TREB Decision: Analysis and Critique

by

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Introduction to the Toronto Real Estate Board (TREB)

TREB was founded in 1920 by a small group of real estate practicioners and today is Canada's largest real estate board[1]. TREB owns and operates the Toronto Multiple Listing Service (MLS) system[2], which contains current property listings and historical information about the purchases and sales of residential real estate in Toronto and the surrounding areas[3]. The vast majority of local real estate transactions make use of the Toronto MLS system[4]. This means TREB's approximately 39,000 members are using it as a tool in helping customers buy and sell homes[5].

Competition Problem: Restrictions on Virtual Office Websites (VOWs)

TREB places restrictions on its members' access to and use of information[6], and includes restrictions on the manners in which agents can provide information from the Toronto MLS system to their customers[7]. TREB restricts how its member brokers can provide information to its customers. In particular, TREB requires that any information not available on www.realtor.ca be provided by hand, fax, or e-mail, and not through direct online access by the customer.

TREB's VOW restrictions of interest to the Commissioner are the following[8]:

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[1] About TREB, Toronto Real Estate Board, at: "http://www.trebhome.com/about_TREB/who_we_are/index.html".
[2] Response of the Toronto Real Estate Board To the Amended Notice of Application, August 19, 2011, at para 3.
[3] *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp. Trib. 7, 2016 CarswellNat 1506, at para 72.
[4] Supreme Court Denies Toronto Real Estate Board's Application for Leave to Appeal Pro-Competitive Federal Court of Appeal Ruling: Consumers and Brokers One Step Closer to Increased Competition in Toronto's Real Estate Market, July 24, 2014, at "http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03781.html".
[5] Supreme Court Denies Toronto Real Estate Board's Application for Leave to Appeal Pro-Competitive Federal Court of Appeal Ruling: Consumers and Brokers One Step Closer to Increased Competition in Toronto's Real Estate Market, July 24, 2014, at "http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03781.html".
[6] Response of the Toronto Real Estate Board To the Amended Notice of Application, August 19, 2011, at para 4.
[7] Reasons for Order and Order, April 27, 2016, at para 95.
[8] Reasons for Order and Order, April 27, 2016, at para 95.

Rule	Description
Rule 800 and 805	A member of the public may only access MLS information on a Member's VOW if: (1) the Member has first established a broker-consumer relationship; (2) the Member obtains the name and a valid email for a consumer; (3) the consumer has agreed to prescribed "terms of use"; and (4) the consumer creates a user name and password for the Member's VOW
Rule 803	A Member's VOW may provide other features, information, or functions in addition to the display of TREB's MLS information
Rule 823	A Member, whether through their VOW or by any other means, may not make available for search by, or display to, consumers the following MLS data intended exclusively for other Members and their brokers and salespersons, subject to applicable laws, regulations and the RECO rules: o Expired, withdrawn, suspended or terminated listings, and pending solds or leases, including listings where sellers and buyers have entered into an agreement that has not yet closed; o The compensation offered to other Members; o The seller's name and contact information, unless otherwise directed by the seller to do so; o Instructions or remarks intended for cooperating brokers only, such as those regarding showings or security of listed property; and Sold data, unless the method of use of actual sales price of completed transactions is in compliance with RECO rules and applicable privacy laws

This restriction was not unduly restrictive on traditional real estate agents, who frequently interact with their customers and therefore can easily transfer information. However, this restriction proved troublesome for new and innovative real estate brokers, who operate their businesses through Virtual Office Websites (VOWs) instead of the traditional bricks and mortar.

Brokers operating through a VOW are not in contact with their customer as frequently as traditional brokers, meaning that TREB's restriction place a unique impediment on the VOW brokers' ability to transfer valuable housing information to their customers.

The problems caused by TREB's restrictions on use and access to information are compounded by the fact that no other competitors in the market have access to the same level of information as TREB. The information on TREB is more detailed than other competitors. TREB data includes previous listing and sales prices, historical prices for comparable properties in the area, and the amount of time a property has been on the market. Although competitors such as www.realtor.ca exist, they ultimately are not equal competitors, as they stand on uneven informational footing.

By refusing to allow information to be disseminated in this manner, the Commissioner alleged that TREB was abusing a dominant, denying consumer choice, and stifling innovation[9]. Indeed, the Commissioner's position witnesses testified to the impact TREB's restrictions had on their businesses, including: increased barriers to entry and expansion, increased costs to VOWs, and reduction of innovation, range, and quality of services[10]. The Commissioner also alleged that the Canadian economy suffers, as consumers have a reduced selection of service and pricing options for buying and selling their home. Companies are eager to accommodate the demand for innovative services, but are unable to do so.

At the time of the Commissioner's application, there were no VOWs operating in the Toronto real estate market that enabled customers to search a full inventory of listings. Removing this restriction would permit VOW customers to search a full inventory of listings containing up to date data online, before making the decision to tour a home or attend an open house. The Commissioner alleges such VOWs would enable customers to be more selective and focused, and would allow agents to spend less time trying to find an appropriate property for a specific customer[11].

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[9] Notice of Application, May 27, 2011, at para 4.
[10] Summary of Reasons in Ruling in Toronto Real Estate Case: Technical Backgrounder, May 10, 2016, at "http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04082.html".
[11] Further Closing Submissions of the Commissioner of Competition, November 12, 2015, at para 5.

TREB rejected the Commissioner's allegations, stating that VOWs are not necessarily the way of the future, VOWs are not the only manner of innovating in the real estate market, TREB does not even competing in the market it is allegedly asserting dominance in, and that the judicial interpretation of the abuse of dominance provisions shows that the provision does not apply to their business.

The Competition Tribunal experienced confusion with this case, that required input from the Federal Court of Appeal before a new verdict against TREB could be rendered. In order to understand the court's confusion about abuse of dominance provisions and the reasons behind the court's final decision and order against TREB, it is first necessary to take a few steps back to learn the judicial history of the *Competition Act*'s abuse of dominance provisions.

History of Abuse of Dominance Provisions (s. 78 & s. 79)

The interpretation of s. 78 of the *Competition Act*[12], the provision allowing an order to be granted under s. 79, has been the subject of judicial debate for some time.

Section 79 outlines acts that are considered anti-competitive, but is incomplete and allows for other anti-competitive actions through its opening statement.

> **Abuse of Dominant Position**
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> **78 (1)** For the purposes of section 79, *anti-competitive act*, without restricting the generality of the term, includes any of the following acts:
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> **(a)** squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
> **(b)** acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
> **(c)** freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
> **(d)** use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

[12] RSC 1985, c. C-34.

