] However, the Tribunal highlighted the little weight it gave to the low conversion rates:

> [662] The Tribunal does not accord much significance to the fact that the low conversion rates of firms such as ViewPoint, Redfin and TheRedPin suggest that many consumers are evidently treating the information available on their websites as complements to the information available from the (different) broker they ultimately use to list or purchase their home. The fact remains that the innovative tools, features and other services available on those websites is assisting them to compete, and is forcing traditional brokerages to respond.

In other words, if we understand the Tribunal correctly, it was not prepared to, in effect, give any weight to the fact that the conversion rates of ViewPoint, Redfin, and TheRedPin were not significant. However, later in its reasons, the Tribunal makes the finding that if the disputed data were available to these firms in the GTA, they likely would have been successful in converting "an increasing and significant number of website users into clients". Paragraph 676 reads:

> [676] The Tribunal concludes that being able to obtain sold information from the VOW Data Feed, and to work with that data as they see fit, would likely enable full-information VOWs, including ViewPoint and those such as TheRedPin who would like to become full-information VOWs, to convert an increasing and significant number of website users into clients.

[27] Then, in dealing with the issue of qualitative evidence, the Tribunal made six observations based on the evidence adduced on behalf of the Commissioner:

> [666] First … the Disputed Data is very important, if not critical, in assisting Internet-based brokerages to distinguish themselves from incumbent traditional brokerages. …
>
> [667] Second, home purchasers and sellers value being able to obtain information with respect to sold prices, the conditional sale status of homes in the market, firm "pending sold" information, [withdrawn, expired, suspended or terminated] listings and cooperating broker commissions *prior to* meeting with their broker/agent, or in any event *prior to* finalizing the listing price of their homes or making an offer on a home.
>
> [668] Third, an inability to display and use the Disputed Data to develop innovative products has been preventing, and is likely to continue to prevent, ViewPoint from entering the Relevant Market. This has also prevented Realosophy and TheRedPin from growing as much as they likely would have grown … this also prevented Sam & Andy from expanding within the Relevant Market, and prevented their brokerage customers from doing the same.
>
> [669] Fourth, ViewPoint, Realosophy and TheRedPin are Internet-based innovative brokerages that, in aggregate, likely would have introduced a considerably broader range of brokerage services, increased the quality of some important services (such as CMAs), benefited from lower operating costs and considerably increased the overall level of innovation in the Relevant Market, "but for" the VOW Restrictions. …
>
> [670] Fifth, the VOW Restrictions have erected barriers to the entry and expansion of innovative brokers in the Relevant Market …
>
> …
>
> [672] Sixth, the VOW Restrictions have stifled innovation in the supply of Internet-based real estate brokerage services in the GTA.
>
> (emphasis in original)

[28] The Tribunal then discussed the importance of the disputed data fields to brokers and consumers, finding that sold data, pending and conditional solds, and withdrawn, expired, suspended or terminated listings were valued by home buyers and sellers (TR at paras. 675 -

685). In the Tribunal's opinion, making cooperating broker commissions available would also increase transparency in the market and would allow brokers to distinguish themselves by providing more information (TR at paras. 686 - 690).

[29] The Tribunal then reviewed counterarguments to its above findings. The Tribunal did not find significant that some VOW operators in Nova Scotia, which does not have any VOW restrictions, had abandoned their VOWs (TR at para. 693). Likewise, the Tribunal did not find significant the fact that statistics from the National Association of Realtors in the United States indicated that customers did not value the disputed data fields that highly (TR at para. 694 - 696). The Tribunal noted that in the United States, where sold information was "widely displayed by competitor websites", the National Association of Realtors had started displaying sold information on what appeared to be its official website (TR at para. 700). In addition, the Tribunal was satisfied that the fact that brokers displayed the disputed data when permitted indicated that that information was of value to home buyers; otherwise brokers would not display it (TR at para. 701).

[30] The Tribunal stated its conclusion on the magnitude of the effect of the VOW restrictions on competition in the following way:

> [702] For the reasons set forth above, the Tribunal concludes that the VOW Restrictions have adversely affected non-price competition in the Relevant Market to a degree that is material. Indeed, the Tribunal concludes that the aggregate adverse impact of the VOW Restrictions on non-price competition has been substantial, having regard to the considerable negative effect on the range of brokerage services, the negative effect on the quality of service offerings, and the considerable adverse impact on innovation in the Relevant Market. In the absence of an order, this substantial adverse impact is likely to continue. The Tribunal has reached this conclusion despite the fact that, the quantitative evidence on commission rates does not indicate that net commissions for real estate brokerage

> services were, are or likely would be, materially higher than in the absence of the VOW Restrictions.
>
> (emphasis added)

[31] Then, turning to duration and scope, the Tribunal found that, as the VOW restrictions had been in place since 2011, the duration was substantial. Likewise, as the effects were present throughout the GTA, a substantial part of the market was impacted (TR at paras. 703 - 704).

[32] Thus, the Tribunal found that all three of the subsection 79(1) requirements had been met and that the VOW restrictions were substantially preventing competition for residential real estate brokerage services in the GTA. At paragraphs 705 to 715 of its reasons, the Tribunal summarized its views on the three elements of subsection 79(1).

[33] Turning to copyright, the Tribunal found that TREB did not lead sufficient evidence to demonstrate copyright in the MLS database. Copyright in a database exists where the "selection or arrangement of data" is original (TR at para. 732). The Tribunal found that TREB's evidence did not speak to skill and judgment in compiling the database, but rather illustrated that it was a more mechanical exercise. The Tribunal pointed to many facts including: TREB did not present witnesses on the arrangement of the data; a third party corrects errors in the database; contracts referencing copyright are not evidence that copyright exists; members provide the information which is uploaded "almost instantaneously" to the database; TREB's database is in line with industry norms across Canada; and creating rules on accuracy and quality of the information does not reflect the originality of the work (TR at para. 737).

[34] In the alternative, the Tribunal found that, even if TREB had copyright in the database, it would not enjoy the protection offered by subsection 79(5) because TREB's conduct amounted to more than the "mere exercise" of its intellectual property rights (TR at paras. 720 - 721, 746 - 758).

IV. Issues

[35] In order to dispose of this appeal, we must determine the three following issues:

1. Did the Tribunal err in finding that TREB had substantially reduced competition within the meaning of subsection 79(1) of the *Competition Act*?
2. Did the Tribunal err in failing to conclude that TREB's privacy concerns or statutory obligations constituted a business justification within the scope of paragraph 79(1)(*b*)?
3. Does subsection 79(5) of the *Competition Act* preclude TREB and CREA from advancing a claim in copyright in the MLS database? If not, did the Tribunal err in its consideration of TREB's claim of copyright?

V. Analysis

A. *Standard of Review*

[36] Before addressing the three issues, a few words on the standard of review are necessary.

[37] There is a statutory right of appeal to this Court from decisions of the Tribunal. Subsection 13(1) of the *Competition Tribunal Act*, R.S.C. 1985 (2nd Supp.), c. 19 (*Competition Tribunal Act*) provides that any decision or order can be appealed "as if it were a judgment of the Federal Court". In *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28, [2014] 2 F.C.R. 352 (*Tervita FCA*), our Court held that questions of law arising from decisions of the

Tribunal were to be reviewed on the standard of correctness (TR at paras. 53 - 59; see also *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104 at para. 88, [2001] 3 F.C. 185). That determination was upheld by the Supreme Court of Canada in *Tervita Corp. v. Canada (Commissioner of Competition*), 2015 SCC 3, [2015] 1 S.C.R. 161 (*Tervita SCC*).

[38] As to questions of mixed fact and law, the Supreme Court in *Tervita SCC* also upheld this Court's determination in *Tervita FCA* that such questions were to be determined on the standard of reasonableness. With regard to questions of fact, leave of this Court is required (*Competition Tribunal Act*, s. 13(2)). In the present matter, no such leave was sought and consequently we cannot interfere with the Tribunal's findings of fact (see *CarGurus, Inc. v. Trader Corporation*, 2017 FCA 181 at para. 17; *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2011 FCA 188 at para. 47, 419 N.R. 333 (*Nadeau Poultry Farm*)).

B. *Substantial Reduction in Competition*

(1) TREB's and CREA's Submissions

[39] TREB submits that the Tribunal erred in finding that the test under subsection 79(1) of the *Competition Act* was made out. In its view, the Commissioner bore the burden of proving each element of the test and did not discharge that burden on any of the three elements.

[40] TREB asserts that since it does not control the relevant market, paragraph 79(1)(*a*) has not been established.

[41] TREB submits that it did not act with the necessary anti-competitive purpose, therefore the Tribunal erred in finding that paragraph 79(1)(*b*) was made out. In its view, the VOW Policy was meant to allow its members to offer VOWs and thus reach a greater range of potential buyers. The exclusion of some data from the data feed was made for legitimate privacy related reasons.

[42] With respect to paragraph 79(1)(*c*), TREB submits that the Tribunal erred in accepting speculative qualitative evidence. Actual quantitative evidence was available and should have been brought forward by the Commissioner. His failure to do so should have led the Tribunal to make an adverse inference against him. CREA, the intervener, agrees with TREB's submissions on these three points.

[43] CREA further argues that the Tribunal read out, for all intents and purposes, the requirement of 'substantiality' from the subsection 79(1) test. In its view, statements by brokers are insufficient to establish that access to the disputed data would increase competition substantially. While access to the disputed data may help brokers improve their services, this is not equivalent to a competitive benefit. CREA points to other evidence it claims demonstrates that brokers operating with the current VOW data feed are equally or more competitive than those with access to more data. Furthermore, CREA asserts that there is no proven link between broker success and receiving more data.

