THE LAMENTABLE RISE OF AN EXPANDED ESSENTIAL FACILITIES DOCTRINE IN CANADA: THE TROUBLING ECONOMIC FOUNDATIONS OF THE TORONTO REAL ESTATE BOARD DECISION[†]

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This paper documents the successful, if lamentable, rise of a made-in-Canada essential facilities doctrine. This made-in-Canada essential facilities doctrine is a consequence of recent enforcement of the abuse of dominance provisions of the Competition Act *in the* Toronto Real Estate Board *case. The analysis in this paper finds that the rise of the made-in-Canada essential facilities doctrine is one implication of the developing jurisprudence of the Federal Court of Appeal and the Competition Tribunal with respect to all three of the elements required for a finding of abuse of dominance: control, practice of anticompetitive acts, and a substantial prevention or lessening of competition. This paper explains the error made in the* Toronto Real Estate Board *case for all three of these required elements and how they combine to result in the made-in-Canada essential facilities case. The policy and economic incoherence of this made-in-Canada essential facilities doctrine are fully manifested in the current abuse of dominance case against the Vancouver Airport Authority. This paper explains that this made-in-Canada essential facilities doctrine is inconsistent with the economics of vertical foreclosure and the economic foundations of the abuse of dominance provisions in the* Competition Act. *The problem in both of these cases is not conduct that creates, enhances, or maintains market power, but instead exclusion downstream is possible because of market power upstream and it may enhance efficiency.*

Cet article traite de l'implantation – malheureusement réussie – d'une doctrine canadienne des installations et équipements essentiels, résultat de la récente application de dispositions de la Loi sur la concurrence *concernant les abus de position dominante dans l'affaire du* Toronto Real Estate Board. *À la fin de cette analyse, je conclus que l'implantation de la doctrine des installations et équipements essentiels au Canada est une conséquence de la jurisprudence qui émerge à la Cour d'appel fédérale et au Tribunal de la concurrence en ce qui concerne les trois critères permettant de conclure à un abus de position dominante : contrôle, agissements anticoncurrentiels, empêchement ou diminution sensible de la concurrence. J'explique l'erreur commise dans l'affaire du* Toronto Real Estate Board *pour ces trois critères*

et en quoi leurs effets combinés donnent vie à la doctrine canadienne des installations et équipements essentiels. L'incohérence économique et politique de cette doctrine se manifeste pleinement dans l'affaire actuellement en instance d'abus de position dominante intentée contre l'administration de l'aéroport international de Vancouver. J'explique aussi pourquoi cette doctrine est contraire aux dispositions de la Loi sur la concurrence *concernant la dynamique économique de forclusion verticale et les fondements économiques de l'abus de position dominante. Dans ces deux cas, le problème n'est pas qu'il y a conduite qui crée, augmente ou maintient l'emprise sur le marché, mais plutôt qu'une emprise en amont rend possible une exclusion en aval, malgré que cela puisse entraîner un gain d'efficacité.*

1 Introduction

The thesis of this paper is that the recent decision by the Competition Tribunal in *Toronto Real Estate Board* ("*TREB Redetermination*") and the subsequent application by the Commissioner of Competition against the Vancouver Airport Authority ("*YVR*") represent a made-in-Canada version of the essential facilities doctrine.[1] While the Commissioner has prevailed, at least to date, in the Toronto Real Estate Board matter, the theory of vertical foreclosure advanced and accepted by the Competition Tribunal in the *TREB Redetermination* and the Commissioner's application in *YVR* are inconsistent with the economics of foreclosure and the economic foundations of the abuse of dominance provisions in the *Competition Act*. Fundamental errors of economics made by the Competition Tribunal in the *TREB Redetermination* provide the foundation for this made-in-Canada essential facilities doctrine. Those fundamental errors are discussed in detail in this paper. The Tribunal's fundamental errors incorporate all three requirements for a finding of abuse of dominance: control, practice of anticompetitive acts, and a substantial lessening or prevention of competition. The negative implications of the Tribunal's findings for future enforcement include, but are not limited to, the made-in-Canada essential facilities doctrine. The fundamental errors have the potential to result in successful enforcement in any abuse of dominance case being inconsistent with consumer welfare or efficient resource allocation.

The Commissioner's application against the Toronto Real Estate Board ("TREB") was initially dismissed by the Competition Tribunal on the basis that TREB did not compete in the provision of residential real estate brokerage and hence its conduct could not harm a competitor,

it did not exercise market power in this market, and if it did not have market power in the residential real estate brokerage market its conduct could not create, enhance, or preserve that market power.[2] The initial decision by the Tribunal was overturned by the Federal Court of Appeal (*FCA 2014*) on the basis that the anticompetitive conduct did not have to be directed against a competitor and that it was possible to "control" a market without being a participant, i.e., it was possible to have market power in a market without participating in that market.[3] On remand, a second panel was constituted to reconsider the Commissioner's application. The second panel's decision (*TREB Redetermination*) found that the Toronto Real Estate Board had abused its dominant position by not including in its data feed made available by brokers on their websites, so called Virtual Office Websites ("VOWs"), some listing data found in its multiple listing service database. In particular information on the historic sold price of a listing, pending listings, and withdrawn, expired, suspended, and terminated listings ("confidential price data") were excluded from the TREB data feed, and there were restrictions on displaying this information on websites by brokers.[4]

Sections 78 and 79 of the *Competition Act* establish the reviewable offense of abuse of dominance. Under these provisions the Competition Tribunal can make an order enjoining the conduct of a firm if, upon application by the Commissioner of Competition, the Tribunal finds that a firm has control of a market, has engaged in a practice of anticompetitive acts, and the practice has had, or is likely to have, the effect of substantially preventing or lessening competition in a market.[5]

The fundamental problem in TREB and YVR is that the conduct at issue is the exercise of market power in an upstream market, the effect of which is to raise prices and reduce output in a downstream market. The means by which prices increase and output is reduced in the downstream market is indeed a negative effect on the costs and quality of competitors in the downstream market. But this is not a substantial lessening or prevention of competition because there is no maintenance, creation, or enhancement of market power, instead it is the result of the exercise of market power upstream. The conduct by the upstream supplier in these two cases, restricting access to the confidential price data in the case of TREB and restricting airport access in the case of YVR, did not, and does not, affect the ability of any firm, either upstream or downstream to exercise market power. Negatively affecting the costs, quality, and number of downstream firms, real estate brokers in the case of TREB, and suppliers

of galley handling services and caterers to airlines in the case of YVR, is not the same as a negative effect on competition in the downstream market, rather it is the effect of the exercise of market power upstream.

The exclusion of downstream suppliers in the two cases does not negatively effect competition in the downstream markets: it does not create, enhance, or maintain market power in the downstream market. In TREB this is obvious: the provision of residential real estate brokerage services in the Greater Toronto Area is close to textbook competitive, with thousands of agents and very low entry barriers. This is true whether the confidential price data is supplied to brokers as part of the data feed or not and with, or without, restrictions on their ability to share it with their clients on a website. The effect of not supplying the confidential price data and permitting it to be searchable by clients of a broker is to reduce the supply of residential brokerage services—perhaps quality adjusted—and hence to change the competitive equilibrium in residential real estate brokerage, perhaps raising prices and lowering quality, but it has no effect on market power in the supply of real estate brokerage. The reason, as explained *infra*, for the restrictions on access, lies not in creating, enhancing, or maintaining market power but instead in realizing efficiencies, including in this particular case preventing free riding and providing incentives for investment by protecting quasi-rents.[6]

The YVR case is not quite as obvious as the TREB case. The difference lies in the extent of competition in the downstream market. In YVR there are only two suppliers authorized to provide service, so surely allowing more suppliers to access planes to supply catering would reduce the market power of the two existing suppliers? The answer is obviously yes. But the question is wrong: the market power of the downstream firms does not exist independently of YVR's monopoly power in the upstream input. If service requires airport access—it is essential—then the number of downstream firms depends on YVR. The source of YVR's market power is the scarcity of the upstream input, the inability or unwillingness of downstream firms to substitute to other inputs, and the unwillingness of consumers in the downstream market to substitute to other goods that do not use the upstream input controlled by YVR, e.g., flights out of YVR without catering or flights from a different airport. If YVR is truly a monopolist in the supply of access to airplanes, then YVR has the ability to be the only supplier of catering if it precluded supplying access to other catering firms. Allowing more competitors downstream does not change YVR's market power: instead it exercises it upstream in

the market for airplane access rather than downstream in the provision of catering.

YVR might open up access, perhaps limited access, because by doing so it can extract more profit from its monopoly: independent suppliers may have lower costs or access to other inputs that allow them to create surplus above and beyond what YVR can do on its own and which may also benefit consumers in the downstream market. Indeed the Chicago School's single profit theorem suggests that YVR should never restrict access. But if the simple conditions of the single profit theorem do not hold, then to insure that more of this extra surplus is captured by it, and not downstream consumers, YVR will have an incentive to manage competition between suppliers of catering.

In both the TREB and YVR case the ability to exclude downstream competitors by foreclosing access to an input upstream arises only if TREB and YVR have market power in the supply of the input. In the absence of monopoly power in the supply of the input, downstream firms could substitute to other inputs and not be disadvantaged in the supply of the downstream product. In both cases, the "exclusion" of some downstream suppliers does not create, enhance, or maintain market power, but instead reflects the exercise of market power upstream and the form in which the exercise occurs, exclusion, will both be optimal for the upstream monopoly and often efficiency enhancing and beneficial for downstream consumers. To be clear, the upstream owner of the essential facility is using its market power upstream to restrict access to downstream competitors but it does so to realize efficiencies, not to create, enhance, or maintain its market power either upstream or downstream.

The thesis advanced here is that the effect on competition in the downstream market is not relevant for whether the exclusion is anticompetitive.[7] The thesis of this paper is that a well-founded enforcement action against either TREB or YVR under the abuse provisions of the *Competition Act* for their exclusionary conduct requires evidence that it creates, enhances, or maintains the market power of TREB in the market that includes the confidential price data and YVR in the market for access to airplanes, i.e., *the upstream market defined around the essential facility*. This can either be because the conduct restricts the competitive discipline of alternatives to the essential facility upstream or the competitive discipline of alternatives in the downstream market that do not use the essential facility.

The analysis in this paper shows a degree of economic illiteracy that is troubling. The failure to properly understand and apply the relevant economic concepts and analysis results in errors of analysis and economic incoherence. This economic incoherence makes the application of any provisions in the *Competition Act* requiring a demonstration of a negative economic effect problematic, with resulting costs to Canadians from the ensuing uncertainty and it is likely to weaken support for competition policy enforcement in the long run.

The confusions identified in this paper include not just appreciating the difference between the exercise of market power and conduct that creates, enhances, or maintains market power, but also encompass a failure to correctly (i) define market power; (ii) define and identify anticompetitive conduct; and (iii) define and identify a substantial prevention or lessening of competition.

The Tribunal incorrectly: defines market power as the ability to exclude competitors; determines whether conduct is anticompetitive by assessing its purpose; and identifies a substantial lessening or prevention of competition by assessing the effect of conduct on prices or quality, not market power. Beyond this, it does not incorporate the overall effects of the conduct on consumer welfare or the efficiency of resource allocation.

The result of these errors of economics and law results in a made-in-Canada version of the essential facilities doctrine.[8] The made-in-Canada essential facilities doctrine created by the FCA and the Tribunal in TREB maps the following into an abuse of dominance:

- The Commissioner must establish that a firm supplies an input that is necessary for production in a downstream market. This involves establishing that the firm is dominant in the input market, i.e., an upstream monopolist. Hence upstream monopolists will be found to control downstream markets that use their input.
- If the upstream monopolist discriminates in the supply of an input or excludes some downstream firms from supply, it will be found to have engaged in a practice of anticompetitive conduct. If conduct is explicitly exclusionary, then its intent is to harm downstream rivals and prevent them from using the input and competing downstream; in the case of discrimination, the intention is to limit rivals' ability to compete. Consideration of the effect of the

exclusion or discrimination on consumer welfare or resource allocation is irrelevant.

- If the result of the exclusion or discrimination of downstream rivals is a marked increase in prices; a marked reduction in product quality and diversity; or a marked reduction in innovation in the downstream market there is a substantial prevention or lessening of competition. The Tribunal will likely have a high prior that the effect of exclusion will be these effects if the exclusion is "widespread".
- The remedy is an order requiring non-discriminatory access.

The made-in-Canada version of the essential facilities doctrine is particularly troubling since under it the Commissioner of Competition can ask the Competition Tribunal to order access to the assets of an upstream supplier if control of those assets provides it with dominance in the supply of an input to a downstream market. In making this determination the Competition Tribunal will not consider whether a denial of access or discriminatory access will create market power or even whether it would result in an increase in consumer welfare or total welfare (efficiency). That is, the Tribunal will not consider that mandating access to the assets of a firm will have negative ramifications on incentives for investment or other efficiency justifications for why a supplier of an input upstream might restrict competition in the market for services that use its input.

Section 2 is a review of Sections 78 and 79, the relevant provisions of the *Competition Act*. Section 3 is a first-principles discussion of the economics of abuse of dominance and develops an economic implementation of the abuse of dominance provisions of the *Competition Act*. Section 4 is a review of the relevant economics of vertical foreclosure and monopoly power in the supply of an input. Section 5 is a critique of the Federal Court of Appeals first TREB decision ("*FCA 2014*"), as well as the Competition Tribunal's second TREB decision ("*TREB Redetermination*"). Section 6 maps the cumulative impact of these decisions into a Canadian essential facilities doctrine and discusses the Commissioner's application in *YVR*.

2 Abuse of Dominance: the Legal Framework

The abuse of dominance provisions are Sections 78 and 79 of the *Competition Act*. Section 79(1) specifies the requirements that must be met

for the Competition Tribunal to make an order upon application by the Commissioner of Competition. The three sections of Section 79(1) are:

- 79(1)(a) requires a demonstration that one or more persons substantially control a class or species of business throughout, or within a particular region of, Canada;
- 79(1)(b) requires demonstration that the person or those persons are engaged in or have engaged in a practice of anti-competitive acts; and
- 79(1)(c) requires demonstrating that the practice has had, is having, or is likely to have the effect of substantially preventing or lessening competition in a market ("SPC" or "SLC").

An interpretation of these three requirements had developed prior to TREB. The interpretation by section:

(a) *Control.* The requirements for control had been interpreted to mean dominance. Dominance in turn meant the sustained exercise of substantial market power in a relevant market.

(b) *Practice of Anticompetitive Acts.* A practice of anticompetitive acts involved establishing conduct that is exclusionary or predatory and which does not have a legitimate business justification.

(c) *Substantial Prevention or Lessening of Competition.* The Commissioner must establish that the conduct that creates adverse effects on a competitor has also harmed competition in a relevant market. In the usual case, the requirement is that the conduct at issue creates, preserves, or enhances the market power of the dominant firm in the same market in which it is dominant. However, that need not be the case: the conduct could create, preserve, or enhance the market power of the dominant firm in another market.

For an order the *Commissioner* must establish all three conditions—dominance, anticompetitive practice, and substantial lessening or prevention of competition.

3 Abuse of Dominance: the Economic Framework

This section builds up an economic interpretation of the abuse of dominance provisions. The objective is to develop an economic implementation of Sections 78 and 79 that identifies circumstances when

enforcement of the *Competition Act* will increase consumer welfare or enhance efficiency. That is, the concern is identifying conduct that creates, enhances, or maintains market power (a condition necessary to establish abuse of dominance), where the effect of the increase in market power is to reduce consumer welfare or the value of output (efficiency).