> **(e)** pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
> **(f)** buying up of products to prevent the erosion of existing price levels;
> **(g)** adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
> **(h)** requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
> **(i)** selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Two Competition Bureau cases, *NutraSweet*[13] and *Laidlaw*[14] were the first applications considered by the Competition Bureau under the abuse of dominance provisions that replaced the criminal monopolization provisions in 1986[15].

In *NutraSweet*[16], the Competition Bureau found that the grouping of the actions listed in s. 78 had a common purpose that makes them "anti-competitive". All anti-competitive acts listed in s. 78 are done for a purpose, and that purpose common to all is that the action have "an intended negative effect on a competitor that is [...] predatory, exclusionary or disciplinary[17]." The court's decision created a working definition of the word "anti-competitive" that was used until the Federal Court of Appeal's 2003 decision in *Canada Pipe*[18].

In *Canada Pipe*[19], the court reiterated that s. 78 is non-exhaustive, and merely provides an illustrative list that provides direction as to "the type of conduct that is intended to be captured by paragraph 79(1)(b)[20]". The court stated that a non-enumated anti-

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[13] *Director of Investigation and Research v. The NutraSweet Company* (1990), 32 CPR (3d) 1, [1990] CCTD No. 17.
[14] *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (1992), 40 CPR (3d) 289.
[15] Abuse of Dominance – Recent Case Law: *Nutrasweet* and *Laidlaw*, Bruce M. Graham, (1993) 38 McGill LJ 800, at page 802.
[16] *Director of Investigation and Research v. The NutraSweet Company* (1990), 32 CPR (3d) 1, [1990] CCTD No. 17.
[17] *Director of Investigation and Research v. The NutraSweet Company* (1990), 32 CPR (3d) 1, [1990] CCTD No. 17., at para 90.
[18] *Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233.
[19] *Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233, 268 DLR (4th) 193.
[20] *Canada Pipe*, at para 15.

competitive act will exhibit the share essential characteristics of the examples listed in section 78, however the court does not state what these "shared characteristics" are.

Instead, the court adopted the working definition enunciated in *NutraSweet*, stating that it was "very close in substance to the core characteristic of the enumerated list of section 78". The court then specifically noted two other characteristics of the definition, which proved to be the source of confusion in the *TREB* cases:

1. An anti-competitive act is identified by reference to its purpose; and
2. The requisite purpose is an intended predatory, exclusionary or disciplinary negative effect <u>on a competitor</u>.

The court in *Canada Pipe* extrapolated on the second requirement[21]:

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

Both *Nutrasweet* and *Laidlaw* decisions have been criticized by both the legal and economic communities[22]. One economist[23] argues that both decisions severely underestimated the disciplining power of the market, stating that dynamic market forces would likely have addressed the inefficiencies associated with the alleged anti-

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[21] *Canada (Commissioner of Competition) v Canada Pipe Co.,* 2006 FCA 233, 268 DLR (4th) 193, at para 63.

[22] Abuse of Dominance – Recent Case Law: *Nutrasweet* and *Laidlaw*, Bruce M. Graham, (1993) 38 McGill LJ 800.

[23] Abuse of Dominance – Recent Case Law: *Nutrasweet* and *Laidlaw*, Bruce M. Graham, (1993) 38 McGill LJ 800.

competitive practices. As proof of this, he argues, the orders issued by the Tribunal had little or no effect on the markets after the decisions[24].

The history of the abuse of dominance provisions brings us to our current discussion on the judicial treatment of the Toronto Real Estate Board. The Commissioner's initial application when before the Tribunal, was successfully appealed to the Federal Court of Appeal, then was sent back down for the Tribunal to consider a second time.

JUDICIAL CONSIDERATION

Competition Hearing #1

On May 27, 2011, the Commissioner of Competition filed a Notice of Application alleging that TREB displayed anti-competitive conduct pursuant to s. 79(1)(b) of the *Competition Act*, RSC 1985, c. C-34[25]. The Notice of Application specifically challenged the restrictions TREB imposed on its member agents who want to use the internet and VOWs to serve customers.

The Commissioner contended that TREB and its members substantially or competely control the market for supply of residential real estate brokerage services in the Greater Toronto Area[26] and that TREB restrictions "restrict and prevent innovation in the supply of residential real estate brokerage services, particularly services offered over the internet"[27]. In short, the application requested that TREB remove the restrictions on its use and access to information, alleging that the restrictions exclude, prevent or impede the new entry of certain real estate companies into the market.

On April 15, 2013, the Competition Tribunal found in TREB's favor. The Tribunal found that TREB does not compete with its members, and therefore could not satisfy the *Canada Pipe* test that the actions must be undertaken *against a competitor*. Essentially,

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[24] Abuse of Dominance – Recent Case Law: *Nutrasweet* and *Laidlaw*, Bruce M. Graham, (1993) 38 McGill LJ 800., at page 4.
[25] Notice of Application, May 27, 2011.
[26] Amended Notice of Application, July 7, 2011, at para 3.
[27] Amended Statement of Claim, at para 4 .

the Tribunal ruled in TREB's favor by default – competition law's abuse of dominance provision cannot apply to TREB because they do not compete in the real estate brokerage market. Considering TREB is the only company with access to this level of data, the data is essential to real estate brokerage services, and TREB appears to have complete control over which brokers have access to its data, it seems absurd that the Tribunal dismissed the application on definition, without considering its merits.

Federal Court of Appeal

The Federal Court of Appeal (FCA) disagreed with the the Tribunal's decision in the first hearing. The FCA allowed the Commissioner's appeal and referred the application back to the Tribunal for determination on the merits of the case[28].

The FCA found that *Canada Pipe* does not stand for the proposition that as a matter of law, a person who does not compete in a particular market can never be found to have committed an anti-competitive act against competitors in the market[29]. Sharlow J.A. writing for the court, found that a person that is not a competitor in a particular market nevertheless may control the market substantially within the meaning of paragraph 79(1)(a)[30].

