

## Legal update

### Abuse of dominance do-over: Competition Tribunal rules restrictions on data sharing affecting innovation can be an anti-competitive act

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#### Antitrust and competition

The Competition Tribunal ruled in favour of the Commissioner of Competition in the ongoing abuse of dominance case against the Toronto Real Estate Board (TREB).<sup>1</sup>

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#### Background

The TREB is a trade association whose members include most real estate agents in Toronto. 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*.

In April 2013 the tribunal concluded that because TREB's actions did not affect competitors, its conduct did not fall within the scope of section 79.<sup>2</sup> The decision was appealed to the Federal Court of Appeal, which found that the tribunal's interpretation of a leading dominance case, *Canada Pipe*,<sup>3</sup> was incorrect, and as a result the court ordered the tribunal to reconsider its decision on the merits.<sup>4</sup> Additional background information, and our commentary on the tribunal and Federal Court of Appeal's decision, is [available online](#).

#### Competition Tribunal decision

The tribunal determined that the commissioner established the three elements of section 79:

- TREB substantially or completely controls the supply of MLS-based residential real estate brokerage services in greater Toronto;
- TREB engaged, and continues to engage, in anti-competitive acts contemplated at paragraph 79(1)(b); and
- TREB's rules restricting how members can display and use MLS services have prevented, are preventing, and are likely to prevent competition substantially.

Importantly for the commissioner's ongoing discussions of innovation and the digital economy, the tribunal noted that the anti-competitive effects include "a considerable adverse impact on innovation, quality and the range of residential real estate brokerage services."<sup>5</sup>

## Implications

The tribunal has not yet determined the appropriate remedy, and will only do so following additional submissions from the parties. Contravention of the abuse of dominance provisions typically results in a prohibition order requiring the party to stop the offending conduct, and since 2009 the tribunal has had the discretion to impose administrative monetary penalties of up to \$10 million in such cases.

The tribunal only issued a summary of its 170-page decision, which will be released once measures are taken to protect confidential evidence in the decision. The full implications of the decision will not be known until the redacted public reasons are released and the remedy is determined. Stay tuned.

Stephen Natrass

## Footnotes

- <sup>1</sup> Summary decision dated 28 April 2016 in *Commissioner of Competition v Toronto Real Estate Board*, file CT-2011-003, online at: [http://www.ct-tc.gc.ca/CMFiles/CT-2011-003\\_Summary%20of%20Decission\\_373\\_38\\_4-28-2016\\_4727.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Summary%20of%20Decission_373_38_4-28-2016_4727.pdf).
- <sup>2</sup> *Commissioner of Competition v Toronto Real Estate Board*, 2013 Comp Trib 9.
- <sup>3</sup> *Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233, [2007] 2 FCR 3.
- <sup>4</sup> *Commissioner of Competition v Toronto Real Estate Board*, 2014 FCA 29.
- <sup>5</sup> Summary decision dated 28 April 2016 in *Commissioner of Competition v Toronto Real Estate Board*, file CT-2011-003, at para 3.

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