3.1 Understanding the Source and Consequences of Market Power

The abuse provisions—and indeed all of the provisions—of the *Competition Act* embody an important distinction: they are not intended to address the exercise of market power, but conduct that under certain conditions enhances, maintains, or creates market power.[9]

3.1.1 Market Power

Market power is typically defined as the ability of a firm to profitably raise price above competitive levels.[10] In the case when the products of firms are homogenous, a firm has market power if the market price increases when it reduces its supply below competitive levels and the increase in the market price increases its profits. In the case of differentiated products, the profit of the firm rises when it raises its price over competitive levels. More generally, a firm has market power if it can profitably alter other aspects of its behavior away from competitive levels, such as quality, advertising, innovation, variety, and, importantly, restrictions on the use of its product.

3.1.2 Determinants of Market Power

The substitution alternatives available to the customers of a firm determine its market power. Customers discipline, and thereby constrain, the market power of a firm by substituting away from its products when it raises its price. When a firm increases its price, it gains increased revenues from its higher price on inframarginal sales (sales it continues to make), but loses the profits on marginal sales (sales no longer made). A price increase will be profitable if the gain in revenues from the inframarginal units exceeds the loss on marginal units. The loss on marginal units equals the product of the reduction in volume from consumers substituting to other alternatives and the firm's prevailing profit margin on those sales. The greater the losses at the margin are the more effective substitution by consumers is in limiting the profitability of the firm raising its price. The decrease in sales of a product when a firm

increases its price depends on its elasticity of demand.[11] The greater the firm's elasticity of demand and the greater its margin, the greater its profit loss at the margin from raising its price and the less its market power.

The extent of demand substitution depends on whether a firm's customers are willing, or able, to divert their demand. Consumers may be able to switch, or divert their demand, to other products or other suppliers of the same product. Their *willingness* to switch to other products depends on how close a substitute consumers view alternative products. Their *ability* to substitute to another supplier of the same product depends on whether other suppliers of the same product will find it profit maximizing to increase their output.

The more the possibilities for substitution are limited, the greater the ability of a firm to exercise market power. Conduct that creates, enhances, or maintains market power must, therefore, restrict the possibilities for substitution. Conduct that increases market power does so by reducing the willingness and ability of consumers to substitute away from a firm that attempts to exercise market power.

For market power to persist in the long run there must be barriers to entry and asymmetries that provide incumbent firms with a competitive advantage vis-à-vis entrants. Barriers to entry are factors that tend to reduce the profitability of entry. In the absence of asymmetries that provide incumbents with a competitive advantage, economic profits from the exercise of market power (pricing above competitive levels) will, in the long run, attract entry of either other producers of the same product or the development of new substitute products. Both types of entry will create additional avenues of substitution for a firm's customers, reducing or even potentially eliminating its returns in excess of a competitive level and the exercise of market power. Any barriers to entry will limit the number of firms, but the number of firms will adjust such that prices reflect long-run average costs and firms earn competitive returns. Asymmetries between entrants and incumbents post entry can result in situations where entry is not profitable, but incumbents are able to exercise market power and earn monopoly profits.[12]

Canadian competition law has avoided the potentially problematic aspects of the classic U.S. Supreme Court definition of monopoly power in *du Pont* as the "power to control prices or the power to exclude competitors" (emphasis added).[13] Instead it is understood in Canada that dominance involves substantial and durable market power. In assessing

market power, the requirement to exclude competitors is incorporated in the definition of market power by including a time dimension: the ability to raise prices above competitive levels for a "considerable period of time." The Tribunal in its decisions in assessing market power has typically considered barriers to entry in assessing market power.[14]

In fact, as is discussed in academic commentary on the U.S. definition and indeed in the *du Pont* decision itself, there are not two separate tests for market power in the U.S., but instead the two components are to be treated as one. As commentators have observed, it is the exclusion of competitors that is the source of the power to raise price over competitive levels. Without the exclusion of competitors, a firm will not be able to maintain its power to control prices.[15] The source of its market power is exclusion of competitors. The asymmetries that in conjunction with entry barriers exclude competitors and maintain a firm's market power and above average profitability are often due to its control of a unique input. The source of a firm's market power is its ability to exclude other firms from using the input that they cannot replicate. The firm's source of market power in the production of goods and services that use the input is its control of the input. For it to have the power to exclude, it must also have market power in the input. That is implied by the inability of other firms to replicate it, or enter downstream and compete using other inputs. Market power upstream provides the firm in these circumstances with the ability to exclude entry downstream.

The less competitive downstream firms are that use other inputs, the greater the market power of a firm that controls an input that cannot be replicated. In an essential facilities case, presumably, competition from downstream firms that use other inputs is virtually non-existent and the upstream firm is a monopoly or dominant in both the upstream and downstream markets.

Exclusion of entrants is an important source of market power downstream and it can be informative regarding the existence of market power (that is, it can be used as evidence for the existence of market power), but the power to exclude entrants is not market power in the market from which they are excluded, rather it is the source of market power in the downstream market. Consequently, entry deterrence—or "the power to exclude"—is necessary but not sufficient alone to infer a substantial and durable exercise of market power in a downstream market.

3.1.3 The Effects of Market Power

For markets in which the product is sold to final consumers, the effects of the exercise of market power—the increase in price above competitive levels—are two-fold.[16] First, there is a transfer of some of the gains from the production and exchange of the inframarginal units from consumers to the firm exercising market power. Consumers pay higher prices on units they continue to purchase, so consumers will receive less benefit and the firm more. Second, there is a loss in economic value as consumers reduce their purchases of the good. The lost value arises because less of a good for which market power is exercised is produced relative to competitive production.

The lost value from the substitution by consumers to their second-best choice when market power is exercised, and the price of the good rises above the competitive outcome, is called the deadweight loss. It is a quantitative measure of the allocative inefficiency created by the exercise of market power and is equal to the extent to which the value of production has not been maximized (as it would be if markets were perfectly competitive). The deadweight loss arises because the gain to the firm from exercising market power arises from the transfer on inframarginal units, but the total loss to consumers includes both the loss on inframarginal and marginal units. The inefficiency of market power results from this quantity distortion: the exercise of market power raises prices and induces a reduction in consumption and output, with a diversion of resources to less valued alternatives.

Many products are inputs and are traded in wholesale, or upstream, markets where the buyer is a firm who uses the input to produce a product it sells in a downstream market. In the simplest case the downstream market involves sales to final consumers and the downstream suppliers are perfectly competitive. As with retail markets, there are two effects from the exercise of market power in an upstream input, or wholesale, market. The first is a transfer of profits from downstream firms to the upstream supplier on inframarginal units—the units that the downstream firms continue to purchase even though price has risen. The second is the loss in economic value as downstream firms reduce their purchase of the input.

The downstream firms reduce their demand for two reasons. First, as the price of the input rises, they may substitute to alternative inputs. Second, to the extent they pass through the price increase of the input to

their customers, downstream demand will fall, reducing the demand for the input by the downstream firms. Hence when the good in question is an input, there is the possibility of direct substitution by the downstream firms to another input, and indirect substitution by consumers downstream who divert demand to goods that do not use the input.

The lost value as firms and consumers in the downstream market substitute to their second-best choice when the price of the input rises again gives rise to a deadweight loss and inefficiency. This inefficiency is from the exercise of market power in the upstream market. The deadweight loss from the exercise of market power in an input market is the change in total surplus (the harm) in the downstream market that uses the input less the increase in profits in the supply of the input.[17]

The increase in the upstream price from the exercise of market power does harm the downstream market: it results in higher prices and lower quantities. The higher prices downstream are a result of the higher marginal costs downstream from the exercise of market power upstream. If the market downstream is competitive, the exercise of market power upstream raises marginal costs downstream and shifts the supply curve downstream up and in, leading to higher prices and reduced output downstream. But this occurs without a change in market power in the downstream market. Instead it reflects the exercise of market power in the upstream market. A similar causal effect from the exercise of market power upstream would result in higher prices and less output downstream even if the market downstream is not perfectly competitive.[18]

3.1.4 Classic vs. Exclusionary Market Power

In recognizing the potential for raising rivals' cost strategies, Steven Salop and his coauthors introduced the notion of exclusionary market power, in contrast to classic market power.[19] Exclusionary market power is defined as the power to raise prices above competitive levels by raising the costs of rivals and thereby reducing their output. Classic market power is the ability of a firm to profitably raise price by reducing *its* output.

But in fact a closer examination of exclusionary market power indicates that this distinction is misleading. Exclusionary market power has two aspects. First, it involves conduct by firms to create market power in an input or upstream market. This often involves vertical integration and foreclosure: a downstream firm acquires an upstream supplier and

by ceasing to supply its downstream rivals creates market power for the remaining suppliers of its downstream rivals. Second, the result is an increase in the price of the input used by its competitors in the output or downstream market. The increase in the price of the input arises from the exercise of market power that arose from the *conduct* that created, enhanced, or maintained market power in the input market. It raises the costs of rivals in the downstream market, relaxing the constraint they exert on market power in the downstream market. Raising rivals' costs therefore involves conduct that creates, enhances, or maintains market power in an input market and the exercise of that market power in the supply of the input to downstream rivals.[20] Exclusionary market power involves the creation and the exercise of classic market power.

Calling the exercise of market power in an upstream market exclusionary because of the effect of its exercise on rivals in the downstream market obscures the two-step nature of exclusionary market power: (i) some conduct that creates, enhances, or maintains market power in the upstream market and (ii) the effect of the exercise of that market power on the downstream market. It also obscures that the market in which the firm acquires market power is an upstream market and that the conduct that therefore should be the focus of an antitrust analysis is the conduct that creates, enhances or maintains market power upstream, i.e., the conduct that gives market power over the input price paid by its rivals.

3.2 Anticompetitive Conduct

The objective of legal prohibitions on unilateral conduct is to deter firms with substantial antitrust market power—market power that is significant and durable—from engaging in certain kinds of conduct that creates, enhances or maintains market power. Conduct that does this typically reduces the extent to which customers are willing or able to substitute. If the conduct increases the market power of a firm, the firm's elasticity of demand should be reduced, i.e., it becomes more inelastic as consumers response to an increase in price falls.[21] Typically, the conduct increases a *firm's* market power by reducing the extent to which *its* customers are willing or able to substitute, reducing *its* demand elasticity.[22]

The conduct that Section 79 seeks to enjoin either reduces the attractiveness of the products of a dominant firm's competitors, thereby reducing the willingness of its consumers to substitute; raises the costs of its competitors, thereby reducing the extent to which its consumers can substitute; or both. Conduct is anticompetitive if it enhances, creates, or

maintains market power by targeting rivals or reduces the likelihood of entry and hence future rivals. To enhance, create, or maintain market power, conduct must reduce the extent to which a firm's customers are able to substitute to rivals by reducing the ability or incentives of rivals to expand their output in response to an attempt to increase price, or customers' willingness to substitute by reducing the quality of the products of rivals.

Decreasing the ability of a rival to respond to the exercise of market power typically involves reducing the elasticity of supply of rivals by raising their marginal costs of production, reducing their capacity, preventing their entry, or inducing their exit. By reducing the profitability of output expansion, increases in a firm's marginal cost will typically make it less willing to expand output in response to a reduction in output or increase in price by its rivals. Decreasing a firm's available capacity reduces its ability to increase production, and therefore, the ability of consumers to substitute.

Alternatively, conduct that reduces the willingness of consumers to substitute to the products of competitors may also reduce the elasticity of firm demand and thereby increase market power. Conduct that reduces the quality of competitors' products is an example. For instance, where the willingness to pay for one good ("hardware") depends on the variety of compatible complements ("software"), reductions in the variety of software available to a rival—by merger and foreclosure—may increase the market power of the integrated firm.[23]

Notice that it is not harm to the rival per se that defines anticompetitive conduct. The relevant harm is to the rival's ability to discipline the exercise of market power, either by reducing its ability to expand or reducing the willingness of consumers to substitute to its products. Moreover, it is insufficient to establish only a negative effect on the ability of a rival to respond. It is also typically required that the negative effect on a rival allows the firm whose conduct is at issue to exercise *more* market power. That is the negative effect on the rival must also translate into a negative effect on the market, resulting in a SPC or SLC.

3.3 Substantial Lessening or Prevention of Competition

The premise of competition law and enforcement is that competition for market power, competition for the market (Schumpeterian competition), results in innovation and investment whose benefits dominate

price competition and is therefore to be encouraged. Market power that is the result of enhancing choices and providing value superior to competitors is the cost of progress. Competition policy is directed at market power that results instead from eliminating competitors or agreeing not to compete. The logic of Section 79 is that 79(1)(b) requires that a dominant firm engages in a practice of anticompetitive acts that harms rivals in a way that reduces their ability to discipline the dominant firm's ability to exercise market power; 79(1)(c) is a check to make sure that the effect matters in the market.

The abuse provisions require that the effect of the conduct on competition be substantial. This requires measuring and comparing the extent of competition with, and without, the conduct. The concern for why a market outcome may not be competitive, or the operation of the market not competitive, is the exercise of market power. The extent to which the market outcome is not competitive depends on the ability of firms to exercise market power. The extent to which firms can exercise market power is a measure of the extent to which the market is not competitive.

Changes that reduce competition increase market power: a positive effect on market power, all else unchanged, is a reduction in competition. This is reflected in changes to prices and qualities relative to their competitive level, but not necessarily observed changes in price levels. An increase in price or reduction in quality is consistent with an SLC if they are the result of an increase in market power. Changes in price or quality may indirectly signal an increase, maintenance, or enhancement of market power. But the inference from increases in price or lower quality depends on the competitive level not changing. If the competitive level changes, then any inference from a change in prices or quality to market power is subject to error. This is a key error in the logic of the Tribunal in the *TREB Redetermination*, as discussed *infra*, and opens the door to the made-in-Canada essential facility doctrine.

A corollary that follows is that without an effect on market power, the anticompetitive practice cannot result in a substantial lessening or prevention of competition. As indicated above the effect of the exercise of market power in an upstream market is to raise the marginal costs of production downstream and reduce supply, resulting in an increase in price in the downstream market. But the negative effects arise from the exercise of market power upstream, not an increase in market power in the downstream market. The negative effects are a consequence of the

exercise of market power upstream, not an increase in market power in the downstream market from exclusionary conduct. The change in prices downstream do not reflect a change in market power downstream, but instead a change in the downstream equilibrium from the exercise of market power upstream. They reflect a change in the competitive level downstream, not an increase in market power downstream.

Finally, it may be the case that the conduct of the dominant firm both reduces the competitive constraint of rivals and increases the competitiveness of the dominant firm. In these instances, the efficiency benefits of the conduct must be traded off against its anticompetitive effects. This can be done by considering the net effect of the conduct on consumer welfare or total surplus (depending on the standard adopted). But it cannot be done by determining the intent or purpose of the conduct. Ultimately what should matter if the goal of antitrust enforcement is to promote efficiency or consumer welfare is the net effect of the conduct.

For instance, a dominant firm might enter into an exclusive supply agreement with a significant supplier of an input. In particular, in exchange for a lower price and agreement that the supplier will not supply other downstream firms it agrees to purchase a minimum volume. This allows the supplier to achieve economies of scale, lowering its average cost. Both the dominant firm and the supplier are made better off from this agreement. The lower costs and minimum volume also give the dominant firm an incentive to increase its output in the downstream market, benefiting the customers of the dominant firm. If this was all there was, then the conduct would be efficiency enhancing.

However, it could be the case that since the exclusive supply arrangement precludes other downstream firms from supply, there is an increase in the market power of the other input suppliers. As a result, there may be an increase in the input price to the rivals of the dominant firm downstream, raising their costs and reducing their ability to discipline the market power of the dominant firm.

Which of the two effects dominates, the efficiency effect of lower costs on the dominant firm or the anticompetitive effect of raising rivals' costs, will determine the net effect on the price in the downstream market. If it rises, consumers are likely harmed, but if it falls, consumers would likely benefit. Even if consumers are harmed because the downstream price rises, total surplus might still increase if the cost savings from the economies of scale upstream are sufficiently large.

As discussed *infra*, the Tribunal's treatment of efficiencies has been dominated by concerns over intent rather than effect. This is particularly problematic when the conduct is exclusion from accessing services made possible by investment, as in an essential facilities case. The made-in-Canada essential facilities doctrine has been developed out of jurisprudence that does not adequately recognize and incorporate that the same conduct can have competing effects and gives short shrift to efficiencies.