Most interestingly, the FCA implicitly disgarded their own judgments in *NutraSweet*, *Laidlaw*, and *Canada Pipe* by rejecting the definition of anti-competitive practices that had been developed over years. Instead, the FCA found that the wording of the provisions indicated that Parliament did not intend for the scope of subsection 79(1) to be limited to only apply in the manner proposed in *Canada Pipe*. The FCA stated[31]:

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[28] *Canada (Commissioner of Comepetition) v Toronto Real Estate Board*, 2014 FCA 29, 2014 CarswellNat 150, at para 1.
[29] *Canada (Commissioner of Comepetition) v Toronto Real Estate Board*, 2014 FCA 29, 2014 CarswellNat 150, at para 14.
[30] *Canada (Commissioner of Comepetition) v Toronto Real Estate Board*, 2014 FCA 29, 2014 CarswellNat 150, at para 13.
[31] *Canada (Commissioner of Comepetition) v Toronto Real Estate Board*, 2014 FCA 29, 2014 CarswellNat 150, at paras 19-20.

> "*Canada Pipe* is a leading authority on the meaning of subsection 79(1). In analyzing in that case what acts might be considered anti-competitive acts within the meaning paragraph 79(1)(*b*) and subsection 78(1), the Court focused on acts that have as their purpose a negative effect *on a competitor* that is predatory, exclusionary or disciplinary. However, I do not interpret *Canada Pipe* to mean that as a matter of law, a person who does not compete in a particular market can never be found to have committed an anti-competitive act against competitors in that market, or that a subsection 79(1) order can never be made against a person who controls a market otherwise than as a competitor".[32]
>
> …
>
> "The Court stated in *Canada Pipe* that a common element of the anti-competitive acts listed in subsection 78(1) is that they are acts taken by a person against that person's own competitor. But in the same reasons the Court recognizes, correctly in my view, that paragraph 78(1)(*f*) describes an act that is not necessarily taken by a person against that person's own competitor. The inconsistency is not explained in *Canada Pipe* or in any other authority to which the Court was referred.
>
> In my view, paragraph 78(1)(*f*) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to the Board in this case. If the Court in *Canada Pipe* intended to narrow the scope of subsection 79(1) as the Tribunal held, then I would be compelled to find that aspect of *Canada Pipe* to be manifestly wrong because it is based on flawed reasoning (specifically, the unexplained inconsistency in the reasons)."[33]

<u>Leave to Appeal to Supreme Court of Canada (SCC) Denied</u>

TREB appealed this decision to Canada's highest court – the Supreme Court of Canada. TREB appealed the decision by asking the SCC to reconsider the ruling in the Board's case against TREB. On July 24, 2014, the Supreme Court of Canada (SCC) dismissed the leave to appeal application by the Toronto Real Estate Board (TREB)[34]. Having exhausted their last route of appeal, TREB's only choice to fight the removal of the

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[32] *Canada (Commissioner of Comepetition) v Toronto Real Estate Board*, 2014 FCA 29, 2014 CarswellNat 150, at para 14.
[33] *Canada (Commissioner of Comepetition) v Toronto Real Estate Board*, 2014 FCA 29, 2014 CarswellNat 150, at paras 19-20.
[34] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2014 CarswellNat 2755.

restrictions was to have the hearing heard by the Competition Tribunal a second time – this time with the new interpretation of s. 79.

<u>Competition Hearing #2</u>

Armed with the FCA's direction, the Tribual allowed the Commissioner's application in part at the second hearing. The Tribunal found that TREB has and continues to engage in anti-competitive acts in the form of the enactment and maintenance of VOW restrictions[35]. The Tribunal found that these restrictions had the effect of substantially preventing competition in the market[36].

As a result of the decision, the following Orders were made:

- TREB cannot preclude or restrict its members use of information on any device
- TREB may only restrict data usage for the purpose of providing brokerage services
- TREB must provide all information to all members (traditional and VOW) at the same time

ECONOMIC CONSIDERATIONS

<u>Why is uncertainty in Abuse of Dominance provisions problematic?</u>

The uncertainty surrounding the interpretation of the abuse of dominance provisions results in substantial substantial private and public costs. Public costs manifest through expensive enforcement mechanisms, and private costs through businesses employing business strategies that ultimately classified as illegal. If there is uncertainty in the process, it increases both public[37] and private[38] costs. Uncertainty may also cause the

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[35] Reasons for Order and Order, April 27, 2016, at para 4.
[36] Reasons for Order and Order, April 27, 2016, at para 4.
[37] Regulatory costs of enforcing against practices, that may ultimately end up being legal (See: Crampton, Paul S., *Alternative Approaches to Competition Law: Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals* (1993), page 3)
[38] Struggle by private companies to determine whether certain practices should be pursued, or will ultimately be prohibited, and costs incurred when pursing the practice that ultimately determined to be prohibted (See: Crampton, Paul S., *Alternative Approaches to Competition Law: Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals* (1993), page 3)

public may lose confidence in the regulatory scheme[39]. TREB employed a business strategy that ultimately was determined to be illegal and incurred significant costs advocating for that point of view.

The reason the Competition Tribunal experienced such difficulty interpreting the provision is largely due to the fact that the *Competition Act*[40] uses a legal definition to express what is ultimately an economic problem.

<u>What test does the Abuse of Dominance provisions currently employ?</u>

In order for the Tribunal to grant a remedy under the abuse of dominance provisions, the Tribunal must find that[41]:

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

It appears that the current abuse of dominance provisions are directed towards maximizing total surplus, as the provisions themselves, combined with the purpose of the Act and the sections, refer both to mazimizing producer and consumer interests.

The Bureau's Guidelines on abuse of dominance provisions state that section 79 "promotes conditions under which all firms are afforded an opportunity to succeed or fail on the basis of their respective ability to compete" and that the section "does not seek to establish equality among competitors"[42].

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[39] *The Antitrust Paradox – A Policy at War with Itself*, Cf. R. Bork, New York, Basic Books Inc., 1978, at 81-82.
[40] RSC 1985, c. C-34.
[41] *Competition Act*, RSC 1985, c. C-34, s. 79(1).
[42] The Abuse of Dominance Provisions: Sections 78 and 79 of the Competition Act, Enforcement Guidelines (2012), Competition Bureau of Canada, at "http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/$FILE/cb-abuse-of-dominance-provisions-e.pdf".

An order is only ordered where the practice has had, or is likely to have the effect of preventing or lessening competition in a market[43], which is a factor that assumes less competition is worse for consumers. The Act seemingly balances this desire to uphold consumer interests with the desire to support innovation in business with a provision that bars liability on companies that have superior competitive performance[44].

Has the Tribunal achieved this goal through its decision? Potentially, no. The Tribunal has made a decision that considers both producer and consumer surplus, but that, alone, does not mean that total surplus is maximized. TREB is definitely worse off having to share its information with competitors. Consumers are not as well off as if the Tribunal had required the information to be fully public. Consumers still can only obtain the information necessary to make the most important asset purchase of their lives with the assistance of a broker.

