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I. INTRODUCTION

On February 8, 2010, the Canadian Competition Bureau (the "Bureau") filed an abuse of dominance application against one of Canada's largest single industry trade associations—The Canadian Real Estate Association ("CREA").[2]

According to the Bureau, CREA has used rules, under which it licenses its MLS® trade-mark and related marks to member real estate boards, to maintain control of the market for residential real estate brokerage services in Canada. In particular, the Bureau has taken the position that CREA's MLS® Rules inhibit or prevent non-traditional business models, including fee-for-service and flat-fee models, from effectively competing in the residential real estate services market.

II. ABUSE OF DOMINANCE IN CANADA

In Canada, the Commissioner of Competition may apply to the Competition Tribunal ("Tribunal") under section 79 of the *Competition Act* ("Act") for remedial orders where a firm (or firms) has abused its dominant position by engaging in a practice of anticompetitive acts that prevent or lessen competition substantially in a market. As a result of recent sweeping amendments to the Act, the Tribunal may also now order "administrative monetary penalties" (essentially civil fines) of up to Cdn. $10 million (Cdn. $15 million for subsequent orders) (although the Bureau is not seeking AMPs in this case).[3]

While abuse of dominance remains an enforcement priority for the Bureau, together with criminal cartels and deceptive marketing, fully contested abuse cases remain rare in Canada. In this regard, there have been less than ten contested abuse cases in Canada in the past twenty-five years.

As a result, key elements of abuse of dominance remain unsettled, including what constitutes a practice of anticompetitive acts, what constitutes a legitimate business purpose to counter allegations of anticompetitive conduct, and how, in practice, it is demonstrated that competition has been prevented or lessened substantially in a relevant market.

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[2] The pleadings for this case, including the Commissioner's Notice of Application and CREA's Response, are *available* on the Tribunal's website at http://www.ct-tc.gc.ca/.

[3] Canada's abuse of dominance provisions are set out in sections 78 and 79 of the Act. While section 78 contains a list of anticompetitive acts for the purposes of section 79, they are non-exhaustive and many aspects of what constitutes an anticompetitive act for the purposes of section 79 remain uncertain.

III. OVERVIEW OF THE MLS® CASE

In its application, the Bureau takes the position that CREA has a dominant position ("substantial or complete control") over the supply of residential real estate brokerage services in Canada and has used its MLS® Rules to exclude non-traditional business models (e.g., flat-fee and fee-for-service models) to entrench "the traditional full-service real estate business model" in Canada. The Bureau's case essentially turns on the proposition that the MLS® system is an essential input, and that non-traditional real estate business models cannot effectively compete without uninhibited access to the MLS® system (essentially a "raising rivals cost" argument).

In challenging CREA, the Bureau has focused on CREA's "three pillars," which are rules that require that the following conditions be satisfied to list a property on a local real estate board's MLS® system: (i) membership (only member realtors("REALTORS")) may list properties on a local board's MLS® system), (ii) agency (a listing REALTOR must act as agent for the seller throughout the duration of a property listing) and (iii) compensation (as the MLS® system is a cooperative selling system, the listing REALTOR must offer some compensation to selling REALTORs—that is, REALTORs bringing potential buyers to a transaction).

The Bureau is particularly concerned with CREA's "agency pillar," taking the view that this requirement either completely excludes or severely impedes non-traditional real estate brokerage models in their ability to compete, reducing consumer choice for residential real estate services in Canada.

CREA's response has been that: (i) the Bureau's definition of the market is flawed (i.e., given that CREA, as a trade association, does not provide real estate brokerage services, it cannot possess market power in the residential real estate services market), (ii) that its MLS® Rules do not constitute a practice of anticompetitive acts (based, in part, on its right to assert control over its MLS® and other trade-marks) and (iii) that its MLS® Rules do not prevent or lessen competition substantially—citing, for example, vigorous actual competition from discount, fee-for-service, and flat-fee business models.

IV. IMPLICATIONS

The MLS® case, hearings for which will begin in April 2011, raises a number of interesting and challenging issues. These include the appropriate market definition when the target is a trade association not engaged in providing the relevant product (in this case, according to the Bureau, residential real estate brokerage services), whether (and on what basis) a network or other asset should be considered to be an essential facility, and to what extent intellectual property rights (in this case CREA's trade-mark rights) can be unilaterally exercised without triggering competition law liability.

A. Market Definition

The Bureau has taken the position that CREA, through its MLS® Rules, controls the market for residential real estate brokerage services in Canada. Not surprisingly, CREA's reply is that, given that it is a trade association and does not provide residential real estate brokerage services, it cannot possess market power in that market (or any market for that matter).

The Bureau's approach in the CREA case is similar to that reflected in its recently issued *Competitor Collaboration Guidelines* ("Guidelines") discussing the potential liability of trade

associations under Canada's new conspiracy law regime.[4] Canada's new conspiracy offense applies when competitors (or potential competitors) enter into three types of proscribed "hard core" agreements (bare price-fixing, market allocation, or supply restriction agreements). The Bureau takes the view in its Guidelines that a trade association can attract liability under the cartel offense, notwithstanding questions about how a trade association can constitute a "competitor" of anyone, unless perhaps a rival trade association in the same industry.