What matters is that the Tribunal does determine the overall balancing of the effect of the conduct that simultaneously increases market power and achieves efficiencies. The ruling interpretation by the Federal Court of Appeal, reflected in the *TREB Redetermination* prohibits a balancing of effects—see discussion *infra*. But there are two alternatives, that the overall effect be considered in whether the conduct is an anticompetitive practice (79(1)(b)) or that an SLC requires not only an increase in market power (a necessary condition), but also that the conduct results in a harm to consumers (under a consumer welfare standard) or a reduction in efficiency (under a total welfare standard). Failure to even consider the benefits to consumers and efficiency of denying access to competitors of a firm's input is a particularly problematic aspect of the made-in-Canada essential facility doctrine that has been fashioned by the Federal Court of Appeal and the Competition Tribunal.

3.4 Abuse of Dominance: Conceptual Summary

If the objective of the abuse provisions is to control conduct by dominant firms that maintains, enhances, or creates market power, with a negative effect on consumer welfare or total welfare, then the economic review suggests the following are the requirements for the Commissioner to make a successful application to the Competition Tribunal:

- For dominance, it must be the case that the firm whose conduct is alleged to harm competition must have significant market power that is durable, i.e., it should be earning monopoly returns and able to maintain its return in excess of competitive levels in the long run. To maintain its market power, i.e., its control over price, competitors must be excluded. Without exclusion of competitors, the dominant firm will not be able to maintain its control over price or otherwise exercise market power.

- The alleged conduct by the dominant firm must reduce the

competitive discipline or constraint on market power of competitors. This occurs, typically if, the conduct reduces the ability and willingness of consumers to substitute.

- The conduct must have a substantial effect on the exercise of market power. That is, in the absence of the conduct, market power would be substantially less.

- An increase in market power is only a necessary condition for a negative effect on consumer welfare or efficiency. In some cases, the conduct may have *both* a negative effect on rivals that materially reduces their ability to restrain the exercise of market power *and* a positive effect on the costs or quality of the dominant firm. Welfare consistent enforcement will require that these two effects be traded off appropriately, i.e., does consumer surplus or total surplus on net increase.

4 The Economics of Vertical Foreclosure

Mandated access to an input of a firm to its rivals typically involves the following fact pattern. There is an upstream supplier of an input that is vertically integrated downstream or has a commercial interest in some of the downstream firms. The integrated firm then engages in vertical foreclosure by denying access or refusing to supply the input to its unintegrated rivals, places restrictions on the use of the input by its unintegrated rivals, or otherwise discriminates between its use or access to the input and the use or access of all or some its unintegrated rivals in the downstream market.[24] The alleged conduct is full or complete foreclosure: the integrated firm's denial of access means that potential downstream rivals cannot enter the market. It is this that makes the input "essential": without access downstream rivals are either ineffective or precluded from competing.

In TREB the allegation is that "full information" Virtual Office Websites ("VOWs") require access to confidential price data, data that was not provided in the VOW data feed provided by TREB to realtors, including historic sold prices.[25] Without access to the confidential price data, the website of a broker cannot provide the data to its clients and any results in response to a search done by the client will not include these listings or information. Thus without the confidential data in the VOW feed and permission to include this data on their websites, "full information" VOW brokerages allegedly cannot exist. Similarly, in YVR,

without access to the airport, competing galley handling and caterers cannot provide service.

There are two threshold issues with regard to an allegation of complete vertical foreclosure. The first is whether the vertically integrated firm has the power to foreclose: this will require it to have market power in the supply of the input. The second is whether it has the incentive to do so. In this section both of these issues are addressed.

4.1 Monopoly Power in the Supply of an Input

In an essential facilities case, the incumbent firm must provide a unique input: it is essential for rivals to have access if they are going to compete in the downstream market. This means that the two types of substitution, both direct and indirect, are very limited, providing the input supplier with monopoly power. Limited direct substitution means that some downstream firms are unable or unwilling to substitute to alternative inputs. Dominance in the provision of the services provided by the upstream input, the essential facility, also implies that competitors cannot profitably duplicate the "same" facility and discipline the market power of the monopolist upstream.

For an input to be essential, it must not be duplicable. What this means is that there must be sufficient barriers to entry that duplication is not economically possible. That is, an entrant that tried to duplicate the input would not earn revenues equal to the opportunity cost of its inputs. Hence while it might be physically possible to replicate the input, it is not economically feasible. The Competition Bureau has suggested that it is not enough for entry to be profitable, it must also be effective—that is, even if entry is profitable, the entrant must be an effective competitor, capable of disciplining the market power of the incumbent input supplier.[26]

It is important to recognize that even if there are some firms in the downstream market whose ability to substitute to other inputs when denied access is limited, this does not mean that the input supplier is a monopolist whose input is essential. The possibility exists for indirect substitution to discipline the exercise of market power by the only supplier of an input. This might be the case when the downstream products are differentiated in part by their use of different inputs. If so, then the extent of competition between differentiated products downstream will be an important determinant of the elasticity of demand downstream, and hence the elasticity of demand for the input. When the supplier of

an input exercises market power, it raises the costs of suppliers in the downstream market that utilize its input. They in turn pass through some of this increase in costs to their buyers in the downstream market by increasing their prices. If the buyers in the downstream market can substitute to other suppliers who provide service without utilizing the input, and can do so sufficiently, then indirect substitution will discipline the exercise of market power by the input supplier. Its input will not be essential.

As an example, consider a local telephone network that provides wholesale access to its network. Assume that only the local telephone network provides access to entrants, either voluntarily or by regulation, which allows the entrants to provide broadband service to their residential retail customers. Under this assumption the local telephone network operator is the sole provider in the wholesale market for network access. However, demand by entrants for access may be quite elastic if they face competition from other networks. In these circumstances, demand for wholesale access may be elastic if homeowners are sufficiently able and willing to substitute to broadband access over an alternative network, such as a cable television network or a wireless network. An increase in the wholesale price, to the extent it is passed on by entrants to downstream consumers, will raise the entrants' price, and result in consumers substituting to the other networks. Indirect substitution in this case undercuts the alleged market power in the upstream input.

More importantly, competitors cannot invest in an alternative input that would permit supply by downstream competitors that would discipline the market power of a vertically integrated firm that controlled the alleged essential facility. That is, suppose the owner of the essential facility was vertically integrated downstream and did not supply any other downstream firms. The key issue is would there be other differentiated inputs available that downstream competitors could access, either in wholesale markets or by self-supply, that would allow them to compete and discipline the market power of the vertically integrated firm in the downstream market. If there is no "dominance" in the downstream market, the input is not essential upstream, and the integrated firm is not dominant in the upstream market: indirect substitution downstream disciplines the market power upstream and means that the market upstream includes the alternative inputs used by downstream competitors.[27]

The example of the competition from cable companies in the provision

of local telephony and broadband services with the telecommunication services providers should at least indicate that the copper loop network of the latter is not obviously an essential facility. Indeed it has been argued that the circumstances are such that relative to the direct and indirect costs of regulation, competition between the two networks (cable and telco) in Canada means that the telco networks are not essential facilities and that the optimal governance structure is deregulation at both the wholesale and retail levels.[28] With approximately equal market shares in the provision of local telephony, starting from telco shares of 100%, and active rivalry to provide network services to a location, it is very difficult to argue that the telco copper loops are an essential facility.[29]

4.2 The Effects of the Exercise of Market Power Upstream

The effect of the foreclosure in the downstream market from the denial of access will be an increase in costs or a reduction in quality of downstream firms. It is important to recognize that in many instances the effect of a reduction in quality is formally identical to an increase in costs. If foreclosure prevents the introduction of higher quality products, the effect on downstream consumers is often that they must consume *more* of a lower quality product. This increases the cost to them, just as an increase in an input price from an exercise of market power would raise the price paid by consumers in the downstream market.

To understand the effects of the exercise of market power upstream, consider two cases. In the first case, the downstream market is perfectly competitive both with and without the exercise of market power upstream. In the second case, the exercise of market power upstream, by discriminating or excluding some firms downstream, does affect market structure downstream and market power.

4.2.1 Competition Downstream

Suppose that an input supplier has monopoly power. Suppose further that they are not vertically integrated into the downstream market, but that they discriminate between downstream suppliers. If the downstream suppliers are competitive, then this discrimination will simply be a manifestation of the exercise of market power. The exercise of market power upstream will reduce the number of suppliers (those excluded) or effectiveness of some suppliers (those discriminated against) and as a result the supply curve downstream will shift up and to the left. The

result will be an increase in the price downstream, a decrease in output, and possibly a reduction in quality.

The difference between the downstream outcome with, and without, foreclosure is the difference between one competitive equilibrium and another. The rise in the equilibrium price and reduction in quality is the result of the exercise of market power upstream and its effect on reducing supply in the downstream market. Certainly, consumers in the downstream market are harmed and there is a reduction in output downstream, but this is the *effect* of the exercise of market power upstream. There is not an increase in market power downstream and there is no antitrust harm. The increase in price downstream is not the result of conduct that creates, enhances, or maintains market power, but the effect of the exercise of market power *upstream*.[30]

4.2.2 Oligopoly Downstream

It might be the case that the upstream monopolist affects the extent of competition downstream when it discriminates against, or refuses to supply, some downstream firms. The question that arises is whether the conclusion in the preceding section is robust to situations when downstream firms have "market power". The answer, developed below, is that it is robust, because the source of market power is control of the essential facility, and while increasing the number of firms downstream might appear to decrease their market power, it has no effect on the market power upstream, i.e., in the supply of the services of the essential facility. Instead the monopolist of the input may find that allowing some competition downstream increases the profitability of its upstream monopoly, i.e., enhances its ability to extract profits from its upstream monopoly relative to it being vertically integrated and being a monopolist downstream.

The owner of the alleged essential facility could simply extend its monopoly downstream by vertically integrating and never supplying any rivals downstream with access. There would not be any market transactions: there would not be discrimination in the terms of supply or some downstream firms provided with access and others precluded. If the vertically integrated firm has not provided wholesale access to any rivals that provide service in the downstream market, it is difficult to argue that antitrust enforcement should play the role that regulators might, identifying essential facilities, mandating unbundling, and setting regulated access prices and terms of service, in order to control the exercise

of market power. If there was a policy issue with the exercise of market power in the downstream market, the response would be regulation, either of downstream prices or mandated wholesale access at regulated prices to the input, not antitrust enforcement.[31]

Why would the owner of an essential facility provide supply to non-affiliated downstream firms at all? It would if providing supply or access to unaffiliated downstream firms creates value, i.e., by lowering costs or increasing quality. That is, relative to zero access to unaffiliated firms, limited or discriminatory access may increase the profits of the monopolist and value for final consumers. In doing so, the monopolist might discriminate or restrict access to some downstream firms, but it is doing so not to create, enhance, or maintain its market power but to create and extract more value from the supply chain it controls because of the essential facility.

The most obvious cases of when a monopolist upstream would invite some downstream firms to supply are when they have lower costs or can provide higher quality. But, the monopolist could limit supply downstream or discriminate in the terms of access to internalize competition and service externalities between downstream firms. Internalizing or restricting these externalities is intended to align incentives and restrict dissipation of value. For instance, if there are economies of scale downstream, the monopolist will have an incentive to restrict entry to avoid higher average costs and prices downstream. The monopolist could do this by either explicitly limiting the number of downstream firms it supplies or by setting an optimal two-part tariff. A two-part tariff involves both a usage charge per unit of service supplied and a fixed fee. The fixed fee when set optimally transfers profits from the downstream firms to the upstream monopolist. It implicitly controls the number of downstream suppliers: too many suppliers mean that there is too much competition and insufficient profits to pay the fixed fee. Hence the number of suppliers downstream reacts to the level of the fixed fee and makes sure that the competition downstream is sufficiently restricted to generate sufficient quasi-rents. If the downstream firms are differentiated or provide services that enhance quality, the upstream monopolist will have an incentive to optimize the range and diversity of products available downstream: it could easily do so by restricting and discriminating its terms of access.

There is a well-known and accepted distinction that conduct that is extractive, which more effectively utilizes existing market power

is acceptable, but conduct that extends market power, conduct that enhances, maintains, or enhances market power, is the legitimate target for antitrust enforcement.[32] That same principle is illustrated here: discrimination or exclusion by an upstream monopolist in the supply of an input to downstream firms is not conduct that extends market power, but instead it is extractive and may increase efficiency. It does not create, enhance, or maintain the monopolists' upstream market power.

There are two points worth emphasizing. First restrictions on downstream competition do not affect the market power of the essential facility. Hence there is not an antitrust case based on conduct that has extended the market power of the upstream dominant firm. Second, in terms of welfare, the relevant comparison is between consumer or total welfare with some access and some exclusion relative to consumer or total welfare when the owner of the essential facility monopolizes the downstream market. That is in assessing the welfare consequences of conduct that enhances extraction, the use of existing market power, this is the relevant comparison.

4.2.3 Summary of the Economics of Monopoly Upstream

This section can be summarized as follows:

- If a facility is essential, then its owner has monopoly power and it is dominant, not only upstream but also downstream.

- Conduct that appears to restrict competition in the downstream market can easily be the exercise of market power upstream. If it is, then it is not conduct that should be reachable under the *Competition Act*. Exclusion downstream is possible because of market power upstream, but the exclusion downstream might well enhance efficiency.

- Conduct that restricts access to the essential facility should only be reachable under the *Competition Act* if it creates, enhances, or maintains market power. This has to be the market power of the dominant upstream supplier in the upstream market defined around the essential facility. This can either be because the conduct restricts the competitive discipline of alternatives to the essential facility upstream (direct substitution) or the competitive discipline of alternatives in the downstream market that do not use the essential facility (indirect substitution).

4.3 Regulation vs. Antitrust Enforcement

There is an important distinction between the role that monopoly power or dominance in the supply of an input (an essential facility) plays in antitrust enforcement under Section 78 and 79 of the *Competition Act* and the role that it plays in regulation. In a regulatory context the policy choice to regulate involves, as a necessary condition, the establishment of monopoly power in the downstream market. The issue is then whether retail rates are regulated, as was done traditionally, or instead access to some facilities or services of the incumbent mandated with regulated terms and prices of service.

If the market power downstream is because of control of an essential facility upstream, then market power downstream might be better controlled through enabling competition from rival service providers by mandating access to the essential facility. Hence downstream regulation at retail is replaced by wholesale regulation. The monopoly power of the incumbent—necessarily attributable to the control of the essential facility—is controlled by regulating the facility and not the services that are enabled by access to it. The benefit from providing access is the entry downstream enabled and its disciplining effect on the market power in downstream services provided by the vertically integrated firm. An advantage of mandated access in the wholesale market to control market power in the downstream market is that providing downstream competitors with access to the essential input might—and this is a big might—spur innovation and product diversity downstream, as well as lead to lower prices. The competition created downstream by mandating access is the goal of the regulatory intervention and it is enabled by regulating the upstream market power of the vertically integrated firm. In the absence of regulation, the upstream market power might not be reflected in high wholesale prices for the access charged to downstream rivals but rather in high, unregulated retail prices and no supply of access to downstream rivals. This is likely to be the case if independent downstream providers do not add much value.

In the case of enforcement under the *Competition Act*, the objective of the *Act* is not to regulate the exercise of market power. Instead its objective is to prevent conduct that creates, enhances, or maintains market power. Hence from the perspective of the *Competition Act*, the importance of denial of service is whether it creates, enhances, or maintains market power upstream relative to the but-for world. Unlike in the

context of regulatory mandated access and unbundling that creates a market and access is priced at competitive levels, the relevant but-for is access to the input provided by a monopolist.[33] The focus of antitrust enforcement should be on how the refusal to provide access creates, enhances or maintains the market power of the monopolist upstream, not whether access reduces its ability to exercise market power.