When balancing the competing interests of businesses and consumers, the Tribunal is also fored to make difficult policy and political decisions. The Tribunal is required to delve into the world of subjectivity, weighing real, economically weighted concerns with concerns about fairness in the market, political agendas, and their own subjective beliefs about what will have the best outcome in the future.

Housing prices are a source of concern in Canada. The Tribunal's decision against TREB may have been a politically motivated policy decision to reduce the costs of real estate transactions. We will never fully know the extent to which the tribunal was implicitly biased against TREB or the extent to which any decision is politically motivated, however, we can look to the decision itself for evidence that the Tribunal was not purely motivated by a desire to maximize total surplus. The Tribunal references increasing innovation, and increased consumer choice in its decision against TREB, which may largely be a guise to reduce costs of entering prohibitiely expensive housing markets.

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[43] *Competition Act*, RSC 1985, c. C-34, s. 79(1)(c).
[44] *Competition Act*, RSC 1985, c. C-34, s. 79(4).

What this all means is that at the end of the day, the Competition Act may be best served by focussing solely on efficiency grounds. Non-efficiency, subjective interests and standards can be left to the legislature to promote and enforce, rather than allowing a group that is not created for policy work to enforce subjective policy standards.

What test should the Abuse of Dominance Provisions employ?

Instead of providing a list of examples in which a dominant position is being abused, one could envision a mathematical test, or overarching economic standard such that arbitrariness in words does not need to be involved. Such a standard has the added benefit of likely being cheaper, as the costs of administering a public interest standard may be much higher than the cost of administering a market power or efficiency standard[45].

It is also the goal of the courts to apply the law, not create it, and therefore the court may not be the best place to balance a wide range of social and economic efforts[46]. Policy goals may be achieved more successfully in manners other than competition law. For example, if a country wishes to promote regional development, employment, or small businesses, it may be a better use of public dollars to pursue those objectives through direct investment than through the enforcement mechanisms of competition law[47].

The goal of this test should be to have a definite standard that courts and businesses can measure their behaviors against. The legislature should specifically outline any factors it considers relevant, with particular regard to the subjective factors.

The immediate suggestion is a standard that dictates that an act is not anti-competitive where the company's actions maximize surplus. Which surplus would that be?

i. Producer Surplus

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[45] *An Antitrust Enforcement Policy to Maximize Economic Wealth of All Consumers*, C. Rule and D. Meyer, XXXIII Antitrust Bulletin, 1988, 677, at 694-695.

[46] Crampton, Paul S., *Alternative Approaches to Competition Law: Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals* (1993), page 3.

[47] Crampton, Paul S., *Alternative Approaches to Competition Law: Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals* (1993), page 3.

Producer surplus describes the difference between the price that producers in a market collectively receive for their products, and the sum of those producers' respective marginal costs at each level of output. The producer surplus as a proportion of total surplus depends on the competitive structure in the industry.

If perfectly competitive market

If the market is perfectly competitive, a large number of producers compete with each other, such that no single producer has market power nor can they individually dictate the price of goods. For this reason, there is no need for government regulatory intervention in a perfectly competitive market. There is no reason to discuss what competition law policy should be implemented in this context.

If monopoly

Monopolists enjoy market power and therefore can set the price and quantity they wish. In the Toronto market, TREB is the only provider of this specific MLS service, making it effectively a monopolist (if we ignore the "competitor in a market" analysis for the time being) in Toronto. TREB, as a monopolist, would set quantity (and accordingly, prices) where marginal revenues equal marginal costs in order to maximize their surplus. Monopolists enjoy not only an accounting profit, but an economic profit.

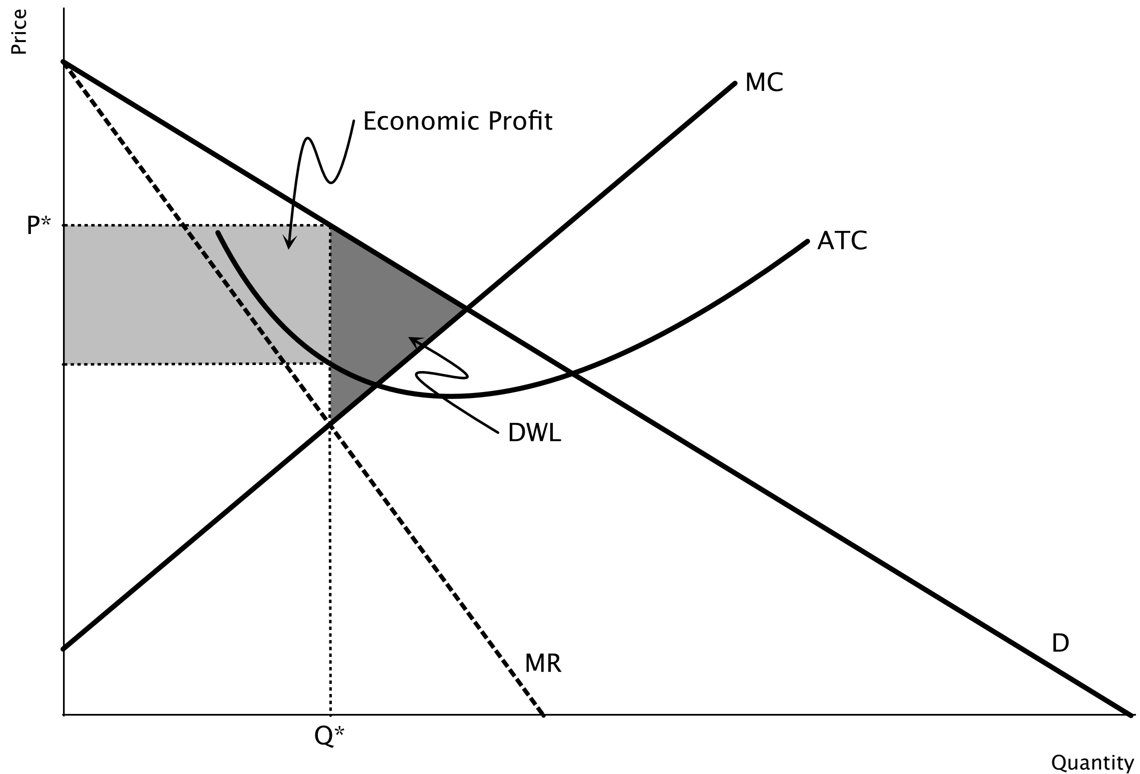
Monopolists will set quantity where:

