

Canada Enforcement Update

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Active Pursuit of Abuse of Dominance Cases Continues in Canada

On May 27, 2011, Canada's Commissioner of Competition filed an application with the Competition Tribunal in response to allegedly anticompetitive practices by the Toronto Real Estate Board ("TREB").¹⁴ This case is a sequel to the Canadian Real Estate Association ("CREA") case reported in the Winter 2011 edition of the Newsletter and represents a counterpart to the U.S. Department of Justice's case against the National Association of Realtors.

The Commissioner alleges that the rules to which TREB member brokers are subject deny consumers choice and prevent real estate agents from offering innovative real estate brokerage services through the use of virtual office websites ("VOWs"), which would allow consumers to search Multiple Listing Service ("MLS") properties online themselves, thus largely disintermediating brokers from basic search activities. In the Commissioner's view, TREB's restrictive rules perpetrate inefficient intermediary activities by brokers and result in higher search costs for consumers. As a test case, it is likely to determine the fate of similar restrictions used by real estate boards across Canada.

The Commissioner's application was brought pursuant to the abuse of dominance provision of Canada's *Competition Act*. Under this provision, the Tribunal may order a prohibition or other order to remedy the impugned conduct in circumstances

where one or more firms that dominate a market engage in anticompetitive acts that prevent or lessen competition substantially. The Tribunal may also impose "administrative monetary penalties" (that is, fines) of up to \$10 million. The Commissioner's application argues that TREB has a dominant position in the market for the supply of residential real estate brokerage services to home buyers and the supply of residential real estate brokerage services to home sellers. Moreover, TREB's VOW restrictions are "a practice of anti-competitive acts" because they are exclusionary - *i.e.* they protect traditional brokers against competition from brokers who want to adopt this innovative form of business model.

This, alleges the Commissioner, results in a substantial lessening or prevention of competition by keeping real estate commissions high.

The Commissioner's application seeks an order from the Tribunal that would, among other things:

- prohibit TREB from directly or indirectly enacting, interpreting or enforcing any rules that prevent or discriminate against TREB member brokers who wish to use the information in the Toronto MLS system to offer novel brokerage services such as VOWs; and
- direct TREB to implement such resources and facilities as the Tribunal deems necessary to ensure the operation of VOWs or similar services by, or on behalf of, member brokers.

The application is being vigorously defended by TREB. First, TREB argues that its rules governing VOWs are consistent with the exercise of the copyright it holds over the Toronto MLS system. Under the *Competition Act*, "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*" (among other intellectual property statutes) is "not an anti-competitive act", one of the three necessary elements of any abuse finding. TREB also observes that, as a trade association, it does not offer real estate brokerage services (rather, its members do) and accordingly cannot be said to "substantially or completely control" the market as is required for a finding of abuse of dominance. Finally, TREB takes the position that allowing brokers to disseminate detailed property-specific information on VOWs accessible to the public largely without the intermediation of brokers would give rise to serious privacy concerns in violation of Canada's federal privacy laws.

With leave to intervene granted to both CREA (in support of TREB's position) and Realty Sellers Real Estate Inc. (self-described as TREB's largest non-traditional brokerage and a proponent of VOWs, in support of the Commissioner's position), the case promises to be an interesting one. The hearing is expected to start in the second quarter of 2012.

¹⁴ Industry Canada, *Competition Bureau Sues Canada's Largest Real Estate Board for Denying Services Over the Internet* (May 27, 2011), available online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03379.html>. Full details of this case are available on the Competition Tribunal's website at: <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347>.