

## Legal update

### Competition Tribunal finds Toronto Real Estate Board abused its dominance

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May 2016

#### Antitrust and competition

Five years after the Commissioner of Competition [started](#) proceedings against the Toronto Real Estate Board (TREB), the [Competition Tribunal ruled](#) that the board had abused its dominance by preventing its members from offering more innovative services to their customers. Although the remedy has not yet been determined, the decision will influence how trade associations conduct themselves going forward.

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#### Background

TREB is a trade association whose members include most real estate agents in Toronto. Through rules and policies it restricts how its members can provide information to their customers, which the Commissioner argued is an abuse of dominance contrary to section 79 of the *Competition Act*. The application alleged that TREB used its market power to restrict its members from offering various innovative MLS-related products and services to consumers, and in particular restrictions on the display and use of MLS information on password-protected virtual office websites (VOWs).

This current order is the latest in a series of events going back to May 2011 when the Commissioner filed the initial Notice of Application. The tribunal's original [decision](#), ruling against the Commissioner, was [overturned](#) by the Federal Court of Appeal. A new hearing was ordered, which took place over eight days, and included 15 lay witnesses and three expert witnesses. Our earlier commentaries are available online for the [original tribunal](#) decision, the [Federal Court of Appeal](#) decision, and a [summary of the redetermination](#).

#### May 2016 Competition Tribunal decision

There were six broad issues before the tribunal, namely defining the relevant market(s), establishing the three elements of section 79, determining whether TREB has copyright over the MLS database and whether it provides a complete defence, and what the appropriate remedy would be.

The specific terms of the tribunal's order and remedy will be determined later, but the tribunal stated that they will primarily address the restrictive rules and policies that TREB has adopted in relation to VOWs.

#### Market analysis

The tribunal first determined what the relevant market is for the purposes of the application. In doing so, the tribunal set out an analytical framework that drew from case law, the Bureau's Merger Enforcement Guidelines, and economic theory.

The tribunal looked at the product dimension and noted that even if the supply of real estate brokerage services to home buyers and home sellers is distinct, they are highly similar and constitute a single relevant market. Regarding geographic dimension, the parties agreed that the market is local and encompasses the greater Toronto area (GTA).

### **Substantial or complete control**

The first element the Commissioner had to prove in a section 79 application was that TREB substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA. Prior to this decision, the case law was not clear as to what level of market control would be required to prove this element. The tribunal stated that a “substantial degree of market power” is required, which allows an entity to “determine or influence price or non-price dimensions of competition in a market, including the terms upon which it or others carry on business in the market.”<sup>1</sup>

The tribunal noted that trade associations can exercise market power in various ways, including by mandating product standards and rules that insulate their members from sources of potential competition, and by stalling the entry and expansion of innovative products. Even where there are many competitors in a market, the tribunal stated, a dominant entity can still engage in anti-competitive acts that result in a less competitive market.

The tribunal rejected TREB’s arguments that it is merely a supplier of an input and does not actually participate in the real estate brokerage services market. TREB controls access to the MLS system, and through rules and policies it insulates its members from competition, the tribunal held. In doing so, it also has the ability to exclude new products.

### **Practice of anti-competitive acts**

The second element the Commissioner had to prove was that TREB engaged and/or continues to engage in the practice of anti-competitive acts contemplated at paragraph 79(1)(b) of the *Competition Act*. The analysis requires assessing whether the act was intended, subjectively or objectively, to have a predatory, exclusionary or disciplinary effect on a competitor, as opposed to on competition more broadly defined.

Importantly in the context of a trade association, the competitor is a person who competes in the relevant market and does not have to be a competitor of the specific respondent. In other words, the practice does not have to affect a competitor of TREB, but it does have to affect a competitor in the relevant market.

TREB argued that it had legitimate business justifications for the restrictions because of privacy concerns and compliance with the *Personal Information Protection and Electronic Documents Act*. However, the tribunal found that TREB’s reasons for restricting access were not actually related to privacy, but rather an attempt to restrict a disruptive form of competition that could have a negative impact on the role of its members, as well as increase different forms of price and non-price competition.

The tribunal also rejected TREB’s argument that it was not reasonably foreseeable that restrictions on VOWs would have an exclusionary effect on competitors. The tribunal also stated that the exclusionary impacts of the restrictions were deemed to have been intended by TREB and that any legitimate business justifications did not outweigh the anti-competitive acts.

### **Substantial prevention or lessening of competition**

The third element the Commissioner had to prove was that TREB’s restrictions prevented or lessened competition substantially, or that they are likely to have one of those effects. The burden of proof is on the Commissioner, and the tribunal noted that in innovation cases such as this, qualitative evidence is more likely required. Where the respondent is a trade association, the tribunal will also look at whether the practice increases or preserves the market power of some of the association’s members compared to the market in the absence of the practice.

The Commissioner’s witnesses led evidence, accepted by the tribunal, of five anti-competitive effects of the VOW restrictions: increased barriers to entry and expansion; increased costs imposed on VOWs; reduced range of brokerage services; reduced quality of brokerage service offerings; and reduced innovation. The tribunal held that

these effects showed TREB's restrictive practices substantially prevented competition for MLS-based residential real estate services in the GTA.

In so concluding, the tribunal noted that this case focussed on dynamic competition and innovation, which are the most important forms of competition, and that by "preventing competition from determining how innovation should be introduced" into the market that TREB "substantially distorted the competitive market process."<sup>2</sup>

## Copyright and intellectual property

TREB argued that the Commissioner ignored its copyright in the MLS database, and that under subsection 79(5) it has a complete defence to the Commissioner's allegations because it is entitled to exercise its intellectual property rights. Copyright exists in a database if it is an original arrangement of data that required the exercise of skill and judgment.

The tribunal determined that TREB did not provide enough evidence, and that the mechanical exercise of compiling data did not meet the low threshold for copyright to apply to the MLS database. Further, the restrictions are more than the "mere exercise" of TREB's IP rights, as required by the case law. TREB also argued that the tribunal does not have jurisdiction to order it to grant compulsory IP licences, but the tribunal stated that it has broad remedial jurisdiction that includes jurisdiction in respect of IP rights.

## Remedy

A remedy will be determined following additional written submissions and an oral hearing on June 2, 2016. Contravention of the abuse of dominance provisions typically results in a prohibition order requiring the party to stop the offending conduct. Since 2009, the tribunal has the discretion to impose administrative monetary penalties of up to \$10 million. An order could also be made in relation to TREB's IP rights.

## Implications

Although the full implications of the decision will not be known until the remedy is determined, the case provides important guidance in the area of competition and innovation. Importantly for the Commissioner's ongoing discussions of innovation and the digital economy, the tribunal noted that anti-competitive effects can include "a considerable adverse impact on innovation, quality and the range of residential real estate brokerage services."<sup>3</sup>

While this specific application relates to TREB, it will have ramifications on other real estate brokerage services throughout Canada that maintain MLS databases. As well, the case makes it clear that trade associations can be found liable for abuse of dominance even when they are not a competitor in the market, and thus must exercise caution in establishing industry-wide rules.

Stephen Natrass

## Footnotes

<sup>1</sup> *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7, at paras 173-174.

<sup>2</sup> *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7, at paras 712-713.

<sup>3</sup> *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7, at para 4.

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