(2) The Commissioner's Submissions

[44] The Commissioner asserts that TREB's policies regarding the disputed data comprise at least three acts that constitute an anti-competitive practice, as quoted by the Tribunal at paragraph 320 of its reasons:

> i. The exclusion of the Disputed Data from TREB's VOW Data Feed;
>
> ii. Provisions in TREB's VOW Policy and Rules that prohibit Members who want to provide services through a VOW from using the information included in the VOW Data Feed for any purpose other than display on a website; and
>
> iii. Prohibiting TREB's Members from displaying certain information, including the Disputed Data, on their VOWs… This prohibition is reinforced by terms in TREB's Data Feed Agreement that limit the use of the MLS data in the VOW Data Feed to a purpose that is narrower than the corresponding provision in the [authorized user agreement] that applies to Members using the Stratus system...

[45] In other words, the Commissioner argues that it is anti-competitive to prohibit the disputed data from being distributed via the data feed.

[46] The Commissioner further submits that the Tribunal's paragraph 79(1)(*b*) analysis is reasonable, entitled to deference, and supported by the evidence. The Tribunal applied the correct legal test, and its finding regarding TREB's purpose in implementing the VOW restrictions is one of fact, and therefore not reviewable on this appeal. In the alternative, the Commissioner submits that the facts indicate that the Tribunal's finding on this point was reasonable. The Tribunal looked at the evidence as a whole and determined that, while privacy concerns were mentioned at TREB's VOW taskforce meetings, they were not a principal motivating factor. Furthermore, this finding turned on a credibility assessment of the testimony of Mr. Richardson, TREB's CEO, which is entitled to deference.

[47] Regarding paragraph 79(1)(*c*), the Commissioner submits that the Tribunal once again applied the correct legal test. TREB and CREA misstate the law when they say that the Commissioner must provide quantitative evidence to prove a substantial lessening or prevention of competition. In the Commissioner's view, this position is not supported by the case law. The Commissioner differentiates Tervita SCC, which found quantification necessary for a merger test under a different section of the Competition Act, namely subsection 96(1). Indeed, according to the Commissioner, non-price effects such as service quality, range of products, and innovation are not amenable to quantification. The Commissioner submits that TREB and CREA are de facto arguing that he has a legal burden to quantify the substantial lessening or preventing of competition. In addition, the Commissioner says that the Tribunal's refusal to draw an adverse inference against him on this point is entitled to deference.

(3) The Abuse of Dominance Framework

[48] Subsection 79(1), which is reproduced at paragraph 11 above, sets out the three requirements necessary to establish an abuse of dominant position. The Commissioner bears the burden of establishing each of these elements (*Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 at para. 46, 268 D.L.R. (4th) 193, leave to appeal to S.C.C. refused, 31637 (10 May 2007) (*Canada Pipe*)).The burden of proof with respect to each element is the balance of probabilities (*Canada Pipe* at para. 46; TR at para. 34).

[49] Once the Commissioner establishes each element of subsection 79(1), the person or persons against whom the Commissioner's proceedings are directed, in this case TREB, can avoid sanction if they demonstrate that the impugned practice falls under one of the statutory

exemptions. The only provision relevant to this case is subsection 79(5) of the *Competition Act*, which states that "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest" derived under certain legislation pertaining to intellectual or industrial property, including the *Copyright Act*, R.S.C., 1985, c. C-42 (*Copyright Act*), is not an anti-competitive act.

[50] TREB says, in its written submissions, that it "does not control the relevant market(s)" (TREB's Memorandum of Fact and Law at para. 66). However, this is the extent of its submissions on the issue. As TREB's substantive arguments clearly focus on paragraphs 79(1)(*b*) and (*c*), we continue on to examine in more depth the requirements of those provisions.

(4) Paragraph 79(1)(*b*)

[51] Paragraph 79(1)(*b*) requires that the person or persons "have engaged in or are engaging in a practice of anti-competitive acts". There is no dispute that TREB's VOW policies constitute a practice. An indicative list of anti-competitive acts is provided in the *Competition Act* at section 78. None of those acts are directly relevant to this appeal. However, that list is non-exhaustive.

[52] This Court in *Canada Pipe* found that an anti-competitive act is defined by reference to its purpose. Drawing on the Tribunal's decision in *Director of Investigation and Research v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) (*NutraSweet*), this Court said that the requisite purpose is "an intended predatory, exclusionary or disciplinary negative effect on a competitor" (*Canada Pipe* at paras. 66, 74. See also *NutraSweet* at page 34).

[53] To be more precise, *NutraSweet* pointed out that the "purpose common to all acts [listed in section 78], save that found in paragraph 78(*f*), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary" (at page 34). Indeed, paragraph 78(1)(*f*) cannot apply to a competitor, as it reads:

> 78 (1) For the purposes of section 79, *anti-competitive act*, without restricting the generality of the term, includes any of the following acts:
>
> …
>
> (*f*) buying up of products to prevent the erosion of existing price levels;

[54] In *TREB FCA 1*, Sharlow J.A. determined that the 'on the competitor' language from *NutraSweet* and *Canada Pipe* could not mean 'on a competitor of the person accused of anti-competitive practices' (at paras. 19 - 20). On that premise, requiring a predatory, exclusionary, or disciplinary negative effect on a competitor in all cases would render paragraph 78(1)(*f*) meaningless. Paragraph (*f*) reflects a self-serving intent, not a relative one intended to harm a competitor. Yet it has been defined by Parliament to constitute an anti-competitive act.

[55] With this in mind, we believe that the Tribunal applied the correct framework with respect to paragraph 79(1)(*b*). The Tribunal stated that it was looking for a predatory, exclusionary, or disciplinary effect on a competitor (TR at para. 272). Acting on the direction given by TREB FCA 1, the Tribunal defined competitor to mean "a person who competes in the relevant market, or who is a potential entrant into that market" and not a "competitor" of TREB (TR at para. 277).

[56] The Tribunal correctly noted that subjective or objective intent could be used to demonstrate the requisite intent (TR at paras. 274, 283; Canada Pipe at para. 72). It closely scrutinized the evidence of TREB's subjective intent (TR at paras. 319 - 431). The Tribunal also looked to the "reasonably foreseeable or expected objective effects of the act (from which intention may be deemed…)" (TR at paras. 432 - 451) as instructed by Canada Pipe at para. 67 (see also Tele-Direct (Publications) Inc. v. American Business Information, Inc., [1998] 2 F.C.R. 22; 154 D.L.R. (4th) 328 (FCA), leave to appeal refused, 26403 (21 May, 1998) (Tele-Direct)). The Tribunal conducted a balancing exercise between the exclusionary effects (evidenced by subjective intent) and TREB's alleged legitimate business justifications (TR at paras. 319 - 431; Canada Pipe at para. 73).

[57] The application of this test to the facts is a question of mixed law and fact. Ultimately, the Tribunal found that "the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweighs the very limited evidence that was adduced in support of the alleged legitimate business justifications that TREB claims underpinned the development and implementation of the VOW Restrictions" (TR at para. 452). This is a very fact-driven analysis. The Tribunal weighed the evidence, heard competing witnesses, and made findings of credibility. We see no error that would make this analysis unreasonable.

(5) Paragraph 79(1)(*c*)

[58] Paragraph 79(1)(*c*) requires that "the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market" (underlining added). The market in question is not contested. The Tribunal defined the market to be "the supply of MLS-

based residential real estate brokerage services in the GTA" (TR at para. 161). We now turn to address the five other elements, as underlined above, in turn.

(a) *The Practice*

[59] The Commissioner's Notice of Application was filed in May 2011, before TREB's current VOW Policy and Rules were in place. In November 2011, TREB enacted its new rules. The Commissioner accordingly amended her Statement of Claim. Nonetheless, the Statement of Claim remains broadly worded and does not specify which particular parts of TREB's rules and policies the Commissioner is impugning.

[60] The alleged anti-competitive practices relate to what TREB does with some of the data from the MLS system and what TREB allows its members to do with this data. This "disputed data" is defined by the Tribunal, at paragraph 14 of its reasons, to include four types of information:

- sold data
- pending sold data
- withdrawn, expired, suspended, or terminated listings ("WESTs")
- offers of commission to the successful home buyer's real estate broker, also called the cooperating broker.

The utility of this data is described in the Tribunal's reasons at paragraphs 675 to 691, which fall within the "Substantiality" section of the reasons.

[61] The parties' submissions and the evidence centred almost entirely on three particular practices, which the Tribunal collectively refers to as the "VOW Restrictions" (TR at para. 14). Those practices were the focus of the Tribunal's reasons and, after separate written and oral submissions on remedy, these restrictions remained the focus of the Tribunal's order. The following chart provides an overview of the restrictions, as listed in the Tribunal's reasons at paragraph 14, and their sources.

Restriction	Source
The exclusion of the disputed data from the VOW Datafeed	Policy articles 17, 15, 24
The prohibition on the display of the disputed data on a VOW	Rule 823; Datafeed Agreement clause 6.3(a)
The prohibition on the use of the VOW Datafeed information for any purpose other than display on a website	Datafeed Agreement clause 6.2(f), (g)

[62] It is worth noting that the following TREB rules and policies are <u>not</u> affected by the Tribunal's order.

