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Shape of Regulatory Action

Commissioner v. TREB, and the Data War

Technology Edition

Observe. Orient. Decide. Act.

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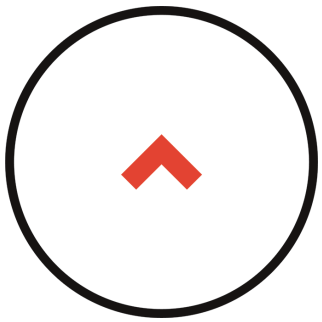


Observe.

INTRODUCTION

In August, the Supreme Court of Canada refused to hear an appeal from the Toronto Real Estate Board ("TREB"), thereby putting an end to a seven-year fight between TREB and the Competition Bureau of Canada.

At issue was a fairly minor detail in the rules of TREB's MLS that prohibited certain uses of sold and pending data, as well as TREB's refusal to allow the display of certain kinds of data on Virtual Office Websites.

The immediate impact is, in all likelihood, far more modest than some people have predicted. After all, the very similar 2008 consent decree between National Association of REALTORS and the U.S. Dept. of Justice had a very small impact on the industry. Many in and around the industry are predicting huge changes across Canada, and a coming explosion of innovation and competition. I am far less sanguine about such a prospect.

So why do we care about this?

The answer is that the TREB case provides valuable insight into the regulatory and legislative mindset, especially as it comes to the all-important topic of *data*. Given the many similarities between US and Canada, I think we can tease out how the fight over data, access to data, usage of data, and the recent concerns by governments everywhere about privacy, is going to play out.

Along the way, we can touch on a number of important topics around competition, technology, and structural issues with organized real estate.

As data becomes more and more important not just to real estate but to our economy as a whole, the war over data is entering a new phase. Who owns it, who controls it, who can see it, and who can use it and

for what purpose and how will all be questions with renewed urgency in the coming years. And potentially, the answers will be different this time around.

One regret I have is that given the topic and the necessity of speculation, this issue of The Red Dot will be light on Recommendations. Nonetheless, I have spoken with a number of you about the topic and since it appears that it is of interest even without the customary list of action items, I will forge ahead.

Robert Hahn
October 2018

EXECUTIVE SUMMARY: TECHNOLOGY

In August, the Supreme Court of Canada dismissed the Toronto Real Estate Board's ("TREB" hereafter) application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-174-16, 2017 FCA 236, dated December 1, 2017. That ended a seven-year battle between TREB and the Competition Bureau of Canada.

In and of itself, the decision is not all that significant, but it provides valuable insight into the regulatory and legislative mindset and how they think of the interaction between data and competition.

Let's start by examining what happened in Canada.

Commissioner of Competition v. TREB

I recommend that you consult legal counsel for an analysis of what these decisions ultimately mean for you and your business.

The Issue

The core issue in *Commissioner of Competition v. TREB* is the question of whether TREB used its monopoly over data to stifle competition in real estate brokerage.

The Competition Bureau took the stance that excluding the Disputed Data (e.g., sold data, pending solds, expireds, compensation, etc.) from the VOW feed and restricting how brokers and agents can use VOW data led to discrimination between traditional "brick and mortar" brokerages and new online brokerage models.

It goes without saying that TREB disagreed with the Competition Bureau.

First, TREB noted that it isn't a brokerage, so is not a competitor in the market for brokerage services. Second, the restrictions were not put in place for bad reasons, but for legitimate reasons, such as

protecting the privacy rights of consumers and TREB members. Third, the restrictions on VOW data and usage do not create any kind of a barrier to competition.

Given that we now know that TREB lost the argument on all three points, what remains interesting for us is *why* TREB lost.

Evidence and Reasoning

The actual result of the TREB case is minimal at best. The more important thing for us is to understand the thinking behind why the regulators and the courts ruled as they did.

TREB is a Competitor… Kinda Sorta

The Tribunal essentially treated TREB as an *independent entity with market power* separate and apart from the brokers and agents who make up TREB. The source of that market power was not in the combined actions of the brokerages that make up TREB, but *in TREB's control over access to the MLS system*.

There are two sub-issues here of importance.

Governance

The Competition Bureau took the representative nature of TREB's governance as evidence of ill-intent. The fact that the Board of TREB is made up of "licensed and practicing broker/agents in the GTA" becomes the reason to believe that TREB acted to "insulate them from new and disruptive forms of competition."

Control of MLS = Market Dominance

The second sub-issue of importance is the very direct statement by the Tribunal (upheld by the Federal Court of Appeal) that control of the MLS necessarily equals market dominance.

In plain English, the MLS has market dominance by the virtue of existing. The only way to not have market dominance is to have competing MLSs in your market area, which is extremely unlikely due to network effects.

Effect on Competition

One of the points that TREB raised throughout this process was that there was no evidence that the restrictions on VOW usage had a substantial effect on competition.

It did not matter that the Disputed Data is widely available with substitutes. The Tribunal decided that the substitutes are inadequate for a variety of reasons, including cost.

Further, the Tribunal thought that the restrictions on VOW data usage limit and restrict real estate agents from offering better/cheaper services. So it isn't really about what data consumers do or do not want, and whether they have access to that information from one source or another. It's about whether brokers and agents can provide something better, cheaper, faster, whatever.

It did not matter that there is very little evidence that VOW policy or availability of Disputed Data makes any difference whatsoever based on the experience of other markets without any restrictions, such as the U.S. and Nova Scotia.

Instead, the Competition Bureau and the Tribunal relied on "qualitative evidence" – which is to say, testimony from a few brokerages who said they could not do some of the things they wanted to do because of TREB's rules and restrictions.

"But For" Analysis

The Tribunal undertook, and the Federal Court of Appeal upheld, what it called a "but for" analysis.

The Commissioner would have to come up with a theoretical world in which restrictions did not exist and come up with a story of how in that non-existent theoretical world, consumers would enjoy a greater range and quality of services and lower prices.

So, despite the fact that there is fierce competition between brokerages, despite large number of brokers and agents getting into and out of the business, despite significant commission discounting, and despite significant ongoing technological and other innovation… TREB's restrictive VOW policy led to:

- Increased barriers to entry and expansion;
- Increased costs to VOW operators;
- Reduced the range of brokerage services;
- Reduced the quality of brokerage services; and
- Reduced innovation.

What is interesting about all of the testimony relied on by the Tribunal is that they are based on "we would have" and "we could have" statements.

The decision was based solely on qualitative testimony by a few brokerages.

It is simply astonishing to think about the range of MLS rules and policies that are subject to this kind of "but for" analysis.

The Issue of Privacy

One of the central conflicts in this case was whether there was any legitimate purpose to the VOW Policy and Rules.

TREB has maintained and still maintains that privacy was the primary motivation behind its adoption of a more restrictive VOW policy than NAR's 2008 post-settlement VOW policy.

Both the Tribunal and the Federal Court of Appeal smacked down the privacy justification. Why they did so is an important lesson.

An Afterthought and a Pretext

Bottomline, the Tribunal goes through a long history of the VOW policy and how it came about and concludes that privacy is a fig leaf behind which TREB is trying to hide.

Throughout the Order, one finds constant references by the Tribunal to how the testimony of various TREB witnesses is not borne out by the meeting minutes of TREB's VOW Task Force.

Put as bluntly as possible, the Tribunal called bullshit on TREB's privacy concerns.

The Copyright Argument

The Court of Appeal dismissed TREB's copyright argument handily. But it did not stop there. The Court took the step of explaining further, to TREB's detriment.

The Tribunal and the Federal Court of Appeal found a lack of "skill, judgment or labour needed to show originality and satisfy the copyright requirements" in the MLS compilation database.

TREB just might have opened up Pandora's Box.

Why None of This Matters

Those of us living in the U.S. where there has been, for all practical purposes, no restriction on VOW data feeds or VOW data usage, since 2008 realize that the TREB decision will make precious little difference to the brokers, agents, and consumers in the Toronto market.

Redfin operates the highest trafficked brokerage website by a longshot, with sold data, with data analytics, with innovative products and information and data for consumers and its agents… and has for ten years. As of Q2/2018, Redfin had reached 0.83% market share of U.S. existing home sales. And one can reasonably argue that much of that growth is the result not of superior VOW data delivery, or fantastic data tools for consumers, but the result of Redfin's 1% Listing Fee which it has marketed all over the place.

I estimate the chances of TheRedPin, ViewPoint, and other newly empowered VOW-based brokerages making a huge leap in growth and productivity and bringing the homesellers and homebuyers of Toronto a wider range of higher quality brokerage services at lower cost to be asymptotically approaching zero.

Why This Matters

The reason why the *Commissioner of Competition v. TREB* matters is that it gives us valuable insight into the regulatory and legislative mindset, especially as it comes to the all-important topic of *data*.

The reasoning that the Competition Tribunal employed is one that is likely to be the same or similar to what any regulator in U.S. and

Canada will use when analyzing an issue of competition and data in the real estate industry.

The evidence that convinced or failed to convince the Competition Tribunal are likely to be similar to the evidence that will convince or fail to convince future regulators and courts.

And the story is being told about this case will be similar to the stories that will be told about real estate, about the role of the MLS, and about innovation, competition, and control over data going forward.

So let's start there, with the stories.

Media Coverage

Despite the fact that this is an incredibly boring anti-trust case that was highly technical (even for lawyers), the media coverage of the Supreme Court's refusal to hear the appeal has been... well... sensational? Suggestive? Dare I say, Fakenews?

One news story made it sound as if Canadian consumers had no way of getting the information on price trends to listing histories. As you know by this point, they always could. They just couldn't get it from a VOW site. Now they can. But the media story reads as if REALTORS had been hoarding all of that information, and at last, information is available.

The point to be made about these stories is that they are casting TREB and organized real estate (and by extension, brokers and agents who belong to Associations and the MLS) as the mustache-twirling bad guy in a soap opera drama, laughing as the train hurtles towards the maiden-in-distress (the consumer). If it weren't for our dashing hero the Government to step in, why, it would be disaster!

Let me note that being cast as the villain by the media has serious repercussions if the market turns, the economy sours, and politicians are seeking to find someone to blame for problems. Ask the mortgage bankers in the United States about their experience after 2007.

REALTORS and Political Power

Bad PR is especially troubling for REALTORS because REALTOR political power comes from the purse.

Since 1990, NAR has given over $100 million in political contributions. In 2018, NAR is the #2 on the list of Top Spenders for lobbying, with $53.8 million, more than double the third-place lobbyist, the Pharmaceutical Research & Manufacturers of America.

This is not a criticism. When REALTORS talk about protecting homeownership and the American Dream, they mean it. Without political power, all that would be hot air.

The issue with political power based on money, however, is that *bad publicity can kill it off*. If an organization is painted as toxic by the media, politicians will refuse to take its money, and in some cases, return contributions already made.

So when news media stories about you are consistently negative, and paint the REALTOR organization as some sort of conspiracy to keep consumers in the dark about vital information, it almost doesn't matter that the stories are biased, filled with errors, or flat out wrong. It becomes more and more difficult to exercise political power through money if your organization becomes politically toxic.

The Significance of Regulatory Thinking

There are three interesting takeaways from how the Tribunal thought through the issues in the TREB case. Well, there are dozens, but three are truly important.

First, that as far as the regulators are concerned, the MLS has market dominance simply by existing.

Second, that every decision and action and policy of the MLS will be seen through the glass of protecting incumbents from competition.

Third, that the MLS does not have a copyright interest in its database.

This is not that idle an exercise.

The FTC-DOJ Investigation

As it happens, the FTC and the DOJ have launched a joint investigation into competition in the real estate industry.

What we in the industry have to think about is not the formal commentary of the Competition Bureau to their counterparts at the FTC and the DOJ, but the informal conversations and information-sharing that is assuredly happening between them.

Given the closeness between Canada and the U.S., and given the similarities between the two countries in terms of how real estate is bought and sold *and* how the real estate industry is organized (a fact that Competition Bureau Canada calls out in its formal comments), it is entirely predictable that the FTC and DOJ regulators will learn from and take seriously the experiences and the reasoning of their counterparts up north.

So what happens if we apply the logic of the TREB case to some of the questions and issues that the FTC and the DOJ are looking at?

Current Barrier to Competition: The MLS?

The MLS has market dominance simply by existing.

The fact that the MLS and the Association are not brokerages, and therefore not a competitor in the market for brokerage services, is of no import because the MLS is "effectively dictating the rules under which brokers are allowed to compete and not compete. It's dictating whether they can compete and it's dictating the forum in which they can compete."

The policies and rules of the MLS will be considered through the lens of insulating incumbent brokers and agents from new types of competition, even ones that do not exist, because "but for" the policies of the MLS, they would exist.

And furthermore, the MLS does not have a copyright in the database (at least according to FCA.

With that logic, it's difficult to conclude that the MLS is anything other than a barrier to competition in real estate, whatever the reality.

Novel Business Models "But For" the MLS and Association

If the basic thinking of the authorities is that (a) MLS is a monopoly, (b) operated to protect incumbents from competition, and (c) its rules and policies are automatically suspect because "but for" those rules and policies, better, cheaper, faster brokerage services would exist, then there are a few rules and policies that immediately become problematic.

REALTOR-Only MLS

A strong case could be made by some as-yet-non-existent brokerage that they would enter the market and offer brokerage services at lower cost to consumers "but for" the additional fees layered on top of MLS fees by the mandatory membership requirement in the REALTOR Association.

Mandatory Listing Submission

Every MLS in the U.S. and Canada require that its members submit all listings to the MLS.

The narrow exceptions have to do with "pre-market" or "coming soon" listings, in which the listing agent promotes a property in the days and weeks during which the property is being repaired, painted, staged, or otherwise made ready to go on the market, that is, put into the MLS system.

The iBuyer phenomenon is still a relatively new thing in real estate, and it is as yet unclear how it will play out.

It is entirely conceivable that an as-yet-non-existent company could come forth and claim that they would happily enter the brokerage services market, or claim that they would expand their operations, and instead of taking additional profits by going "off-MLS", charge the consumer less in commissions... "but for" the mandatory submission policy of the MLS.

Let Your Imagination Run Wild

Fact is, under the framework that the regulators and judges in TREB used, there is no rule, no policy, no action of the MLS that is safe from being anticompetitive on a "but for" analysis. You'd have to come up with a legitimate business purpose in order to defend against the claim that the rule/policy/action is not meant to quash competition and insulate traditional brokerage members.

On Privacy

We saw above that even as TREB maintained steadfastly from the very start that privacy rights of members and consumers was the driving force behind their VOW policy, the Tribunal and the FCA more or less laughed at them, or worse (in polite legalese) called TREB's people liars.

But what's more, within the privacy concerns analysis, the Tribunal and the FCA seemed to suggest that privacy concerns related to real estate really are not that high.