4.4 Anticompetitive Conduct by the Monopoly Supplier of an Input Upstream

Anticompetitive conduct by a monopoly supplier of an input must, therefore, involve conduct that creates, enhances, or maintains its market power in the relevant upstream market. There are two possible scenarios:

- The conduct reduces the constraint, actual or potential, of other suppliers in the upstream market. The conduct reduces the extent of direct substitution by downstream firms.
- The conduct reduces the constraint of other suppliers in the downstream market who do not use the essential input in a downstream market. The conduct reduces the extent of indirect substitution by downstream consumers and this increases the market power of the firm in the upstream market.

An upstream monopolist without the threat of entry or actual competition upstream is unlikely to have an incentive to foreclose access to its input for market power reasons. First, coherent theories—i.e., explanations that are consistent with profit maximization and that identify market power creation, enhancement, and/or maintenance to explain conduct that harms competitors downstream—are scarce. The Chicago School critique of leveraging based on the single profit theorem must be refuted or shown to be inapplicable. The single profit theorem states that profits arise because of the single monopoly, it is upstream, and hence market power and profits are unlikely to be enhanced by foreclosing competition downstream. If foreclosure is observed, it is because of efficiency reasons or to more effectively exploit the market power it has by facilitating price discrimination, not to extend market power. Second, the few coherent post-Chicago theories that exist are often not consistent with the facts.

4.4.1 Single Profit Theorem

The single profit result is based on the observation that by appropriate choice of the wholesale price, the upstream monopolist can ensure the

price in the competitive market downstream is identical to the price a vertically integrated monopolist would set, and its profits in the upstream market equal the profits of the vertically integrated monopolist.[34] The vertically integrated monopolist can monopolize the downstream market by refusing to supply the input to the other downstream firms. If its monopoly price is P^M, then its integrated profit margin will be $I=P^M-c-d$, where c is the unit cost of production upstream and d are the additional costs downstream to transform a unit of the upstream good into a unit of the downstream good.[35]

In the absence of vertical integration, the price in the perfectly competitive downstream market will equal the marginal cost of production downstream: $P^C=w+d$, where w is the monopolist's wholesale price. The unintegrated monopolist can earn the same profit as if it were vertically integrated by setting its wholesale or upstream price such that the downstream price under competition is the same as it would be if there were vertical integration. Setting $w=P^M-d$ insures that $P^C=P^M$ and yields the same profits as integration and foreclosure. The assumption of fixed proportions ensures that sales of the upstream input equal sales of the downstream good, and hence the quantity demanded will be the same as the vertically integrated quantity. The upstream monopolist's profit margin will also be the same as if it were integrated ($I=P^M-c-d$). The downstream price, quantity, and the profits of the monopolist are identical whether the monopolist integrates or not.

If it integrates, it provides the downstream services and incurs cost d to do so. If there is vertical separation, competitive downstream firms provide the downstream services for the monopolist at a cost of d. The monopolist earns the monopoly profit by realizing the monopoly margin in the wholesale market. Because of fixed proportions and competition downstream, this margin is simply passed on to final consumers by the downstream sector. Vertical integration does not increase profits, and a vertical merger is not required to realize monopoly profits.

Since increased profits and market power are not the reason for the vertical merger, the argument is that the rationale for the vertical merger must be based on realizing efficiencies that lead to lower per unit costs or integration and foreclosure can be a means to implement price discrimination. Lower per unit costs, whether upstream or downstream, lead to an increase in the monopolist's profits on its prevailing sales. It can

further increase its profits by increasing sales. It can only increase sales by lowering the price to consumers, thereby making them better off as well.

4.4.2 Anticompetitive Conduct by an Upstream Input Monopolist

Coherent theories of anticompetitive conduct by an upstream input monopolist are not impossible, just scarce. These theories escape the Chicago School critique based on the single profit theorem by assuming that competition is imperfect downstream, i.e., downstream firms have market power. The coherent theories typically involve integration and foreclosure by an upstream monopolist downstream to prevent entry by a rival upstream, thereby preserving market power upstream. At the core of these theories is the interaction between economies of scale upstream and denial of demand downstream by integration. The integration and foreclosure by the incumbent monopolist reduces demand downstream for a rival by foreclosing customers and, if there are economies of scale, this can make entry unprofitable for it.[36]

Even if the result is entry deterrence and maintenance of the foreclosing firm's upstream monopolist, it might benefit consumers downstream and increase total welfare. The reason is that with imperfect competition downstream, there will be double marginalization: in the absence of integration the upstream monopolist will charge a wholesale price above its marginal cost and the downstream firms when they exercise their market power will mark up over their marginal cost, which will include the upstream monopolist's mark up. Hence there is double marginalization. A vertically integrated firm will have lower marginal costs downstream, since it will transfer the upstream input at marginal cost *not marginal cost plus a mark up*: this provides it with an incentive to lower prices and expand output relative to its unintegrated rivals. The effect of internalizing double marginalization from integration can make integration and foreclosure good for consumers or increase total surplus.[37] Vertical integration and foreclosure is an example of conduct that can both create market power (by reducing the competitive constraint of rivals) and lower costs (improving resource allocation and creating incentives to lower prices downstream).

5 Errors in Economics: the FCA and Tribunal in *TREB*

In this section, the interpretation of the abuse provisions in *TREB* by the Federal Court of Appeal and the Tribunal (second panel) are assessed

based on the economic framework of the preceding section. The errors of economics committed by the FCA and the Tribunal establish the foundation for the made-in-Canada essential facilities doctrine.

5.1 Control

Since the first abuse of dominance application, *NutraSweet*, the Tribunal has interpreted control of a class or species of business to mean market power in a relevant antitrust market.[38] In *Canada Pipe* the Tribunal observed:[39]

> A "class or species of business" has been interpreted by the Tribunal in abuse of dominance cases to mean the relevant product market. The expression "Canada or any area thereof" is to be understood as the geographic market, while "control" has been found to be synonymous with market power *(Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.; Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.; Canada (Director of Investigation and Research) v. NutraSweet Co.; Canada (Director of Investigation and Research) v. Tele-Direct.*

The Commissioner alleged that TREB controlled the downstream market, residential real estate brokerage, because it (a) controlled the multiple listing service, including setting the rules for access to the multiple listing service, and (b) without access to the multiple listing service, realtors cannot provide residential real estate brokerage.

The FCA endorsed the possibility that the requirement for control could be satisfied if a supplier of an input could use the terms of access to affect competition in the downstream market. The sole discussion of this in the FCA decision is a single paragraph:[40]

> The Commissioner takes the position that a person that is not a competitor in a particular market nevertheless may control that market substantially within the meaning of paragraph 79(1)(a) by, for example, controlling a significant input to competitors in the market, or by making rules that effectively control the business conduct of those competitors. In my view, the Commissioner's position reflects an interpretation of paragraph 79(1)(a) that its words can reasonably bear, given the statutory context.

The Tribunal in the *TREB Redetermination* agreed with the Commissioner that market power includes the power to exclude if excluding competitors profitably influences prices and goes onto observe that it is the "exercise of the power to exclude that facilitates a dominant firm's

ability to profitably influence the dimensions of competition referred to in *Tervita*."[41]

The Tribunal correctly observes that the exclusion of competitors is a necessary condition for classic market power, but conflates the exclusion of competitors with market power. As discussed above, in an essential facilities scenario, market power upstream gives the power to exclude downstream, but it is not market power downstream. Exclusion of competitors is not market power, but it can give rise to the ability to exercise market power. It can be the case that the exclusion of competitors does not give rise to classic market power. Hence evidence on exclusion is not sufficient to conclude that a firm has market power.

This is the case in *TREB*: the realtors in the downstream market do not have market power. Indeed, it is hard to imagine a market that more closely resembles that of textbook competition. There were over 36,000 realtors in Toronto, there was lots of entry and very low entry barriers, concentration levels by neighbourhood were very low, market shares were unstable and there was considerable turnover of the market leader.[42] The Tribunal agreed:[43]

> [500] The Tribunal acknowledges that individual real estate brokers and agents in the Relevant Market do not have market power.
>
> . . .
>
> [501] The Tribunal also acknowledges 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.

Given the almost free entry and exit into the downstream market, realtors and brokers do not earn profits above the competitive level and the conduct by TREB did not increase the profits of some brokers and realtors above competitive levels. In asserting that TREB's conduct "profitably influenced dimensions of competition" in the downstream market, the Tribunal appears to confuse quasi-rents and Ricardian rents with above average returns attributable to the exercise of market power.[44]

Moreover, the Tribunal and Commissioner do not understand that the power to exclude or affect competition in the downstream market only exists if the upstream supplier has market power in the upstream market.

The input supplier can only "control" the downstream market if it has market power in the supply of the input, otherwise downstream firms could ignore the rules and restrictions regarding the use of the input. As usual, buyers can evade the exercise of market power if they can substitute to alternatives. And, of course, determining whether the input supplier has market power will require defining an upstream market where the input supplier is dominant. If it is not, then the facility is not essential, and the upstream firm cannot affect competition in the downstream market.[45]

The Tribunal's mistake of conflating market power downstream with the power to exclude arises because it does not recognize that the power to exclude arises only if there is market power upstream. Moreover, it is also not supported by the legal precedents it relies upon. The economic foundations for defining market power to include the power to exclude are incorrect and likely so too is its legal foundation.

The Supreme Court in *Tervita* defines market power as the following:[46]

> Generally, a merger will only be found to meet the "lessen or prevent substantially" standard where it is "likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms" (O. Wakil, *The 2014 Annotated Competition Act* (2013), at p. 246). Market power is the ability to "profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, 11 C.P.R. (4th) 425, at para. 7, aff'd 2003 FCA 131, 24 C.P.R. (4th) 178, leave to appeal refused, [2004] 1 S.C.R. vii). Or, in other words, market power is "the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable" (*Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.), at p. 314);

The definition of market power used by the Supreme Court in *Tervita* is in the context of defining when a merger will lessen or prevent competition. As the first sentence makes clear the concern is that the merged entity will be able to exercise market power and a firm has market power, therefore when it—made clear by the third sentence—can profitably influence or maintain price above competitive levels or other dimensions of competition away from competitive levels. The Supreme Court is defining classic market power: the ability to profitably raise prices above competitive levels.

This is made clear by the full text of the decisions cited by the Supreme Court in *Tervita*. In *Hillsdown* the full cite is:[47]

> Market power in the economic sense is the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable. In a competitive market, prices will tend towards marginal cost. Market power can be viewed as the ability of a firm to deviate profitably from marginal cost pricing.

In *Waste* the full cite identifies the key concern as the ability of the merged entity to exercise more classic market power post transaction:[48]

> The main issue to be decided by the Tribunal is to determine whether the acquisition of the Ridge is likely to result in a substantial prevention and/or lessening of competition, or in other words, whether the merger will create or enhance market power. Market power is the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition.

Moreover, the definition used by the Tribunal in *Waste* is identical to that from the *Merger Enforcement Guidelines ("MEGs")* in force at the time:[49]

> *Market power refers to the ability of firms* to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition in the manner described below. In evaluating whether the *market power of the merging parties* is likely to be greater than if the merger does not proceed, the focus is primarily on the price dimension of competition.

The *MEGs* identify that "the manner described below" is either a unilateral increase in the market power of the merged entity or a coordinated effect:[50]

> A merger can lessen competition in two different ways. The first is where it is likely to enable the merged entity to unilaterally raise price in any part of the relevant market. The second is where it is likely to bring about a price increase as a result of increased scope for interdependent behaviour in the market.

This further makes clear that the Tribunal and the Supreme Court are defining classic market power: an SLC arises when the merged entity has a greater ability to profitably raise prices above competitive levels.

The FCA in *Canada Pipe (Market Power)* provides a summary of the

jurisprudence that had developed at that time on the relationship between market power and control, i.e., the requirements of Section 79(1)(a). The FCA made two observations. First that market power, though not mentioned in Section 79(1)(a), was necessary for control,[51] and, second, citing the FCA in *Southam*, that market power is classic market power:[52]

> "market power is recognized as the ability to profitably raise prices above competitive levels without losing a significant portion of business to rival firms or firms that may become rivals as a result of the price increase"

The result of the FCA's cursory analysis and the Tribunal's mistake in the *TREB Redetermination* is economic mischief. Instead of substantial and durable market power in a well-defined antitrust market, control now also encompasses a monopoly supplier of an input in an upstream firm if it uses the price and terms of supply to limit competition in the downstream market. If it uses the terms of supply to limit or set the rules of competition downstream, the input supplier is deemed to have market power *in the downstream market, when its ability to do so arises because it has market power upstream*. The Tribunal will find that monopoly power upstream means dominance downstream since any exercise of monopoly power will "limit" competition downstream.[53] The FCA and the Tribunal fall into the trap of mistaking the effect of an exercise of market power upstream for market power in the downstream market.

5.2 Practice of Anticompetitive Acts

5.2.1 The Canada Pipe Rule

The ruling interpretation of 79(1)(b) was established by the Federal Court of Appeal in *Canada Pipe (SLC)*. The so-called Canada Pipe rule defines anticompetitive conduct as conduct that has "an intended predatory, exclusionary, or disciplinary negative effect on a competitor."[54] The Canada Pipe rule requires conduct that (i) is exclusionary, predatory, or disciplinary and (ii) against a competitor.

The Federal Court of Appeal in *FCA 2014* rejected the Canada Pipe rule that an anticompetitive practice required conduct that was exclusionary, predatory, or disciplinary against a *competitor* on two grounds:

- Competitor does not necessarily mean a competitor of the dominant firm, defined as the target of the Commissioner's application.[55]
- Section 78(1)(f) is an example of an anticompetitive practice that

> is "not necessarily taken by a person against that person's own competitor."[56] Section 78 lists a non-exhaustive list of examples of anticompetitive acts. Section 78(1)(f) includes "buying up of products to prevent the erosion of existing price levels" in the list of anticompetitive acts. The presence of Section 78(1)(f) provides the latitude to conclude that the intention of Parliament was *not* to limit the application of Section 79 to actions taken by a dominant firm against its competitors.[57] Such an interpretation, that the action has to be directed against a competitor, would be "manifestly wrong" due to "flawed reasoning".[58]

The second prong of the FCA's rationale suggests the first part of the Canada Pipe rule is also in doubt. Just like the FCA's finding that Section 78(1)(f) is not necessarily directed at a competitor, and indeed perhaps more so, Section 78(1)(f) is also not necessarily disciplinary, exclusionary, or predatory.

Section 78(1)(f) is exclusionary if the conduct involves overbuying of an input to raise the costs of a rival.[59] But it might involve buying up the output of competitors, its most straightforward interpretation.[60] A dominant firm might find it profitable to purchase the product of its rivals to prevent price erosion if by doing so it reduced the competitive constraint of those rivals on its ability to exercise market power. In such circumstances, its competitors will likely benefit from higher prices as a result of this conduct.

It is not so apparent therefore, that Section 78(1)(f) undermines the *competitor* portion of the Canada Pipe rule. If the overbuying is in an input market and raises the cost of a rival, there is clearly a competitor that is (partially) excluded. If the overbuying is in the output market, it must be from, or involve, a competitor or it does not benefit the dominant firm. Indeed, to the extent the dominant firm buys some or all of the output of its competitor, the competitor is partially or fully *excluded* from the market but it is not harmed.

Section 78(1)(f), does, however, serve as *sufficient* grounds for rejecting the "exclusionary, predatory, or disciplinary" part of the Canada Pipe rule, *at least if exclusionary means that the competitor is harmed.* Overbuying in the downstream market can benefit rivals, i.e., result in a higher price and profits, even though it reduces their competitive constraint on the dominant firm.