$$\boldsymbol{MR = MC}$$

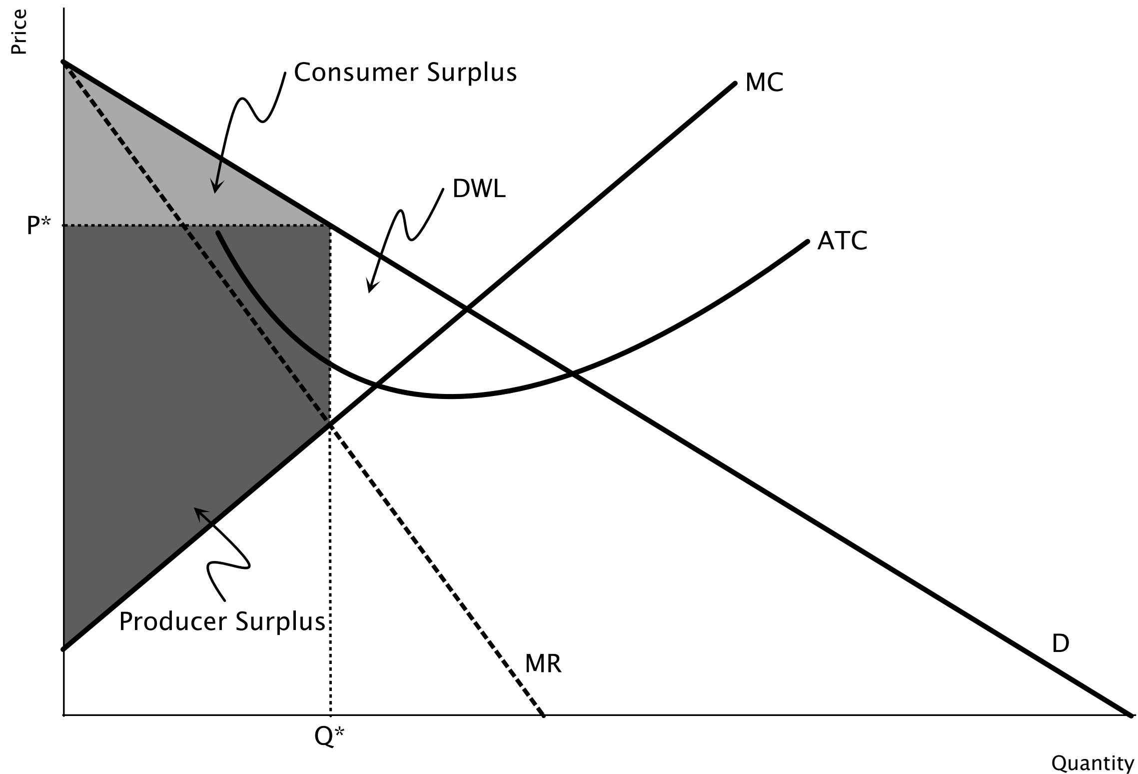
$$MR = P + P'(Q) * Q; \qquad where\ P'(Q) > 0$$
$$MC = C'(Q); \qquad where\ (Q) > 0$$

$$\boldsymbol{P + P'(Q) * Q = C'(Q)}$$

Allowing a monopoly to maximize the economic profit could arguably be good in that it provides that economic profit to the Canadian economy overall. However, monopoly prices create a deadweight loss, and have no regard for consumer surplus.



Rational producers will maximize their profit by maximizing producer surplus. If monopolists are able to set the quantity they wish, which (assuming producers are rational) they already do, any enforcement regulation aimed at maximizing producer surplus will not create a different outcome. Legislation will be redundant and putting government resources to this use is arguably inefficient. Advocating for a producer surplus centric objective is akin to advocating to let market forces prevail – if this is the goal, there is no need for government intervention in a rational world.



It goes without saying that a standard that relies purely on maximizing producer surplus would not meet the competing legislative goals of both encouraging business and innovation, as well as improving prices and options for consumers.

Other imperfectly competitive markets

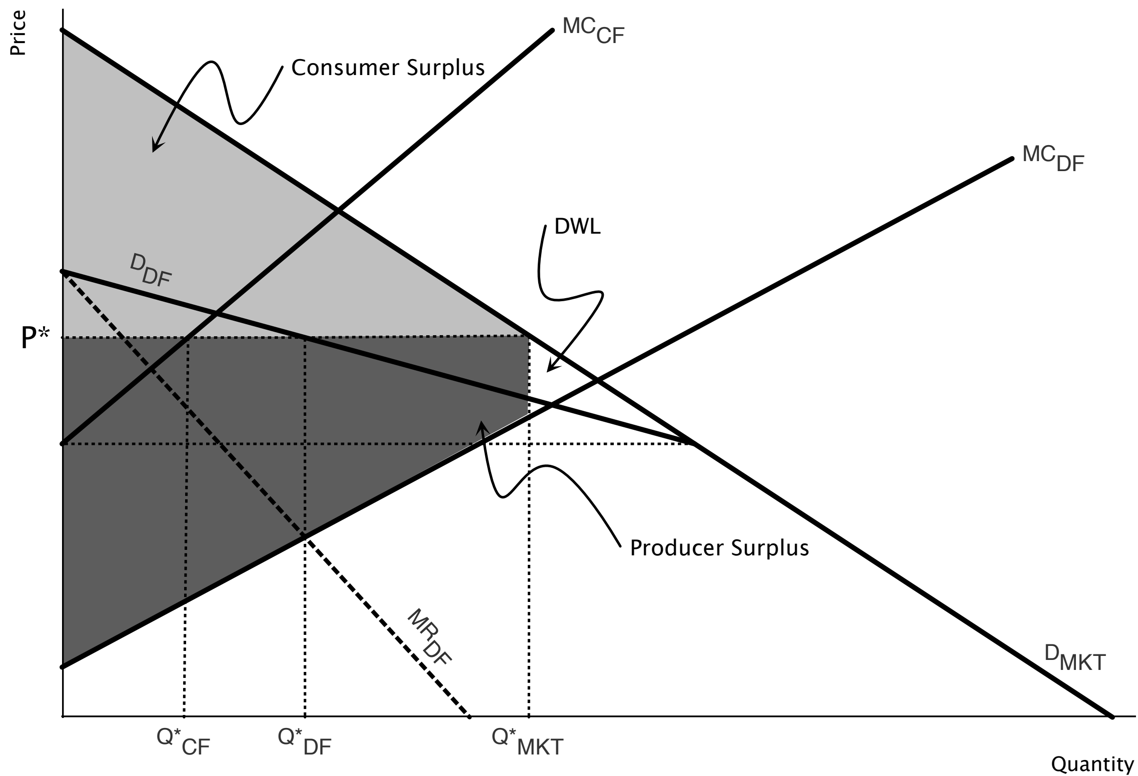
Things become more complex where markets are neither perfectly competitive nor are monopolies. Once the assumption of homogeneity of producers is relaxed, there are any number of market characteristics that can be imagined that could be subject to competition law review. It is for this reason that competition law is a complex issue, and well-established economists can disagree on seemingly straightforward questions, such as whether a firm has market power, and whether producers are abusing it. To simplify an exceedingly complex problem, I will narrow this discussion to a market in which one dominant firm has a large market share due to such factors as larger scale or a reduced cost structure, and where all other firms are price-takers. I have chosen this example, as it is a structure that is perhaps seen often in competition law contexts in Canada. At least when it comes to the TREB market, where TREB has access to information no other company does, and seemingly if they did have access to it, it would come at a set cost.