To Be Taken Seriously…

Since it is beyond obvious that the Tribunal and the FCA did not take TREB's assertions of privacy concerns seriously, we have to look at why that is, and how others in the real estate industry might be taken seriously by regulators and courts in future situations where they claim privacy concerns.

So how does the real estate industry get taken seriously when we talk about privacy?

Actually Mean It

The first and most obvious thing is to actually be concerned about privacy. In the case of TREB, the Tribunal was persuaded that TREB was making bad-faith arguments about privacy because of the evidence from the early years in the development of the VOW Policy.

Moving forward, if you want to be taken seriously by regulators and judges that you are serious about privacy concerns, then *you actually*

need to be serious about privacy concerns. Privacy cannot be a fig leaf after the fact, because the regulators are skeptical and not stupid.

Paper Trail

The second thing to do is to create and maintain a paper trail of your privacy concerns. This is particularly important if there's a paper trail in the past that you were concerned about other things, which may be problematic.

In the TREB case, the testimonies of witnesses were often either unsupported by or contradicted by the paper trail. People testified to agreements or comments made at a meeting, but the meeting minutes did not reflect them in any way.

Implement Changes Consistent with Your Concern

Finally, if you have had a Road to Damascus moment on the issue of data and privacy, and have changed your mind completely about what is and is not important with respect to real estate data, then you need to implement changes that reflect that conversion from the Old and Busted of protectionism through controlling data to the New Hotness of controlling data to protect privacy rights.

Let's take just one example from the Tribunal's Order that is sure to shock the American audience: cooperating broker commissions.

Privacy Concerns Over Cooperating Commissions?

For American MLSs, the idea of sharing cooperating compensation information with clients is crazy, because of the parity rule.

In Toronto, because there was no parity rule, compensation commission information will now be available via VOW. While this development in Toronto may be shocking to American real estate professionals, when looked at from a privacy angle, it isn't clear that there is one.

After all, everyone would agree that the property owner's name and contact information is private and personal information that ought not to be shared at all.

Compensation *and bonuses* offered to cooperating brokers is a little different. There's no privacy consideration here. Every single member of the MLS can see that information.

There being no privacy justification to keep this data from consumers, you had better come up with a legitimate business reason for doing so that doesn't smell a whole lot like keeping secrets from your clients, to whom you owe a fiduciary duty.

Otherwise, it's easy to see how a regulator would look at that refusal to make data available.

Is There a Privacy Right in Real Estate Data?

One of the more intriguing things to come out of the TREB case, particularly from the FCA Ruling, is the suggestion that there may not be any privacy rights in real estate data at all with narrow exceptions. (And maybe not even then.)

Public Records

The first obvious point, which the FCA made, is that it's hard to assert a privacy right over information that is required to be put into a public title registry.

So if the information is public data, including sold price, it's really difficult to claim some sort of a privacy right to that.

Widely Available Information

Having said that, there are possible privacy rights that attach to things like interior photographs, floorplans, and the like.

But as the Tribunal noted, just how much expectation of privacy could you have about something that is out on the Internet and widely available from every broker and agent website and many portals?

Personal Data vs. Real Estate Data

There is no doubt that some of the information that agents and brokers collect, and deposit into the MLS, belongs in the category of

personal data with all manner of privacy rights: name, telephone number, Social Security number, etc.

But it is important to separate out personal data from property data. The latter may not have any expectation of privacy, except on the narrow edges (like interior photographs), and even then, it's hard to argue for strong privacy rights when those photographs and virtual tours are all over the Internet.

Pulling It All Together: The Coming War Over Data

This seemingly unimportant issue from a case out of Toronto, Canada, turns out to be significant. It may be the first time we have had a formal decision by the government, using reasoning we can understand, applying anti-trust rules to the issue of **control over data**.

That in turn is significant because regulators tend to think alike, and regulators working in similar legal environments, facing similar market conditions, and similar industry structures and institutions are likely to talk to, learn from, and borrow from each other.

The iBuyer and The Platform

The most important point of contention coming up is how the iBuyer phenomenon (addressed in depth in the August Red Dot), and its ultimate successor, The Platform (addressed in depth in the September Red Dot), will create new points of conflict in terms of access to data, collection and distribution of data, and control over how data can be used.

Both of these business models exist outside of the traditional MLS system. They can work within it, of course, and to date, they have. But unlike traditional brokerage services, the iBuyer doesn't *require* it because fundamentally, it doesn't require cooperation and compensation. The iBuyer is fundamentally dealing directly with the home owner or the home buyer, and buying and selling homes "direct to the public." That all current iBuyers offer cooperation and compensation is a matter of convenience and industry relations, not a matter of necessity.

Government *Will* Get Involved

Just as we saw in the TREB case above, when the fight over data breaks out in earnest, the government will get involved.

And based on what we have seen, we can draw some conclusions.

Regulators Are Ignorant, Not Stupid

It is impossible for regulators (and judges) to understand some of the intricacies, details, and subtleties of all industries. They're not experts, and they will never be. But it is a grave mistake to confuse ignorance with stupidity.

They will see through pretexts, no matter how solid we think those pretexts are, because they are just that: pretexts, rather than true reasons.

State v. Federal Regulators

The real estate industry is largely self-regulated.

Consider the makeup of the real estate commissions themselves in most of the United States, which is usually made up of real estate brokers.

One issue that such self-regulation creates is that the federal regulators, such as the DOJ and the FTC, do not trust the state regulators, who they see as being captured agencies.

The Media Does Not Like You

As the coverage of the TREB case illustrates, the news media is not a friend to the industry. Oftentimes, the problem is one that plagues news media as a whole: reporters and editors who do not understand the issue but go for the most sensational headline and juiciest take on a story.

The other problem, however, is that the industry does to the media what it often does to consumers and regulators: get defensive, spin things beyond credibility, and play hide the ball. It's hard to like someone who you think is trying to play you for a fool.

The Real Estate Industry is Divided

As the TREB case shows us, and present controversies continue to show us, and future issues will show us, the real estate industry is not a united front. It never was, and it never will be.

Absent Changes, The Real Estate Industry Will Lose, and Lose Big

There are two axiomatic truths when it comes to regulators. One cannot become a regulator at all without believing all three of these things.

First, you cannot trust the industry.

Second, you must believe that you know better than veterans of the industry you regulate what is best for consumers.

Whatever future issues arise, whether a dispute over data and data rules or a dispute over business rules or a dispute over business models, if the industry approaches them the same way it has in the past, the outcome is quite likely to be worse than if the industry had approached things in a far more cooperative and collaborative manner.

Protecting the interests of their members is what the Association and the MLS must do. Protecting the interests of their agents is what brokerages have to do. And protecting the interests of their clients is what agents ought to do. But trying to protect things too much, by any means necessary, could mean unexpected (although not unforeseeable) consequences for us all.

Self-Regulation Is Not a Given

Finally, the real estate industry is largely left to regulate itself, for the most part, between the industry-dominated real estate commissions to the REALTOR Associations to the MLS.

That does not have to be the case.

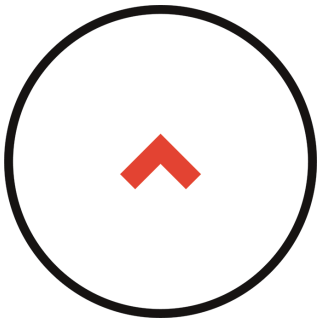
With the media not our friend, and public perception of real estate brokers and agents at historic lows, it is not unthinkable that the

relative independence that real estate industry has enjoyed for decades be yanked away.

Recommendations: Technology

Please turn to the Recommendations section at the end of the report for details.

- **Pay Attention**
- **Think Hard About the "But For" Test**
- **Privacy and the MLS**



Orient.

MAIN SECTION

In August, the Supreme Court of Canada dismissed the Toronto Real Estate Board's ("TREB" hereafter) application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-174-16, 2017 FCA 236, dated December 1, 2017. That ended a seven-year battle between TREB and the Competition Bureau of Canada.

As a result, TREB has to allow sold data to be displayed on Virtual Office Websites ("VOW") of its member brokers and REALTORS. With a 60-day timeframe to comply with the order of the Competition Tribunal, that work is mostly done by now in October. But firms such as Zoocasa and Housesigma started publishing sold data immediately after the decision by the Supreme Court.

In and of itself, the decision is not all that significant. If you were expecting an earth-shattering kaboom, you will be disappointed. Yes, it is somewhat significant for TREB and the brokerages in the Toronto area, but as Inman News noted, sold information has been available in the U.S. for years from companies like Redfin and Zillow, not to mention brokers and agents.

So why do we care?

This case is an intersection between two of the most important issues in the economy: data and competition.

The emergence of giant companies like Google, Facebook, Amazon and others that collect, analyze, and monetize personal data has led to significant legislative and regulatory actions across the world. The EU's GDPR law is only the most well-known.

And competition has always been a particular issue for the real estate industry in North America because of the unique coopetition structure created by the MLS and REALTOR Associations.

Numerous past actions by governments suggest a continuing suspicion of the real estate industry.

The TREB case provides valuable insight into the regulatory and legislative mindset and how they think of the interaction between data and competition. Given the many similarities between US and Canada, I think we can tease out how the fight over data, access to data, usage of data, and the recent concerns by governments everywhere about privacy, is going to play out.

Something to think about:

- The US DOJ and FTC are holding joint workshops into competition in real estate, in light of the expiration of the 2008 consent decree between NAR and the DOJ,
- Their investigation seems particularly interested in data,
- The Competition Bureau has shared formal commentary with the DOJ and the FTC

What happened in Canada may be a harbinger of what we can expect here in the US. And along the way, we can look at different aspects of the industry, its structure, its institutions, and where potential pressure points are.

Let's start by examining what happened in Canada.

The core issue in Commissioner of Competition v. TREB is the question of whether TREB used its monopoly over data to stifle competition in real estate brokerage

Commissioner of Competition v. TREB

The refusal by Canada's Supreme Court to hear the appeal from TREB ended a seven-year long fight over its data rules. I don't think it's all that interesting to go back to the beginning and look at all of the procedural history, the arguments, orders, decisions, appeals, new decisions, etc. etc. For our purposes, there are two main documents to look at if you're really interested in digging into this case.

The first is the 2016 Order from the Competition Tribunal, which sided with the Commissioner of Competition. That was appealed to the Federal Court of Appeal, which resulted in....

The 2017 opinion of the Federal Court of Appeal, 2017 FCA 236, in which the Court of Appeal sided with the Tribunal. This decision was what TREB appealed to the Supreme Court, so the denial means that it stands as the ruling.

I will refer to these as "Order" and "Ruling" respectively when referencing them herein.

I will do my best to keep this section short, avoid as much legalese as possible, and get to the important lessons and insights. But by all means, I recommend that you consult competent legal counsel for a real legal analysis of what these decisions ultimately mean for you and your business.

The Issue

The core issue in *Commissioner of Competition v. TREB* is the question of whether TREB used its monopoly over data to stifle competition in real estate brokerage. Commissioner of Competition says it did, TREB says it did not.

We do need to spend some time on what the actual problem was.

A Little History and Background

We can't avoid going a little bit into the history and the background of the TREB case. I'll follow the history as presented in the Order above. Please read one or both of the documents referenced above for a far fuller account.

It is not uncommon for issues to arise first in the U.S., and then make its way to Canada. This case was no different.

TREB first began thinking about VOW policy circa 2003, when NAR circulated the 2003 draft VOW policy. Since NAR and CREA are sister associations, we know a lot of information sharing goes on between American REALTOR organizations and their Canadian counterparts. NAR implemented a VOW policy; TREB/CREA did not.

The DOJ sued NAR in 2005 for its VOW policy, which included an "opt-out" provision which the DOJ found problematic. The DOJ felt that such opt-out rights discriminated against VOWs and online brokerages and was anti-competitive.

NAR settled with the DOJ in 2008 and entered into its consent decree. That settlement led to the 2008 VOW policy which removed the "opt-out" right and important for us, prohibited discrimination against VOWs. If information could not be shared over a VOW, then it could not be shared by any other means: telephone, fax, in-person, etc.

Shortly after the announcement of the settlement between NAR and DOJ, the Competition Bureau approached TREB about implementing a VOW policy similar to the "non-discrimination" policy that NAR had just promulgated.

Skip over a few years of confusion between CREA and TREB and who should do what policy, and so on and so forth. In 2011, TREB prepared its draft VOW policy, which more or less copied the 2008 NAR VOW Policy, but importantly, left out the non-discrimination provisions and added certain other provisions.

One key distinction:

> For example, whereas the 2008 NAR VOW Policy permitted the restriction on the display of certain information by VOWs only if the restriction applied to other delivery mechanisms (such as fax and telephone), TREB's draft VOW policy contained no restriction upon how its Members could communicate the Disputed Data through other delivery mechanisms. *Order, ¶89*.

Further revisions were made in 2011, but ultimately, TREB's VOW policy did two things that the Competition Bureau found problematic:

> However, that policy continues to prohibit VOWs from displaying the Disputed Data at all. Indeed, as discussed below, TREB also does not include the Disputed Data in its VOW Data Feed and prohibits the use of any information included in the VOW Data Feed for purposes other than display on a website. *Order, ¶91*.

So, to make a very long story short, the Competition Bureau brought action, which led to the rest of the legal journey.

Competition Bureau's Position

So the two things that really caused heartburn for the Competition Bureau were:

1. TREB did not include the "Disputed Data" in the VOW feed; and
2. TREB prohibits the *use* of the VOW data other than display on a website.

What is this "Disputed Data"? Here you go:

> These restrictions notably exclude certain types of information from the VOW data feed (the "VOW Data Feed") that TREB makes available to its Members. This excluded information concerns data with respect to: sold and "pending sold" homes; withdrawn, expired, suspended or terminated listings (the "WEST" listings); and offers of commission to brokers who represent the successful home purchaser, known as "cooperating brokers" (collectively, the "Disputed Data"). *Order, ¶14.*

Why did these two things cause such heartburn?

The Competition Bureau took the stance that excluding the Disputed Data from the VOW feed and restricting how brokers and agents can use VOW data led to discrimination between traditional "brick and mortar" brokerages and new online brokerage models. This is almost exactly what the US DOJ's concerns were in 2005:

> Accordingly, in addition to requiring the Disputed Data to be included in the VOW Data Feed, the order being sought by the Commissioner would reflect this general non-discrimination principle, as well as ensuring that the VOW Data Feed includes all MLS information that is available in other ways to TREB's Members, and that there are no restrictions on how VOW operators or other Members may use MLS information on the VOW portions of their websites.

