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Competing Fairly from a Monopoly Position: Six Things to Know about Abuse of Dominance After TREB

Under Canadian law, many provisions of the *Competition Act* can only be enforced by the Commissioner of Competition, and not by private parties. That has led to a dearth of jurisprudence, and certainty, regarding the interpretation of several provisions of the *Competition Act*. For that reason, both major businesses and industry groups will want to take careful note of the recent decision in *Toronto Real Estate Board v Commissioner of Competition*, where the Federal Court of Appeal gave further guidance as to when a party will be liable for abuse of dominance.

The facts of the *Toronto Real Estate Board* (typically known as “TREB”) decision are in many ways unique. TREB maintained a database of information regarding property listings in the Greater Toronto Area. TREB controlled this information and disseminated it to its members, who were real estate agents, in particular ways. Some data could be distributed on its members’ websites, while other information could only be distributed by brokers through traditional in-person routes. The Commissioner alleged that this practice imposed burdens on brokers who operated virtual office websites (known as “VOWs”) rather than traditional bricks-and-mortar offices. The Commissioner alleged that this constituted an abuse of dominance by TREB.

After a complicated litigation history (involving a prior trip to the Federal Court of Appeal), the Commissioner prevailed before the Competition Tribunal, successfully establishing that TREB’s restrictions constituted an abuse of dominance. TREB unsuccessfully appealed to the Federal Court of Appeal.

While the facts of the *TREB* decision may be unique and not particularly relevant to many businesses, the Federal Court of Appeal’s decision does provide important guidance for business on the abuse of dominance provisions. The decision reaffirms the law in respects, but adds important clarity in others.

Here are six important takeaways from the Court's decision:

- Any anti-competitive act can ground an abuse of dominance claim – One of the most powerful aspects of the abuse of dominance provision for the Commissioner is that it can apply to potentially any type of anti-competitive act. While s. 78 of the *Competition Act* contains an illustrative list of anti-competitive acts, TREB's conduct did not fall within any of them. Notwithstanding that, TREB's conduct was nonetheless found to constitute a "practice of anti-competitive acts".
- Proving a substantial prevention or lessening of competition requires analysis of the counterfactual – In order for the Commissioner to make out his case for abuse of dominance, he must show that there was a substantial prevention or lessening of competition in the relevant market. That requires the Tribunal consider whether, if the anti-competitive effects of the practice at issue had not occurred, the market would be substantially more competitive. The analysis is about the relative, not absolute, level of competition.
- Quantitative evidence is not necessary to prove a substantial lessening of competition – In its case before the Tribunal, the Commissioner did not lead any quantitative empirical evidence that TREB's practices led to either higher prices or reduced dynamic competition. The Federal Court of Appeal held that the Commissioner had no legal burden to lead quantitative evidence. Rather, it was appropriate for the Tribunal to find a substantial lessening or prevention of competition on the basis of qualitative evidence alone.
- Legitimate legal restrictions can justify an anti-competitive practice – TREB asserted that the reason for its restrictions relating to VOWs was to comply with requirements in federal privacy legislation. TREB contended that compliance with that law constituted a business justification that defeated any abuse of dominance claim. The Federal Court of Appeal accepted that compliance with other laws, including privacy legislation, could constitute a business justification that defeated an abuse of dominance claim. However, the Court found that TREB had not established that privacy legislation compelled the VOW restrictions.
- Legitimate legal restrictions need not have been the motive for the anti-competitive practice – Building on the previous point, the Court of Appeal's decision confirms

that the motivation to adopt the anti-competitive practice need not have been to comply with statutory or regulatory restrictions in order for the abuse of dominance claim to be dismissed. Put differently, a party can avoid liability for abuse of dominance if the anti-competitive practice is necessary to comply with the party's legal obligations, even if the original motivation for adopting the anti-competitive practice was different. However, there will always be a burden on the party "to establish a factual and legal nexus between that which the statute or regulation requires and the impugned policy".

- Protecting intellectual property rights can sometimes, but only sometimes, justify an anti-competitive practice – TREB also argued that it had copyright in its database and that the VOW restrictions simply helped it protect that copyright. The Federal Court of Appeal acknowledged that s. 79(5) of the *Competition Act* provides some protection to holders of intellectual property rights from an abuse of dominance claim. However, the Court held that a party can only rely on its intellectual property rights to avoid an abuse of dominance finding if "the use or protection of the [intellectual property right] is the sole justification for the practice". If the purpose of asserting the intellectual property rights was in part to eliminate competition, then the party could not rely on its intellectual property rights to shield itself from liability.

In many respects, the Federal Court of Appeal's decision is a helpful clarification of the law in this area. However, many aspects of the law remain to be clarified in the future. In particular, given both the ever-expanding regulatory state and the increasing importance of intellectual property rights in virtually all parts of the economy, it is likely that there will be further litigation over the issue of when practices touching on those matters will be exempted from scrutiny under the abuse of dominance provision. In particular, there will almost certainly be future debate and clashes over the relatively limited scope the Federal Court of Appeal gave to intellectual property rights as a justification to avoid an abuse of dominance finding.