In this situation, the dominant firm (DF) is a price-setter, and all other firms are competitive price-takers (CF), as independently they are too small to impact price. A dominant firm's demand curve differs from the demand curves because it has dominance in the market and is setting the price in the market. The dominant firm sells a different quantity than the price-taking firms.

If a competitive firm tried to set their own price by decreasing it the following would happen:

$$\rightarrow Increase\ Q_{CF}\ in\ the\ short\ run$$
$$\rightarrow decrease\ P_{DF}$$
$$\rightarrow decrease\ P_{CF}\ of\ all\ competitive\ firms$$
$$\rightarrow decrease\ the\ number\ of\ competitive\ firms\ output, or\ their\ exit\ from\ the\ market$$
$$\rightarrow decrease\ Q_{CF}, increase\ Q_{DF}\ in\ the\ long\ run$$

Which means that short-term actions by competitive firms will ultimately lead to long-term benefits to the dominant firm.



In this market, the dominant firms quantity, Q^*_{DF}, is given as:

$$Q *_{DF} = Q *_{MKT} - Q *_{CF}$$

Since the dominant firm has market power, they control both the price and the quantity the supply. Due to this market power, and the firms are able to capture some of the consumer surplus and convert it into producer surplus. This creates an inefficiency, which can be seen through the presence of deadweight loss. Therefore, as stated in the monopoly section, a sole focus on producer surplus maximization would not meet the competing legislative goals.

ii. Consumer Surplus

Consumer surplus is a concept that describes the difference between what a consumer would pay for a product, and what they actually paid. Off the top of your head, it seems as though the same argument against the use of only producer surplus could similarly be used against the use of solely consumer surplus as the tool. Not all academics agree. Some academics believe that the market is inherently punishing of companies that do not play fair. Therefore, the reasoning goes, the legislation should focus solely on protecting consumer welfare in the form of consumer surplus.

Graham[48] suggests that competition law has greater chance of success as a policy tool if the government were not so scared to articulate the nature of the competition protected. Namely, Graham proposes that if the word "competition" were to mean "the enhancement of consumer welfare", the interests of competitors could no longer be pitted against the welfare of consumers[49]. What Graham proposes is a working of competition law that does not work to balance the competing interests[50] of competitors and consumers, but focusses wholly on increases in consumer surplus.

However, it appears to be generally accepted in Canada that the promotion of competition is also desirable because competition typically leads to a more efficient allocation of

[48] Crampton, Paul S., *Alternative Approaches to Competition Law: Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals* (1993).
[49] Crampton, Paul S., *Alternative Approaches to Competition Law: Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals* (1993), at page 4.
[50] See: *Competition Act*, s. 1.1 "Purpose of the Act" – "… to maintain and encourage competition in Canada … in order to expand opportunities for Canadian participation in world markets … and in order to provide consumers with competitive prices and product choices."

resources in the domestic economy, and improving the allocation of resources is one of the best ways of increasing the average standard of living within the economy[51].

If perfectly competitive

To reiterate, it is irrelevant to talk about perfect competition in the context of competition law. Consumer surplus is already maximized by producers in perfectly competitive markets, as producers set price at marginal cost. There is no other price a perfectly competitive market could set such that consumer surplus is greater.

If monopoly

Maximizing consumer surplus, when dealing with a monopoly, requires a government imposed price ceiling. In order to capture all available consumer surplus, the ceiling should be set to (or slightly above) the monopolies shutdown point, where marginal cost equals average variable cost, below average total costs. At this point the firm will continue to operate in the short run, but is not sustainable in the long run, as fixed costs are not being covered. This is inefficient, not only because it will create deadweight loss, but also because the firm will require additional funding to stay operational in the long run, most likely in the form of government subsidies.