The reason that a dominant firm would engage in any of the conduct

listed in Section 78 is not because the harm is "experienced by a competitor". Instead what is relevant is that for all of the eight acts where there is a predatory, exclusionary, or disciplinary object or purpose, the intent is to reduce the ability of competitors to constrain the exercise market power by the dominant firm. Within the logic of the abuse of dominance provisions, the conduct that is to be deterred is conduct that creates, maintains, or enhances the market power of the dominant firm by reducing the ability and willingness of its customers to substitute, where this effect arises from reducing the ability of competitors to expand output or by reducing the quality or attractiveness of competitors' products. All of the acts listed have the feature that they involve reducing the ability of consumers of the dominant firm to substitute to competitors by preventing or impending the ability of competitors to expand or eliminating them from the market. From this perspective it is not that the common purpose has a negative effect on a competitor per se that is important, but that it has a negative effect on the ability of a competitor to constrain the market power of the dominant firm by removing their output from the market.

In this context Section 78(1)(f), "buying up of products to prevent the erosion of existing price levels", has exactly the same effect. A dominant firm would only purchase the product of its rivals to prevent price erosion if by doing so it reduced the competitive constraint of those rivals on its ability to exercise market power. Buying up product in the downstream market—by buying it from suppliers who are competitors (to it or an affiliated/related firm)—so that the price does not fall in the downstream market prevents consumers from benefiting from competition, i.e., prevents competitors from competing. By taking the output of its rivals off the market, it is able to reduce the ability of its customers to substitute to alternatives when it exercises market power and raises its price. This will be profitable if the value of the purchases is less than the gain in profits from being able to raise prices. In this sense, the conduct in 78(1)(f) is similar to a merger: it involves eliminating the competitive constraint of the dominant firm's competitors. Instead of buying the firm, i.e., the capability to product output, as in a merger, the dominant firm instead buys its rival's output.

Without an effect on competition between firms there cannot be an effect on competition. Without an effect on competitors of the dominant firm or *related affiliates* there is not an anticompetitive incentive for the dominant firm to engage in the conduct. So, the conduct or act must

negatively affect the incentives or ability of a firm that competes with the dominant firm or a related entity. This means that the FCA's first ground for excluding the competitor requirement discussed above is economically illiterate, the conduct must affect a competitor of the dominant firm or a related firm. Anticompetitive conduct must ultimately benefit the dominant firm (or related firms) from increasing market power and monopoly profits or its purpose is not anticompetitive.

This interpretation would incorporate conduct that softens price competition between rivals.[61] Conduct that softens price competition does so by making demand more inelastic and to do so it must reduce the ability of consumers to substitute. For instance, the expansion in sales from a price reduction may be much less when there are best price clauses, since the effect is to reduce the price of all suppliers. A common price decrease will not be met with the same expansion in volume if it is matched by all suppliers. As a result demand for all firms will be less elastic with best price clauses.

5.2.2 Legitimate Business Justifications

The Tribunal in the *TREB Redetermination* followed the jurisprudence developed by the Federal Court of Appeal in *Canada Pipe* and *FCA 2014*. In the Tribunal's view the legal requirement is that the conduct's purpose must be exclusionary, predatory, or disciplinary on a competitor.[62] Following *FCA 2014*, the conduct need not be against a competitor of the party engaged in the conduct, but the party engaging in the conduct must have a plausible interest in competition in the market where its conduct negatively affects a competitor because it is exclusionary, predatory, or disciplinary.[63] The purpose or intent of the conduct can be established by reference to evidence of subjective intent or from the reasonably foreseen effects of the conduct.[64]

The FCA in *Canada Pipe* determined that in assessing the purpose of conduct, the Tribunal is to consider whether it has a legitimate business justification. Indications, whether subjective or based on the effects of the conduct, that it has a legitimate business justification are to be weighed against the evidence suggesting the motivation for the conduct was predatory, exclusionary, or disciplinary. A legitimate business justification "essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein."[65]

The Tribunal in *TREB Redetermination* summarized its view of how it was to determine whether conduct was anticompetitive:[66]

> In conducting this balancing exercise, the Tribunal will endeavour to ascertain whether, on a balance of probabilities, the actual or reasonably foreseeable anti-competitive effects are disproportionate to the efficiency or pro-competitive rationales identified by the respondent; or whether sufficiently cogent evidence demonstrates that the respondent was motivated more by subjective anti-competitive intent than by efficiency or pro-competitive considerations. In other words, even where there is some evidence of subjective anti-competitive intent on the part of the respondent, such evidence must convincingly demonstrate that the overriding purpose of the conduct was anti-competitive in nature. If there is evidence of both subjective intent and actual or reasonably foreseeable anti-competitive effects, the test is whether the evidence is sufficiently clear and convincing to demonstrate that such subjective motivations and reasonably foreseeable effects (which are deemed to have been intended), taken together, outweigh any efficiencies or other pro-competitive rationale intended to be achieved by the respondent. In assessing whether this is so, the Tribunal will assess whether the subjective and deemed motivations were *more important to the respondent* than the desire to achieve efficiencies or to pursue other pro-competition goals.

The FCA, with some considerable clarification by the Tribunal in the *TREB Redetermination*, defined a legitimate business justification to be "a credible efficiency or pro-competitive rationale".[67] This means that the conduct must lead to efficiencies or other advantages for the firm that enable it to more effectively "compete on the merits."[68] Both the FCA and the Tribunal, however, require that the business justification be independent of the anticompetitive effect of the practice.[69]

As has been remarked in the United States by Judge Posner, the focus on intent is very unfortunate in and of itself:[70]

> The importance of intent in such fields as tort and criminal law makes it natural to suppose statutory tort. But here is an insoluble ambiguity about anticompetitive intent that is not encountered in the ordinary tort case . . . If firm A through lower prices or a better or more dependable product succeeds in driving competitor B out of business, society is better off, unlike the case where A and B are individuals and A Kills B for B's money. In both cases the 'aggressor' seeks to transfer his victim's wealth to himself, but in the first case we applaud the result because society as a whole benefits from the competitive process. That Western Union

> wanted to 'flush those turkeys' tells us nothing about the lawfulness of its conduct.

But perhaps more important is the view that the business justification must be independent of the anticompetitive effect and therefore in instances where the conduct both has an efficiency enhancing effect and an anticompetitive effect, the business justification is not relevant for determining whether the intent was anticompetitive. While there is an inherent problem of balancing two competing explanations underlying intent to determine which dominates, there is an even more significant problem that renders this balancing of intent impossible and harmful when the same conduct has both effects, i.e., it enhances a firm's efficiency and it reduces the competitive constraint of rivals.

The problem created in the context of an upstream facility for which access is "essential" for competition downstream is that exclusion of others from the asset protects the flow of quasi-rents that justifies the investment in the asset. Firm investment in the real world often involves expenditures on capital that is specific in terms of where it can be used and what it can produce. This specificity gives rise to sunk costs, i.e., the opportunity cost of the investment is much less than its historic cost. The difference between unrecovered historic cost and the salvage value of the asset, its value in its next best alternative use, is the sunk cost of the investment. These sunk costs are recovered, if at all, from using the asset in its specific use. Using the asset in its specialized use generates quasi-rents, the difference between revenues and avoidable costs. For the firm to break even, including earning a competitive rate of return on its investment, the quasi-rents earned will have to equal its sunk expenditures.

Mandated access, to the extent it leads to lower prices from more competitors, will reduce quasi-rents. An expected reduction in quasi-rents will reduce the expected returns from the investment. This would be expected to reduce the incentives to invest in a facility that might be deemed ex post essential. And for facilities that already exist, mandating access that has the effect of reducing quasi-rents to incumbents is regulatory hold up: it is a change in policy that makes sunk investments unrecoverable. Developing a reputation for changing the rules after investment is sunk will make firms wary to invest, resulting in both higher rates of return and limits on investment.

The relationship between private property rights—which typically include the right to exclude others—and incentives for investment is

both well understood and obvious. It may be the case that others could benefit from accessing a firm's assets. But there must be a very high hurdle for efficient competition policy to mandate access to the assets of either an individual or a group of individuals. The essence of competition is investment in production of a good or service that is valued higher or has lower cost than competitors. The expectation of sales provides the incentive for the investment and implicit in the expectation of sales is providing at least some consumers a better option than their next best alternative. Competition is driven by the investment incentives created by offering consumers a cheaper, better mousetrap. Mandating sharing of the mousetrap is, as Judge Hand observed years ago, akin to urging a firm to win the race, but then penalizing them when they do.[71]

The exclusion of others from accessing the assets and facilities of a firm is intended to exclude them and to maximize the benefits from the investment. The Tribunal's approach in *TREB Redetermination* suggests that exclusion of others from using an asset will be deemed an anticompetitive act, just because it is intended and has the effect of exclusion, regardless of its efficiency benefits. Indeed, the Tribunal used the evidence that some brokers were concerned about an increase in competition from entry by full information VOWs and the effect on commissions to justify the TREB VOW policy as evidence that it was intended to be anticompetitive.[72] Exclusion to protect quasi-rents and exclusion to protect monopoly rents from market power should not be treated the same.

There may be other efficiency rationales besides protecting the returns to investment of the upstream firm that may underlie restrictions imposed by it on downstream competition. As discussed above, these may involve internalizing externalities, avoiding rent dissipation, and providing incentives for downstream firms to make investments.

Not only does the framework developed by the FCA and the Tribunal for assessing whether conduct is anticompetitive or not prohibit an objective balancing of the effects of the conduct on resource allocation, which is especially problematic when the conduct both relaxes the competitive constraint of rivals and benefits consumers or realizes efficiencies, it does not even recognize that the exclusion may not have any effect on market power.

The Tribunal and the FCA have held that information regarding the exercise of market power cannot be used to assess whether conduct is anticompetitive. For instance, the FCA in *Canada Pipe (SLC)* was critical

of the Tribunal in *Canada Pipe* for looking for a link between the conduct and a decrease in competition.[73] The Tribunal in *TREB Redetermination* summarizes this as follows:[74]

> To the extent that past pronouncements of the Tribunal may have suggested that it is necessary for an adverse impact on competition be demonstrated before it can be concluded that impugned conduct is anti-competitive within the meaning of paragraph 79(1)(b), (e.g., *Canada Pipe CT* at para 171; *Nielsen* at p. 257; *Laidlaw* at p. 333), they should be disregarded.

This refusal to look at the ultimate effect of the conduct on competition leads to incorrect categorizations of conduct and decision errors. The most obvious error occurs in *TREB*. The consensus of the evidence (shared by the Tribunal) is that there is no exercise of market power downstream by realtors either with, or without, the restrictions on the confidential data. Thus, there is no way that the restrictions on the confidential price data should be deemed an anticompetitive practice. Without market power downstream, there is no way that those restrictions can relax the competitive discipline on brokers, creating, maintaining, or enhancing their market power. In the absence of market power downstream, the rational for the exclusion must be efficiency enhancing: it cannot be anticompetitive. And the efficiency rationale in *TREB*, as in any, essential facility case included the preservation of incentives for investment by protecting quasi-rents and preventing free riding by competitors.

5.3 Substantial Lessening or Prevention of Competition

The Tribunal in the *TREB Redetermination* and the Commissioner have eviscerated Section 79(1)(c) by adopting a new definition of an SLC. Traditionally an SLC was assessed by observing the effect of the conduct on market power. Was market power enhanced, created, or maintained by the conduct? And the effect had to be substantial. The Commissioner's burden was to show a link from the anticompetitive practice to an effect on the market. In *TREB Redetermination* the Commissioner and the Tribunal look from an effect *possible* from an increase in market power to presume such an increase. They thus ignore that there might be other reasons for the assessed effects they rely upon to find an SLC.

The logic of the Tribunal in the *TREB Redetermination* is to (i) observe exclusion; (ii) conclude that by definition there must be a decrease in

product diversity and innovation; and therefore (iii) that there must be a SLC.

But this is wrong on the face of it since the Tribunal agrees that there is no market power in the downstream market either before or after the conduct. Instead the exclusion is based on efficiency rationales and the negative effects they believe they find on the market are attributable not to an increase in market power, but are the results of the exercise of market power upstream. Exclusion downstream is possible because of market power upstream, arises because of its exercise, and enhances efficiency. There is nothing untoward with TREB acting to protect the investments of its members by preventing the dissipation of quasi-rents from lower prices enabled by competitors accessing the investments made by its members.

5.3.1 Pre-*TREB* Jurisprudence on SLC

The requirement for an effect on competition of the anticompetitive conduct requires that the effect on the conduct of rivals translate into an effect on market power. The Competition Bureau recognizes this in their discussion of what constitutes a substantial lessening of competition in its *Abuse of Dominance Guidelines*:[75]

> Generally speaking, a substantial lessening or prevention of competition creates, preserves, or enhances market power. A firm can create, preserve, or enhance market power by erecting or strengthening barriers to expansion or entry, thus inhibiting competitors or potential competitors from challenging the market power of that firm. In examining anti-competitive acts and their effects on entry barriers, the Bureau focuses its analysis on determining the state of competition in the market in the absence of these acts. If, for example, it can be demonstrated that, but for the anti-competitive acts, an effective competitor or group of competitors would likely emerge within a reasonable period of time to challenge the market power of the firm(s), the Bureau will conclude that the acts in question result in a substantial lessening or prevention of competition.

The FCA in *Canada Pipe* confirmed the relationship between the requirements for an SLC or SPC and an effect on market power, noting the Tribunal's findings in *NutraSweet*:[76]

> "The factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that NSC [NutraSweet Co.] has market power [that is, market share and entry barriers]. In essence, the question to be

decided is whether the anti-competitive acts engaged in by NSC preserve or add to NSC's market power."

And, in Nielsen:[77]

"The central issue to be decided in determining whether the Director has satisfied this third element [of subsection 79(1)] is the effect of the exclusives with retailers and the long-term contracts with customers on the conditions of entry into the market. Or, to paraphrase the words of the Tribunal in *NutraSweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen [D & B] preserve or add to *Nielsen's market* power. "

The FCA in *Canada Pipe* confirmed the assessment of the meaning of Section 79(1)(c) in the academic literature and its assessment is consistent with the economic discussion *supra*.[78]

The focus of the Commissioner's appeal in *Canada Pipe* was the Tribunal's finding that there could not be a substantial lessening of competition during the time period of the alleged anticompetitive practice (the Stocking Distributor Program (SDP)) because despite the practice there was evidence of competitive pricing due to increases in the extent of imports and entry.[79] The FCA overturned the Tribunal on the basis that it had not done a "but-for analysis". Under a but-for analysis the Tribunal must compare the extent of market power given the practice against the extent of market power in a counter factual that assumes away the practice. In the words of the FCA:[80]

In summary, the Tribunal should have turned its mind to the question of whether, in each of the relevant markets, *competitiveness was substantially lessened in the presence of the SDP, as compared to the likely state of competition in the absence of this practice*. In other words, the Tribunal should have considered whether, without the SDP, the relevant product market would be substantially more competitive. Proper examination of this question might include the following considerations: whether entry or expansion might be substantially faster, more frequent or more significant without the SDP; whether switching between products and suppliers might be substantially more frequent; whether prices might be substantially lower; and whether the quality of products might be substantially greater. In this regard, identification of the occurrence of entry, or reference to evidence of competition subsisting in the presence of the impugned practice, is insufficient. I conclude therefore that the Tribunal erred in law in its analysis, for the purposes of paragraph 79(1)(c),

> as to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially in the relevant markets.

The lower prices and greater quality in the but-for world indicate an SLC only if the higher prices and lower quality are the result of an *increase in market power relative* to the but-for world. That is, they, as well as the other considerations mentioned, are relevant *only* because they may be indirect signals of an increase, maintenance, or enhancement of market power. This is the import of the but-for test, highlighted in the first sentence: how has competitiveness changed relative to the but for? *Competitiveness or the state of competition is not measured by service levels or the level of prices*. Instead the state of competition is measured by market power. In this regard, an SLC or SPC is based on an increase in the difference between the levels of these indicators and their competitive level, not from a change in their competitive level.