> In brief, the Commissioner seeks an order that would, in his view, ensure a level playing field between more traditional "bricks and mortar" brokers and those who wish to provide new products and services based on MLS information in the manner that they think is appropriate, and in particular over the Internet. *Order, ¶16-17.*

TREB's Position

It goes without saying that TREB disagreed with the Competition Bureau. Let me quote from the Order at some length, because it really captures what seems obvious to many of us in the real estate industry:

> Moreover, TREB maintains that none of the three elements set forth in subsection 79(1) is met. Specifically, TREB submits that:
>
> a. It does not substantially or completely control the supply of residential real estate brokerage services in the GTA, primarily because **it has no market power in that market and has no motivation to exercise any market power, due to the fact that it is not itself a supplier of residential real estate brokerage services**;
>
> b. Neither the VOW Policy and Rules nor any of the other conditions that TREB places on its Members' access to and use of the MLS system have **the purpose of having a negative effect on a competitor that is predatory, exclusionary or disciplinary**. Instead, they have been implemented for a number of **legitimate purposes**. These include preserving the value of the MLS system for the benefit of its Members, and safeguarding the **privacy rights of its Members and their customers** by ensuring that its Members are compliant with their respective obligations under privacy legislation and the Code of Ethics, O Reg 580/05 (the "Code of Ethics") established by the Real Estate Council of Ontario ("RECO"), pursuant to the Real Estate and Business Brokers Act, 2002, SO 2002, c 30, Sched C ("REBBA"); and

> c. **There is no basis for the Commissioner's allegation that, "but for" TREB's impugned conduct, there would likely be greater innovation, enhanced quality of service or increased price competition in the supply of residential real estate brokerage services in the GTA. TREB contends that the VOW Policy and Rules do not create, maintain or enhance market power**. Furthermore, in the context of the broader competition that is occurring in the supply of real estate brokerage services to buyers and sellers of homes in the GTA, TREB submits that the incremental negative effect of its VOW Policy and Rules, if any, is not significant. (*Order, ¶21*, emphasis added.)

Let me restate and summarize here, removing as much legalese as possible.

First, TREB noted that it isn't a brokerage, so is not a competitor in the market for brokerage services. It has no intention of being a competitor. So how could it be trying to quash competition when, to use TREB's language, it has no horse in the race?

Second, the restrictions were not put in place for bad reasons, but for legitimate reasons, such as protecting the privacy rights of consumers and TREB members.

Third, the restrictions on VOW data and usage do not create any kind of a barrier to competition.

Given that we now know that TREB lost the argument on all three points, what remains interesting for us is *why* TREB lost.

This is where things get important. The actual result of this Order, the Ruling that followed, or the Supreme Court's refusal to hear the appeal is minimal at best. The more important thing for us is to understand the thinking behind why the regulators and the courts ruled as they did.

What was the reasoning and the evidence considered by the Tribunal and the Federal Court of Appeal?

Evidence and Reasoning

Once again, there are tens of thousands of words dedicated to all aspects of this case. This was a complicated case, legally speaking, and it's difficult to find what was important and what was peripheral. So this is purely my judgment on what is important in this case, based on a U.S.-based outsider's reading.

Having said that, let's get into the weeds just a little bit, because we have to.

The Tribunal essentially treated TREB as an independent entity with market power separate and apart from the brokers and agents who make up TREB. The source of that market power was not in the combined actions of the brokerages that make up TREB, but in TREB's control over access to the MLS system.

TREB is a Competitor… Kinda Sorta

TREB's obvious first point, that it is not a brokerage, not a competitor, and have no incentive to become one, was initially successful. The first panel of the Competition Tribunal in 2013 dismissed the case against TREB over this rather obvious fact:

> The panel found that, because TREB does not compete with its Members, the MLS Restrictions could not have the negative effect on a competitor required by *Canada Pipe FCA*, as interpreted by the panel. It found that *Canada Pipe FCA* served as a binding precedent. *Order, ¶37*.

Unfortunately for TREB, the Federal Court of Appeal reversed the Tribunal's decision in 2014 and held that in fact TREB can be engaging in anti-competitive behavior even if it isn't a competitor per se. I know, it's tricky language and logic, but… here's a bit of legalese for you, because it's the best I can do:

> With respect to subsection 79(4), [the Court of Appeal] agreed with the Commissioner that it only applies for the purpose of assessing whether a practice has had, is having or is likely to have the effect of preventing or lessening of competition substantially in a market, as contemplated by

> paragraph 79(1)(c) of the Act. In other words, this provision does not support the view that, "as a matter of law, a subsection 79(1) order cannot be made against [TREB] simply because it does not compete with its members" (TREB FCA at para 22). *Order, ¶45*.

So after the case got kicked back down to the Tribunal, a whole new panel of the Tribunal took a very different stance:

> TREB states that it has no financial or other interest in how competition occurs among its Members. In oral argument, this was put in terms of TREB having no "horse in the race" (Transcript, November 2, 2015, at p. 1270). TREB adds that its governance structure provides a constraint on the exercise of any market power that TREB could have or might otherwise wish to exercise against its Members.
>
> **However, TREB's mission is to act for the benefit of its Members. This includes acting in ways that its Board of Directors, all of whom are licensed and practising brokers/agents in the GTA, direct it to act, whether it be to insulate them from new and disruptive forms of competition, or otherwise.**
>
> In this context, the Tribunal is satisfied that TREB does indeed have an interest in how competition occurs among its Members, and does indeed have a "horse in the race," namely, the Members whose success TREB pursues as its "core purpose" (2015 Richardson Statement, at para 5). The Tribunal is also satisfied that **TREB can and does exercise the substantial market power that it derives from its control over access to the MLS system**, as well as under the terms of the By-Laws, the MLS Rules and Policies, and the AUA, **for the benefit of its traditional brokers, who comprise the vast majority of TREB's membership**. As noted by Dr. Vistnes, **TREB's control of the MLS system "gives TREB the opportunity to dictate who can compete and who cannot compete, and that provides it with significant market power**" (Transcript, October 5, 2015, at p. 458). *Order ¶256-259,* [emphasis added]

It is entirely possible that I'm overthinking this or overstating this, but I find the reasoning of the Tribunal here enormously important.

The Tribunal essentially treated TREB as an *independent entity with market power* separate and apart from the brokers and agents who make up TREB. The source of that market power was not in the combined actions of the brokerages that make up TREB, but *in TREB's control over access to the MLS system*.

There are two sub-issues here of importance.

Governance

What TREB put forth as a defense – that it not only has no market power, but its governance structure eliminates the possibility that it would exercise market power – was *turned against TREB as evidence of bad intentions*.

The fact that the Board of TREB is made up of "licensed and practicing broker/agents in the GTA" becomes the reason to believe that TREB acted to "insulate them from new and disruptive forms of competition."

TREB pointed out that its Board of Directors is made up of TREB members, brokers and agents, who are competitors in the marketplace and would prevent TREB from using its resources or rules or policies to discriminate against any of them.

This is how just about every single MLS and REALTOR Association in North America is constituted. Many an MLS go out of their way to ensure that the Board of Directors is "representational." Large firms, mid-sized firms, small firms, different Associations from different geographies, oftentimes lenders and appraiser affiliates – all are represented on the Board so as to make sure that the decisions of the Board are as neutral as possible without favoring or disfavoring one type of broker or agent over another.

Conflicts still arise all the time as some brokerages feel that their concerns get overridden in the Boardroom, but the purpose of this "representational" model of governance is precisely to avoid stifling of competition even as you preserve cooperation essential for a real estate transaction.

The Competition Bureau, however, took the representative nature of TREB's governance as evidence of ill-intent. Recall that Canada's

Competition Act requires that a policy be motivated by a "purpose of having a negative effect on a competitor that is predatory, exclusionary or disciplinary." The fact that the Board of TREB is made up of "licensed and practicing broker/agents in the GTA" (Order, ¶258) becomes the reason to believe that TREB acted to "insulate them from new and disruptive forms of competition."

As the Tribunal put it:

> The Tribunal also agrees with the following observation made by Dr. Vistnes:
>
> > As long as TREB serves as a vehicle through which its members can act to promote their own self-interest, TREB's conduct can be expected to largely mimic those members' collective preferences. Thus, from an economic perspective, it does not matter that TREB uses its market dominance to benefit its members rather than itself (...). (2012 Vistnes Reply Expert Report, at para 28) (Order, ¶260)

Think about that for a moment.

Control of MLS = Market Dominance

The second sub-issue of importance is the very direct statement by the Tribunal (upheld by the Federal Court of Appeal) that control of the MLS necessarily equals market dominance.

The Commissioner of Competition based his assertion that TREB controls the market for brokerage services because of its control over the MLS:

> The Commissioner asserts that TREB controls that relevant market because it controls how its Members compete through its rule-making ability. It controls access to the MLS system; it has the ability to discipline Members who do not follow its rules, including by withdrawing their access to the MLS system; it has imposed such discipline in the past; and it can and does insulate its Members from competition by excluding the innovative products of actual or potential competitors who threaten to disrupt the status quo. (Order, ¶198)

One of TREB's counter-arguments was that despite its control over the MLS, it's ridiculous to think that a trade association substantially controls the market for brokerage services due to the extremely low barrier to entry. Large numbers of brokers become Members and Participants of TREB each year, without regard to their business models. Discounters can become members of TREB. Limited service brokerages can become members of TREB. Tech-based brokerages can become members of TREB. And they do.

So to suggest that TREB controls or substantially influences competition is an illogical mistake.

The only way to not have market dominance is to have competing MLSs in your market area, which is extremely unlikely due to network effects.

In response, the Tribunal says:

> TREB further suggests that it cannot substantially or completely control the Relevant Market because there are insignificant barriers to entry into the market, as evidenced by the large number of brokers who become Members of TREB each year.
>
> However, this misses the point. **The source of TREB's substantial market power is its control over its MLS system and how information on that system can be used**. As noted above, TREB's control over that system is reinforced by the By-Laws, by TREB's MLS Rules and Policies, and by the terms of the AUA. **In this context, the potential entry that is relevant is the entry of a competing MLS system, not the potential entry of new Members**. The Tribunal accepts Dr. Vistnes' evidence that, due to the important network effects associated with TREB's MLS system, the entry of a competing MLS system "is extremely unlikely" (2012 Vistnes Reply Expert Report, at para 23). (Order, ¶263-264, Emphasis added)

In plain English, what this says to me is that the MLS has market dominance by the virtue of existing. The only way to not have market dominance is to have competing MLSs in your market area, which is extremely unlikely due to network effects.

So by existing, the MLS has market dominance. Because the Board of Directors is comprised of licensed and practicing brokers/agents, any decision, action, or policy of the MLS will be seen as attempting to benefit the status quo and insulating traditional brokerages from competition.

The next step then is to establish that the MLS has used its market dominance to stifle competition. How does the Tribunal do this?

Effect on Competition

One of the points that TREB raised throughout this process was that there was no evidence that the restrictions on VOW usage had a substantial effect on competition. That word "substantial" is important in Canadian anti-trust law.

The Data is Widely Available Elsewhere

TREB's expert witness testified that not providing the Disputed Data is not a big deal because there are many substitutes.

First of all, listing price is a very good substitute, and "there is a very stable relationship between list prices and sales prices." *Order, ¶221*.

Second, sold data is available from sources other than TREB:

> Dr. Church also suggested that historical and current data with respect to sold prices is available from other sources, such as Teranet; MPAC; large real estate brokerages like Royal LePage, Century 21 and RE/MAX; and firms that provide appraisal services, such as Zoocasa and Centract Settlement Services (now Brookfield RPS). *Order, ¶225*.

Again, TREB lost that argument. The Tribunal found the expert witness for the Competition Bureau more convincing than the expert witness for TREB.

It decided that the substitutes are inadequate for a variety of reasons, including cost: the third-party companies like MPAC wanted to charge an enormous amount of money for its sold data.

But what is interesting and important is the continual distinction the Tribunal made between *consumers* and *agents*. This paragraph is an example, the theme of which is sounded throughout the Order:

> Similarly, the fact that consumers are able obtain information with respect to "solds" and "pending solds" directly from an agent, either in person, by fax or by email at the valuation/offer phase does not assist innovative agents who would like to be able to access such information over TREB's VOW Data Feed, and then provide it to their customers through products and services offered over the Internet. *Order, ¶224*.

The reason is that the Tribunal and the Competition Bureau thinks that the restrictions on VOW data usage limits and restricts real estate agents from offering better/cheaper services. So it isn't really about what data consumers do or do not want, and whether they have access to that information from one source or another. It's about whether brokers and agents can provide something better, cheaper, faster, whatever.

So does the unrestricted usage of VOW data lead to that outcome?

The Evidence from Other Markets

Well, as it turns out, TREB pointed out that there are markets in Canada and US where there are no restrictions on VOW data. And in those markets, there is very little evidence that VOW policy or availability of Disputed Data makes any difference whatsoever.

In particular, TREB raised the point that if lacking VOW data was such a big deal, there should be quantitative evidence available from the U.S. and Nova Scotia, neither of which have the kinds of restrictions on VOW data usage that TREB had. The Competition Bureau did not undertake any quantitative study, produced no numbers showing advantages for unrestricted VOW brokerages, and so on.

Suffice to say that because of jurisprudential reasons having to do with interpretation of the Canadian Supreme Court's decision in *Tervita SCC* and §92 vs §96 of the Competition Act… TREB lost the argument. I suspect that whole discussion is of zero interest to anyone who is not a Canadian antitrust lawyer. I barely got through it myself.

Instead, the Competition Bureau and the Tribunal relied on "qualitative evidence" – which is to say, testimony from a few

brokerages who said they could not do some of the things they wanted to do because of TREB's rules and restrictions.

Even after acknowledging that the lack of any empirical evidence makes it harder to decide whether TREB's policies stifle competition or not, the Tribunal decided that they do and substantially so. They did this through a "but for" analysis, which we turn to next.

"But For" Analysis

The Tribunal undertook, and the Federal Court of Appeal upheld, what it called a "but for" analysis. This was at the heart of the Competition Bureau's case:

> Finally, the Commissioner maintains that the MLS Restrictions, and in particular the narrower VOW Restrictions, have lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate brokerage services in the GTA. **The Commissioner affirms that this is so because, "but for" those restrictions, consumers would benefit from substantially greater competition in that market. Specifically, the Commissioner states that the MLS Restrictions effectively protect and perpetuate the static traditional brokerage model for the delivery of residential real estate brokerage services.** The impugned restrictions on innovative, Internet-based business models such as VOWs thus have negatively affected the range and quality of services being offered over the Internet by brokers to their customers and have denied consumers the benefits of downward pressure on commission rates that would otherwise exist. (Order, ¶27)

To be clear, this means that the Commissioner would have to come up with a theoretical world in which these restrictions did not exist and come up with a story of how in that non-existent theoretical world, consumers would enjoy a greater range and quality of services and lower prices.