Restriction	Source
An individual needs the permission of their broker of record to establish a VOW	Datafeed Agreement clause 6.3(g)
Before viewing listing information on a VOW, a consumer must enter a lawful broker-consumer relationship with the brokerage; this includes agreeing to terms and conditions acknowledging entering into such a relationship and declaring that the consumer has a bona fide interest in the purchase, sale or lease of residential real estate	Rules 805, 809(i), (iii) Policy articles 1, 6, 7(iii)
Any listings other than TREB's MLS listings must be labelled as such and searched separately by consumers	Rules 828, 829

(b) *Temporal Requirement*

[63] The temporal aspect of paragraph 79(1)(*c*) is not in issue. The effect on competition can be past, present, or future (*Canada Pipe* at para. 44) The Tribunal found that the VOW restrictions had anti-competitive effects in the past, present and future (TR at para. 706).

[64] A duration of two years will usually be sufficient to establish an effect (Tervita FCA at para. 85). Here, TREB's VOW restrictions came into force in November 2011 and the Tribunal found the anti-competitive effects had been occurring for a substantial period of time (TR at paras. 703, 708).

(c) *Preventing or Lessening*

[65] Paragraph 79(1)(*c*) refers to either a prevention and/or lessening of competition. The Tribunal found a prevention of competition (TR at para. 705). This means that there is no past time that the Tribunal can look at to compare with the present: the Tribunal must look at the present state of competition compared to a hypothetical world in which the VOW restrictions did not exist. This approach is not contested.

(d) *Competition*

[66] Paragraph 79(1)(*c*) looks to the level of competition, as opposed to any effects of the behaviour on competitors (*Canada Pipe* at paras. 68 - 69). A "but for" inquiry is an acceptable method of analysis (*Canada Pipe* at paras. 39 - 40). This is a relative assessment: the current intensity of competition is not relevant in isolation.

[67] Two questions must be asked regarding the nature of the competition element. The first is: competition for what? Here, the relevant competition is over real estate brokerage clients (TR at paras. 645 - 646). It is important to distinguish this competition from other, related, competition: for example, all websites want to attract web traffic in order to compete for advertising dollars.

[68] Second, we must ask: competition between whom? This case is about competition in the "the supply of MLS-based residential real estate brokerage services in the GTA" (TR at para. 161). In order to supply MLS-based services, a broker must be a member of TREB. Therefore, we are really discussing competition between segments of TREB members.

[69] The use of imprecise terminology sometimes makes it difficult to distinguish between competing TREB members. The Tribunal uses the terms "full information VOW-based brokerages" or "full information VOW brokerages" in contrast to "traditional 'bricks-and-mortar' brokerages." The Commissioner uses the terms "genuine VOWs" and "innovative brokers" in contrast to "VOWs." Dr. Vistnes, the Commissioner's expert witness, uses the terms "innovative VOW-based brokers" or "VOW-based brokers" in contrast with "traditional brick-and-mortar brokers."

[70] However, for the purpose of the legal analysis required by paragraph 79(1)(*c*), the current competition between any two groups is not important per se. Rather, it is the general competition in the defined market between all participants now (with the VOW restrictions) and in the hypothetical "but for" world (without the VOW restrictions).

(e) *Substantiality*

[71] The final element requiring elaboration is substantiality: the difference between the present and "but for" worlds must be substantial (*Canada Pipe* at para. 36). In its reasons, the Tribunal addressed substantiality in a separate section of its reasons (TR at paras. 640 - 704).

(i) Overview of the Evidence on Paragraph 79(1)(*c*)

[72] There were eight expert reports in evidence before the Tribunal, four from the initial hearing in 2012 and four from the redetermination hearing in 2015.

[73] Generally, the Tribunal found the evidence of the Commissioner's expert Dr. Vistnes to be credible and persuasive. However, on the particular issue of 79(1)(*c*) the Tribunal found that his evidence had missed the mark, saying that "Dr. Vistnes did not have a good understanding of the legal test for what constitutes a 'substantial' prevention or lessening of competition, as contemplated by paragraph 79(1)(*c*) of the Act. For this reason, the Tribunal refrained from accepting Dr. Vistnes' evidence on that particular issue" (TR at para. 108).

[74] The Tribunal found Dr. Church, called by TREB, "to be less forthright, objective and helpful than Dr. Vistnes or Dr. Flyer." The Tribunal also found Dr. Church "to be evasive at several points during his cross-examination and to have made unsupported, speculative assertions at various points in his testimony and in his written expert reports" (TR at para. 109). Dr. Church's evidence on the issue of whether the prevention of competition was "substantial" is neither referred to nor mentioned in the Tribunal's reasons.

[75] The Tribunal found Dr. Flyer, called by CREA, to be generally objective and forthcoming. However, it also found that "his testimony often remained general and high-level, and that he did not immerse himself in the details of the Canadian real estate industry and in the specific evidence and matters at issue in this proceeding to the same degree as Dr. Vistnes and Dr. Church" (para. 110) (We note, parenthetically, that given the Tribunal's view of Dr. Church's evidence, the criticism of Dr. Flyer on the basis that his evidence was not as detailed as Dr. Church is somewhat incongruous.) Dr. Flyer focused on the economic impact of the requested remedy on CREA, with considerable attention to the impact on CREA's trademarks. In our view, his reports are of little help in analyzing paragraph 79(1)(*c*).

[76] In addition, there are a total of 23 witness statements from 15 witnesses. The names and the firms of the witnesses whose testimonies (and statements) are most relevant to the Tribunal's determination of substantial prevention of competition are the following:

- William McMullin, Chief Executive Officer of ViewPoint Realty Services Inc. (Viewpoint)
- Shayan Hamidi and Tarik Gidamy, co-founders of TheRedPin.com Realty Inc. (TheRedPin)
- Joel Silver, Managing Director of Trilogy Growth, LP (Trilogy)
- Mark Enchin, Sales Representative of Realty Executives Plus Ltd. (Realty Executives)
- Scott Nagel, Chief Executive Officer of Redfin Corporation (Redfin)
- Sam Prochazka, Chief Executive Officer of Sam & Andy Inc. (Sam & Andy)
- Urmi Desai and John Pasalis, co-founders of Realosophy Realty Inc. (Realosophy)

[77] TREB and CREA do not challenge the admissibility of the statements and testimonies of the lay witnesses on which the Tribunal relies for the findings which form the basis of its conclusion that the anti-competitive effects resulting from the VOW restrictions lead, or are likely to lead, to a substantial prevention of competition in the GTA. Nevertheless, we believe that some guidance with respect to the evidence of lay witnesses in the context of a case like the one now before us might be useful.

[78] Generally, the evidence of lay witnesses is limited to facts of which they are aware (David Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015) at 195; Ron Delisle et al, *Evidence: Principles and Problems*, 11th ed. (Toronto: Thompson Reuters, 2015) at 874). This principle is reflected in Rules 68(2) and 69(2) of the *Competition Tribunal Rules*, SOR/2008-141, which are identical, and read "[u]nless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents".

[79] However, opinion evidence from lay witnesses is acceptable in limited circumstances: where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts (*Graat v. The Queen*, [1982] 2 S.C.R. 819 at 836 - 839, 144 D.L.R. (3d) 267; *Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 at para. 17, 215 D.L.R. (4th) 193 (Ont. C.A.), quoting with approval Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of*

Evidence in Canada, 4th ed. (Markham, ON: LexisNexis Canada, 2014) at 12.14. See also Paciocco and Stuesser, *ibid* at 197 - 198 and Delisle et al, *ibid* at 874 - 876).

[80] The question of opinion evidence given by lay witnesses was recently addressed by this Court in *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723, where Stratas J.A., writing for this Court, upheld the Federal Court's acceptance of a corporate executive's testimony about what his pharmaceutical company would have done in the "but for" world in circumstances where the witness had actual knowledge of the company's relevant, real world, operations (at paras. 105 - 108, 112, 121).

[81] Nevertheless, we think it is clear that lay witnesses cannot testify on matters beyond *their own conduct* and that of *their businesses* in the "but for" world. Lay witnesses are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the "but for" world, nor do they have the experiential competence. While questions pertaining to how their particular business might have responded to the hypothetical world are permissible provided the requisite evidentiary foundation is established, any witness testimony regarding the impact of the VOW restrictions on competition generally strays into the realm of inappropriate opinion evidence.

(ii) Substantiality Analysis

[82] Before addressing this important issue, it will be helpful to consider what the Supreme Court and this Court have said in regard to the expression "the effect of preventing or lessening

competition substantially" found in paragraph 79(1)(*c*) of the *Competition Act* and the test relevant to a determination of substantial lessening or prevention of competition.