The logic of Section 79 is that under 79(1)(b) a dominant firm engages in a practice of anticompetitive acts that reduces the ability of rivals to discipline the dominant firm's ability to exercise market power; 79(1)(c) is a check to make sure that the effect matters in the market. Hence the Bureau's traditional focus on barriers to entry and expansion. But it is only if these barriers to expansion and entry have an effect on the market that there will be an SPC or SLC. This is reflected in changes to prices and qualities relative to their competitive level. If the *competitive level* does not change, then it is possible to just to ask what happens to the prices and qualities and infer this is caused by a change in market power.

But the conduct could change both prices and non-price outcomes without affecting market power. Conduct can result in higher prices or a reduction in non-price competition without first creating, enhancing, or maintaining market power. As discussed above prices could be higher and product diversity and innovation lower not because the conduct is anticompetitive but because it is the exercise of market power upstream and competitors downstream are excluded for efficiency reasons. The inference from higher prices or reduced innovation and product diversity to anticompetitive behavior can therefore easily result in a false positive: a finding of an SLC or SPC under this approach does not require the creation, enhancement, or maintenance of market power either upstream or downstream. In particular higher prices downstream or a reduction in innovation and product diversity downstream can occur without a change in market power or competition upstream and even if there is no market power downstream by actual suppliers in the

downstream market. This is the error made by the Tribunal in the *TREB Redetermination*.

5.3.2 Tribunal Assessment of SLC in *TREB Redetermination*

The Tribunal started well in its *TREB Redetermination* deliberations. It observes that the requirement for liability is a materially greater exercise of market power as a result of the conduct.[81] But then the Tribunal falls into the trap discussed above and makes the fundamental error of inferring an effect on market power by looking at the outcome in the downstream market from the conduct:[82]

> When assessing whether competition with respect to *prices* has been, is or is likely to be prevented or lessened *substantially*, the test applied by the Tribunal is to determine whether prices were, are or likely would be, materially higher than in the absence of the impugned practice. With respect to *non-price* dimensions of competition, such as quality, variety, service, advertising or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition was, is or likely would be materially lower than in the absence of the impugned practice (*Tervita* at para 80; *CCS* at paras 123-125 and 376-377).

The reference to the Supreme Court is not supportive of the Tribunal's position that it can rely on whether the level of one or more dimension of competition has been lowered. The referenced paragraph and the beginning of the next discuss using a "but for analysis" to assess the effect of the conduct, in *Tervita* a merger, on market power:[83]

> [80] The Tribunal's analytical framework and conclusion that the merger will likely substantially prevent competition are, in my view, correct. The Tribunal correctly applied the analytical framework set out above. It used a forward-looking "but for" analysis to determine whether the merger was likely to substantially prevent competition. The Tribunal identified the acquired party, the Vendors, as the focus of the analysis. The Tribunal then assessed whether, but for the merger, the Vendors would have likely entered the relevant product market in a manner sufficient to compete with Tervita.
>
> [81] The Tribunal concluded that the merger "is more likely than not to maintain the ability of [Tervita] to exercise materially greater market power than in the absence of the [m]erger, and that the [m]erger is likely to prevent competition substantially" (para. 229(iv)).

Similarly, the Tribunal's approach in the same matter also clearly

identifies that the effect on price must be a result of an increase in market power from the merger:[84]

> [377] Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger.

The Tribunal in discussing the "but for approach" correctly observes that it is required to compare the "state of competition" with and without the conduct.[85] But it again immediately confuses evidence on the level of prices and non-price competition with that state of competition, i.e., the level of market power:[86]

> That is to say, the Tribunal compares, on the one hand, the level of competition that exists, or would likely exist, after the implementation of the impugned practice, and on the other hand, the level of competition that likely would have existed "but for" the impugned practice. As stated in the preceding section of these reasons, the test contemplated by this paragraph is whether the difference between those two levels of competition is, was, or would likely be, *substantial*; and this test is met when the price of the relevant product is likely to be materially higher, or the level of one or more significant dimensions of non-price competition is likely to be materially lower, than in the absence of the impugned practice.

The Tribunal does appear to recognize the link between market power and an SPC. In particular, its test in the *TREB Redetermination* focuses on the effect of exclusion from the confidential data (the essential facility in this matter) on market power in the downstream market (real estate brokerage):

> [475] Where the respondent is a trade association, the Tribunal will consider whether the impugned practice is likely to facilitate the exercise of new or increased market power by some or all of the members of the association, or to preserve their market power, relative to the situation that would likely have prevailed in the absence of the respondent's impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be prevented or lessened at all, let alone substantially.

The Tribunal, moreover, "acknowledges that individual real estate brokers and agents in the Relevant Market [residential real estate brokerage do not have market power."[87] That should have been enough to deny

the application, since if the downstream firms do not have market power, there cannot be any increase in market power, and without an increase in market power there cannot be an SLC or SPC.[88]

Instead the Tribunal insists that if the conduct by TREB, on behalf of its members, has prevented "a material increase in quality, variety or innovation, or a material reduction in price," it has prevented "a material reduction in one's market power", i.e., there is an SPC.[89] The Tribunal found that denial of the confidential information resulted in an SPC precisely because of the negative effects on quality, variety, and innovation.[90]

The Tribunal implicitly acknowledges the inconsistency of determining that TREB has acted on behalf of its members to preserve their market power in the downstream market even though they do not have any. For instance, in the *TREB Redetermination*, the Tribunal states:

- "When a group of rivals, whether through their trade association or otherwise, insulates itself from increased competition, they are in essence exercising a cognizable form or market power."[91]
- "the Tribunal is satisfied that TREB has exercised, and continues to exercise, such market power on behalf of its Members who sought to be insulated from innovative forms of competition."[92]
- "However, to the extent that the VOW Restrictions insulate TREB's Members from increased competition from new entrants and from Members who would like to provide additional service offerings through their existing VOWs, or through new VOWs, those restrictions are maintaining what is in essence the *collective market power* that TREB's Members are able to exercise through their control of TREB and its rule-making functions. This *collective market power* is manifested in the form of materially less brokerage service offerings, innovation, quality and variety than would exist "but for" the VOW Restrictions."[93]

The Tribunal in its justifications is actually acknowledging that the SPC it has found is not because there is an increase in market power downstream, but instead the effects on competition in the downstream market arise from the exercise of market power by TREB in the upstream market, the supply of the confidential price data.

The effect of raising the cost of provision of full information VOWs in the downstream market (if any) is simply the result of the exercise of market power by TREB in the relevant market that contains the

confidential price information. The exercise of market power (if any) could result in a reduction in competitive supply in the downstream market, with higher prices and lower quality in the competitive downstream equilibrium. But this is not conduct that creates, enhances, or maintains market power in the upstream market or the downstream market. Hence there cannot be a substantial lessening or prevention of competition even if TREB has market power, exercises it and it materially affects the costs of full information VOWs.

The Tribunal started by looking for an increase in market power: unfortunately in the case of denial of access to an essential facility for a well-founded case it should have been looking for an increase, maintenance, or creation of market power in the market in which the essential facility provides services, i.e., the upstream input market. When the downstream market, with and without mandated access to the essential facility downstream is competitive, as in *TREB*, finding an increase in market power in the downstream market is going to be an illusion.

5.3.3 Efficiencies and Denial of Access to the Confidential Data

The Tribunal agreed with the evidence that there is no market power in the downstream market either before, or after, the conduct. The question then arises as to why TREB would restrict the use of the confidential data. The typical Chicago School answer would be in this case that there must be an efficiency rationale for the restrictions on the use of the data. Of course the efficiency restrictions can only have an effect if TREB has market power in the confidential data: without market power the downstream firms could ignore the restrictions by substituting to substitute data provided by other suppliers. But the important point is that the restrictions are not anticompetitive: the exclusion by TREB is part and parcel of realizing efficiencies.

The negative effects the Tribunal found in the downstream market are attributable not to an increase in market power, but are the results of the exercise of market power upstream that are joint with realizing efficiencies. In the case of TREB's restrictions on the confidential price data, the exclusion is based on promoting investment and protecting quasi-rents, lowering costs of the MLS, and promoting trade and liquidity.[94]

Real estate agents make a number of investments. These include investments in building up their reputation, acquiring and valuing

listings, and developing and operating the multiple listing service (MLS). In particular agents incur costs in acquiring listings and valuing properties. These investments create de facto property rights in listings, which include the confidential price data. The agents then contribute those listing to the MLS database.

Mandating access to the confidential price data, under the theory of the Commissioner and the belief of the Tribunal, will result in full information VOWs that will have a significant impact on the revenues of existing agents. Existing agents will see decrease in prices and their sales. Thus the full information VOWs will benefit from the investments in listings at the expense of existing agents. That is free riding.

Moreover the agents have made their investments in the context of TREB's Rules, without considering that revenues would be reduced by facilitating movement to a more competitive equilibrium by enabling brokerages with full information VOWs. Free-entry by agents means that the marginal entrant expected zero economic profits. If revenues are reduced by providing access to VOWs with display and search of all MLS information then existing agents are held up and suffer financial losses to competitors that require their cooperation and access to their inputs. This is *not* the normal dynamics of a competitive market. In competitive markets firms do not have to share inputs in which they have property rights with competitors even if the result is lower prices. The transfer of revenues to brokerages with full information VOWs and consumers by mandating access is regulatory holdup—expropriation of sunk investments by changing the framework. The risk of holdup, as discussed above, both reduces the extent of investment and raises the required rate of return.

The MLS is a two-sided platform: more participants on one side benefit participants on the other side, i.e., the more buyers, the more attractive for sellers to participate and vice versa. Restrictions that promote liquidity on the MLS may be pro-competitive if they limit negative effects that reduce participation by buyers or sellers. Listing of the confidential price data might give rise to privacy concerns, strategic interference and bargaining advantages, and create a mix of price and non-price competition that reduces the pool of buyers and sellers. The concern with the latter is that full information VOWS might encourage price competition for inframarginal participants instead of non-price competition for marginal participants.

Mandating equal access transforms the MLS into a non-discriminating

joint venture. Non-discriminating joint ventures are fragile: they have to reconcile opposing interests between different groups. If they are unable to do so, then they may splinter and larger firms could go it alone, with the result that there is competition between competing pools of listings and the efficiency advantage of a single MLS are lost.

Information can be copied at low cost, use of it is non rivalrous and hard to monitor, and there are incentives to use the confidential price data for commercial purposes. In these circumstances TREB has an incentive to limit distribution of the confidential price data. If access is required for the public instead of the 35,000 agents, then searching will be provided by TREB not on mirrored servers and will be costly.

The extensive theoretical discussion of efficiencies is not matched by the same degree of supporting factual evidence. This is because many of the costs associated with mandated access are not observable without mandated access *and* a large effect on the market for residential brokerage from full information VOWS. In Toronto there has not been mandated access to the confidential information, the available evidence suggested a limited impact, a limited impact borne out by the experience in the U.S. The U.S. experience shows the irrelevancy of VOWS and the importance of search portals such as Zillow.

6 A Made-in-Canada Essential Facilities Doctrine

6.1 Is *TREB* an Essential Facilities Case?

The Tribunal in *TREB Redetermination* held that this was not an essential facilities case, since realtors that would like to offer full information VOW services still had access to the confidential price data, just not in the VOW data feed and there were restrictions regarding what they could do with the data.[95] Hence the Tribunal found that "this is not a case in which an upstream input supplier is denying customers *access* to an input."[96] The irony is that the Tribunal determined that TREB's VOW policy resulted in a substantial prevention of competition because it reduced the extent of innovation and product diversity. This must mean that it was the Tribunal's view that the existing access to the confidential data was not a good substitute for including the confidential data in the VOW feed and relaxing the rules on how brokers would manipulate and display that data. That is, precisely *because* the two inputs, data under the TREB VOW policy and data not subject to the TREB VOW policy, are not sufficiently good substitutes, that data not subject to the TREB

VOW policy is required to allow for a different downstream product, full information VOWs. The existing input that was available for which there was access did not allow for downstream brokers to offer full information VOW products, i.e., without access to the confidential price data full information VOWS are foreclosed from the downstream market.[97]

The Tribunal cannot have it both ways: there is a glaring logical inconsistency between finding that restricting access to the confidential price data results in a substantial prevention of competition because it makes it impossible for the product—full information VOWS—to be offered downstream and a finding that this is not a case about denying downstream firms access to an input. The prevention of competition in the Tribunal's view arises from the inability of full information VOWS to enter because they do not have access to an input, the confidential price data without restrictions.[98]

6.2 Mapping the *TREB Redetermination* into a Made-in-Canada Essential Facilities Doctrine

The made-in-Canada essential facilities doctrine created by the FCA and the Tribunal in *TREB* maps the following into an abuse of dominance:

- The Commissioner must establish that a firm supplies an input that is necessary for production in a downstream market. This involves establishing that the firm is dominant in the input market, i.e., an upstream monopolist. Hence upstream monopolists will be found to control downstream markets that use their input.
- If the upstream monopolist discriminates in the supply of an input or excludes some downstream firms from supply, it will be found to have engaged in a practice of anticompetitive conduct. By the nature of its conduct, exclusion, the intent is to harm downstream rivals and prevent them from using the input and competing downstream, or in the case of discrimination it is to limit their ability to compete. Consideration of the effect of the exclusion or discrimination on consumer welfare or resource allocation is irrelevant.
- If the result of the exclusion or discrimination of downstream rivals is a marked increase in prices; a marked reduction in product quality and diversity; or a marked reduction in innovation in the downstream market there is an SLC. The Tribunal will likely have

a high prior that the effect of exclusion will be these effects if the exclusion is "widespread".

- The remedy is an order requiring non-discriminatory access.

6.3 *YVR* is the Unfortunate Legacy of *TREB*

The Commissioner's application against the Vancouver Airport Authority provides evidence of the existence of the made-in-Canada essential facilities doctrine and the unfortunate perversion of the abuse of dominance provisions by the FCA and the Tribunal in the *TREB Redetermination*. Presently YVR restricts the choice of airlines to only two suppliers of catering and galley services. The Commissioner has applied for an order from the Tribunal requiring that YVR provide open access to airplanes for other suppliers of catering and galley services.

The Commissioner's case can be briefly summarized as follows:[99]

- YVR is a monopoly supplier of airside access and hence it has control of the downstream market (catering and galley handling).
- YVR has denied access to entrants.
- There is likely an SLC since the conduct has reduced competition in the downstream market (catering and galley handling) because competitors have been excluded.
- The Commissioner is requesting an order as remedy that YVR provide non-discriminatory access.

The YVR case demonstrates that the concerns over the errors made by the FCA and the Tribunal in the *TREB Redetermination* have opened the door for further applications by the Commissioner which fundamentally are incompatible with the economic foundations of the abuse of dominance in the *Competition Act* and, more importantly, the welfare of Canadians and efficient resource allocation.

The effect of the exclusion on downstream competition, in catering and galley handling, is irrelevant: the focus of an abuse case should be on whether the conduct by YVR creates, enhances, or maintains its market power in airside access, the upstream market. The exclusion downstream is possible because it has market power upstream and likely creates value for either it, the airlines, or both.

The application of the abuse provisions, in these made-in-Canada

essential facilities cases, substitute antitrust enforcement for regulation of market power. In doing so the Commissioner and the Tribunal have expanded their jurisdiction with unfortunate consequences. The objective of the *Competition Act* is not the regulation of market power, but some types of conduct that creates, enhances, or maintains market power, conduct in particular that does not benefit consumers or the efficient allocation of resources. The remedy under the *Competition Act* achieved in *TREB* and sought in *YVR* appears to be costless, but it is not.

There are two important costs that are ignored. The first is that the remedy is behavioural: access is to be open and non-discriminatory. This will require that the price, quality, and terms of service be determined and enforced. Industry-specific regulators find the task of setting efficient access prices difficult, if not impossible. How the Competition Bureau or Tribunal are to do so is not clear. Second, a successful application under the abuse framework does not provide for the "balancing" between controlling market power through widening access versus the benefits of denying and restricting access. Those benefits include incentives for investment in the essential facility and exercising market power upstream to limit the number of competitors, or otherwise discriminate against some competitors, downstream to realize efficiencies.