Arguing a counterfactual is always difficult, and quite often dicey. And yet, it is at the heart of anti-trust law.

Let me cut through dozens of pages of legal analysis, expert testimony, lay testimony, and so on, and get to the Tribunal's conclusion:

> 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).
>
> 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). (*Ruling, ¶17-18* Emphasis Added)

So, despite the fact that there is fierce competition between brokerages, despite large number of brokers and agents getting into and out of the business, despite significant commission discounting, and despite significant ongoing technological and other innovation… TREB's restrictive VOW policy led to:

- Increased barriers to entry and expansion;
- Increased costs to VOW operators;
- Reduced the range of brokerage services;
- Reduced the quality of brokerage services; and
- Reduced innovation.

Who knew that such a small thing having to do with password-protected VOW websites had such a substantial impact on competition?

A Note on Barrier to Entry

The Tribunal based its "but for" decision on the testimony of four people representing three brokerages and one VOW developer. We have to talk about this because of the reasoning involved.

The three brokerages were ViewPoint, TheRedPin, and Realosophy and the VOW developer is Sam & Andy Inc.[1]

William McMullin of ViewPoint, a web-based brokerage in Nova Scotia where restrictions on VOW do not exist, testified that ViewPoint would have expanded into the Toronto market but could not "due to TREB's VOW Restrictions, including the lack of certain content in TREB's VOW Data Feed." (Order, ¶511) He further said that without those restrictions, ViewPoint would enter the Toronto market within three to four months.

Tarik Gidamy of TheRedPin testified that the restrictions on usage of VOW data have "limited TheRedPin's ability to 'get better traction as a brokerage.'" (Order, ¶524) So this testimony went directly to the restrictions on usage:

> Mr. Gidamy also stated that, with access to the Disputed Data, **and the freedom to use it in innovative ways**, TheRedPin would be in a much better position to prepare accurate and in-depth advice and CMAs; and to more generally better distinguish TheRedPin from its competitors by putting MLS data to its best and highest use for home sellers and buyers. By contrast, without that data and freedom, he believes that TheRedPin is at "a serious competitive disadvantage" with other brokerages, which are able to provide the Disputed Data such as sold information to their clients in conventional ways. (Order, ¶526)

John Pasalis of Realosophy testified that the VOW restrictions were limiting their growth:

> Among other things, he asserted that the limitations in TREB's VOW Data Feed are impeding Realosophy's ability to provide more advanced analytics and commentaries online

[1] I leave out Redfin and Mark Enchin, a Guelph-area real estate agents with a history of developing technology-based tools for use by agents, because the Tribunal chose not consider their testimony on the barrier to entry issue.

> and through the media, and to engage with clients more frequently by providing more updates of information. (Order, ¶529)

Finally, Sam Prochazka, founder and CEO of Sam & Andy Inc., a real estate software company, testified that TREB's VOW Data Feed was inadequate for their needs, and TREB's VOW Policy and Rules "increased Sam & Andy's operating costs and created barriers for agents who wished to purchase its products and services." (Order, ¶542)

What is interesting about all of the testimony relied on by the Tribunal is that they are based on "we would have" and "we could have" statements. That's precisely the point of a "but for" analysis, after all. What would XYZ company have done in a theoretical world without whatever restrictions are at issue?

It doesn't matter whether you or me or anyone else agrees or disagrees with the testimony of the witnesses at the Tribunal, since the Tribunal was persuaded by them. What does matter is the thinking and the reasoning of the Tribunal, and the fact that *they* found such "what if" testimony convincing.

Again, note that no empirical quantitative evidence was produced or introduced about the impact of VOW restrictions on potential entrants into the brokerage market in Toronto. The decision was based solely on qualitative testimony by a few brokerages.

It is simply astonishing to think about the range of MLS rules and policies that are subject to this kind of "but for" analysis.

Why wouldn't cooperating compensation rules be subject to "but for" analysis? Why wouldn't REALTOR-only MLS membership rules be subject to "but for" analysis? IDX rules are certainly subject to a "but for" analysis. And it goes on and on.

The Issue of Privacy

One of the central conflicts in this case was whether there was any legitimate purpose to the VOW Policy and Rules. Recall from above that it was the second major defense that TREB raised during the hearings:

> Neither the VOW Policy and Rules nor any of the other conditions that TREB places on its Members' access to and

> use of the MLS system have **the purpose of having a negative effect on a competitor that is predatory, exclusionary or disciplinary**. Instead, they have been implemented for a number of **legitimate purposes**. These include preserving the value of the MLS system for the benefit of its Members, and safeguarding the **privacy rights of its Members and their customers** by ensuring that its Members are compliant with their respective obligations under privacy legislation and the Code of Ethics, O Reg 580/05 (the "Code of Ethics") established by the Real Estate Council of Ontario ("RECO"), pursuant to the Real Estate and Business Brokers Act, 2002, SO 2002, c 30, Sched C ("REBBA").

TREB has maintained and still maintains that privacy was the primary motivation behind its adoption of a more restrictive VOW policy than NAR's 2008 post-settlement VOW policy.[2]

Bottomline, the Tribunal goes through a long history of the VOW policy and how it came about and concludes that privacy is a fig leaf behind which TREB is trying to hide.

In the appeal to the Federal Court of Appeal, TREB reiterated the argument that privacy was its central concern:

> 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.
>
> TREB also asserted that it was required, as a matter of law, to comply with *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (PIPEDA). **It contended that this statutory requirement constituted a business**

[2] I spoke by telephone with John DiMichele, CEO of TREB, who remains concerned about privacy issues.

> **justification, separate and apart from any question of the underlying motive TREB may have had for the VOW Policy and its anticompetitive 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. (*Ruling, ¶129-130* Emphasis added)

Both the Tribunal and the Federal Court of Appeal smacked down the privacy justification. Why they did so is an important lesson.

An Afterthought and a Pretext

Bottomline, the Tribunal goes through a long history of the VOW policy and how it came about and concludes that privacy is a fig leaf behind which TREB is trying to hide:

> In summary, the Tribunal has determined that the evidence on the record in this proceeding demonstrates that TREB's motivations in initially resisting the emergence of VOWs in the GTA, and then in adopting and maintaining a more restrictive and discriminatory policy than what is reflected in the settlement reached between NAR and the U.S. DOJ, were primarily to limit or at least restrict a potentially disruptive form of competition in the GTA, and to retain full control of TREB's MLS data. Among other things, TREB appears to have been concerned that VOWs could lead to increased price and non-price competition, to reducing TREB's and its Members' control over MLS data, and to reducing the role played by TREB's Members in residential real estate transactions. **Privacy played a comparatively small role, and only towards the end of TREB's process. Based on the evidence adduced, the Tribunal has concluded that the privacy concerns that have been identified by TREB were an afterthought and continue to be a pretext for TREB's adoption and**

> **maintenance of the VOW Restrictions**. (*Order, ¶390*. Emphasis added)

Throughout the Order, one finds constant references by the Tribunal to how the testimony of various TREB witnesses is not borne out by the meeting minutes of TREB's VOW Task Force.

For example:

> According to Mr. Richardson [Donald Richardson, former CEO of TREB until 2014], it was also agreed that "the NAR VOW Policy would need to be modified in light of Canadian laws, including PIPEDA [*Personal Information Protection and Electronic Documents Act*, SC 2000, c 5], and RECO's code of ethics" (2012 Richardson Statement, at para 125). However, that is nowhere reflected in the minutes of that meeting. (Order, ¶351)

And:

> According to Mr. Richardson, privacy law concerns were also raised at the April 21 meeting of TREB's VOW Task Force. However, there is no reference to such discussions in the minutes of that meeting, which address a broad range of other issues. This inconsistency, together with the corresponding inconsistency regarding whether privacy issues were discussed at the initial meeting of TREB's VOW Task Force on March 31, gives the Tribunal significant doubts regarding the reliability of Mr. Richardson's evidence in respect of this issue. Those doubts are reinforced by the fact that Mr. Richardson stated that TREB's VOW Task Force also discussed concerns regarding WEST listings, at its final meeting on May 20. However, while the minutes of that meeting reflect a desire to obtain greater clarification regarding the potential application of the PIPEDA and RECO's rules to "solds," they do not mention WEST listings. (Order, ¶355)

And on it goes. The strong impression one gets from reading the Tribunal's account of the history around the VOW Task Force and the adoption of the VOW Policy is one of *disdain*.

Put as bluntly as possible, the Tribunal called bullshit on TREB's privacy concerns.

The Federal Court of Appeal backed the Tribunal, noting:

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. (Ruling, ¶132)

As a final matter, the Federal Court of Appeal conducted its own legal analysis of the Tribunal's decision vis-à-vis PIPEDA (Canadian privacy legislation) and ruled against TREB. I'm not going to get into the weeds there, but if you're interested, it's in the Rulings ¶152-175.

Suffice to say that the Court smacked down the PIPEDA argument.

The Tribunal and the Federal Court of Appeal found a lack of "skill, judgment or labour needed to show originality and satisfy the copyright requirements" in the MLS compilation database... TREB just might have opened up Pandora's Box.

The Copyright Argument

In one of the more... ah... interesting sections of the Ruling, the Federal Court of Appeal went out of its way to smack down TREB some more, this time on the question of copyright in the MLS database.

See, TREB had claimed that it had a copyright in the MLS database, which includes the sold, pending, and other Disputed Data. Under Canada's *Competition Act*, the assertion of an intellectual property right cannot be an anti-competitive act.

So first, the Tribunal had found that TREB "did not lead sufficient evidence to demonstrate copyright in the MLS database." (Ruling, ¶33) Uh oh. TREB appealed.

The Court of Appeal dismissed that handily, saying, "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." (Ruling, ¶176)

But it did not stop there. The Court took the step of explaining further, to TREB's detriment.

After agreeing with TREB and CREA that the Tribunal had used the wrong legal test ("originality" vs "creativity" under Canadian precedents), the Court of Appeal writes:

> We agree with the appellants on this point. However, in view of the Tribunal's findings of fact, applying the correct test, we reach the same result.
>
> 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.**
>
> 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, but 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). (Ruling, ¶193-195. Emphasis added.)

It appears to me that the Federal Court of Appeal just denied that TREB has an intellectual property interest in its MLS database. Perhaps someone more versed in Canadian copyright law can correct me if I'm wrong, but… given that the Supreme Court refused to hear

an appeal, and the Tribunal and the Federal Court of Appeal found a lack of "skill, judgment or labour needed to show originality and satisfy the copyright requirements" in the MLS compilation database… TREB just might have opened up Pandora's Box.

Why None of This Matters

So both the Competition Tribunal and the Federal Court of Appeal more or less dismissed TREB's arguments. With the denial of the appeal to the Supreme Court, the end of road has been reached, and TREB will now have to modify its VOW policy to make the Commissioner of Competition happy.

Those of us living in the U.S. where there has been, for all practical purposes, no restriction on VOW data feeds or VOW data usage, since 2008 realize that the TREB decision will make precious little difference to the brokers, agents, and consumers in the Toronto market.

The whole "VOW will bring forth new internet-based brokerages who will change everything" prediction has been completely wrong, at least in the U.S. It turns out that consumers don't really care all that much about registration-required, password-protected, VOW websites when alternatives exist.

In fact, in the U.S., we have gone past VOW data policy issues and have gone all the way to displaying sold data over IDX – which does not require registration or passwords.

As yet, none of these MLS data policy rules have had any appreciable impact on the shape of competition in the brokerage space.

Redfin operates the highest trafficked brokerage website by a longshot, with sold data, with data analytics, with innovative products and information and data for consumers and its agents… and has for ten years. As of Q2/2018, Redfin had reached 0.83% market share of U.S. existing home sales. And one can reasonably argue that much of that growth is the result not of superior VOW data delivery, or fantastic data tools for consumers, but the result of Redfin's 1% Listing Fee which it has marketed all over the place.

A story in Seattle Business Magazine quotes a dismissive comment from a Redfin competitor:

> "[Redfin's] in-city market share in Seattle in 2016 was just about 5 percent of all transactions, after 12 years," says OB Jacobi, copresident of Windermere Real Estate.
>
> Windermere, which has been around since 1972, has a 32 percent share of that market, according to Jacobi. The largest brokerage in the Puget Sound region, Windermere has 850 agents working in the city of Seattle.

And that's Redfin, a venture-backed, technology company-cum-brokerage which happens to be a $1.43 billion public company drawing the best and brightest engineers from one of the top tech cities on the planet that is home to Amazon and Microsoft.

I estimate the chances of TheRedPin, ViewPoint, and other newly empowered VOW-based brokerages making a huge leap in growth and productivity and bringing the homesellers and homebuyers of Toronto a wider range of higher quality brokerage services at lower cost to be asymptotically approaching zero.

If the Competition Tribunal and the Federal Court of Appeal are hoping to see a wild burst of competition, innovation, and commission cutting now that TREB members are allowed to display various Disputed Data on a password-protected website, and to use Disputed Data for "better CMAs" and such... they're about to be very, very disappointed.

So why did we just spend 10,000 words on an obscure anti-trust law case out of Canada? What the hell?

Why This Matters

The reason why the Commissioner of Competition v. TREB matters is that it gives us valuable insight into the regulatory and legislative mindset, especially as it comes to the all-important topic of *data*.

The specifics of this case and the VOW policy at issue are completely unimportant in the long run to anybody who is not a TREB employee or a brokerage dreaming of money raining down because they put sold data on a password protected website. The latter should include every grown man and woman who is not outright delusional.

The reasoning that the Competition Tribunal employed is one that is likely to be the same or similar to what any regulator in U.S. and Canada will use when analyzing an issue of competition and data in the real estate industry.