[83] First, in *Tervita SCC*, albeit in the context of the merger provisions of the *Competition Act*, the Supreme Court made the following comments at paragraphs 44 to 46 of its reasons:

> [44] Generally, a merger will only be found to meet the "lessen or prevent substantially" standard where it [here, the "it" means the practice at issue] is "likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms". Market power is the ability to "profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition. Or, in other words, market power is "the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable"; where "price" is "generally used as shorthand for all aspects of a firm's actions that have an impact on buyers. If a merger does not have or likely have market power effects, s. 92 will not generally be engaged
>
> (references omitted)
>
> [45] The merger's likely effect on market power is what determines whether its effect on competition is likely to be "substantial". Two key components in assessing substantiality under the "lessening" branch are the degree and duration of the exercise of market power (*Hillsdown* at pp. 328-29). There is no reason why degree and duration should not also be considered under the "prevention" branch.
>
> [46] What constitutes "substantial" will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria:
>
> > What will constitute a likely "substantial" lessening will depend on the circumstances of each case... .Various tests have been proposed: a likely 5% price rise sustainable for one year; a 5% price rise sustainable over two years; a small but significant and non-transitory price rise. The Tribunal does not find it useful to apply rigid numerical criteria although these may be useful for enforcement purposes.
> >
> > (*Hillsdown*, at pp. 328-329)
>
> (emphasis added)

[84] Then, at paragraphs 50 to 51 of *Tervita SCC*, the Supreme Court indicated that the words of paragraph 79(1)(*c*) of the *Competition Act* and those of subsection 92(1) were similar and thus conveyed the same idea:

> [50] *Canada Pipe* was a case involving abuse of dominance under s. 79(1)(*c*) of the Act. The words of s. 79(1)(*c*) – "is having or is likely to have the effect of preventing or lessening competition substantially in a market" – are very close to the words of s. 92(1) – "likely to prevent or lessen" – and convey the same ideas. In *Canada Pipe*, the Federal Court of Appeal employed a "but for" test to conduct the inquiry:
>
> > . . . 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"... .
> >
> > The comparative interpretation described above is in my view equivalent to the "but for" test proposed by the appellant. [paras. 37-38]
>
> [51] A similar comparative analysis is conducted under s. 92(1). A merger review, by its nature, requires examining a counterfactual scenario: "... whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark or 'but for' world" (Facey and Brown, at p. 205). The "but for" test is the appropriate analytical framework under s. 92.

[85] Lastly, at paragraph 60 of its reasons in *Tervita SCC*, the Supreme Court made the following remarks regarding the "but for" test:

> [60] The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. <u>It is necessary to identify the potential competitor, assess whether but for the merger [here "but for" the anti-competitive practice] that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial.</u>
>
> (emphasis added)

[86] In *Canada Pipe*, at paragraphs 36 to 38 and 45 to 46, this Court, in addressing the test required to make a determination under paragraph 79(1)(*c*), observed that the test is relative in nature. Rather than assessing the absolute level of competition in the market the Tribunal must assess the level of competition in the presence of the impugned practice and compare this with the level of competition that would exist in the absence of the practice. This difference can occur in the past, present or future and the test will be made out where the difference is substantial. This Court noted that it is the role of the Tribunal to adapt this assessment to the case before it.

[87] At paragraph 46 of *Canada Pipe*, this Court explicitly indicated that it was not dictating the type of evidence required, rather it wrote: "Ultimately, the Commissioner bears the burden of proof for each requisite element, and the Tribunal must be convinced on the balance of probabilities. The evidence required to meet this burden can only be determined by the Tribunal on a case-by-case basis."

[88] It is clear from *Canada Pipe* that what will constitute a "substantial" lessening or prevention of competition depends on the facts of the case and that the Tribunal is not bound to apply a particular test in determining the issue. However, it is clear that in order for the Tribunal to find that a substantial lessening of competition has been established, it must be able, on the evidence before it, to conclude that were it not for the anti-competitive effects of the practice at issue, the market at issue would be substantially more competitive. In other words, in the present matter, would there be a substantial incremental benefit to competition arising from the availability of the disputed data in TREB's VOW data feed?

[89] In the present matter the Tribunal turned its mind to both the meaning of "substantiality" and the appropriate test to be applied. The Tribunal noted, at paragraph 461 of its reasons, that substantiality is an assessment of the exercise of market power. Market power, as the Tribunal defines it in paragraph 165 of its reasons, is the ability to control either prices or non-price dimensions of competition for a significant time. Non-price dimensions of competition include innovation and quality of service, among others.

[90] At paragraph 480 of its reasons, the Tribunal acknowledges that the test for substantiality is relative in nature. That is, the Tribunal is to compare the level of competition that exists in the actual world with the level of competition that would exist, but for, the impugned practices. The test then, is to assess whether the difference between these two worlds is substantial. The Tribunal indicates that this test will be met where either price is materially higher, or one or more non-price dimension are materially lower than in the absence of the practices.

[91] In making this assessment the Tribunal will have regard to the overall economic conditions of the relevant market. As explained in paragraph 468 of its reasons, this means that the duration of the impact will be considered along with the relative size of impact to determine whether the impact is substantial.

[92] In our view, the Tribunal correctly understood the significance of the word "substantially" and the test which it had to apply in determining whether or not, on the facts of this case, TREB's practice regarding the disputed data was a practice which had the effect of preventing competition substantially in the GTA.

[93] With these comments in mind, we now turn to TREB's and CREA's submissions as to why we should intervene. Their principal submission on substantiality is that it was improper for the Tribunal to determine whether the anti-competitive effects led to a substantial prevention of competition on the basis of qualitative evidence only. In their view, this led the Tribunal to determine the issue on "speculative opinion evidence unsupported by available empirical evidence" (TREB's Memorandum of Fact and Law at para. 14).

[94] In making this submission, TREB and CREA put forward two arguments. The first is that in *Tervita SCC*, the Supreme Court held that the Commissioner had an obligation to quantify any quantifiable anti-competitive effect and that failure to do so would prevent him from relying on qualitative evidence in respect of effects which could have been quantified. Thus, in the view of TREB and CREA, anti-competitive effects can be considered qualitatively by the Tribunal only if they cannot be quantitatively estimated.

[95] TREB and CREA further say that the Tribunal erred in concluding (TR at paras. 469 - 470) that the aforementioned principle, enunciated by the Supreme Court in *Tervita SCC* at paragraph 124 of its reasons, did not apply to a determination made under section 92 of the *Competition Act* or under subsection 79(1) thereof. In other words, they submit that the Tribunal erred in finding that the Supreme Court's holding in *Tervita SCC*, on which TREB and CREA rely, was limited to determinations under subsection 96(1).

[96] More particularly, TREB and CREA say that the rationale underlying the Supreme Court's statement of principle in *Tervita SCC* not only applies to determinations under

subsection 96(1), but also to determinations arising under both section 92 and subsection 79(1). In support of this view, they rely on that part of paragraph 124 of *Tervita SCC* which we have underlined herein below.

> [124] The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., paras. 84 and 88). On the contrary, the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.
>
> (emphasis added)

[97] TREB's and CREA's second argument is that the Tribunal should have drawn an adverse inference against the Commissioner by reason of his failure to adduce empirical evidence concerning competition on price and dynamic competition in markets (United States and Nova Scotia) where full information VOWs exist and in respect of which it was possible to measure the actual effects on competition. They say that the Commissioner deliberately decided not to perform a quantitative analysis of competition effects in these markets. More particularly, TREB and CREA argue that the Tribunal should have drawn the only inference possible resulting from the Commissioner's failure to adduce quantitative evidence, "namely that there was no substantial prevention or lessening of competition, dynamic or otherwise, that could be demonstrated on a balance of probabilities" (TREB's Memorandum of Fact and Law at para. 77).

[98] TREB and CREA then address the reasons given by the Tribunal for not drawing an adverse inference against the Commissioner, namely that the Commissioner had to be prudent with regard to the spending of the funds under his authority and because of Dr. Vistnes' advice to the Commissioner that a study of the United States' experience would constitute a difficult and expensive endeavour that would likely not yield useful answers. (TREB and CREA say that Dr. Vistnes' testimony on this point constitutes an off the cuff response to a question posed by the Tribunal during the hearing). TREB and CREA say that the reasons given by the Tribunal for refusing to draw the adverse inference are improper and cannot be right.

[99] In our respectful view, TREB's and CREA's submissions cannot succeed. First in *Tervita SCC*, the Supreme Court did not, contrary to TREB's and CREA's assertion, make any pronouncement pertaining to section 92 of the *Competition Act* regarding the necessity of quantifying effects which could be quantified. To the contrary, at paragraph 166 of its reasons in *Tervita SCC*, the Supreme Court indicated that there was no obligation on the part of the Commissioner to quantify anti-competitive effects under section 92:

> [166] It may seem paradoxical to hold that the Tribunal was correct in finding a likely substantial prevention of competition, only to then conduct the s. 96 balancing test and find zero anti-competitive effects. However, this result merely appears paradoxical in view of the particular facts of this case. Here, as discussed above, the Tribunal was able to consider evidence as to the effect on the market of the emergence of likely competitors, whether acceptable substitutes existed, and so on. Section 93 expressly permits the consideration of these factors in and of themselves. Ordinarily, the Commissioner would also use the evidence bearing on those factors to quantify the net effect of those factors on the economy in the form of deadweight loss. <u>However, the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantify deadweight loss, and thus the Commissioner's failure to do so in this case was not fatal to the s. 92 determination. By contrast, the balancing test under s. 96 does require that quantifiable anti-competitive effects be quantified in order to be considered.</u> As such, the failure to quantify deadweight loss in this case barred consideration, under s. 96, of the quantifiable effects that supported a finding of likely

> substantial prevention under s. 92. In circumstances where quantifiable effects were in fact quantified, a finding of likely substantial prevention under s. 92 would be accompanied by the consideration of quantified anti-competitive effects under the s. 96 analysis.
>
> (emphasis added)

[100] Although we agree, as a matter of logic, that the Supreme Court's rationale in *Tervita SCC* for requiring that quantifiable effects be quantified could equally be applied to determinations made under both subsection 79(1) and section 92, there can be no doubt that the Supreme Court made it clear, at paragraph 166 cited above, that the principle did not apply to section 92. That being the case, we have no choice but to hold that the principle requiring quantification of quantifiable effects cannot be applied to subsection 79(1). Had it been open to us to decide the issue afresh, we would have held that the principle applied to determinations under subsection 79(1).

[101] Consequently, TREB and CREA cannot succeed on their assertion that the Commissioner, in seeking a determination under subsection 79(1), had a legal obligation to quantify all effects which could be quantified. On the basis of *Tervita SCC*, the Commissioner did not have such an obligation.

