CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
Nov 2014 (1)

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I. INTRODUCTION

Canada's Competition Bureau (the "Bureau") has maintained its focus on trade and professional associations in 2014. This has involved not only various forms of prosecutions and proceedings but also initiatives in a growing part of the Bureau's enforcement agenda: advocacy and compliance.

A summary of 2014's key developments is set out below.

II. THE TREB CASE

TREB, Canada's largest real estate board, represents more than 35,000 real estate brokers and agents principally in the Greater Toronto Area ("GTA"). TREB owns and operates an electronic database known as the TREB Multiple Listing Service™ system ("TREB MLS®"), which contains current and historical information about the purchase and sale of residential real estate in the GTA. Only TREB's members have direct access to the TREB MLS®,[2] and these members must agree to abide by certain rules and policies enacted by TREB in order to maintain their membership in good standing.

In May 2011, the Bureau filed an application against TREB, arguing that it had abused its dominant position in the market for residential real estate brokerage services. Specifically, the Commissioner alleged that restrictions imposed by TREB on the information that its members could provide to consumers over the internet through password protected websites known as "VOWs" perpetuated the traditional "bricks and mortar" business model used by most brokers and agents and prevented the creation of innovative business models that, the Bureau claimed, would improve productivity and lower costs to consumers.

In order for an abuse of dominance case to be made out, the Tribunal must find that:

a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;

b) that person or persons have engaged in or are engaging in a practice of anticompetitive acts; and

c) the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

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[2] Some brokers and agents outside of the GTA may also have access to TREB MLS® data as a result of reciprocal agreements between their real estate boards and TREB.

In a decision released in April 2013, the Tribunal held that, because TREB is an association that does not itself compete in the market for residential real estate brokerage services, the Bureau's case did not satisfy any of the above criteria.

First, the Bureau could not show that TREB controlled a relevant market as required by (a) above. Second, the Tribunal stated that it was bound by the Federal Court of Appeal's 2006 *Canada Pipe* decision, where the Court held that in order for the requirements of (b), above, to be met, the anticompetitive acts in question must be directed towards a competitor of the dominant firm. Since TREB does not compete with its members, its restrictions on the data permitted to be provided to consumers on a VOW could not have the negative effect on a competitor required by the *Canada Pipe* decision. Finally, since there was no anticompetitive act, the Tribunal held that the requirements of (c), above, also could not be met on the facts of the case.

On February 3, 2014, the Federal Court of Appeal overturned the Tribunal's decision. The Court held that the Tribunal had misinterpreted the Court's earlier decision in *Canada Pipe* and that the *Competition Act*'s abuse of dominance provisions could potentially apply to a person that controls a market even if that person does not compete in that market. The Court remanded the case back to the Tribunal to be reconsidered on the basis of proper legal principles.

On July 24, 2014, the Supreme Court of Canada refused to grant TREB leave to appeal the Federal Court of Appeal's decision.

While the merits of the TREB case will now be decided by the Tribunal after a re-hearing, the Supreme Court of Canada's decision to deny leave means that the Federal Court of Appeal's decision in TREB is, for now, the most current guidance on the type of conduct that may be pursued under the Competition Act's abuse of dominance provisions.

In practical terms, the Federal Court of Appeal's decision in the TREB case has the potential to expand the scope of conduct that may be pursued under the abuse of dominance provisions. While it is difficult to anticipate all the circumstances or markets in which such effects might arise, an illustrative example of this broader approach to abuse of dominance may be found in a recent decision in the United Kingdom where an airport authority was found to have abused its dominant position by restricting the number of bus routes serving the airport, thereby lessening competition for local bus transportation—a market in which the airport authority did not compete.[3]

The Federal Court of Appeal's decision also confirms that trade associations may be pursued for abuse of dominance in appropriate circumstances. While other provisions of the *Competition Act* also remain relevant, the Bureau in the past 20 years has tended to base its applications against trade associations on allegations of abuse of dominance. The Federal Court of Appeal's decision confirms the viability of this approach.

[3] *Arriva The Shires Ltd.* v *London Luton Airport Operations Ltd.*, [2014] EWHC 64 (Ch), *available at* http://www.bailii.org/ew/cases/EWHC/Ch/2014/64.html.