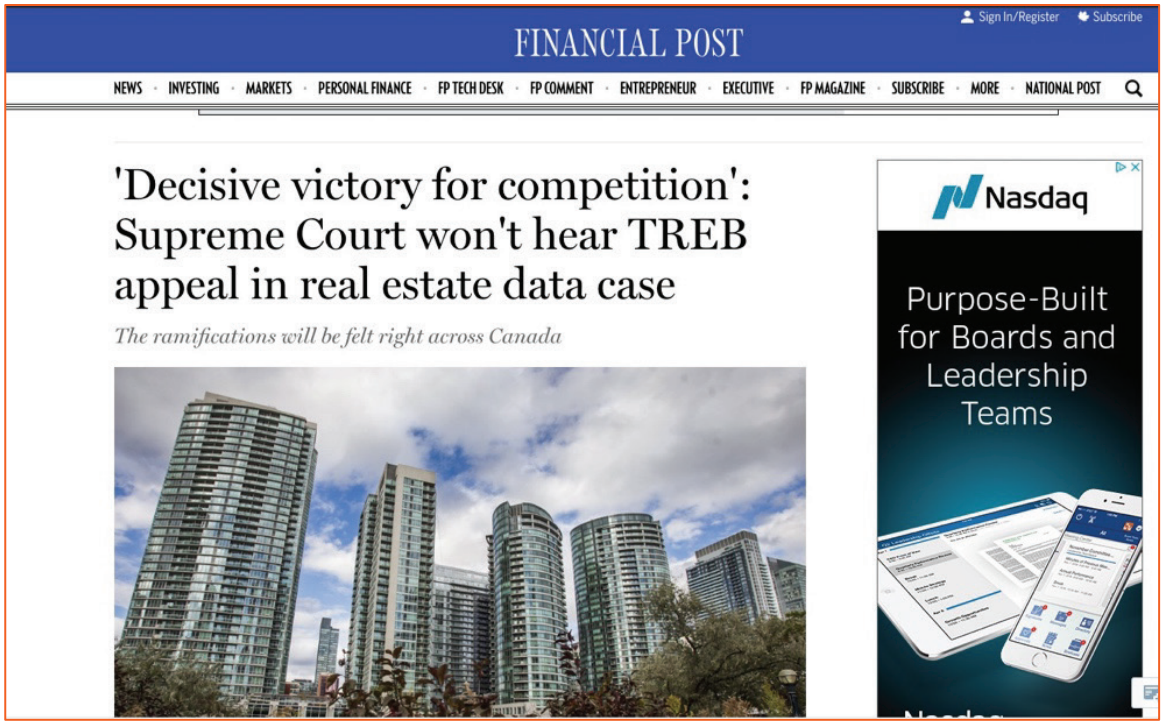
The evidence that convinced or failed to convince the Competition Tribunal are likely to be similar to the evidence that will convince or fail to convince future regulators and courts.

And the story is being told about this case will be similar to the stories that will be told about real estate, about the role of the MLS, and about innovation, competition, and control over data going forward.

So let's start there, with the stories.

Media Coverage

Despite the fact that this is an incredibly boring anti-trust case that was highly technical (even for lawyers), the media coverage of the Supreme Court's refusal to hear the appeal has been... well... sensational? Suggestive? Dare I say, Fakenews?



That is the headline from Financial Post talking about the case.

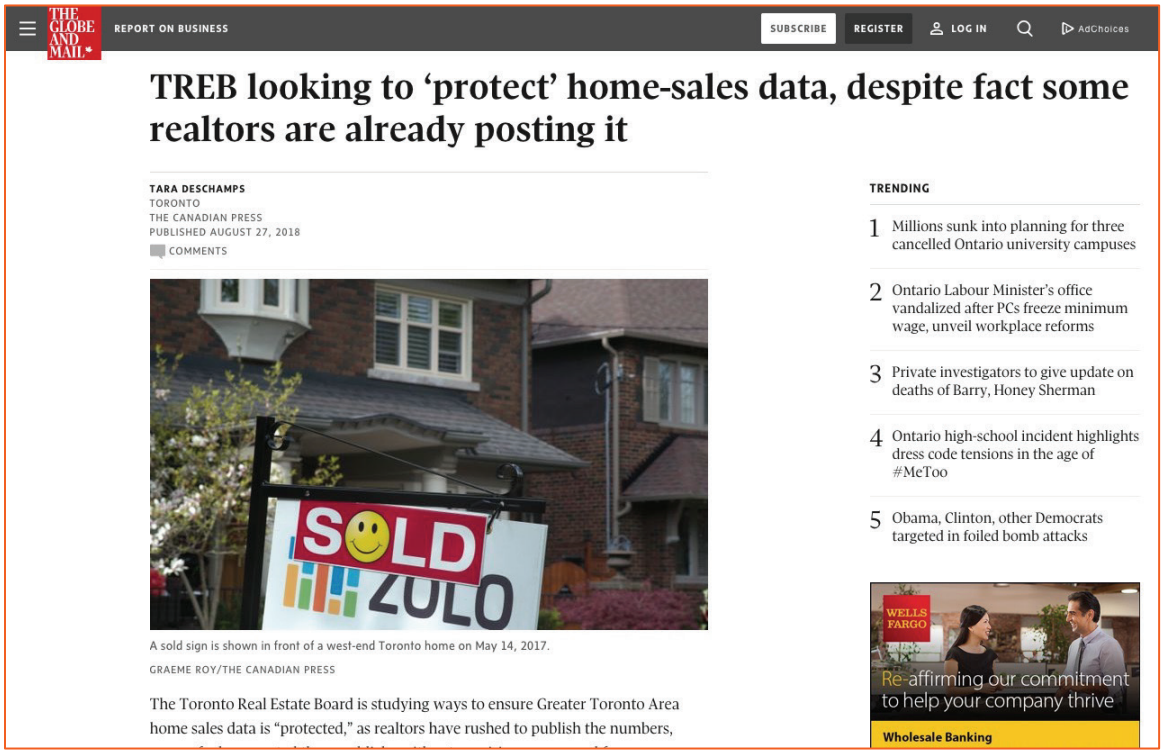
"Decisive victory for competition" seems a bit overblown when you consider what actually happened here. "The ramifications will be felt right across Canada" says the subhead. I'll go on record as saying that the ramifications will not be felt at all outside of a tiny circle of MLS executives and staff.

Then you have this breathless passage from the CBC story on the case:

> **Advantage to the consumer**
>
> Zeng [Joseph Zeng, operator of HouseSigma] said TREB's concern was not about privacy, but about control of the market, so that only real estate agents with access to the MLS system would know the full picture of home sale prices. But he said Toronto agents have little reason to be concerned.
>
> In the U.S., where house price data have been available for 10 years, there has been no retreat from use of real estate agents, he said.
>
> "The general expectation for the consumer is that they will finally not be blindsided in a real estate transaction."
>
> Zeng gave the example of his own purchase of a condo in 2009.
>
> "I had no idea for how many transactions happened on the property before my purchase," he said. "If I had had that information, it would have affected my offer price."

I for one am tempted to ask if Joseph Zeng used an agent when he purchased his condo in 2009, because if he had, his agent would have been able to tell him in quite some detail about how many transactions had happened on the property before his purchase. In fact, his agent could have emailed him the information, or called him and told him, or met him for a latte and shown him a printout.

Then you have this headline from The Globe and Mail:



THE GLOBE AND MAIL REPORT ON BUSINESS SUBSCRIBE REGISTER LOG IN AdChoices

TREB looking to 'protect' home-sales data, despite fact some realtors are already posting it

TARA DESCHAMPS
TORONTO
THE CANADIAN PRESS
PUBLISHED AUGUST 27, 2018
COMMENTS

A sold sign is shown in front of a west-end Toronto home on May 14, 2017.
GRAEME ROY/THE CANADIAN PRESS

The Toronto Real Estate Board is studying ways to ensure Greater Toronto Area home sales data is "protected," as realtors have rushed to publish the numbers,

TRENDING

1 Millions sunk into planning for three cancelled Ontario university campuses

2 Ontario Labour Minister's office vandalized after PCs freeze minimum wage, unveil workplace reforms

3 Private investigators to give update on deaths of Barry, Honey Sherman

4 Ontario high-school incident highlights dress code tensions in the age of #MeToo

5 Obama, Clinton, other Democrats targeted in foiled bomb attacks

Does "TREB looking to 'protect' home-sales data" sound like a favorable headline to you in light of recent events? If it does, I have some fantastic public relations professionals I would be glad to introduce to you.

Elsewhere in The Globe and Mail, we find this passage:

> The decision means the country's largest real estate board cannot limit how brokers use the data in its multiple-listing service, removing an obstacle for upstarts, particularly online services, competing for new clients.
>
> Consumers, in turn, will benefit from more information on everything from price trends to listing histories and even the sales volumes and selling prices for specific agents. The decision is also expected to compel real estate boards across the country to re-examine anti-competitive policies and practices that stifle innovation and limit consumer choice.

Of course the decision means nothing of the sort. The country's largest real estate board can limit how brokers use the data in its MLS in all sorts of ways. For example, a TREB agent cannot simply

take someone else's listings and claim it as his own in advertisements. Closer to the point, TREB can absolutely limit the disclosure of sold data to password-protected VOW sites.

But the real zinger to me is that second paragraph, as if Canadian consumers had no way of getting the information on price trends to listing histories. As you know by this point, they always could. They just couldn't get it from a VOW site. Now they can. But the media story reads as if REALTORS had been hoarding all of that information, and at last, information is available.

Finally, the last sentence should be a wakeup call to the real estate industry as a whole, but particularly to REALTOR Associations and MLSs. Re-examine anti-competitive policies and practices that stifle innovation and limit consumer choice? Yes, that's exactly what the media thinks you do. That's what the storytellers in our society believe of you.

The point to be made about these stories is that they are casting TREB and organized real estate (and by extension, brokers and agents who belong to Associations and the MLS) as the mustache-twirling bad guy in a soap opera drama, laughing as the train hurtles towards the maiden-in-distress (the consumer). If it weren't for our dashing hero the Government to step in, why, it would be disaster!

Let me note that being cast as the villain by the media has serious repercussions if the market turns, the economy sours, and politicians are seeking to find someone to blame for problems. Ask the mortgage bankers in the United States about their experience after 2007.

REALTORS and Political Power

Bad PR is especially troubling for REALTORS because of the nature of the political power that REALTORS exercise.[3] While REALTOR Associations like to paint itself as a grassroots organization with huge

[3] Please note that I will limit myself to speaking of the United States in this section, as I am not familiar with Canadian election laws, campaign finance system, or Canadian REALTOR Associations political expenditures. However, I imagine it isn't all that different from the U.S. If it is, please feel free to contact me with clarifications of the differences.

numbers of members who would vote one way or another based on housing issues, the truth is that REALTOR political power comes from the purse.

It's simple math, really. There aren't enough REALTORS in any jurisdiction in the country who vote in blocks to make a difference in an election. There are only 1.3 million REALTORS in the United States, after all, and only about 15% of them are committed enough to government affairs to even respond to a Call for Action. Even when a local REALTOR Association goes to talk to a state representative, the state representative can count on single-digit percentages of the total membership to vote one way or the other based on endorsement of or opposition of the REALTOR Association.

This has become even more true as politics has become more and more partisan and more and more divided.

It is difficult to imagine a liberal Democrat committed to abortion rights, gun control, and universal healthcare choosing to vote Republican because that candidate supports more tax credits for homebuyers. Similarly, a conservative Republican would never vote for a Democrat because he's better on housing issues.

Where REALTORS wield immense political power and influence is through money: campaign contributions as well as indirect spending. In 2007-2008, NAR was ranked 7th in the Top National Donors list, with $4.9 million in Federal Contributions and a whopping $23.9 million in State Contributions. Since 1990, NAR has given over $100 million in political contributions. In 2018, NAR is the #2 on the list of Top Spenders for lobbying, with $53.8 million, more than double the third-place lobbyist, the Pharmaceutical Research & Manufacturers of America.

No wonder that NAR is listed as a Heavy Hitter in OpenSecrets.org, and no wonder that NAR lobbyists get their phone calls returned by Senators, Congressmen, and Regulators.

This is not a criticism. Political power is possibly the most valuable asset of the REALTOR movement, and people who are active in REALTOR Associations recognize the importance of having and wielding political power to prevent government overreach, bad legislation, bad regulation, and inaction. When REALTORS talk

about protecting homeownership and the American Dream, they mean it, and without political power, all that would be hot air.

The issue with political power based on money, however, is that *bad publicity can kill it off*. If an organization is painted as toxic by the media, politicians will refuse to take its money, and in some cases, return contributions already made. See, for example, what has been happening to the National Rifle Association in the United States the past couple of election cycles. A number of candidates returned campaign contributions from Harvey Weinstein, or donated them to charity, after news broke about his years of sexual harassment and assault.

So when news media stories about you are consistently negative, and paint the REALTOR organization as some sort of conspiracy to keep consumers in the dark about vital information, it almost doesn't matter that the stories are biased, filled with errors, or flat out wrong. It becomes more and more difficult to exercise political power through money if your organization becomes politically toxic.

This is something that REALTOR Associations *must* address, and sooner rather than later.

The Significance of Regulatory Thinking

There are three interesting takeaways from how the Tribunal thought through the issues in the TREB case. Well, there are dozens, but three are truly important.

First, that as far as the regulators are concerned, the MLS has market dominance simply by existing.

Second, that every decision and action and policy of the MLS will be seen through the glass of protecting incumbents from competition.

Third, that the MLS does not have a copyright interest in its database.

What we are going to do now is to engage is rampant speculation, but one that is hopefully somewhat informed about both the regulatory

mindset and the industry's stance on these issues. My goal here is to tease out how U.S. and Canadian regulators and legislators might handle future cases that arise based on the logic on display in TREB.

This is not that idle an exercise.

The FTC-DOJ Investigation

As it happens, the FTC and the DOJ have launched a joint investigation into competition in the real estate industry upon the request of two U.S. Congressmen in January of 2018:

> Two congressmen — Republican Tom Marino of Pennsylvania and Democrat David Cicilline of Rhode Island — sent a letter to the leadership of the Department of Justice and the Federal Trade Commission last month, urging the federal agencies to update a previous 2007 joint report on real estate competition. The congressmen are the top members of the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law.

To date, the FTC and DOJ have held one workshop in June with panels from across the real estate industry. They have sought and received dozens and dozens of official public comments from industry organizations, companies, nonprofits, think tanks, individuals, and other government agencies. In particular, the FTC received formal comments from the Competition Bureau Canada, the same one that has been pursuing the case against TREB. Please feel free to read the whole thing, as it is a nice summary of what I've outlined above (without the emotion-tinged commentary from Yours Truly).

What we in the industry, or observing the industry, have to think about is not the formal commentary of the Competition Bureau to their counterparts at the FTC and the DOJ, but the informal conversations and information-sharing that is assuredly happening between them.

It is naïve to think that regulators do not network with each other, talk to each other, and share information and experiences with each other. Every single industry in the world does it. REALTORS talk to each other all the time about what worked, what didn't work, what issues they came across, etc. etc.

Given the closeness between Canada and the U.S., and given the similarities between the two countries in terms of how real estate is bought and sold *and* how the real estate industry is organized (a fact that Competition Bureau Canada calls out in its formal comments), it is entirely predictable that the FTC and DOJ regulators will learn from and take seriously the experiences and the reasoning of their counterparts up north.

So what happens if we apply the logic of the TREB case to some of the questions and issues that the FTC and the DOJ are looking at?