[102] We now turn to the Tribunal's refusal to make the adverse inference against the Commissioner which TREB and CREA sought because the Commissioner had failed to provide an empirical assessment "of the incremental effect of sold and other Disputed Data in increasing a full-information VOW operator's ability to generate clients" (TR at para. 653). This submission, in our respectful view, is also without merit.

[103] To begin, we agree with the Commissioner that TREB's and CREA's argument is tantamount to arguing that the Commissioner had a legal burden to adduce quantifiable evidence. As we have just indicated, no such obligation arises under subsection 79(1).

[104] Considering that the Commissioner had no such legal obligation, he, like any other plaintiff, had to decide what evidence he had to put forward to prove his case. As we know, he chose to do so by way of qualitative evidence and in so doing, he took the risk of failing to persuade the Tribunal that the anti-competitive effects of TREB's practice resulted in a substantial prevention of competition. As it turned out, the Tribunal was persuaded by the qualitative evidence adduced by the Commissioner.

[105] We have carefully considered the case law and cannot see any basis to accept TREB's and CREA's proposition that the Tribunal ought to have drawn an adverse inference against the Commissioner for failing to conduct an empirical assessment of markets in the United States and in Nova Scotia, or for that matter in the GTA. That, in our respectful view, would be akin to giving the Tribunal the power to dictate to the Commissioner how he should present his case. There is no authority for such a proposition.

[106] We agree with TREB and CREA in one respect. Had there been a valid basis to draw an adverse inference against the Commissioner, the reasons for refusing to draw the inference given by the Tribunal would clearly not have withstood scrutiny. The fact that the Commissioner has limited funds to spend may be a reality, but it is of no relevance to a determination of whether or not an adverse inference should be made. As to Dr. Vistnes' view with regard to the utility and

cost of producing an empirical assessment, that, in our view, is also an irrelevant consideration. Whether the study would have been useful is a matter which the Tribunal would have had to appreciate and determine. It was clearly not up to Dr. Vistnes to make that determination. In any event, it is doubtful that Dr. Vistnes could provide that opinion to the Tribunal as it does not appear in his expert reports. However, as we are satisfied that there was no basis to draw the inference sought by TREB and CREA, the reasons given by the Tribunal, even though misguided, are of no consequence.

[107] Additionally, it should be remembered that in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 at paragraph 73, [2001] 1 S.C.R. 221, the Supreme Court made the following point: "Whether or not an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts" (see also *Benhaim v. St-Germain*, 2016 SCC 48 at para. 52, [2016] 2 S.C.R. 352). Thus, the Tribunal's refusal to draw an inference against the Commissioner is subject to the standard of reasonableness. We see no basis to conclude that the Tribunal's refusal to draw the inference is unreasonable.

[108] TREB and CREA make a further submission regarding the Tribunal's determination that the prevention of competition was substantial. They say that, in any event, it was an error for the Tribunal to rely on evidence which they characterize as speculative qualitative evidence. At paragraph 75 of its Memorandum of Fact and Law, TREB defines quantitative evidence as "empirical evidence of the actual effect of certain impugned acts on competition in an existing real estate market" and defines qualitative evidence as "a reference essentially to opinion and

anecdotal evidence of what might happen in the market if certain acts are permitted or not permitted".

[109] More particularly (the argument which we now explain is one put forward mainly by CREA), they make four points. First, they say that the Tribunal erred in concluding, on the basis of statements made by brokers to the effect that they needed the disputed data in their VOWs so as to improve their offerings to the public and that their clients, i.e. buyers and sellers, valued the opportunity of accessing the disputed data on their VOWs, that the availability of the disputed data would result in a substantial incremental competition benefit.

[110] In TREB's and CREA's view, the Tribunal's conclusion on substantiality which results from its finding with respect to the anti-competitive effects of TREB's practice was tantamount to reading out the word "substantial" from the statutory provision. They say that, at best, the aforementioned witness statements constitute evidence of "an effect" on competition but clearly not of a substantial incremental competition benefit arising from the availability of the disputed data on the VOWs.

[111] Second, TREB and CREA say that it was an error on the part of the Tribunal to find, on the basis of the evidence of William McMullin, that Viewpoint was prevented from entering the GTA market because of the unavailability of the disputed data. They say that Mr. McMullin's evidence on this point, in light of the overall evidence, was not credible adding that, in any event, the Tribunal erred in finding that Viewpoint's entry into the GTA would have had a substantial competitive effect considering that Viewpoint was less competitive (if one considers

Viewpoint's commission rates and lack of rebates) in terms of price than other brokerages such as Realosophy and TheRedPin.

[112] Third, TREB and CREA say that the Tribunal made a further error in finding that the Commissioner had met his burden of proof on the basis of qualitative benefits asserted by brokers when the evidence showed that brokers operating in the GTA with VOWs fed by TREB's VOW data feed (i.e. without the disputed data) were equally or more competitive than brokers operating on a data feed that included some of the disputed data.

[113] Fourth, TREB and CREA say that the Tribunal also erred in finding that a substantial prevention of competition had been demonstrated by the Commissioner because there was a lack of evidence showing a link between the success of brokerages such as Redfin and Viewpoint and the availability of the disputed data in a VOW. In making this point, TREB and CREA argue that it was clear from the evidence that there was no causal relationship between being able to convert website users into clients and the availability of the disputed data on one's VOWs.

[114] TREB and CREA conclude on this point by saying that the evidence regarding conversion rates was extremely important because the purpose of designing attractive websites was to convert viewers into clients.

[115] TREB and CREA also point out that after finding that the evidence regarding conversion rates did not support the Commissioner's case, the Tribunal downplayed the importance of conversion rates on the basis of Dr. Vistnes' opinion that local differences in the markets under

consideration probably explained why the conversion rates were low. TREB and CREA say that there was no evidence of these local differences before the Tribunal on which Dr. Vistnes could give the opinion that he gave. Dr. Vistnes' opinion, in their view, was entirely speculative.

[116] Finally, TREB and CREA conclude their arguments regarding conversion rates by saying that even though the Tribunal refused to give any weight to the evidence showing low conversion rates, it nonetheless found, at paragraph 676 of its reasons, that if the disputed data was made available on TREB's data feed, web based brokerages would likely be successful in converting "an increasing and significant number of website users into clients".

[117] To place TREB's and CREA's arguments in perspective, it is important to point out that the Tribunal understood the difference in nature between quantitative and qualitative evidence and that it recognized that it was more difficult for the Commissioner to prove his case on the basis of mostly qualitative evidence. The Tribunal indicated that in a case like the one before it, which pertained mostly to dynamic competition, it was inevitable that the Commissioner would have to rely on qualitative evidence in the form of business documents, witness statements, and testimonies, adding, however, that it remained the Commissioner's burden to prove his case on a balance of probabilities (TR at paras. 469 - 471).

[118] On the basis of the qualitative evidence put forward by the Commissioner and in particular on the basis of the witness statements and testimonies of the persons referred to at paragraph 76 of these reasons, namely Messrs. McMullin, Hamidi, Gidamy, Silver, Enchin, Prochazka, Desai, and Pasalis, the Tribunal made findings of a number of anti-competitive

effects caused by the VOW restrictions. In each case, the Tribunal found both that an anti-competitive effect existed and emphasized the relative significance of that effect as follows:

- The prevention of a considerably broader range of broker services in the GTA (TR at para. 583)
- The prevention of an increase in the quality of these services in a significant way (TR at para. 598)
- The prevention of the advent of considerably more innovation (TR at para. 616)
- The significant adverse impact on entry into, and expansion within the relevant market (TR at para. 550)

[119] It was the Tribunal's opinion that "but for" the VOW restrictions these anti-competitive effects would be considerably lower. At paragraph 702 of its reasons, the Tribunal concluded that when considered in the aggregate, these anti-competitive effects on non-price dimensions amounted to a substantial prevention of competition.

[120] In other words, the Tribunal held that the ultimate consequence of the anti-competitive effects found to exist was the maintenance of TREB and its members' collective market power in respect of residential brokerage services in the GTA (TR at para. 709) and that failing an order on its part, that market power would likely continue (TR at para. 712).

[121] In our view, TREB's and CREA's arguments regarding the Tribunal's reliance on qualitative evidence are without merit.

[122] First, it is clear that most of the points which TREB and CREA make on this issue are to the effect that many of the Tribunal's crucial findings are not supported by the evidence. This is

particularly so in regard to their criticism of Mr. McMullin's evidence and in regard to Viewpoint's entry into the GTA. Although we have some misgivings in regard to a number of the findings made by the Tribunal, it must be remembered that these findings result from the Tribunal's assessment of the evidence before it. The same goes with respect to the weight which the Tribunal gave to that evidence. As we have already indicated, TREB and CREA, not having sought leave to challenge questions of fact on this appeal, cannot pursue this line of attack. TREB and CREA, without so saying, are inviting us to reassess the evidence before the Tribunal and to make different findings. We clearly cannot do so. Further, as this Court indicated in *Nadeau Poultry Farm* at paragraph 47, parties cannot "under cover of challenging a question of mixed fact and law, revisit the Tribunal's factual conclusions".

[123] Second, it is also important to repeat that TREB and CREA do not challenge the admissibility of the statements nor of the testimonies given by the lay witnesses upon which the Tribunal relies for its findings.

[124] Third, in our respectful opinion, the underlying premise behind TREB's and CREA's challenge on this point is that qualitative evidence without quantified evidence, which they say was available to the Commissioner, should not be considered nor given any weight. We have already determined that this premise is not well founded.