III. CARTEL CASES

It is trite to say that trade associations often feature prominently in cartel investigations and prosecutions. But that is because it so often happens to be true.

The latest Canadian entry in this category became public in April 2014, when several parties pleaded guilty to participating in an agreement to collectively set various surcharges relating to the supply of "non-vessel operating common carrier" ("NVOCC") export consolidation services from Canada to foreign destinations.

Of interest, according to the "Statement of Admissions and Agreed Facts" filed with the Court, the parties' communications (for at least a portion of the time) were conducted under the auspices of the Canadian Freight Forwarder Association ("CIFFA"), and specifically a CIFFA committee working group called the "NVOCC Export Working Group of the Ocean Freight Committee." Moreover, according to the court-filed documents, CIFFA published the surcharge formulas set by this working group through electronic bulletins that it distributed to its members. In most cases, the surcharges were apparently published in the "members only" portion of CIFFA's website.

An industry trade association was also said by the Bureau to have played a critical role in an alleged conspiracy involving providers of concrete forming services for residential developments in the City of Toronto. The Bureau alleged that the parties had used meetings of their industry association to set pricing and monitor non-compliance. The Bureau executed search warrants in January 2013 but dropped the case a year later, having decided not to refer the matter for prosecution.

IV. ADVERTISING RESTRICTIONS

The Bureau announced earlier this year that it had undertaken a review of advertising restrictions imposed by certain professional associations (pharmacists, dentists, and veterinarians) on their members. More details are expected to be released before the end of 2014.

Restrictions on advertising were also among the issues canvassed by the Bureau in a study it published on professional associations in 2007, the last time that the Bureau conducted an extended review of competition among self-regulated professions. In that study, which looked at five professions (accounting, legal, optometrists, pharmacists, and real estate agents), the Bureau identified numerous restrictions that, in its view, appeared "to go beyond what is necessary to protect consumers from false or misleading advertising and, as a result, limit consumers' access to legitimate information that greatly benefits competition."

The Bureau expressed particular concerns about restrictions on comparative advertising. Associations often impose such restrictions on members, ostensibly as a way of promoting collegiality and respect among members. From the Bureau's perspective, however, limits on comparative advertising "obstruct competition between service providers and make it difficult for new entrants to advertise any distinctive features of the services they offer, protecting incumbents from the full forces of competition."

It is not clear if the Bureau's current examination of advertising restrictions for dentists and veterinarians was motivated by specific complaints or if it was simply a matter of being their "turn." It is also not clear why the practices of pharmacists are once again under Bureau scrutiny.

Answers to these questions will have to await the conclusion and publication of the Bureau's report.

V. COMPLIANCE

To underscore the importance of competition law compliance for trade associations, the Bureau released in March 2014 a pamphlet entitled "Trade Associations and the *Competition Act*" (ominously the pamphlet was published to coincide with the Bureau's first "Anti-Cartel Day").

Although quite brief (two pages), the pamphlet sets out some helpful basic "Dos and Don'ts" for trade associations. But associations should not be misled into believing that this pamphlet represents the alpha and omega as far as their compliance obligations are concerned. Indeed, the first "do" emphasized by the Bureau is that associations should establish an "effective" compliance program and "where practicable," appoint a "compliance officer" to implement and oversee this program.

Further details are set out in the Bureau's proposed draft revisions to its bulletin on "Corporate Compliance Programs," which was released for comment on September 18, 2014. The draft revised bulletin offers the Bureau's most current blueprint for competition compliance, including for trade associations. Intriguingly, and in contrast to the United States, the Bureau also expressly states in the draft that it intends to establish an "incentive program," which could result in reductions in fines for leniency applicants who can demonstrate that they had established a "credible and effective" competition compliance program, notwithstanding their involvement in illegal conduct.

Trade associations, of course, can differ widely in the resources available to them to implement competition compliance programs. It would be a mistake, however, to conclude that any such program must be of the "Cadillac" variety to qualify as "credible and effective." It is possible to craft suitable programs to suit any association's budget and level of resources. What is needed, above all, is the commitment to make competition compliance a priority. The Bureau's continuing focus on trade association conduct should provide all of the incentive that is required in that regard.