Here's the list of topics the FTC and the DOJ wanted to address at the June Workshop:

- Existing and emerging consumer-facing platforms for accessing listings information
- Availability of listings information to consumers
- Regulatory and competitive hurdles facing listings platforms
- Effect of listings platforms on consumers' use of real estate services
- Changes in traditional real estate broker, brokerage, and Multiple Listing Service (MLS) practices
- Emergence and growth of nontraditional fee and service models
- Obstacles and catalysts to innovation in real estate fee structures and service models
- Competitive impact of nontraditional real estate fee and service models
- Effect of antitrust enforcement actions and consent decrees on competition in the residential real estate industry
- State licensing regimes relating to residential real estate transactions

In addition, the FTC and DOJ specifically sought public comments on these questions:

1. How has residential real estate brokerage competition evolved over the last ten years? Has consumer demand for particular brokerage services or models changed with increasing reliance on Internet-enabled technologies? How do brokers compete today with respect to fees, services, reputation for quality, and other variables?

2. How have Internet-enabled technologies, including consumer-facing platforms for accessing listings information, changed the residential real estate brokerage industry? What are the benefits and drawbacks of these platforms for consumers?

3. What are the current barriers to competition in residential real estate brokerage markets?

4. What have been the effects of past regulatory and antitrust enforcement actions on residential real estate brokerage markets? What actions can legislatures, regulators, and other government bodies take to maintain future competition in this industry?

Whatever the public commentary, what are the answers to these questions if we assume that the FTC and DOJ will apply the same kind of reasoning as the Competition Tribunal did in TREB?

Current Barrier to Competition: The MLS?

It is paranoid, yes, to think that perhaps regulators would be united in thinking that one current barrier to competition is the MLS and its data policies. But being paranoid doesn't mean they're not after you.

If the basic thinking of the authorities is that (a) MLS is a monopoly, (b) operated to protect incumbents from competition, and (c) its rules and policies are automatically suspect because "but for" those rules and policies, better, cheaper, faster brokerage services would exist, then there are a few rules and policies that immediately become problematic.

If you read through the reasoning of the Competition Tribunal, it's difficult to conclude otherwise.

The MLS has market dominance simply by existing. Absent real competition in the form of another MLS, the fact that brokers and agents come and go is of no importance.

The fact that the MLS and the Association are not brokerages, and therefore not a competitor in the market for brokerage services, is of no import because the MLS is "effectively dictating the rules under

which brokers are allowed to compete and not compete. It's dictating whether they can compete and it's dictating the forum in which they can compete." (Order, ¶254(k), quoting Dr. Vistnes, expert witness for the Commissioner.)

The policies and rules of the MLS will be considered through the lens of insulating incumbent brokers and agents from new types of competition, even ones that do not exist, because "but for" the policies of the MLS, they would exist. Commission prices would be lower "but for" the policies of the MLS and the Association. A wider range of services, and higher quality services would exist "but for" the rules and policies and actions of the MLS and the Association.

And furthermore, the MLS does not have a copyright in the database (at least according to FCA), no restriction on the usage of MLS data can be upheld on intellectual property rights grounds.[4]

With that logic, it's difficult to conclude that the MLS is anything other than a barrier to competition in real estate, whatever the reality.

Novel Business Models "But For" the MLS and Association

I touched on this above when asking what rules and policies are not implicated under the "but for" analysis, but let's get into it a bit deeper.

If the basic thinking of the authorities is that (a) MLS is a monopoly, (b) operated to protect incumbents from competition, and (c) its rules and policies are automatically suspect because "but for" those rules and policies, better, cheaper, faster brokerage services would exist, then there are a few rules and policies that immediately become problematic.

[4] Please note that as of this writing, no court in the U.S. has not followed the FCA. The U.S. Copyright Office still issues copyright registrations to MLSs.

REALTOR-Only MLS

In all but a few parts of the United States[5], a broker or agent can be required to become a REALTOR in order to access the MLS.[6]

The Tribunal merely noted the fact and moved on, despite noting that "TREB's brokers and brokers and salespersons pay annual membership dues of $611.80, as well as an initiation fee ($4,960 for businesses and $460 for individuals) that, in part, reflects the fact that new Members gain access to the information that has been "built up over years" in TREB's MLS Database." (Order, ¶246.)

A strong case could be made by some as-yet-non-existent brokerage that they would enter the market and offer brokerage services at lower cost to consumers "but for" the additional fees layered on top of MLS fees by the mandatory membership requirement in the REALTOR Association.

This tying of Association membership and MLS subscription has been challenged numerous times in the past, with little success. But the way that the Tribunal and the FCA reasoned its way into their rulings against TREB suggest that perhaps things have changed since 2006, when the last serious challenge to the REALTOR MLS policy was brought.

It is important to note further that the 2006 challenges of *Reifert*, *Buyer's Corner* and *Prencipe* were brought by individual litigants, not by the anti-trust enforcement authorities as was the case in *Commissioner of Competition v. TREB*. Accordingly, should the FTC or DOJ get

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[5] The exceptions are the so-called Thompson states of Alabama, Florida and Georgia, because of the 11th Circuit decision in *Thompson v. Metropolitan Multilist*, 934 F. 2d 1566 (11th Cir. 1991) and California due to rulings in that state stemming from the Cartwright Act, the state anti-trust statute. Please see, *Non-Member Access to REALTOR Association Multiple Listing Services* at https://www.nar.realtor/legal/non-member-access-to-realtor-association-multiple-listing-services

[6] Note further that in the U.S., due to the "Three Way Agreement" of NAR, one must join the local, state and national Association of REALTORS and pay dues to all three levels in order to be a REALTOR. See, *The Three-Way Agreement* at https://www.nar.realtor/about-nar/policies/the-three-way-agreement.

involved in this kind of an action, it is rather unclear whether the result would be different.

Mandatory Listing Submission

Every MLS in the U.S. and Canada require that its members submit all listings to the MLS. If there is an MLS that does not, I am not aware of it.

The narrow exceptions have to do with "pre-market" or "coming soon" listings, in which the listing agent promotes a property in the days and weeks during which the property is being repaired, painted, staged, or otherwise made ready to go on the market, that is, put into the MLS system.

This passage from the MLS rules MetroList Services, Inc., an MLS based in Sacramento, CA, is a good example of this mandatory submission policy:

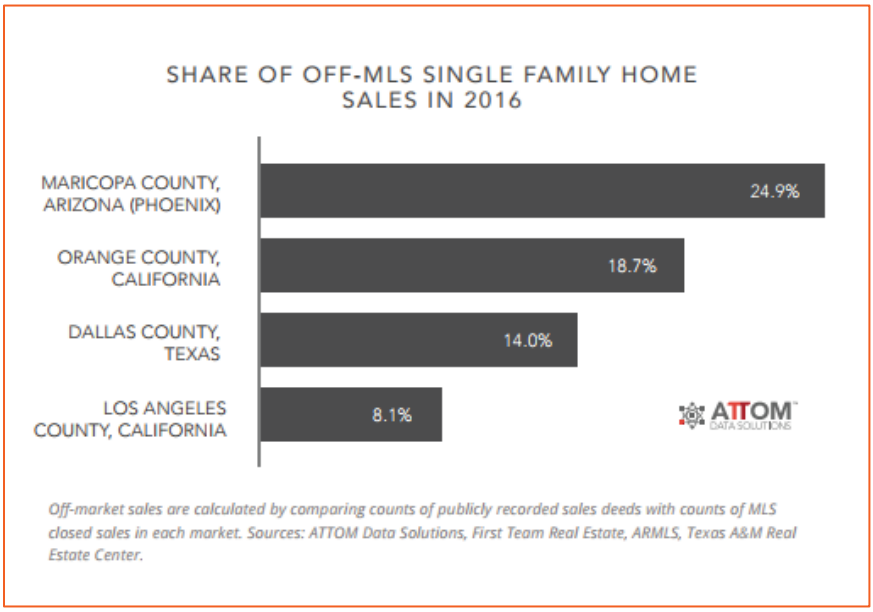
> **7.6 Mandatory Submission.** Broker Participants and R.E. Subscribers shall input exclusive right to sell or exclusive agency listings on Residential/Common Interest, Mobile Home in Park, Residential Income and Residential / Commercial Land located within the service area of the MLS within three (3) business days of the commencement date of the listing or three (3) business days of receipt of all necessary signatures of the seller(s) on the listing, whichever comes later.
>
> Failure to submit a listing or MLS waiver form within three (3) business days of the commencement date of listing or receipt of seller(s) signature, whichever occurs later, shall result in an automatic fine as set forth in Addendum B.
>
> Failure to include the specific date when the MLS waiver expires shall result in an automatic fine as set forth in Addendum B.
>
> MLS waivers submitted to MLS must be complete in all respects as described in Addendum D.
>
> Incomplete waivers are not valid waivers as required by these Rules.

> For listings delivered to a MetroList Office for input, there shall be a loading fee charged as set forth in Addendum A.
>
> Only those listings that are within the service area of the MLS must be input. Open listings or listings of property located outside the MLS's service area (see § 7.8) are not required by the Service but may be input at the Broker Participant's option. [Line breaks inserted for legibility]

In recent years, especially in a hot seller's market with low levels of supply of housing, so-called "off-market" or "off-MLS" listings became an issue in some markets. For example, Jim Harrison, CEO of MLSListings, Inc., an MLS that serves the Silicon Valley market, has often stated at industry conferences that as high as 30% of sales happen "off-MLS" in one shape or form.

Attom Data Solutions published an article in 2017 discussing this phenomenon, saying:

> Traditional MLS relationships are being challenged by a growing number of member brokers who believe the fastest and easiest way increase profits is to stop dividing commissions, forget about MLS cooperation, and cut out other brokers.



Attom further noted:

> The share of off-MLS sales was also much higher than the national average across the country in Dallas and Phoenix.

> An ATTOM Data Solutions analysis of MLS closed sales counts provided by the Texas A&M Real Estate Center and public record closed sales counts in Dallas County, Texas, shows MLS-closed sales of single-family homes in 2016 represented 86 percent of single-family home sales recorded with the county for the year.
>
> In Maricopa County, Arizona, home to the city of Phoenix, MLS-closed sales of single-family homes represented just 75 percent of the single-family home sales recorded with the county for 2016, up slightly from 74 percent in 2015, according to an ATTOM analysis.
>
> What do Dallas and Phoenix have in common? They are both testing grounds for a quickly growing alternative to listing for sale on the MLS: iBuyers such as Opendoor and Offerpad.

The iBuyer phenomenon is still a relatively new thing in real estate, and it is as yet unclear how it will play out. But combined with the growing number of brokers and agents who want to grow profits by cutting out other brokerages, the entire "off-MLS" movement is not dead but growing.

It is entirely conceivable that an as-yet-non-existent company could come forth and claim that they would happily enter the brokerage services market, or claim that they would expand their operations, and instead of taking additional profits by going "off-MLS", charge the consumer less in commissions... "but for" the mandatory submission policy of the MLS.

Let Your Imagination Run Wild

Fact is, under the framework that the regulators and judges in TREB used, there is no rule, no policy, no action of the MLS that is safe from being anticompetitive on a "but for" analysis. You'd have to come up with a legitimate business purpose in order to defend against the claim that the rule/policy/action is not meant to quash competition and insulate traditional brokerage members.

But one of the lessons from the TREB case is that the real estate industry has to be very careful about asserting a legitimate business purpose, and be far more conscientious about emails, communications, and particularly, meeting minutes.

We'll tackle that as part of the next major topic, which was an eye-opening and somewhat shocking determination by the Tribunal and the FCA about data privacy in the *Commissioner of Competition v. TREB* case.

On Privacy

One of the most surprising aspects of the TREB rulings to me, and I'm certain to the people at TREB, is the outright dismissal and brutal smackdown of TREB's privacy concerns.

We saw above that even as TREB maintained steadfastly from the very start that privacy rights of members and consumers was the driving force behind their VOW policy, the Tribunal and the FCA more or less laughed at them, or worse (in polite legalese) called TREB's people liars.

If you've read a legal opinion or two, you know there's no other way to interpret language like: "privacy concerns that have been identified by TREB were an afterthought and continue to be a pretext" and "gives the Tribunal significant doubts regarding the reliability of Mr. Richardson's evidence in respect of this issue."

But what's more, within the privacy concerns analysis, the Tribunal and the FCA seemed to suggest that privacy concerns related to real estate really are not that high.

So let's do this in two parts.

First, we'll tackle the issue of the real estate industry being taken seriously for its concerns around client and member privacy.

Second, we'll tackle the issue of whether real estate data is even raises privacy concerns at all for regulators and courts.

To Be Taken Seriously...

Since it is beyond obvious that the Tribunal and the FCA did not take TREB's assertions of privacy concerns seriously, we have to look at why that is, and how others in the real estate industry might be taken seriously by regulators and courts in future situations where they claim privacy concerns.

This is not an idle exercise. With what's going on with tech giants like Google, Facebook, and Amazon, privacy is a very hot topic outside of real estate for sure. But within real estate, the focus on data as a competitive differentiator will naturally lead to privacy issues and concerns. We've already seen it manifest in small ways, as some brokerages promoting Project Upstream talk about their duty to protect client privacy.

So how does the real estate industry get taken seriously when we talk about privacy?

Actually Mean It

The first and most obvious thing is to actually be concerned about privacy. In the case of TREB, the Tribunal was persuaded that TREB was making bad-faith arguments about privacy because of the evidence from the early years in the development of the VOW Policy.

The Tribunal concluded that it wasn't privacy concerns, but fear of disintermediation and loss of control over MLS data that motivated the VOW Policy.

The Tribunal references the CREA Electronic Data Usage Task Force ("EDU Task Force") from around 2003, and emails that went between the Task Force members:

> Subsequent email exchanges between the members of the EDU Task Force reflected ongoing concerns. For example, one member reported back that he had received "the distinct feeling that clear guidelines [were] wanted by everyone who [had spoken to him] but [had] a feeling from some that [they] should not tolerate any kind of VOW" (Exhibit CA-003, Document 10026, at p. 1).
>
> Another member suggested that "[b]rokers must have the choice of opting in or out and full disclosure to the VOW visitor is also very important" (Exhibit CA-003, Document 10026, at p. 1).
>
> A third person observed: "I see that NAR is proposing fairly extensive restrictions on VOW's [sic]. We would be advised to do the same" (Exhibit A-004, Document 865, at p. 1).

> Another person mentioned that "no matter what type of rules we put in for VOW's [sic]- the second they are adopted - many people will try to find a way around the rules. Has the idea of not allowing VOW's [sic] been set aside?" (Exhibit A-004, Document 10033, at p. 1). (Order, ¶329. Line breaks added for legibility.)