[125] We agree, however, with TREB and CREA that the evidence pertaining to conversion rates does not support the Commissioner's case. Had the conversion rates been the determinative factor in this appeal, we would have intervened. We cannot see how the Tribunal can say, as it

does at paragraph 676 of its reasons, that if Viewpoint and others could use the disputed data they would be in a position "to convert an increasing and significant number of website users into clients". The Tribunal's findings on conversion rates, which appear at paragraphs 653, 657, 658, and 664 of their reasons, show that the evidence before it did not support the Commissioner's case.

[126] However, as the Commissioner argues, the Tribunal, although recognizing that conversion rates were low, made the point that his application was primarily concerned with dynamic competition and innovation and that, in the absence of quantifiable evidence on point, it had no choice but to determine the matter on the evidence before it, mostly qualitative evidence. More particularly, at paragraph 662 of its reasons, the Tribunal indicated in no uncertain terms that the additional innovation developed by full information VOW brokerages was not only helpful in their attempts to compete but was "forcing traditional brokers to respond" to this new type of competition.

[127] We are therefore satisfied that in relying on qualitative evidence for its findings of anti-competitive effects and its ultimate conclusion on substantiality, the Tribunal made no reviewable error. Consequently, we have not been persuaded, in light of the Tribunal's findings and of the applicable test, that there is any basis for us to interfere with the Tribunal's determination under paragraph 79(1)(*c*) of the *Competition Act*.

[128] We now turn to the second issue raised by this appeal.

C. *Privacy*

[129] TREB sought to justify its restriction on disclosure of the disputed data on the basis that the privacy concerns of vendors and purchasers constituted a business justification sufficient to escape liability under paragraph 79(1)(*b*) of the *Competition Act*. TREB asserted that privacy was integral to its business operations; more specifically, privacy was an aspect of maintaining the reputation and professionalism of its members, central to the interests of purchasers and sellers and to the cooperative nature and efficiency of the MLS system.

[130] TREB also asserted that it was required, as a matter of law, to comply with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (*PIPEDA*). It contended that this statutory requirement constituted a business justification, separate and apart from any question of the underlying motive TREB may have had for the VOW Policy and its anti-competitive effects. Characterized differently, having concluded that the policy was not motivated by subjective privacy concerns, the Tribunal was nevertheless obligated to continue and also determine, one way or another, whether the policy was mandated by *PIPEDA*. Had the Tribunal considered the consents in light of the requirements of *PIPEDA*, it would have found them lacking, and insufficient to authorize disclosure. This would lead, in TREB's submissions, to the conclusion that the restrictions on disclosure were necessary to comply with the legislation and constitute a business justification.

(1) The Tribunal's Decision

[131] In considering privacy as a business justification under paragraph 79(1)(*b*), the Tribunal found that the "principal motivation in implementing the VOW Restrictions was to insulate its

members from the disruptive competition that [motivated] Internet-based brokerages" (TR at para. 430). It concluded that there was little evidentiary support for the contention that the restrictions were motivated by privacy concerns of TREB's clients. The Tribunal also found scant evidence that, in the development of the VOW Policy, the VOW committee had considered, been motivated by, or acted upon privacy considerations (TR at para. 321). The privacy concerns were "an afterthought and continue to be a pretext for TREB's adoption and maintenance of the VOW Restrictions" (TR at para. 390).

[132] The Tribunal found the business justification argument simply did not mesh with the evidence. At paragraphs 395 to 398 of its reasons, the Tribunal observed that it was "difficult to reconcile" TREB's privacy arguments with the fact that the disputed data was made available to:

- All 42,500 TREB members via its Stratus system;
- The members of most other Ontario real estate boards through the data sharing program CONNECT;
- Clients of all TREB members and clients of members of most other Ontario real estate boards;
- Some appraisers;
- Third party industry stakeholders including CREA, Altus Group Limited, the CD Howe Institute, and Interactive Mapping Inc. (albeit for confidential use); and
- Customers via email subscription services or regular emails sent by members.

[133] Further, the Tribunal noted that for many months TREB did nothing regarding two brokers who displayed the disputed data in apparent violation of TREB's policy (TR at paras. 372 - 374). It observed that few clients had reported concerns to TREB about their data being

displayed and distributed online (TR at paras. 386 -387) and that TREB did not produce evidence to support its allegation that including the disputed data in the data feed would push consumers away from using MLS-based services (TR at para. 423).

[134] Additionally, agents were entitled to, and routinely did, distribute detailed seller information, including sold prices, to their own clients without any restriction on further dissemination. Moreover, TREB's own intranet system enables TREB's members to forward by email up to 100 sold listings at a time to anyone (TR at para. 398).

[135] The Tribunal found no evidentiary foundation to support the assertion that the policy was genuinely motivated by a concern about compliance with *PIPEDA*. Although the need to abide by *PIPEDA* was mentioned in the testimony of TREB's Chief Executive Officer, the Tribunal noted the absence of evidence from TREB's Board of Directors, its Chief Privacy Officer or its Chief Information Officer, which would support the conclusion that compliance with *PIPEDA* necessitated the policy (TR at paras. 378 - 379).

[136] The Tribunal noted that while TREB implemented its privacy policy in 2004 and had appointed a Chief Privacy Officer, there was no evidence that the VOW Policy was directed towards compliance. TREB's only contact with the Privacy Commissioner was to ask for an opinion on a different document (a "Questions and Answers" document addressing a number of privacy related topics) in August 2012. These did not include questions related to the disputed data, and, in any event, these communications took place only after the VOW Policy and Rules were set (TR at paras. 375 - 376).

[137] The Tribunal also noted at paragraph 407 of its reasons that Mr. Richardson, the CEO of TREB during the relevant time, operated on the assumption that the wording in the consents in the Listing Agreement was sufficient to permit disclosure.

[138] In argument, TREB pointed to a 2009 decision of the Privacy Commissioner which held that an advertisement which said that a property sold at 99.3% of the list price contravened *PIPEDA* because it allowed the public to calculate the selling price. The Office of the Privacy Commissioner held that the exception for publicly available information did not apply because the information was obtained under the purchase agreement to which the salesperson was not privy and was not actually drawn from the Ontario registry or any source accessible to the public (TR at para. 388).

[139] The Tribunal rejected TREB's assertion that this decision influenced the VOW Policy. It noted that, with two exceptions (the meetings of May 12 and May 20, 2011), privacy concerns were not reflected in the minutes or discussion pertaining to the development of the VOW Policy (see e.g. TR at para. 351). It concluded that privacy considerations were an *ex post facto* attempt to justify the policy.

[140] The Tribunal then considered CREA's argument that consumers were concerned about their property information being disclosed on a public website. The Tribunal concluded that the evidence was very limited and not persuasive (TR at para. 776).

[141] The Tribunal then examined the consent clauses contained in the Listing Agreement and concluded that the consents permitted the disclosure of the data. This point will be expanded upon below.

(2) Burden of Proof

[142] Before turning to the substance of this issue, the parties raise a point concerning the burden of proof.

[143] The Commissioner and TREB agree that TREB is bound by the provisions of *PIPEDA*. However, TREB contends that it was the Commissioner's burden to disprove TREB's assertion that the VOW Policy was required by *PIPEDA*. We do not agree. Neither this contention, nor the law, shifts the legal or evidentiary burden to the Commissioner to disprove the assertion that the policy is necessary as a matter of regulatory compliance.

[144] The normal evidentiary burden applies. The party who asserts must prove: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 30, [2008] 2 S.C.R. 420. TREB has offered no compelling reason as to why this principle should not apply in respect of a business justification under section 79. In consequence, if TREB seeks to establish that regulatory compliance would be compromised, the onus is on it to lead the relevant evidence as part of its evidentiary burden, and to establish the consequential legal conclusions as part of its argument.

(3) A Business Justification was not Established

[145] To begin, we reject the argument that the Tribunal did not consider the possibility that independent of motivation, regulatory compliance with *PIPEDA* could constitute a justification. Having reviewed the law, the Tribunal concluded that the business justification analysis was "subject to the important caveat that legal considerations, such as privacy, may provide a legitimate justification for an impugned practice" (TR at para. 302).

[146] However, earlier in its reasons, the Tribunal wrote that "legal considerations, such as privacy laws, [may] legitimately justify an impugned practice, provided that the evidence supports that the impugned conduct was primarily motivated by such considerations" (TR at para. 294). We appreciate TREB's point that the Tribunal's reasons on this issue are equivocal. In our view, to the extent that the Tribunal required regulatory compliance to be the motivation behind the VOW Policy, it did so in error. If it can be established that a business practice or policy exists as a matter of a statutory or regulatory requirement, whether compliance was the original or seminal motivation for the policy is of no consequence.

[147] This does not, however, eliminate the burden on the corporation to establish a factual and legal nexus between that which the statute or regulation requires and the impugned policy.

[148] In order to establish a business justification within the meaning of paragraph 79(1)(*b*) of the *Competition Act*, a party must establish "a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts": *Canada Pipe* at para. 73. Proof of a

"valid business justification … is not an absolute defence for paragraph 79(1)(*b*)"; it must provide an explanation why the dominant corporation engaged in the allegedly anti-competitive conduct: *Canada Pipe* at paras. 88 - 91. As this Court explained in *Canada Pipe* at paragraph 87:

> [87] …A business justification for an impugned act is properly relevant only insofar as it is pertinent and probative in relation to the determination required by paragraph 79(1)(*b*), namely the determination as to whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor. … [A] valid business justification can, in appropriate circumstances, overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In this way, a valid business justification essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein.