7 Conclusion

This paper has provided an economic critique of the Tribunal's *TREB Redetermination* decision. It has explained why the analysis by the Tribunal in the TREB matter is incorrect with respect to the three requirements for an order under the abuse of dominance provisions in the *Competition Act*: control of a market, anticompetitive practice, and SLC or SPC. While of concern in its own right regarding the foundation for all Section 79 applications and other provisions requiring demonstration of market power and economic effect, the paper has highlighted how these errors have resulted in a made-in-Canada essential facilities doctrine, an assessment confirmed by the Commissioner's application in *YVR*. This doctrine is unlikely to be consistent with enforcement that makes consumers better off or increases the efficiency of resource allocation. In particular, the doctrine makes it far too easy for an order requiring access to the assets of a dominant firm: the short-run benefits of increasing competition in the downstream market are the only factor considered. The effect on the incentives of the dominant firm to make the investments in the first place are not considered. In the long run

consumers will not benefit and political support for competition policy will be undermined.

It is possible to distinguish *TREB* and *YVR*, though the enforcement action by the Commissioner does not. In *YVR* the upstream facility is owned only by YVR and the exclusion is unilateral. In *TREB*, the upstream asset, the confidential price data, is an aggregation of the assets of the members of TREB, i.e., the listings of each agent, and the refusal to allow access is concerted. There is clearly something more going on in the *TREB* matter than in *YVR*, but by proceeding under the abuse provisions and treating TREB as if it was a vertically integrated firm and ignoring the conduct that creates the confidential price database, the cases are considered under the same economic and legal framework. Traditionally there has been more support for mandated access to facilities that are created by pooling the assets of competitors: the focus of such a case is on whether the benefits of the pooling, the efficiency advantages, exceed the cost associated, where the cost is the market power created by the combination of assets of the competitors, a pooling that happens by agreement.[100]

Endnotes

[†] This paper was part of the Scholars Panel at the Fall 2017 Canadian Bar Association Competition Law Fall Conference. My thanks to Michael Osborne and Tom Ross for the invitation to participate. An early airing of the ideas in this paper occurred at the 2016 Forum on Competition Law. This paper has benefited from the comments and observations of Andy Baziliauskas, Renée Duplantis, Tom Ross, Ralph Winter, Kalyan Dasgupta, and participants at the CBA Fall Conference and the Forum on Competition Law. My comments in this paper are my own and do not necessarily reflect their views or the views of the Toronto Real Estate Board.

[1] *The Commissioner of Competition v The Toronto Real Estate Board and the Canadian Real Estate Association* (15 April 2013), CT-2011-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20For%20Order%20and%20Order_238_38_4-15-2013_3949.pdf> [*TREB I*]; *The Commissioner of Competition v The Toronto Real Estate Board*, 2014 FCA 29, 456 NR 373 [*FCA 2014*]; *The Commissioner of Competition v The Toronto Real Estate Board* (27 April 2016), CT-2011-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20for%20Order%20and%20Order_385_66_4-27-2016_7296.pdf> [*TREB Redetermination*]; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [*FCA 2017*]; The Toronto Real Estate Board appealed the most recent Federal Court of Appeal decision upholding the Competition Tribunal's

2016 decision to the Supreme Court of Canada, see: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37932>; *The Commissioner of Competition v Vancouver Airport Authority*, CT-2016-015 (Notice of Application filed 29 September 2016), online: <http://www.ct-tc.gc.ca/CMFiles/CT-2016-015_Notice%20of%20Application_2_66_9-29-2016_5321.pdf> [*YVR*].

[2] *TREB I, supra* note 1 at paras 23-25.

[3] *FCA 2014, supra* note 1 at paras 13, 20.

[4] I provided two expert reports on behalf of the Toronto Real Estate Board and I appeared before the Competition Tribunal twice.
The second panel observed in their decision that I was less helpful than the expert on the other side and occasionally evasive and prone to speculation. See: *TREB Redetermination, supra* note 1 at paras 108-109. No evidence in the decision of my evasiveness is provided, but two instances of speculation are discussed in relation to market definition, see: *TREB Redetermination, supra* note 1 at paras 229, 248-249. Market definition is based on identifying reasonable substitutes, which based on the hypothetical monopolist test involves identifying those products that make a small, but significant and non-transitory increase in price above competitive levels non-profit maximizing. The first instance of speculation identified by the Tribunal was demonstrating that the database of the largest corporate franchise group contained virtually the same information as the entire TREB multiple listings dataset. Using information from it alone to estimate a hedonic pricing model versus using the entire MLS database resulted in an average difference in predicted house values of less than 4%. To me this suggested that the data of the larger brokerage groups should be considered a substitute for the entire database. Second, I observed that the absence of alternative suppliers of the confidential price data to brokers that would like to display and have it searchable on their websites might be attributable to a lack of demand by consumers. That agents might demand it does not necessarily mean that home buyers and sellers will be influenced by its availability when selecting a real estate agent. There might be other reasons why an agent might demand this data that is independent of their competitive position in the market for real estate brokerage: in particular they might instead demand it to be "the" web destination for anyone interested in real estate values and hence be a supplier of eyeballs to advertisers.
The panel in the *TREB Redetermination* engaged with my evidence on market definition, in particular whether it was required to define two markets, an upstream market that includes the input (the confidential price data) and a downstream market where the input is used (residential real estate brokerage) and the evidence regarding whether there are alternatives to the confidential price data. My evidence on whether the denial of access to the confidential data resulted in a substantial lessening or prevention of competition is not discussed in the *TREB Redetermination*, though the Tribunal notes that the Commissioner's expert "did not have a good understanding of the legal test for what constitutes a "substantial" prevention or lessening of competition"

and the Tribunal "refrained from accepting" the evidence of the expert on that issue. See: *TREB Redetermination, supra* note 1 at para 108. The Federal Court of Appeal remarked that "Dr. Church's evidence on the issue of whether the prevention of competition was "substantial" is neither referred to nor mentioned in the Tribunal's reasons." See: *FCA 2017, supra* note 1 at para 174. This paper does not comment on the factual findings in the *TREB Redetermination*: its focus is on the economic logic of the decision and its ramifications, in particular the foundations for a made-in-Canada essential facilities doctrine. Just as the evidence is not supportive that full information Virtual Office Websites ("VOWS"), i.e., brokerages who provide electronic access to the confidential data on the multiple listing service (MLS) of the Toronto Real Estate Board, would have a material effect on commission rates (prices) in real estate brokerage (see *TREB Redetermination, supra* note 1 at paras 625, 639), in my view it is also not consistent with a material effect on non-price competition in the market for real estate brokerage. The evidence in my view is not consistent with realtors who operated full information VOWS being preferred by home buyers and sellers who demand residential real estate brokerage services.

The point of this paper is that the actual effect of the TREB data policy on competition in the residential real estate brokerage market is irrelevant. As a matter of economics, the TREB data policy could not result in a substantial lessening of competition in that market.

[5] The Tribunal is not limited to cease and desist orders. It can also impose a monetary penalty (up to $10 million for the first order and $15 million for subsequent orders), and/or require the firm to otherwise take actions, including divestiture of assets, to overcome the effects of the conduct.

[6] Quasi-rents are the difference between revenues and costs that are avoidable in the short-run. For a firm to break even quasi-rents must be at least as large as sunk costs. Firms will invest if they expect quasi-rents to be greater than sunk costs.

[7] If the concern is market power in the downstream market, as in *TREB*, it is sufficient that downstream competitors even with a refusal do not have market power for it not to give rise to an anticompetitive effect consistent with that concern.

[8] The made-in-Canada essential facilities doctrine is implied, since the Competition Tribunal in the *TREB Redetermination* found that confidential price data was not an essential facility. See discussion at Section 6.1.

[9] The distinction between the exercise of market power and the focus of competition law on prohibiting conduct that creates, enhances, or maintains market power is fundamental to Canadian competition policy. See generally Jeffrey R Church & Roger Ware, "Abuse of Dominance under the 1986 Canadian *Competition Act*" (1998) 13 Rev of Industrial Organization 85 [Church & Ware 1998]; *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, 268 DLR (4th) 193 [*Canada Pipe (SLC)*]; Canada, Competition Bureau, The Abuse of Dominance Provisions, (Ottawa:

Competition Bureau, 2012), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html>; Michael Trebilcock et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) at 507 [Trebilcock et al].
All discuss the Canadian distinction that monopoly power is not reachable under the *Competition Act*, only abuse, which is conduct that creates, enhances, or maintains market power.

[10] See Canada, Competition Bureau, *Merger Enforcement Guidelines*, (Ottawa: Competition Bureau, 2011) at s 2.3, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>; See generally Gunnar Niels, Helen Jenkins & James Kavanagh, *Economics for Competition Lawyers* (Oxford: Oxford University Press, 2011) at 116; Dennis W Carlton & Jeffrey M Perloff, *Modern Industrial Organization* (Boston: Pearson/Addison Wesley, 2005) at 783; Jeffrey R Church & Roger Ware, *Industrial Organization: A Strategic Approach* (New York: McGraw-Hill, 2000) at 29, 603-604 [Church & Ware 2000].
The competitive price level usually refers to long-run average cost. The exercise of market power involves profitably raising price above long-run average cost and earning monopoly profits. In the long run the price in the market must at least equal long-run average cost or production will not be viable and firms will exit. Economists typically define market power as the ability to profitably raise price above marginal cost, the price that would prevail in perfectly competitive markets. However, the definition used by economists is less useful for policy analysis since many firms will be able to exercise market power based on this definition—indeed any firm whose demand curve is downward sloping—but they will not be able to raise price above average cost levels, i.e., earn greater than a competitive return. Indeed, if a firm's unit cost declines as it expands output, the firm will have to be able to profitably raise price above marginal cost in order to break even. The ability to profitably raise prices over average cost reflects the requirement of firms to break even and is a useful definition of a competitive level even when firms are not perfectly competitive. An alternative, and equivalent distinction, is to adopt the economic definition of market power and distinguish between the inefficient and efficient exercise of market power. Only the exercise of market power that raises the price above long run average cost levels is inefficient or harmful.

[11] The own-price elasticity of demand (which when there is no possibility of confusion with cross-price elasticity is sometime referred to as the elasticity of demand) for a firm is the percentage decrease in its sales volume (quantity) from a one percent increase in its price. The smaller is the change in sales volume, the more inelastic is its demand. The market elasticity of demand refers to changes in quantity demand in the market from a change in the market price.

[12] See Church & Ware 2000, *supra* note 10 at s 14.3 (for a discussion of entry

barriers and profitable entry deterrence. For market power to persist that enables prices to be above long run average cost levels, incumbents must have an advantage that entrants cannot profitably match.)

[13] *United States v EI du Pont de Nemours & Co*, 351 US 377 at 391 (1956).

[14] See *Canada (Director of Investigation & Research) v NutraSweet Co* (4 October 1990), CT-1989-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-1989-002_0176a_38IHV-12202004-3351.pdf> at 28; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36; *Commissioner of Competition v Canada Pipe* (3 February 2005), CT-2002-006, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2002-006_0079b_38KCZ-9272006-4715.pdf> at para 65 [*Canada Pipe Tribunal*]; Dany H Assaf & Brian A Facey, *Competition and Antitrust Law: Canada and the United States*, 3rd ed (Markham: LexisNexis Butterworths, 2006) at 238-240.

[15] See Franklin M Fisher, "Detecting Market Power" in Wayne D Collins & Joseph Angland, eds, *Issues in Competition Law and Policy* (Chicago: ABA Section of Antitrust Law, 2008) 353 at 359-360; George A Hay, "Market Power in Antitrust" (1992) 60 Antitrust LJ 807 at 820; Richard Schmalensee, "Another Look at Market Power" (1982) 95:8 Harv L Rev 1789 at 1795; Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, 3rd ed (St Paul: Thomson/West, 2005) at 79; American Bar Association Section of Antitrust Law, *Monopolization and Dominance Handbook* (Chicago: American Bar Association, 2011) at 59 (for the definition of market power and recent case cites), 62 (for discussion of the definition of monopoly in *du Pont and* discussion indicating that it is not "either or" but an "and"), 86-89 (for the discussion on the legality of exercising market power and the definition of monopolization—"monopolization means conduct that, in violation of Section 2, unlawfully allows a firm to gain, maintain, or extend monopoly power").

[16] A broader discussion of the welfare effects of market power includes its effect on cost efficiency and the costs of acquiring market power (rent seeking). See Church & Ware 2000, *supra* note 10 at ch 4.

[17] See Herman C Quirmbach, "Input market surplus: the case of imperfect competition" (1984) 16:3-4 Economics Letters 357 (for references for the case of perfect competition); For more recent analysis of the relationship between harm in the downstream market and the exercise of market power in the upstream market, see Frank Verboven & Theon van Dijk, "Cartel Damages Claims and the Passing-On Defense" (2009) 57:3 The J of Industrial Economics 457; Leonardo J Basso & Thomas W Ross, "Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers" (2010) 58:4 The J of Industrial Economics 895.

[18] There would not be a price increase downstream, but there would be an effect on output if demand downstream was perfectly elastic. There would be no effect on output if demand downstream was perfectly inelastic.

[19] See Thomas G Krattenmaker, Robert H Lande & Steven C Salop, "Monopoly Power and Market Power in Antitrust Law" (1987) 76 Geo LJ 241 at 249.

[20] See Jonathan B Baker, "Exclusion as a Core Competition Concern" (2013) 78:3 Antitrust LJ 527 at 562-564; Timothy J Brennan, "Understanding 'raising rivals costs'" (1988) 33 Antitrust Bull 95 at 96, 99, 110; Timothy J Brennan, "Vertical Market Power as Oxymoron: Horizontal Approaches to Vertical Antitrust" (2004) 12:4 Geo Mason L Rev 895 at 902-903; David T Scheffman, "The application of raising rivals' costs theory to antitrust" (1992) 37:1 Antitrust Bull 187 at 188-189, 196.

[21] If the conduct has decreased the elasticity of firm demand, then it will have increased the firm's market power, suggesting the possibility of an SLC. In the case of a prevent case, the effect of the conduct on the elasticity of firm demand is in the future. If the conduct means that the elasticity of firm demand will decrease in the future, then the increase in the firm's market power will be in the future, suggesting the possibility of an SPC.

[22] A key issue in the TREB case was whether a dominant firm's conduct can be abusive if it increases the market power of firms in a market in which it does not participate.

[23] See Jeffrey Church, "Vertical Mergers" in Wayne D Collins & Joseph Angland, eds, *Issues in Competition Law and Policy* (Chicago: ABA Section of Antitrust Law, 2008) 1455 [Church]; Jeffrey Church, "Conglomerate Mergers" in Wayne D Collins & Joseph Angland, eds, *Issues in Competition Law and Policy* (Chicago: ABA Section of Antitrust Law, 2008) 1502.

[24] The economics of vertical foreclosure is summarized in Church, *supra* note 23. The literature distinguishes between partial foreclosure and complete foreclosure. A vertically integrated firm engages in partial foreclosure when it charges a higher price to rivals than if it was unintegrated. A vertically integrated firm engages in complete foreclosure when it refuses to supply or provide access to its downstream rivals. The focus of the discussion here, matching the usual concern with essential facilities cases, as seen in *TREB* and *YVR*, is refusal to supply or provide access at all to at least some firms wishing to provide service in the downstream market.

[25] The confidential price data included not just historic sold prices for a property, but also data on pending sales and WEST listings. WEST listings are listings that have been withdrawn, expired, suspended, or terminated.