The Tribunal then pointed at the actual work product of the EDU Task Force:

> The purpose of the guidelines proposed by the EDU Task Force was stated to be as follows:
>
> > This discussion paper is for the purpose of developing guidelines for the effective, efficient and beneficial use of electronic data for Boards, Associations and REALTORS.
> >
> > There is a legitimate fear on one hand of capitulating to misuse of REALTORS' hard-earned data banks, and on the other hand of being left behind in an electronic revolution moving at the speed of light.
> >
> > *The objective always is to ensure the REALTOR remains central to the real estate transaction and that efforts to guide the use of MLS® data are to that end.*
> >
> > (EDU Task Force Report, Exhibits IC-084 and CIC-085, Witness Statement of Gary Simonsen dated August 3, 2012 ("2012 Simonsen Statement"), Exhibit 18, at p. 494) (Emphasis added)
>
> The italicized words in the foregoing statement of purpose essentially reflect a concern about "disintermediation." (Order, ¶330-331. Emphasis in original.)

The Tribunal concluded that it wasn't privacy concerns, but fear of disintermediation and loss of control over MLS data that motivated the VOW Policy. It's hard to avoid that conclusion given the evidence above.

I do not know whether the members of the EDU Task Force were or were not concerned with privacy issues in 2003. Given that PIPEDA was passed in 2000, the law was already on the books by 2003. So it does seem like a major omission for the EDU Task Force to not have

mentioned PIPEDA or privacy concerns once during its discussions and deliberations.[7]

But moving forward, if you want to be taken seriously by regulators and judges that you are serious about privacy concerns, then *you actually need to be serious about privacy concerns*. Privacy cannot be a fig leaf after the fact, because the regulators are skeptical and not stupid.

Paper Trail

The second thing to do is to create and maintain a paper trail of your privacy concerns. This is particularly important if there's a paper trail in the past that you were concerned about other things, which may be problematic.

But let's assume that you have changed your mind. Maybe you looked at the experience of some other MLS somewhere else on an issue and decided that your original concerns about disintermediation or whatever do not apply. You're still very concerned about privacy, for real.

In that case, you need a rock-solid paper trail of those concerns, with follow-up.

In the TREB case, as we covered above, the testimonies of witnesses were often either unsupported by or contradicted by the paper trail. People testified to agreements or comments made at a meeting, but the meeting minutes did not reflect them in any way.

In one instance, there was no follow-up to concerns expressed:

> It is also noteworthy that although the issue of "privacy laws and consents" was mentioned in the May 18, 2011 Task Force Report to TREB's Board of Directors, it was simply noted in that report that this issue was "of particular concern" and that the "Task Force felt some 70 additional legal research would be appropriate on both the PIPEDA and RECO requirements" (2012 Richardson Statement, Exhibit FF, at p. 512).

[7] The record is entirely devoid of any evidence that the EDU Task Force or any of its members brought up privacy or PIPEDA as a concern.

> There does not appear to be any evidence on the record as to whether that legal research or any legal advice regarding privacy law and the adequacy of the existing consents signed by home sellers and buyers was ever sought and provided, although Ms. Prescott subsequently provided the Tribunal with her interpretation of those consents. Likewise, there is no evidence that the advice of the Privacy Commissioner was ever sought and obtained prior to the finalization of the VOW Policy and Rules. (The Tribunal acknowledges that TREB explained that it was subjected to pressure by the Commissioner to act very quickly during that timeframe). (Order, ¶359-360)

These kinds of inconsistencies, gaps in the record, and lack of follow-up will lead to the regulator deciding that you're not serious. So there is no reason for them to take you seriously either.

Implement Changes Consistent with Your Concern

Finally, if you have had a Road to Damascus moment on the issue of data and privacy, and have changed your mind completely about what is and is not important with respect to real estate data, then you need to implement changes that reflect that conversion from the Old and Busted of protectionism through controlling data to the New Hotness of controlling data to protect privacy rights.

It is useful to refer to the FCA's litany of people and companies that had access to the Disputed Data, which TREB had sworn up and down was restricted for the sake of consumer privacy:

- 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. (Ruling, ¶132)

It's hard to argue privacy rights when tens of thousands of strangers have access to what you're calling personal and private information.

Let's take just one example from the Tribunal's Order that is sure to shock the American audience: cooperating broker commissions.

Privacy Concerns Over Cooperating Commissions?

In the TREB case, the Commissioner of Competition wanted TREB to make cooperating commission information available in the VOW feed, and to prohibit restrictions on how TREB members could use that data.

To most of us in the real estate industry, that is shocking and beyond the pale. Because American VOW rules have followed a different path after the 2008 settlement between NAR and DOJ, "the parity rule" applies here.

"The parity rule" requires that brokers operating over the internet have to be treated the same way as brokers operating via "brick and mortar." In practical terms, this means that if you can share certain information face to face with a client, you can share it over a VOW. Conversely, if you can't share it over a VOW, you can't share it by any other means.

The MLS Rules of California Regional Multiple Listing Service ("CRMLS"), the largest MLS in the country, is a good example of how the parity rule led to certain data being inaccessible to any non-member:

> **12.15.2 Information Reproduced.** Unless the Participant or Subscriber obtains prior written consent from the Listing Broker, the information reproduced pursuant to this section shall not include the following:
>
> a. Property owner's name, phone number, and address (if different than the listed property);
> b. Instructions or remarks intended for cooperating brokers, including, but not limited to, showing instructions or security references (ex: lock box, burglar alarm, or security system, vacancies) regarding the listed property;
> c. Type of listing;
> d. Compensation or bonuses offered to cooperating brokers; and.

e. Other information which goes beyond a description of the property.

That language applies to *all* "reproductions" of the MLS Information, whether via VOW, email, telephone, printouts, or handwritten letters. So for American MLSs, the idea of sharing cooperating compensation information with clients is crazy.

In Toronto, because TREB did not implement a similar parity rule or non-discrimination rule (and in fact, removed it from the 2008 NAR Draft Policy), the MLS Rules of TREB only contain this:

> A Member, whether through a Member's VOW or by any other means, may not make available for search by, or display to, Consumers the following MLS® data intended exclusively for other Members and their brokers and salespersons, subject to applicable laws, regulations and the RECO Rules:
>
> (a) Expired, withdrawn, suspended or terminated Listings, and pending solds or leases, including Listings where sellers and buyers have entered into an agreement that has not yet closed;
>
> (b) The compensation offered to other Members;
>
> (c) The seller's name and contact information, unless otherwise directed by the seller to do so;
>
> (d) Instructions or remarks intended for cooperating brokers only, such as those regarding showings or security of listed property; and
>
> (e) Sold data, unless the method of use of actual sales price of completed transactions is in compliance with RECO Rules and applicable privacy laws

What that means, of course, is that compensation offered to other Members was shareable with clients over anything other than a VOW: telephone, face to face meetings, emails, etc.

Naturally, this disparity became an issue:

> With respect to the impact of these restrictions on VOW operators' costs, Messrs. Gidamy and Hamidi testified that **TheRedPin would like to use offer of commission data to calculate more tailored rebates**. At the present time, TheRedPin advertises rebates based on an assumed 2.5%

> cooperating commission, because achieving greater precision would require manually entering the offers of commission for every active listing, which would be prohibitively time consuming.
>
> Regarding the ability of VOW operators to distinguish themselves, Messrs. McMullin, Silver, Hamidi and Pasalis each stated that **being able to provide this information would enable them to increase transparency in the market**. Mr. Silver added that this would improve the customer experience created on TheRedPin's website, while Mr. Pasalis observed that this would improve consumers' trust and confidence in real estate agents. Mr. Enchin testified that **educated customers would find this information to be valuable**.
>
> **To the extent that increasing transparency is an important aspect of their Internet-based business models, the Tribunal accepts that being able to display this offer of commission would assist full-information VOWs and other Internet-based brokerages to better distinguish themselves from traditional brokerages, who appear to prefer to disclose this information in person (to keep the broker/agent "at the centre of the real estate transaction"), if at all**. (Order, ¶688-690. Emphasis added.)

While this development in Toronto may be shocking to American real estate professionals, when looked at from a privacy angle, it isn't clear that there is one.

After all, everyone would agree that the property owner's name and contact information is private and personal information that ought not to be shared at all. Showing instructions, lockbox data, burglar alarm systems, etc. are absolutely personal and private information, but they are necessary for the conduct of a real estate sale. We can make great arguments about restricting this information on privacy grounds.

Compensation *and bonuses* offered to cooperating brokers is a little different. There's no privacy consideration here. Every single member of the MLS can see that information. So in the case of large MLSs, we're talking about tens of thousands of people who can see that precise information: compensation and bonuses offered by the seller.

In many states in the U.S., disclosure of cooperating compensation is required by law.

As Mssrs. McMullin, Silver, Hamidi and Pasalis all point out, disclosing this information would create greater transparency, potentially create greater trust in the real estate professional, and certainly educated consumers would find that information valuable.

There being no privacy justification to keep this data from consumers, you had better come up with a legitimate business reason for doing so that doesn't smell a whole lot like keeping secrets from your clients, to whom you owe a fiduciary duty.

Otherwise, it's easy to see how a regulator would look at that refusal to make data available.

Therefore, if you want to control data for the sake of protecting privacy rights, you may need to examine what information you are refusing to share and either open it up or figure out a different legitimate business reason not to do so. It takes a different mindset.

Is There a Privacy Right in Real Estate Data?

One of the more intriguing things to come out of the TREB case, particularly from the FCA Ruling, is the suggestion that there may not be any privacy rights in real estate data at all with narrow exceptions. (And maybe not even then.)

At issue in TREB was whether the homeseller's consent in the listing agreement was sufficient to allow distribution of sold data over the Internet under PIPEDA. We're really not going to get into that at all, except to say that the FCA said it was after lengthy analysis.

But as a last point, almost as an afterthought but perhaps to emphasize the point even more, FCA said:

> 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. (Ruling, ¶174. Emphasis added.)

The Tribunal also took a swipe at the privacy concerns issue vis-à-vis PIPEDA and consents by noting that when TREB got legal advice that posting interior photos and virtual tours of homes raised privacy concerns, TREB made changes to its consent forms, but did not about non-photographic data, such as solds and pending solds. Then it said:

> The Tribunal observes in passing that interior photos and other highly personal information, including virtual tours, are not only available on the websites of TREB's Members, but are also available on popular and frequently visited websites, such as realtor.ca, which not only display such information, but also allow it to be emailed to "a friend." (Order, ¶403.)

That should lead us to ask if there is any privacy right to information about your home at all, and if there is, what and where?

Public Records

The first obvious point, which the FCA made, is that it's hard to assert a privacy right over information that is required to be put into a public title registry:

Lexology tells us:

> All fee interests in real estate – and all mortgages – must be registered in the land records, which are maintained for each state and county throughout the United States. Notices of ground leases and major space leases are also recorded to ensure that the estates are recognized in title transfer or fee mortgage foreclosure cases.

I note in passing that some of the oldest laws in the United States have to do with land and deed registration, with a township act passed in 1634 in the Massachusetts Bay Colony.

While public records data doesn't have all of the data, as every REALTOR and appraiser knows, it does have a lot of the data. Many MLS systems use public records data as the starting point for populating a listing entry form, as an example. Presumably, when that updated listing sells, the new updated information will be entered into the public records database.

So if the information is public data, including sold price, it's really difficult to claim some sort of a privacy right to that.

Widely Available Information

Having said that, there are possible privacy rights that attach to things like interior photographs, floorplans, and the like. Because it does happen from time to time that a new owner would call up the MLS and ask that information about his house be taken down. The most sensitive of that information are interior photos, virtual tours, and floorplans.

But as the Tribunal noted, just how much expectation of privacy could you have about something that is out on the Internet and widely available from every broker and agent website and many portals?

Consider these two statements:

1. There is no expectation of privacy to interior photos, virtual tours, and other information attached to a property, as long as those things are widely available to the public. Or,

2. Consumers must have a simple process by which they can remove all non-public records information about their property from the public.

Only one of those two can be true; both cannot be true. Keep in mind that in this case, the "public" likely includes tens of thousands of REALTORS who are members of an MLS, along with their customers or prospective customers.

Personal Data vs. Real Estate Data

There is no doubt that some of the information that agents and brokers collect, and deposit into the MLS, belongs in the category of

personal data with all manner of privacy rights: name, telephone number, Social Security number, etc. Obviously, things like home security system codes and such would have even stronger rights, but are granted for the short-term purpose of facilitating the sale of a property.

But it is important to separate out personal data from property data. The latter may not have any expectation of privacy, except on the narrow edges (like interior photographs), and even then, it's hard to argue for strong privacy rights when those photographs and virtual tours are all over the Internet.

Given the current interest by the FTC and the DOJ into how data and control over data affects competition in real estate, this is not an idle exercise, even if it is a highly theoretical one.

Pulling It All Together: The Coming War Over Data

This seemingly unimportant issue from a case out of Toronto, Canada, turns out to be significant. It may be the first time we have had a formal decision by the government, using reasoning we can understand, applying anti-trust rules to the issue of **control over data**.

That in turn is significant because regulators tend to think alike, and regulators working in similar legal environments, facing similar market conditions, and similar industry structures and institutions are likely to talk to, learn from, and borrow from each other.

As the real estate industry continues its transformation over the next few years, there is little doubt that the government will play a very large role in that transformation one way or another. Given the current interest by the FTC and the DOJ into how data and control over data affects competition in real estate, this is not an idle exercise, even if it is a highly theoretical one.

The iBuyer and The Platform

The most important point of contention coming up is how the iBuyer phenomenon (addressed in depth in the August Red Dot), and its ultimate successor, The Platform (addressed in depth in the September Red Dot), will create new points of conflict in terms of access to data, collection and distribution of data, and control over how data can be used.

Both of these business models exist outside of the traditional MLS system. They can work within it, of course, and to date, they have. But unlike traditional brokerage services, the iBuyer doesn't *require* it because fundamentally, it doesn't require cooperation and compensation. The iBuyer is fundamentally dealing directly with the home owner or the home buyer and buying and selling homes "direct to the public." That all current iBuyers offer cooperation and compensation is a matter of convenience and industry relations, not a matter of necessity.

Portals who have iBuyer programs – Zillow and Redfin[8] today, who knows tomorrow – do not even require that some other broker or agent bring them buyers: the buyers are already coming to them directly via web and mobile.

Since almost all iBuyers, from Opendoor to Zillow to Redfin, want to work with traditional agents as partners (or as customers in Zillow's case), there is likely to be a number of "but for" situations that arise as the two worlds intersect.

"I have a business that does not yet exist, in which I help negotiate deals directly with iBuyers and save consumers money, and I would totally start that business 'but for' MLS policy X and Association rule Y that prevent me from doing so."