[149] In sum, two facts must be established before an impugned practice can shelter behind paragraph 79(1)(*b*). First, there must be a credible efficiency or pro-competitive rationale for the practice. Second, the efficiencies or competitive advantages, whether on price or non-price issues, must accrue to the appellant. Put otherwise, the evidence must demonstrate how the practice generates benefits which allow it to better compete in the relevant market.

[150] The Tribunal assessed the evidence before it according to the correct principles and found it lacking. The Tribunal concluded that TREB was motivated by a desire to maintain control over the disputed data in an effort to forestall new forms of competition, and not by any efficiency, pro-competition, or genuine privacy concerns (TR at paras. 369, 389 - 390). It was fair for the Tribunal to consider that, had regulatory compliance been a concern, there would have been evidence of such communications. It concluded that there was "no evidence" that TREB's

privacy policies received much, if any, consideration during the development of TREB's VOW Policy and Rules.

[151] The evidence, some of which we have summarized earlier, is compelling. As leave to challenge these findings was not sought, the Tribunal's conclusion that there were no pro-competitive business or efficiency justifications for the policy is reasonable and will not be disturbed. This sets the stage for TREB's second and, we believe, principal argument.

(4) Privacy Obligations under *PIPEDA*

[152] TREB submits that the Tribunal erred in failing to engage in a stand-alone assessment of TREB's responsibilities under *PIPEDA* regarding the collection and use of personal information.

[153] In its reasons, the Tribunal considered *PIPEDA* and whether its requirements mandated the policy. In this regard, it looked at the extent to which TREB engaged with the Privacy Commissioner and considered the provisions of *PIPEDA*. It also examined the nature and scope of the consent clause in the Listing Agreement. It proceeded on the understanding that the data was confidential and then considered the scope and effect of the consents governing its use. It concluded that the consents were effective.

[154] In our view, the role of the Tribunal was to interpret the scope of the consents under the ordinary law of contract, as informed by the purpose and objectives of *PIPEDA*. This is what it did, and we find no error in the conclusion reached.

(a) *The Standard of Review*

[155] As a preliminary matter, we consider that in reviewing the consent in the Listing Agreements, the Tribunal was interpreting a standard form contract. As such, the standard of review is correctness.

[156] Generally speaking, contractual interpretation involves questions of mixed law and fact and, thus, is reviewable on a deferential standard: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50, [2014] 2 S.C.R. 633 (*Sattva*). The interpretation of standard form contracts is an exception to this rule. Their interpretation constitutes a question of law and, thus, is reviewable for correctness: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 46, [2016] 2 S.C.R. 23 (*Ledcor*). Determining the interplay between a statutory provision and a contractual term is also an exception and is reviewable for correctness: *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135 at para. 37, 414 D.L.R. (4th) 165 (*Calian*). Statutory rights of appeal do not necessarily convert a reasonableness standard to a correctness one–it depends on the exact language of the legislative provision: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 31, [2016] 2 S.C.R. 293.

[157] MLS Rules specify that brokers cannot change or delete any part of clause 11 of the Listing Agreement (Rule 340). The *Frequently Asked Privacy Questions* provided by CREA states that "[b]oth current and historical data is essential to the operation of the MLS® system and by placing your listing on the MLS® system you are agreeing to allow this ongoing use of

listing and sales information". The Listing Agreement is, at least for the purposes of these proceedings, a contract of adhesion or standard form.

(b) *The Consents*

[158] *PIPEDA* requires that individuals consent to the collection, use, and disclosure of their personal information (sch. 1, clause 4.3.1). This consent must be informed (sch. 1, clause 4.3.2). Amendments in 2015 to this principle specified that for consent to be informed, the person must understand the "nature, purpose and consequences of the collection, use or disclosure of the personal information" (s. 6.1).

[159] As noted earlier, the Tribunal proceeded on the basis that the sale price of property is personal information and therefore subject to the terms of *PIPEDA*, which mandates informed consent to the use of personal information.

[160] While the Listing Agreement used by TREB provides consent to some uses of personal information, TREB asserts that had the Tribunal examined it more closely, it would have found that the Listing Agreement did not provide sufficiently specific wording to permit disclosure of personal information in the VOW data feed. Specifically, TREB contends that the consents do not permit the distribution of the data over the internet, and that is qualitatively different from the distribution of the same information by person, fax, or email.

[161] The Listing Agreement contains a clause governing the "Use and Distribution of Information". TREB focuses on the consent to the collection, use, and disclosure of information

for the purpose of listing and marketing of the Property itself but omits that part of the consent (in the same clause) that says the real estate board may "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." The Commissioner contends that this latter part of the consent (in the same clause) is the pertinent part and that it is sufficient to permit the ongoing use and disclosure of information, even after the listing is no longer active. We agree with the Commissioner's position.

[162] The Tribunal had before it the Listing Agreements used from 2003 to 2015. Although there is data in the MLS database dating back to 1986, Listing Agreements prior to 2003 were not before the Tribunal or this Court. Therefore, this Court expresses no opinion regarding the information obtained prior to 2003 or any information that may have entered the database without being subject to the 2003 to 2015 Listing Agreements.

[163] The Listing Agreement was created by the Ontario Real Estate Association and recommended by TREB to its members (TR at para. 64). In the most recent version before the Court, the relevant section of the Use and Distribution of Information clause reads:

> The Seller acknowledges that the database, within the board's MLS System is the property of the real estate board(s) and can be licensed, resold, or otherwise dealt with by the board(s). The Seller further acknowledges that the real estate board(s) may, during the term of the listing and thereafter, distribute the information in the database, within the board's MLS System to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others; market the Property, at its option, in any medium, including electronic media; during the term of the listing and thereafter, compile, retain and publish any statistics including historical data within the board's MLS System and retain, reproduce and display photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans,

> architectural designs, artistic renderings, surveys and listing descriptions which may be used by board members to conduct comparative 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)

[164] The wording in the Listing Agreements from 2003 onwards is substantially similar to that quoted above. However, the phrase "during the term of the listing and thereafter" (underlined above), first appears in 2012. The Use and Distribution of Information clause in the Listing Agreement is broad and unrestricted. Sellers are informed that their data could be used for several purposes: for distribution in the database to market their house; to compile, retain, and publish statistics; for use as part of comparative market analysis; and any other use in connection with the listing, marketing, and selling of real estate. Nothing in the text implies the data would only be used during the time the listing is active. Indeed, the use of data for historical statistics of selling prices necessitates that the data will be kept. The Tribunal noted that TREB's policies 102 and 103 add that, apart from inaccurate data, "[n]o other changes will be made in the historical data" (TR at para. 401). We note as well that clause 11 of the Listing Agreement allows for the property to be marketed "using any medium, including the internet".

[165] *PIPEDA* only requires new consent where information is used for a new purpose, not where it is distributed via new methods. The introduction of VOWs is not a new purpose–the purpose remains to provide residential real estate services and the Use and Distribution of Information clause contemplates the uses in question. The argument that the consents were insufficient–because they did not contemplate use of the internet in the manner targeted by the VOW Policy–does not accord with the unequivocal language of the consent.

(c) *Conduct of the Parties*

[166] The conduct of the parties may be considered in the interpretation of a contract. Given our conclusion as to the correct interpretation of the consents, it is not necessary to consider the contextual elements or conduct of the parties. However, we choose to do so here because it illuminates and reinforces our conclusion arising from the terms of the contract itself.

[167] In *Sattva*, the Supreme Court of Canada stated that, with some limitations, a contract's factual matrix includes "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable [person]" (*Sattva* at para. 58 citing *Investors Compensation Scheme v. West Bromwich Building Society* (1997), [1997] UKHL 28, [1998] 1 All E.R. 98 at 114). Thus, the conduct of the parties forms part of the factual matrix of the contract and can, subject to some restrictions, inform the interpretation of its terms.

[168] The extent to which the factual matrix, including the parties' conduct, may inform the interpretation is subject to the "overwhelming principle" (formulated in *Sattva*, but characterized as such in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 55, 411 D.L.R. (4th) 385 (*Teal Cedar*)). There are two elements to the overwhelming principle. The factual matrix cannot be given excessive weight (so as to "overwhelm" the contract); and the factual matrix cannot be interpreted in such isolation from the text of the contract such that a new agreement is effectively created (*Sattva* at para. 57; *Teal Cedar* at paras. 55 - 56, 62).

[169] In *Calian*, this Court observed that "the clear language of a contract must always prevail over the surrounding circumstances" (*Calian* at para. 59). Further, the factual matrix may only be

considered to the extent that it helps determine the "mutual and objective intentions of the parties as expressed in the words of the contract" (*Sattva* at para. 57). Indeed, only evidence revealing "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" may inform the interpretation of the contract (*Sattva* at para. 58). For example, the subjective intention of one party cannot be relied upon to interpret the meaning of a contract (*Sattva* at para. 59; *ING Bank N.V. v. Canpotex Shipping Services Ltd.*, 2017 FCA 47 at paras. 112, 121, 277 A.C.W.S. (3d) 281 (*ING Bank*)). Reliance of that sort would offend the parol evidence rule, i.e., that evidence external to the contract that would "add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing" is inadmissible (*Sattva* at para. 59; *ING Bank* at paras. 112, 121).