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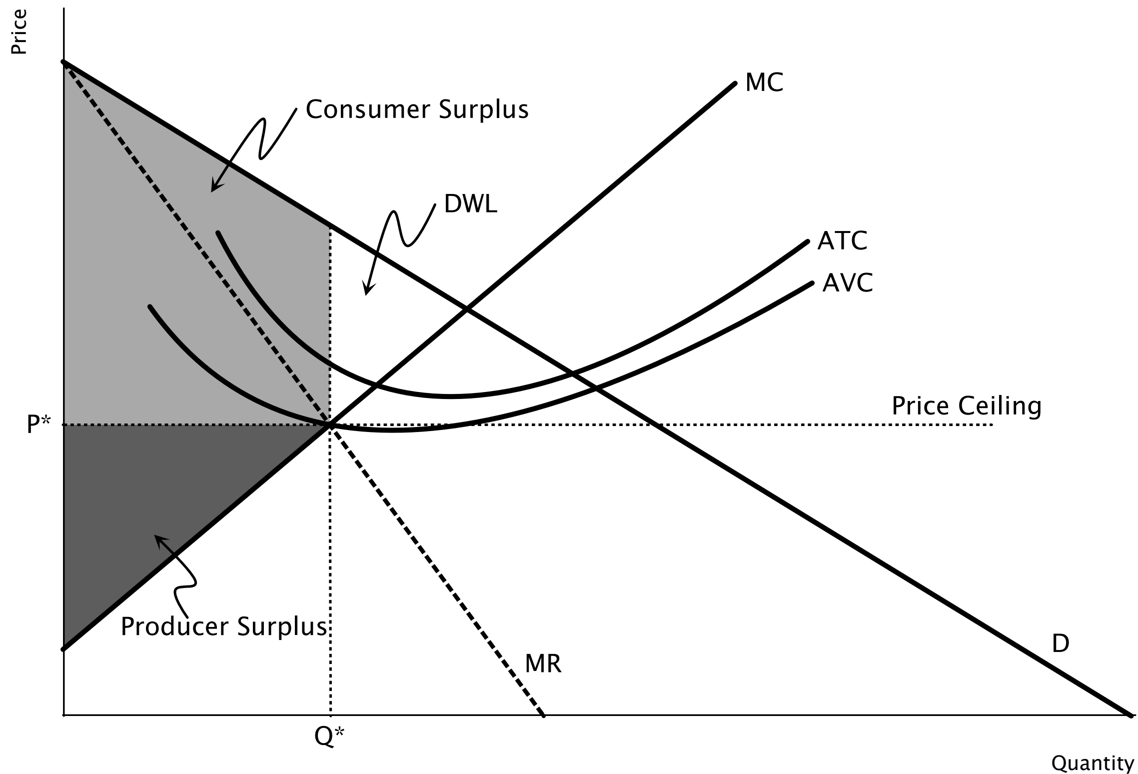
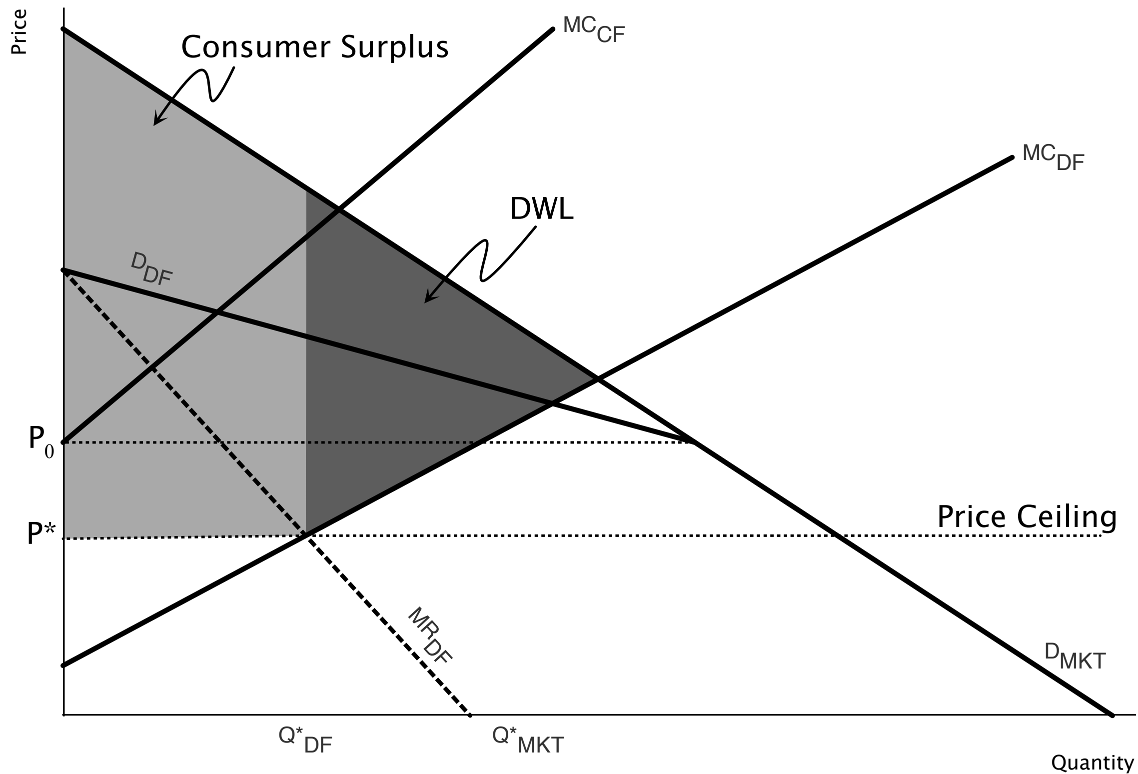
[51] Crampton, Paul S., *Alternative Approaches to Competition Law: Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals* (1993), page 2.



Again, in this situation the government would have to consider whether the most appropriate government intervention is proceedings in the form of a competition law action, or whether the business itself is a true monopoly which the government itself should control. Perhaps the most appropriate action is not to regulate as a third party, but become intimately involved by controlling the business instead. The government is supposedly solely interested in the good of the people, unlike private companies that will always be fighting to change the terms imposed by the regulators.

Other imperfectly competitive markets

Again, focusing on a situation with one dominant firm and many competitive fringe firms, one could maximize consumer surplus by implementing a price ceiling similar to that in the monopoly case. Any ceiling that regulates price be held low enough to weed out the less efficient fringe firms would result in a more efficient market overall, as the dominant firm operates at a much more productive rate.