This kind of a scenario is not a Black Swan, because it is *foreseeable and predictable*.

[8] Please note that Redfin is a brokerage, but it also happens to have the fastest growing website in the real estate category, and is the third largest real estate portal by traffic after Zillow and Realtor.com.

When we move past the iBuyer and into the full-on Game of Platforms mode with companies that will make the bid to become The Real Estate Platform, the result will make the first round of the data wars in real estate (about listings) seem like a friendly game of tennis by comparison.

Government *Will* Get Involved

Just as we saw in the TREB case above, when the fight over data breaks out in earnest, the government will get involved. Regulators might get involved on their own or be invited into the conflict by one or another side within the industry.

Either way, it would be a very useful thing to understand how a regulator or a judge might see complicated data issues in real estate.

So, now that you have reached the end of this very long road to arrive at why we might have spent some 16,000 words on an obscure case from Up North, could I suggest reviewing some of the sections above on how government officials might look at issues of data and competition in the real estate industry?

And based on what we have seen, we can draw some conclusions.

Regulators Are Ignorant, Not Stupid

It is impossible for regulators (and judges) to understand some of the intricacies, details, and subtleties of any industry. They're not experts, and they will never be. But it is a grave mistake to confuse ignorance with stupidity.

Government regulators do not take kindly to being treated as if they are stupid. Their displeasure is evident in the unusually strong language that the Tribunal and the FCA use on the *Commissioner of Competition v. TREB* case.

They felt misled, lied to, and generally treated as if they were stupid. The evidence offered was so thin and contradictory that the arguments offered do sound like an excuse, a pretext. We have no

way of knowing how credible TREB's witnesses were at the hearings, but the record shows that the Tribunal did not think they were.

I think the extraordinary language of the Order and the Ruling, and specifically, the extraordinary step that the FCA took in explaining copyright law beyond what they needed to, suggest some level of frustration with what they saw as TREB playing games. As a result, we now have a real question as to whether, at least in Canada, there is any copyright in the MLS database.

They will see through pretexts, no matter how solid we think those pretexts are, because they are just that: pretexts, rather than true reasons. The temptation to use excuses rather than to relay our true concerns may be high in some future situations, but we must resist it. The consequence might be worse than if the industry simply presents its real reasons in an articulate way.

State v. Federal Regulators

As a general rule, no regulator trusts the industry he is supposed to regulate. It's an axiom of regulation, since the regulator's job is to protect the public from "corporate interests".

However, the real estate industry is largely self-regulated, and I don't mean by way of the REALTOR Associations.

Consider the makeup of the real estate commissions themselves in most of the United States, which is usually made up of real estate brokers. Colorado, for example, requires that three of its five members on the Real Estate Commission are real estate brokers, one of the five an "expert on subdivisions" and one a member of the public. South Carolina, my home state, requires that 8 of the 10 Commissioners be "professionally engaged in the active practice of real estate."

Political scientists would refer to such a phenomenon as "regulatory capture."

One issue that such self-regulation creates is that the federal regulators, such as the DOJ and the FTC, do not trust the state regulators, who they see as being captured agencies. There is a reason why the FTC/DOJ Workshop included "state licensing regimes" in

its list of issues. The DOJ in particular has brought action against states for laws and regulations they felt violated federal antitrust law.

The Media Does Not Like You

As the coverage of the TREB case illustrates, the news media is not a friend to the industry. Oftentimes, the problem is one that plagues news media as a whole: reporters and editors who do not understand the issue but go for the most sensational headline and juiciest take on a story.

"Decisive victory for competition" gets a lot more readers than "Minor changes to arcane MLS rules affecting very few people" does.

The other problem, however, is that the industry does to the media what it often does to consumers and regulators: get defensive, spin things beyond credibility, and play hide the ball. It's hard to like someone who you think is trying to play you for a fool.

The Real Estate Industry is Divided

As the TREB case shows us, and present controversies continue to show us, and future issues will show us, the real estate industry is not a united front. It never was, and it never will be.

In the TREB case, there were a number of brokerages like ViewPoint and TheRedPin and others who disagreed with the policies of the MLS. You can find the same in every single MLS in the United States, no matter how large or how small. There were technology vendors who disagreed; you will find the same throughout the industry.

In fact, there are parts of the industry that do not even acknowledge others as being part of the industry at all. The number of real estate agents and brokers who still think of Zillow as an outsider, a third-party, is frankly amazing given how long Zillow has been around now working very much within the flow of the real estate transaction experience and within the industry.

Due to some of the rapid and fundamental changes within the industry in recent years, it may be that we have not reached a level of broad agreement about the roles and values of each part of the industry. Those may be in flux right now, and the coming wars over data and control over data may help resolve some of those issues. But in the meantime, we have to avoid two equally problematic temptations:

1. To assume that there is widespread agreement on just about any issue in real estate today; and
2. To assume that there is a "us" vs "them" no matter who the "us" and "them" might be.

These temptations are particularly strong for real estate, because it has been so organized for so long, and REALTORS are extraordinarily fond of committees, boards, and groups. Even such a simple statement as "brokerages want" assumes that brokerages are the same, whether a 18,000-agent behemoth or a 2-agent mom-n-pop shop.

Absent Changes, The Real Estate Industry Will Lose, and Lose Big

There are two axiomatic truths when it comes to regulators. One cannot become a regulator at all without believing all three of these things.

First, you cannot trust the industry. No matter how great you think someone is, no matter how good your working relationship with some industry lobbyist, as a regulator, your job is to protect the public from "corporate interests" who are constantly looking for ways to take advantage of them.

Second, you must believe that you know better than veterans of the industry you regulate what is best for consumers. After all, to regulate means telling people who have been doing something a certain way for years, if not decades, that they need to stop doing it, or do it differently, or start doing something new.

The combination of these two often results in turf wars and suspicions between parts of the government; hence, the lawsuits against state real estate commissions.

As we head towards significant changes and significant conflict around the issue of data, control over data, and how that control relates to competition within the real estate industry, I have little doubt that absent changes, the industry will lose and lose big.

The TREB case is illustrative. One can argue that where TREB has ended up after a seven-year fight against the Commissioner of Competition is significantly worse than where NAR is today in terms of control over its rules and its data. To use but one example, had TREB (and CREA) simply adopted the 2008 NAR VOW Policy language about the parity rule, it may be able to keep cooperating commission information off of the Internet. Today, it cannot.

Whatever future issues arise, whether a dispute over data and data rules or a dispute over business rules or a dispute over business models, if the industry approaches them the same way it has in the past, the outcome is quite likely to be worse than if the industry had approached things in a far more cooperative and collaborative manner.

Protecting the interests of their members is what the Association and the MLS must do. Protecting the interests of their agents is what brokerages have to do. And protecting the interests of their clients is what agents ought to do. But trying to protect things too much, by any means necessary, could mean unexpected (although not unforeseeable) consequences for us all.

Self-Regulation Is Not a Given

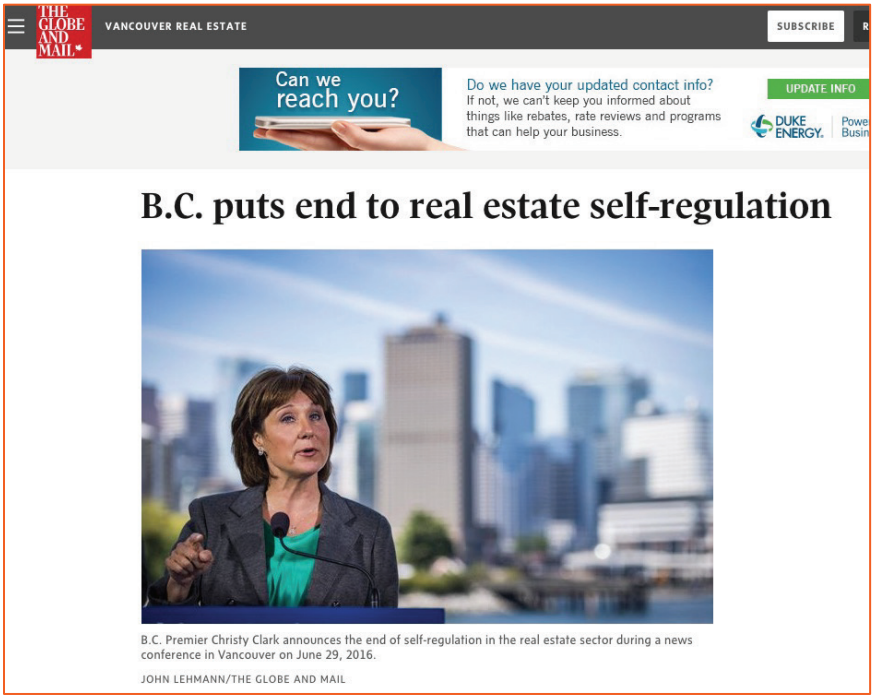
Finally, the real estate industry is largely left to regulate itself, for the most part, between the industry-dominated real estate commissions to the REALTOR Associations to the MLS.

That does not have to be the case. Mortgage bankers and mortgage brokers were once self-regulating as well. And then the financial crisis of 2007-08 happened, the media turned against “greedy bankers”, the public got angry, and politicians did what politicians always do: deflect the blame.

The result is the passage of Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. It did not just regulate Wall Street and investment banks. The Consumer Finance Protection Bureau, created by Dodd-Frank, has taken significant regulatory control over just about every aspect of the mortgage finance industry.

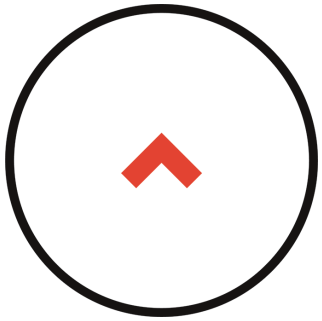
Closer to home for the brokerage industry, self-regulation itself can be taken away, as has happened most recently in British Columbia in Canada:

> "The point of regulation is to protect people, it is to protect consumers," Ms. Clark [Premier of British Columbia] said. "The real-estate sector has had 10 years to get it right on self-regulation, and they haven't."



With the media not our friend, and public perception of real estate brokers and agents at historic lows, it is not unthinkable that the relative independence that real estate industry has enjoyed for decades be yanked away.

Self-regulation is not a right, but a privilege, in the eyes of the government. And it is not a given.



Decide. Act.

RECOMMENDATIONS: TECHNOLOGY

As I mentioned at the outset, given the topic of this Red Dot, the Recommendations section will be forced to be sparse.

The goal of this report was to give you an idea of what happened, how the regulator and the court thought about what happened, how that reasoning tells us what the shape of regulatory action going forward might look like, and the impact of that kind of reasoning on present and future issues in the industry.

Because the topic is a necessary one for strategists, I undertook it. Unfortunately, it is speculative by its very nature. Accordingly, specific action items and recommendations are few and far in between.

Pay Attention

The first recommendation, and perhaps the only solid one, is to pay attention to regulators, to courts, and to legislators.

Now, as technology company executives, entrepreneurs, and managers, you have enough on your plate without adding something that quite frankly should be outside your day to day concerns. But you stand in a peculiar place as a technology company in real estate.

There are two levels of regulation to which you are subject:

1. Private regulation via the MLS; and
2. Public regulation via the government.

Most of you pay a great deal of attention to private regulation, because you have to in order to access the data that fuels your products and services.

What *Commissioner v. TREB* signifies may be that the government is turning its attention to the issue of data access and usage, and the government is not necessarily a fan of the private regulatory system that the real estate industry has set up over the years.

That changes the dynamic a bit, and mostly in your favor.

While there are technology companies whose whole focus and mission is to support the status quo, most technologies by their very nature introduce something new. Sometimes, that something new is disruptive.

Your first hurdle is often the private regulation via the MLS, as was the case in *Commissioner v. TREB*. And prior to that case, it wasn't very clear how you could overcome that, or even if you could at all. Now, it may be that there is a real option to get regulators involved.

Think Hard About the "But For" Test

Tech companies should learn more about the "But For" test as articulated by the Tribunal and the FCA. There's a good deal more research that can be done into that legal test, and an anti-trust attorney is your best bet.

The idea that "But For" some private rule or regulation by the MLS, new innovations could be introduced is much closer to a carte blanche for technology companies than most imagine. And intelligent MLS executives will understand that due to the new regulatory philosophy, it may be wiser to bend a little than to go challenge the government.

You do have to come up with a rational, and preferably compelling story, as to why your technology will improve things and how whatever rule/policy you're looking to challenge is a "But For" barrier. But that strikes me as a fairly low bar to reach for any decent piece of technology with any level of demand in the marketplace.

One other thing to note is that the Tribunal specifically rejected that there has to be consumer demand for some piece of data. It was enough for them that there could be demand from agents and

brokers to help them compete better or more effectively, even on non-price grounds, against incumbents.

Privacy and the MLS

One thing I would want to clarify with a competent attorney is the dicta by the FCA about the expectation of privacy when the information is available to thousands, if not tens of thousands, of agents through the MLS.

There is a hint there that putting information into the MLS could possibly be something like publishing it, obviously dependent on the facts like size of the MLS, data sharing arrangements, and MLS rules around information protection.

There is no doubt that some of the information in the MLS—such as showing notes, alarm codes, when children are home, etc.—is highly private personal information. Putting that information in front of tens of thousands of people is not exactly keeping it private.

Fact is that real estate brokers and agents are all licensed by the state, and subject to rules of the MLS. That should be enough to keep private information private, even if put into the MLS. But I would want to get some further clarification if I am a large technology company.

With the heightened sensitivity around personal data in recent years, and legislation coming like GDPR and California Privacy Act, I think it would be better to be extra paranoid.

CONCLUSION

Commissioner of Competition v. TREB, a seemingly unimportant issue from a case out of Toronto, Canada, turns out to be significant. Given the rapid pace of change in the real estate industry over the past few years, and more importantly, over the next several years, there is a very high likelihood of conflicts and issues that will arise around the issue of data: collection of it, access to it, control over its usage.

The players in that War over Data are the biggest institutions and companies in the industry: NAR, national franchises, major public companies, portals, technology companies, and others.

There is very little chance that government regulators, legislators and judges will not be involved in that War. They will, and their decisions and actions will have major impact on the result and who gains the upper hand and sets the course of the real estate industry for the foreseeable future.

So understanding how they think about the industry, its players, its organizations, and its rules and policies is important for strategists.

I think this Red Dot has attempted to help you understand exactly that and laid out some scenarios in which the question of government rationale will become critical.

Once again, I regret that the Recommendations section for this report is thin out of necessity. There aren't a whole lot of immediate action items, beyond studying the issues and staying on top of developments.

Nonetheless, I hope this has been interesting and useful for you, and I thank you for reading through it. As always, I thank you for your interest and your support in my work.

-rsh