[170] As far as standard form contracts are concerned, the factual matrix is less relevant (*Ledcor* at paras. 28, 32). This is in keeping with the rationale underlying the correctness standard for standard form contracts: that contracts of this nature are not negotiated, but rather offered on a "take-it-or-leave-it" basis. However, in *Ledcor* Wagner J. observed at paragraph 31 that some surrounding circumstances, such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates, may be considered:

> [31] I agree that factors such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form contract. However, those considerations are generally not "inherently fact specific": *Sattva*, at para. 55. Rather, they will usually be the same for everyone who may be a party to a particular standard form contract. This underscores the need for standard form contracts to be interpreted consistently, a point to which I will return below.

[171] Applying these principles to the facts as found by the Tribunal, there is nothing in the evidence that would suggest that TREB considered that the consents were inadequate or that TREB drew a distinction between the means of communication of information. To the contrary, TREB's conduct, as well as the testimony of its CEO, are only consistent with the conclusion that it considered the consents were sufficiently specific to be compliant with *PIPEDA* in the electronic distribution of the disputed data on a VOW, and that it drew no distinction between the means of distribution.

[172] We note as well that TREB's position that *PIPEDA* mandates the VOW Policy is inconsistent with some of its own evidence. For example, TREB refused a request by a seller to remove the seller's MLS listing information, noting that its policy respected *PIPEDA* requirements (TR at para. 400).

[173] The Tribunal also noted that TREB sought legal advice with respect to whether the consents were adequate to address the privacy issues related to the posting of photographs of the interior of homes, and, consequentially changed the consent to provide express authorization with respect to images. There was no evidence that similar steps were contemplated or taken with respect to the sold or pending sold information. Similarly, TREB sought legal advice with respect to the provision of sold data to members. That advice noted that "a strong argument can be made that the words 'conduct comparative market analyses'" in the consents authorised disclosure of selling price information to prospective clients.

[174] Finally, the Tribunal's view on the scope of consents is consistent with the direction of the Supreme Court of Canada in *Royal Bank of Canada v. Trang*, 2016 SCC 50 at paras. 36 - 42, [2016] 2 S.C.R. 412. There the Court held that a mortgage balance was less sensitive information because the principal, the rate of interest, and due dates were all publicly available under provincial land registry legislation. In this case, the selling price of every home in Ontario is publicly available under the same legislation. When the consents are considered in light of the nature of the privacy interests involved, the Tribunal's conclusion that they were sufficient takes on added strength.

[175] This ground of appeal therefore fails and we now turn to the last issue raised by the appeal.

D. *Copyright in the MLS Database*

[176] TREB and CREA submit that the Tribunal erred in finding that TREB does not have copyright in the database. In our view this ground of appeal fails. In light of the determination that the VOW Policy was anti-competitive, subsection 79(5) of the *Competition Act* precludes reliance on copyright as a defence to an anti-competitive act. This is sufficient to dispose of the appeal in respect of copyright.

[177] While not strictly necessary to do so, we will address CREA's contention that the Tribunal applied the incorrect legal test to determine whether copyright exists. On this point we agree. It is, however, an error of no consequence. The same result is reached on the application of the correct law.

[178] We turn to the Subsection 79(5) issue. Subsection 79(5) of the *Competition Act* provides:

Exception	**Exception**
79 (5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.	**79** (5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

[179] Subsection 79(5) seeks to protect the rights granted by Parliament to patent and copyright holders and, at the same time, ensure that the monopoly and exclusivity rights created are not exercised in an anti-competitive manner. The language of subsection 79(5) is unequivocal. It does not state, as is contended, that any assertion of an intellectual property right shields what would otherwise be an anti-competitive act.

[180] Parliament clearly signaled, through the use of the word "only", to insulate intellectual property rights from allegations of anti-competitive conduct in circumstances where the right granted by Parliament, in this case, copyright, is the sole purpose of exercise or use. Put otherwise, anti-competitive behaviour cannot shelter behind a claim of copyright unless the use or protection of the copyright is the sole justification for the practice.

[181] TREB attached conditions to the use of its claimed copyright rights in the disputed data. For the reasons given earlier, we see no error in the Tribunal's findings as to the anti-competitive purpose or effect of the VOW Policy. The Tribunal found that the purpose and effect of those conditions was to insulate members from new entrants and new forms of competition. The purpose, therefore, of any asserted copyright was not "only" to exercise a copyright interest.

[182] While this is sufficient to dispose of this ground of appeal, as noted earlier, we will, for the sake of completeness, address the second alleged error in the Tribunal's analysis of copyright.

[183] Copyright is a creature of statute. The *Copyright Act* provides that copyright exists for "every original literary, dramatic, musical and artistic work" created by Canadians (section 5). This phrase is defined at section 2 to include compilations, which is in turn defined to include works "resulting from the selection or arrangement of data". The classification of the database as a compilation is not contested on appeal.

[184] The meaning of the word "original" in section 5 of the Copyright Act was considered by the Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [*CCH*]:

> [16] … For a work to be "original" within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing

> different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

[185] The point of demarcation between a work of sufficient skill and judgment to warrant a finding of originality and something less than that – a mere mechanical exercise – is not always self-evident. This is particularly so in the case of compilations. It is, however, within the parameters of the legal test, a highly contextual and factual determination.

[186] This is not a new observation. In *Édutile Inc v. Automobile Protection Assn.*, [2000] 4 F.C. 195, 6 C.P.R. (4th) 211, (F.C.A.) the Court acknowledged that "[i]t is not easy in compilation situations to draw a line between what signifies a minimal degree of skill, judgment and labour and what indicates no creative element" (at para. 13). Although decided before *CCH*, the observation remains apposite.

[187] There is, however, guidance in the case law as to the criteria relevant to the determination of whether the threshold of originality is met. In *Red Label Vacations Inc. v. 411 Travel Buys Ltd.*, 2015 FC 18, 473 F.T.R. 38, Manson J. noted that "when an idea can be expressed in only a limited number of ways, then its expression is not protected as the threshold of originality is not met" (at para. 98, citing *Delrina Corp. (cob Carolian Systems) v. Triolet Systems Inc.*, 58 O.R. (3d) 339 at paras. 48–52, 17 C.P.R. (4th) 289, leave to appeal to S.C.C. refused, 29190 (28 November, 2002)).

[188] In *Tele-Direct* the Court found a compilation not to be original in part because it was done in accordance with "commonplace standards of selection in the industry" (paras. 6 - 7). Although *Tele-Direct* predates *CCH*, the proposition that industry standards may be relevant to the originality analysis is a legitimate, residual consideration (see e.g. *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 at paras. 34, 39, 65, 77, 182–188, 92 C.P.R. (4th) 6, aff'd 2012 FCA 226 at paras. 37–38, 107 C.P.R. (4th) 1 (*Harmony FCA*); *Geophysical Service Inc. v Encana Corp.*, 2016 ABQB 230 at para. 105, 38 Alta. L.R. (6th) 48 (*Geophysical*)).

[189] Applying the guidance of the Supreme Court in *CCH*, it is important to view adherence to industry standards as, at best, one factor to be considered amongst many. In. *Geophysical*, Eidsvik J. explained there is no steadfast rule that "there is no entitlement to copyright protection … where the selection or arrangement is directed by accepted and common industry practices" (at paras. 100–101):

> … these cases [that considered "common industry practices"] do not stand for such steadfast rules or copyright criteria. Certainly, these considerations were part of the analysis in those cases in deciding whether the production was an original work, but they are not the test. The judge in each case made a factual determination about whether sufficient skill and judgment was brought to the work to merit the "original" finding.

[190] However, if observing industry standards amounts merely to "mechanical amendments", originality will not be found (*Harmony FCA* at para. 37).

[191] In *Distrimedic Inc. v. Dispill Inc.*, 2013 FC 1043, 440 F.T.R. 209, de Montigny J. (as he then was) wrote that "when the content and layout of a form is largely dictated by utility and/or

legislative requirements, it is not to be considered original" (at para. 324). He continued and observed that compilations

> will not be considered to have a sufficient degree of originality when the selection of the elements entering into the work are dictated by function and/or law, and where their arrangement into a tangible form of expression is not original. Only the visual aspect of the work is susceptible to copyright protection, if original (at para. 325).

[192] In this context, TREB and CREA argue that the Tribunal wrongly required proof of creativity and went beyond the appropriate test for originality. After reviewing the MLS database, the Tribunal noted the "absence of a creative element" (TR at para. 732). Further, while the Tribunal cited *CCH* for the correct originality test in paragraph 733, it then relied on *Tele-Direct* to invoke and apply the element of creativity which, post-*CCH*, is not the correct test (*CCH* at para. 25).

[193] We agree with the appellant on this point. However, in view of the Tribunal's findings of fact, applying the correct test, we reach the same result.

[194] The Tribunal considered a number of criteria relevant to the determination of originality (paragraphs 737 - 738 and 740 - 745). Those included the process of data entry and its "almost instantaneous" appearance in the database. It found that "TREB's specific compilation of data from real estate listings amounts to a mechanical exercise" (TR at para. 740). We find, on these facts, that the originality threshold was not met.

[195] In addition, we do not find persuasive the evidence that TREB has put forward relating to the use of the database. How a "work" is used casts little light on the question of originality. In addition, we agree with the Tribunal's finding that while "TREB's contracts with third parties refer to its copyright, […] that does not amount to proving the degree of skill, judgment or labour needed to show originality and to satisfy the copyright requirements" (TR at para. 737).

[196] We would therefore dismiss this ground of appeal.

VI. Conclusion

[197] For the reasons above, we would dismiss the appeal with costs.

"M. Nadon"
J.A.

"Donald J. Rennie"
J.A.

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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CONCURRED IN BY:	NEAR J.A.
DATED:	DECEMBER 1, 2017

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