[26] *Telecom Public Notice: Review of regulatory framework for wholesale services and definition of essential service* (9 November 2006), 2006-14, online: CRTC <https://crtc.gc.ca/eng/archive/2006/pt2006-14.htm> (Evidence of the Competition Bureau filed 15 March 2007, online: <https://crtc.gc.ca/PartVII/eng/2006/8663/c12_200614439.htm#4b> at 60, 61); Canada, Competition Bureau, *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry*, (Ottawa: Competition Bureau, 2008) at s 4.2.2, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02690.html> [Competition Bureau Telecommunications].

[27] This is the rationale for the Bureau's historical requirement for a double dominance criteria. Without dominance downstream, the input cannot be essential, and it can be an easier task analytically to assess dominance in

the downstream market than determine whether a firm is a hypothetical monopolist upstream. Hence the Bureau's further recommendation that dominance downstream should be an initial screen in essential facility cases. See *Telecom Public Notice: Review of regulatory framework for wholesale services and definition of essential service* (9 November 2006), 2006-14, online: CRTC <https://crtc.gc.ca/eng/archive/2006/pt2006-14.htm> (Argument of the Competition Bureau filed 23 November 2007, online: <https://crtc.gc.ca/PartVII/eng/2006/8663/c12_200614439.htm#4b> at 60, 61) [Competition Bureau Argument].

[28] *Telecom Notice of Consultation: Review of wholesale services and associated policies* (15 October 2013), 2013-551, online: CRTC <https://crtc.gc.ca/eng/archive/2013/2013-551.htm> (Expert Report of Jeffrey Church, attachment 1 to the Intervention of Bell Canada filed 31 January 2014).

[29] *Ibid*; Competition Bureau Argument, *supra* note 27.

[30] There is an old literature that considers the incentive for a monopolist upstream to integrate downstream and foreclose supply to existing downstream firms when the firms downstream are competitive, i.e., price takers, and production downstream is not fixed proportions. This means that the input ratio used to produce the downstream product can, and will, be adjusted, as input prices change. The upstream monopolist when it exercises market power in the wholesale market will be disciplined by both direct substitution (the downstream firms will substitute to other inputs) and indirect substitution (downstream consumers will substitute to other goods). When the monopolist integrates and forecloses it eliminates the direct substitution, thereby increasing its market power, but at the same time it will produce efficiently, lowering costs. Whether integration and foreclosure is harmful or beneficial depends on a trade off between these two effects: the effect on the downstream price depends on the relative magnitude of the ease of substituting inputs in production and the demand elasticity downstream, the determinants respectively of the cost reducing and market power increasing effects of integration. The policy implications do not favour antitrust enforcement:

> The traditional view has been that the relationship between the two [cost decreasing effect and the market power enhancement effect] is complex and measurement problems sufficiently formidable that the trade-off implied is likely subject to considerable error. Moreover, given the incentive problems associated with internalizing transactions, a vertical merger, it is argued, is likely not the optimal response to what is primarily a pricing problem. There are other less costly vertical restraints and alternative pricing schedules that prevent inefficient input substitution and avoid the costs of vertical integration. Hence, the motivation for vertical integration is unlikely to be the elimination of input substitution and enhancement of market power, but instead the transaction is intended to realize other efficiencies.

See Church, *supra* note 23, at 1471, footnotes omitted.

[31] See the discussion in Section 4.3.
[32] Dennis W Carlton & Ken Heyer, "Extraction vs Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct" (2008) 4:2 Competition Policy Intl 285.
[33] Competition Bureau Telecommunications, *supra* note 26 at s 4.2.2.
[34] The discussion of the single profit theorem is based on, and similar, to that in Church, *supra* note 23 at 1469.
[35] The assumption is that downstream production technology is fixed proportions. Downstream output requires a single unit of the upstream services provided by the essential facility and one unit of other inputs whose cost is d. The case of variable proportions was discussed above at footnote 30.
[36] See Church, *supra* note 23 at s 5.3.
[37] *Ibid* at ss 4.1, 5.3.
[38] Church & Ware 1998, *supra* note 9 at 98-99.
[39] *Canada Pipe Tribunal, supra* note 14 at para 65, footnotes omitted.
[40] *FCA 2014, supra* note 1 at para 13.
[41] *TREB Redetermination, supra* note 1 at para 176.
[42] It is true that the top five large corporate franchises had over a 70% market share based on transactions. But that perspective is misleading. It does not recognize the distinction between franchisors (the corporate brands), the franchisees (individual brokerages), and agents, assuming that franchisees and agents under the same corporate banner do not compete with each other. In fact franchisees do compete against other franchisees operating under the same corporate brand and agents within the same brokerage do compete between themselves for transactions. The largest market share for a brokerage in the GTA was around 4%. The share of the top 20 accounted only for about 30% of transactions. See *TREB I, supra* note 1 (Expert Report of Jeffrey Church s 4).
[43] *TREB Redetermination, supra* note 1 at paras 500-501.
[44] Quasi-rents are the difference between revenues and avoidable costs in the short run. They are the contribution earned to cover the firm's sunk costs. Competitive firms break even in the long run if their quasi-rents cover their sunk costs. Ricardian rents accrue to suppliers who are low cost suppliers or high quality suppliers of the product. If the market is competitive, the market price will be determined by the low quality and/or high cost suppliers, i.e., the price equals the marginal cost of low quality output and the marginal costs of high cost suppliers such that at the market price there is sufficient supply to meet demand. Low cost suppliers and high quality suppliers will earn premiums relative to their costs that may well show up as high operating profits and be reflected in high operating profit margins. Firms with higher qualities and lower costs can be price takers: they do not necessarily have either the incentive or the ability to raise the market price by withholding output. If their ability to produce is limited relative to the size of the market, they will find it profit maximizing to produce to capacity.
If a low cost producer reduces its sales volume when its capacity is limited, the

price does not change, but its profits fall as it losses the margin on the reduced sales volume. Hence there is not the familiar trade off of a firm with market power: the gain on inframarginal units from a higher price against the loss in profits from units withheld from the market. Instead the loss in profits is always higher, the firm does not have market power, and it always produces to capacity.

The analysis is the same when there are not capacity issues, all firms produce where price is equal to marginal cost and they earn Ricardian rents on their inframarginal units. The extent of these Ricardian rents will be greater for low cost or high quality firms, since by definition they will be able to produce more than high cost or low quality firms.

The "profits" earned by a higher-quality price-taking supplier or low cost price-taking supplier are not attributable to market power, but their superior inputs that enable them to produce higher quality output or low cost output. Their above competitive profits are earned because they have control of these inputs and the profits above competitive level are really rents earned by these inputs.

These apparent profits above competitive levels are called Ricardian rents, in honour of David Ricardo, who observed in the early 1800's that the price of vegetables sold in London were the same whether they were produced close or far away from London. The delivered, or landed, cost of distant production set the price, the difference between this price and all other costs for production close to London except for land was the rent paid for the land close to London. Thus the rent premium for land close to London relative to land far away equals the differential in transport costs—if all other costs are the same.

[45] The Tribunal, following the Commissioner, denies the requirement to define an upstream market around the confidential data or assess market power by TREB in its supply. Of some interest is that the Commissioner, after denying the requirement to define an upstream and downstream market in the *TREB* matter, does define upstream and downstream markets in *YVR*. See *TREB Redetermination, supra* note 1 at para 252; *Commissioner of Competition v The Toronto Real Estate Board*, CT-2011-003, (Further Closing Submissions of the Commissioner of Competition 12 November 2015 at para 93, online: <http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Closing%20Argument%20of%20the%20Commissioner%20of%20Competition_358_38_11-12-2015_2619.pdf>), and *YVR, supra* note 1 at para 11.

[46] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 44, [2015] 1 SCR 161 [*Tervita*].

[47] *Director of Investigation and Research v Hillsdown Holdings (Canada) Limited* (9 March 1992), CT-1991-001, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-1991-001_0155a_38IEP-4142004-5100.pdf> at 314.

[48] *Commissioner of Competition v Canadian Waste Services Holdings Inc* (28 March 2000), CT-2000-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2000-002_0059a_49PXE-982004-5523.pdf> at para 7.

[49] Canada, Director of Research & Investigation, *Merger Enforcement*

Guidelines, (Ottawa: Industry Canada, 1991) at Part 2 (footnotes omitted and emphasis added).
[50] *Ibid* at Part 2.2. In Part 2.3 there is a similar discussion in the context of a prevention of competition. A prevention of competition can arise either because of a unilateral or coordinated effect.
[51] *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 236 at para 107, 268 DLR (4th) 238 [*Canada Pipe (Market Power)*].
[52] *Ibid* at para 104. The quote is from *Canada (Director of Investigation & Research) v Southam Inc*, 1995 3 FC 557, [1995] 127 DLR (4th) 236 at para 113, and omits citations.
[53] This discussion neglects that the Tribunal and the Commissioner focused on TREB's market power in the provision of the MLS, not the confidential price data. See *TREB Redetermination, supra* note 1 at paras 252 and 253. Access to the MLS and TREB's market power in the provision of the MLS is irrelevant to the conduct in the TREB matter. TREB did not deny access to MLS or tie the use of the MLS to another input it provided (there is no allegation that if a realtor used outside information it would be excluded from use of the MLS). It is the ability to impose restrictions on the use of the confidential price data that was relevant. These rules can only result in "harm" to realtors if they cannot be avoided. That requires market power by TREB in the provision of the confidential price information.
[54] *Canada Pipe (SLC), supra* note 9 at para 66.
[55] *FCA 2014, supra* note 1 at para 17.
[56] *Ibid* at para 19.
[57] *Ibid* at para 20.
[58] *Ibid* at para 20.
[59] See Trebilcock et al, *supra* note 9 at 535-536.
[60] This possibility is explicitly noted by the Tribunal in the first *TREB* decision. See *TREB 1, supra* note 1 at para 16.
[61] An implication is that post *FCA 2014* there may no longer be a gap in the *Competition Act* with respect to facilitating practices that are adopted unilaterally by firms, i.e., without an agreement. See Ralph A Winter, "The Gap in Canadian Competition Law Following Canada Pipe" (2004) 27:2 Can Competition L Rev 293 for a discussion of this gap.
[62] *TREB Redetermination, supra* note 1 at para 272.
[63] *Ibid* at para 279.
[64] *Ibid* at para 274.
[65] *Canada Pipe (SLC), supra* note 9 at para 87.
[66] *TREB Redetermination, supra* note 1 at para 293, emphasis added.
[67] *Ibid* at para 294 and *Canada Pipe (SLC)* at paras 73 and 90-91.
[68] *Ibid* at para 304.
[69] *Ibid* at para 294; *Canada Pipe (SLC), supra* note 9 at para 90.
[70] *Olympia Equipment Leasing Co v Western Union Telegraph Company*, 797 F2d 370 at 379 (7th Cir 1986).
[71] Judge Hand observed in the famous Alcoa decision, "The successful

competitor having been urged to compete, must not be turned on when he wins the race." *United States v Aluminum Corporation of America*, 148 F2d 416 at 427 (1945).
[72] *TREB Redetermination, supra* note 1 at paras 332, 344, 362, 371, 390, 391.
[73] *Canada Pipe (SLC), supra* note 9 at paras 80-81.
[74] *TREB Redetermination, supra* note 1 at para 276.
[75] See Canada, Competition Bureau, *Abuse of Dominance – Enforcement Guidelines*, (Ottawa: Competition Bureau, 2012) at 13.
[76] *Canada Pipe (SLC), supra* note 9 at para 43, emphasis original.
[77] *Ibid* at para 43, emphasis original.
[78] The FCA confirmed the assessment in the academic literature. See Trebilcock et al, *supra* note 9 at 78 (distinguishing control (market power) from a substantial lessening in competition (increase in market power).
[79] *Canada Pipe (SLC), supra* note 9 at para 49.
[80] *Ibid* at para 58, emphasis added.
[81] *TREB Redetermination, supra* note 1 at para 460 and at paras 473-474 where the test for an SLC and SPC focuses, correctly, on market power.
[82] *Ibid* at para 464.
[83] *Tervita, supra* note 46 at paras 80-81.
[84] *Commissioner of Competition v CCS Corporation et al* (29 May 2012), CT-2011-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2011-002_Reasons%20for%20Order%20and%20Order_189_38_5-29-2012_5291.pdf> at para 377 (The Commissioner's challenge was to the acquisition by CCS Corporation of Complete Environmental. By the time the case was considered by the Supreme Court of Canada, CCS had changed its name to Tervita).
[85] *TREB Redetermination, supra* note 1 at paras 478-479.
[86] *Ibid* at para 480.
[87] *Ibid* at para 590.
[88] The Commissioner's allegations and the Tribunal's findings do not consider whether there was an effect of TREB's conduct on the market power of TREB in the supply of the confidential data. Of course even with such a finding, that the market power of the downstream firms was enhanced by the exclusion, perhaps as in *YVR*, this is not sufficient or necessary for the exclusion to be an abuse of dominance. What is necessary is an effect on the market power of the upstream firm.
[89] *TREB Redetermination, supra* note 1 at para 500.
[90] *Ibid* at para 702.
[91] *Ibid* at para 500.
[92] *Ibid*.
[93] *Ibid* at para 709, emphasis added.
[94] For extensive discussion, see *The Commissioner of Competition v The Toronto Real Estate Board and the Canadian Real Estate Association* (15 April 2013), CT-2011-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347> (Expert Report of Jeffrey

Church, filed on 27 July 2012, ss 3.4, 10; Testimony of Jeffrey Church, Volume 12A: 2015:6-2029:5; Expert Report of Jeffrey Church, filed on 15 May 2015, s 5; Testimony of Jeffrey Church, Volume 5: 891:3-896:7).

[95] *TREB Redetermination, supra* note 1 at paras 212-213.

[96] *Ibid.*

[97] It is for this reason that it is very unclear that, despite the Tribunal's findings, TREB actually has market power in the supply of the confidential price data in the VOW feed. All brokers have access to the confidential price data and can share it with their clients in other ways. When clients have reached the valuation stage, that is when it is time to make an offer or to set a list price, the confidential price data will be important and they will have access to it, though they will have to request it from their agent and they will not have the ability to search it themselves. At the search phase, that is when clients are becoming familiar with valuations, it is not clear that there are not good substitutes for the confidential price data, in particular list prices. A very good predictor of the sale price for a property is to multiply its list price by 0.95, i.e., 95% of the list price is the likely sale price. See *The Commissioner of Competition v The Toronto Real Estate Board and the Canadian Real Estate Association* (15 April 2013), CT-2011-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347> (Expert Report of Jeffrey Church, filed on 15 May 2015 at footnote 51). The Tribunal appears to misinterpret the meaning of a regression coefficient, claiming that it is 95% of the average list price in a community. *TREB Redetermination, supra* note 1 at para 223.

[98] This inconsistency has not gone unmarked:

> At the outset, the Tribunal also rejected the proposition that this was an essential facilities case (that is, a case relating to whether, and on what terms, a firm should be granted access to a competitor's facility or asset), holding that TREB was not denying access to its MLS data but merely restricting how its data could be used. It is not clear that this narrow finding is correct in principle, given that the essence of this case relates to access to inputs owned by other competitors and that the Tribunal itself held some of which (sold information) had no close substitutes. The Tribunal also provided no jurisprudential basis for its essential facilities finding (for example, no international law to support its conclusion). The Tribunal's finding, however, means that there remains no explicit decided essential facilities case in Canada (unlike in the United States, where the doctrine has been developed by lower courts). This case is, however, an essential facilities case in substance in many ways.

Practical Law Canada Competition, "Landmark TREB Abuse of Dominance Case May Open the Door for New Real Estate Models in Toronto", Case Comment, on *TREB Redetermination, supra* note 1, online: <https://ca.practicallaw.thomsonreuters.com/w-002-2822?transitionType=Default&contextData=(sc.Default)&__lrTS=20180705171147510&firstPage=true&bhcp=1> (13 May 2016).

[99] *YVR, supra* note 1.
[100] See the discussion in W Michael G Osborne, "Build It and You Must Share It? Essential Facilities in Canada", Canadian Competition Law Review [forthcoming in 2018].