One wonders whether a better approach for the Bureau would have been to argue that CREA is jointly or collectively dominant with its member real estate boards (the abuse of dominance provision applies to both unilateral and joint dominance). Another possibility for the Bureau would have been to treat the case as a concerted boycott under the Act's conspiracy rules. However, while the new conspiracy offense includes supply restriction agreements, the MLS® Rules do not seem to qualify as the type of "hard core" cartel conduct that the Bureau typically pursues under this offense (or has indicated it will pursue in recent public announcements). Moreover, the Bureau has a very poor track record in criminal prosecutions, so it is understandable why it preferred to proceed under the civil abuse of dominance provisions.

B. The MLS® System as an Essential Facility

Another interesting aspect of the MLS® case is that it may be the first decided "essential facilities" case in Canada. The Bureau argues that the Canadian MLS® system "has become a key input to the provision of residential real estate brokerage services" and that there are no reasonable substitutes as a result of network effects (i.e., the MLS® system is effective because it represents such a high buyer/seller participation rate and contains the largest inventory of homes for sale in Canada).

While the Act includes the pre-emption of a "scarce facility or resource" as one of a non-exhaustive list of anticompetitive acts for the purpose of section 79, there has never been a decided essential facilities case in Canada. The closest parallel was the 1995 *Interac* case, which was a joint abuse of dominance case involving the establishment of an electronic banking network by nine of Canada's largest financial institutions.[5]

In *Interac*, the Bureau alleged that certain rules associated with the Interac network, which denied certain competitors access to the network, constituted a practice of anticompetitive acts that substantially prevented or lessened competition. The *Interac* case, however, was settled by way of consent order, which included terms to increase access to the network and alter the association's governance structure.

Given that *Interac* was resolved by way of a consent order, many questions still remain as to when a network or other asset should appropriately be considered to be an essential facility and when access to such a facility must be granted by a dominant party. These are difficult issues and raise, among other things, questions relating to the extent that parties should be required to grant access to joint venture assets (the MLS® system has been persuasively characterized as a cooperative joint venture), as well as the potential negative effects of mandating access to assets on the incentives to create them.

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[4] Competition Bureau, *Competitor Collaboration Guidelines* (2009), *available* on the Bureau's website at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home.

[5] *Canada (Director of Investigation and Research)* v. *Bank of Montreal* (1996), 68 C.P.R. (3d) 527 (Comp. Tribunal), *available* on the Competition Tribunal's website at: http://www.ct-tc.gc.ca/.

C. CREA's Trademark Rights

Finally, perhaps the most interesting aspect of the Bureau's MLS® case relates to CREA's assertion that it cannot be accused of engaging in an anticompetitive act when it is simply enforcing its intellectual property rights (i.e., its MLS® and related trade-marks). CREA argues that it has a right to assert control over the use of its trademarks, and that such control constitutes a valid business justification for the MLS® Rules.

This is one of CREA's most intuitively persuasive arguments, though it is not clear whether it will be a successful argument. While the Tribunal has held that a mere refusal to license trademarks, without "something more," will not be an anticompetitive act, it has also found that the exercise of an IP right in one market to obtain a competitive advantage in another can constitute an anticompetitive act. The risk for CREA is that the Tribunal may conclude that CREA's exercise of its trademark rights constitutes "something more" than the mere exercise of IP rights (for example, extending or leveraging its IP rights in order to control the residential real estate services market). CREA also argues that its MLS® Rules are necessary for the efficient operation of the MLS® system.

The difficult question will be, of course, where CREA's legitimate intellectual property rights end and any anticompetitive conduct (the requisite "something more") begins. It is also not clear how strong CREA's argument is that its exercise of its IP rights constitutes a valid business justification, or whether the Tribunal will accept that its MLS® Rules are necessary for the efficient operation of the MLS® system.

In this regard, the Federal Court of Appeal held in the *Canada Pipe* case that while a party may advance legitimate business justifications to offset an alleged anticompetitive purpose, any business justification must be a "credible efficiency or pro-competitive rationale" for the challenged conduct and that self-interest alone is insufficient. Unfortunately, however, the content of this test remains uncertain. It may be that CREA will be more successful making pro-consumer efficiency arguments than it will with its IP arguments, which may not be seen as sufficiently efficiency-enhancing.

V. CONCLUSION

The MLS® case will be a challenging one for the Bureau. It must establish that: 1) a trade association such as CREA can exercise market power (as opposed to its members acting jointly); 2) the MLS® system is an essential facility; and 3) CREA's MLS® Rules have been exercised to exclude or discipline alternative real estate services models. By the same token, it also will be interesting to see whether CREA can convince the Tribunal that the exercise of its trademark rights constitutes a valid business justification. Regardless of the outcome, the CREA case will be an important and needed addition to the small universe of Canadian abuse cases.