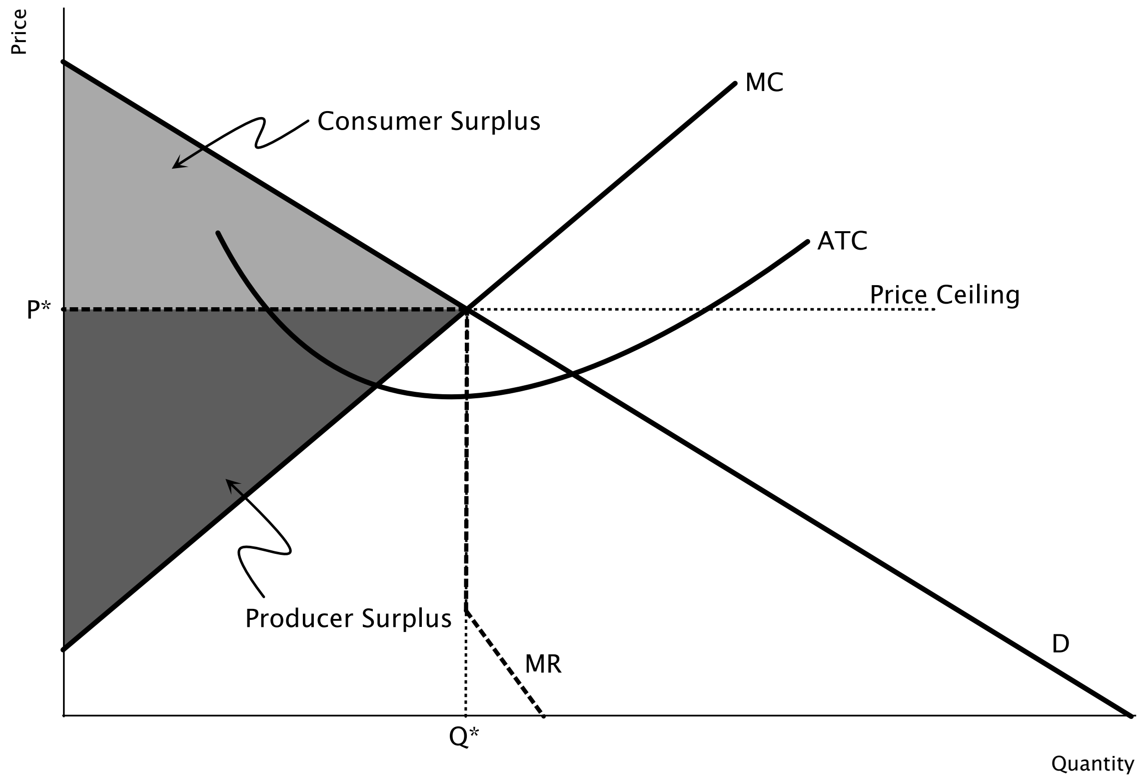


Any point below price P_0 , the competitive fringe firms will not be able to remain in the market, leaving only the dominant firm, turning this into a similar case as the above example.

iii. Total Surplus/ Total Welfare
Total surplus is the sum of consumers' and producers' surplus.

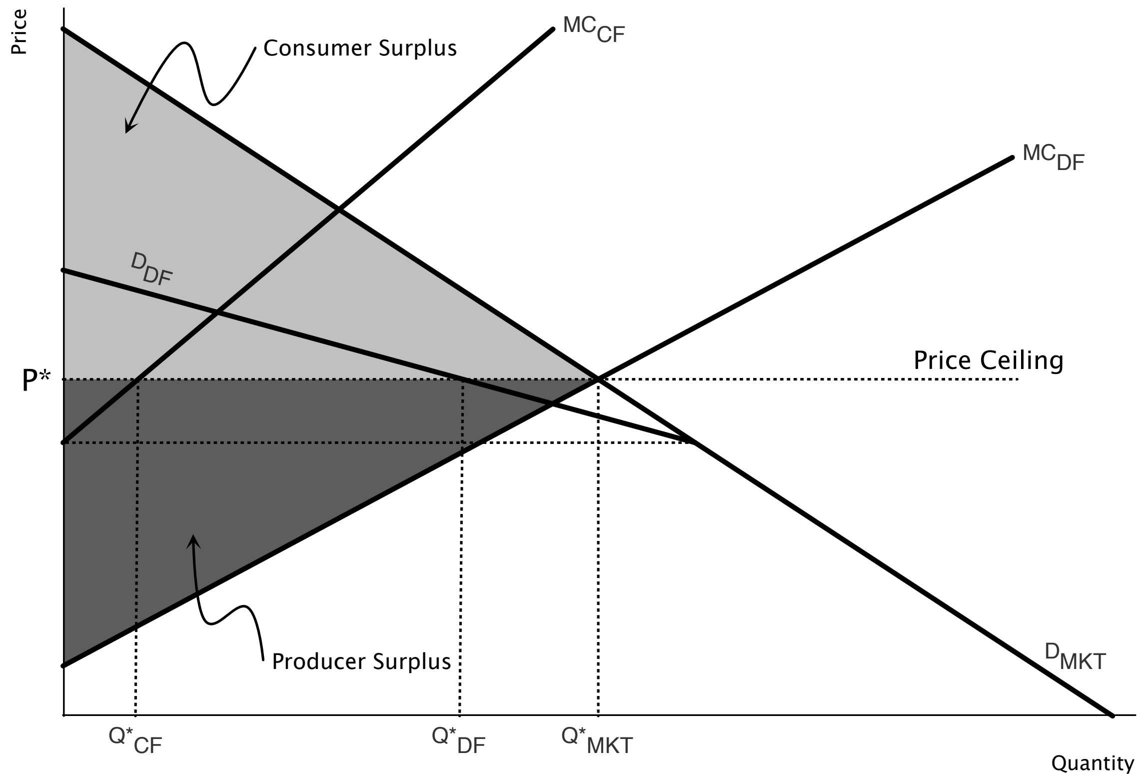
If perfectly competitive
To reiterate, it is irrelevant to talk about perfect competition in the context of competition law. Consumer surplus is already maximized by producers in perfectly competitive markets, as producers set price at marginal cost. There is no other price a perfectly competitive market could set such that consumer surplus is greater.

If monopoly
To maximize total surplus, we once again look to imposing a price ceiling, but this time where marginal cost equals demand. At this point deadweight loss will be eliminated, total surplus will be maximized, and both consumer and producer surplus are at their full potential. In this instance, a price ceiling does not interfere with the market, but actually makes it more efficient.



Other imperfectly competitive markets

Implementing a price ceiling can once again maximize total surplus when considering the case of one dominant firm and many competitive firms. When imposed at P*, the price ceiling will maximize total surplus, eliminate the deadweight loss, and therefore create an efficient market. At this equilibrium, $Q^*_{MKT} = Q^*_{DF} + Q^*_{CF}$.



Summary

As the Competition Tribunal found, TREB has the ability to exert market power over certain competitors in the real estate brokerage services market. Unfortunately, thousands of dollars were spent on litigation in the process. By focussing on a legal definition, and finding themselves bound by their own prior decisions, the Tribunal applied a legal analysis to an economic problem. Going forward, the Tribunal should endeavor to hold economic analysis in higher regard than the tribunal's prior legal analysis.

Incorporating clear, economic tests, as opposed to vague legal ones, may reduce costs of litigation in the future. The Competition Tribunal will continue to face tough enforcement battles and increasing costs of enforcement if the *Competition Act* continues to provide vague abuse of dominance provisions. A few small changes can be made to provide greater clarity and reduce costs to public and private sectors in the future. The abuse of dominance test should continue to consider both consumer and producer surpluses. However, the legislature should provide greater clarity on subjective considerations, such as political or policy objectives, as these objectives are the role of

the legislature and not the courts. For the same reason, the legislature should not rely on the Competition Tribunal to develop tests for “anti-competitive” conduct. The legislature should endeavor to provide greater clarity to the tribunal on subjective concerns that are outside the tribunal’s jurisdiction.