CANADA'S TREB DECISION ON ABUSE OF DOMINANCE: POINTS OF POSSIBLE DIVERGENCE

By Randall Hofley [1]

I. INTRODUCTION

"Abuse of dominance", or monopolization, law is generally engaged in Canada and elsewhere when an entity with market power undertakes conduct, unilaterally, that has the effect of lessening or preventing competition in a relevant market. Case law with respect to abuse of dominance in Canada has been limited and, as such, has looked to "abuse" law (and enforcement) in the U.S. and the European Union for insights, indeed guidance. The recent Canadian Competition Tribunal decision in *Commissioner of Competition v. Toronto Real Estate Board*,[2] no exception in this respect, provides a detailed outline of each element of Canadian abuse of dominance law and, while generally consistent with (the authors' understanding of) analogous U.S. and European Commission ("EC") law, some potential differences arise, most notably as regards "anticompetitive intent", the participation of the target in the relevant market and the role of intellectual property rights ("IPRs").

By way of introduction, the *TREB* decision concerned restrictions the Toronto Real Estate Board ("TREB") placed on the ability of "virtual realtors", called Virtual Office Websites

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[2] *The Commissioner of Competition v. The Toronto Real Estate Board* (April 27, 2016), CT-2011-003 online: Competition Tribunal http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20for%20Order%20and%20Order_385_38_4-27-2016_8854.pdf [*TREB*].

or VOWs, to access and use certain real estate ("MLS") data. In short, TREB imposed restrictions on its VOW members that it did not impose on its "bricks and mortar" members. Finding that TREB had market power and that TREB's restrictions were intended to exclude a (potential) competitor(s) from and had the effect of preventing competition for MLS-based residential real estate brokerage services in Toronto,[3] the Competition Tribunal ordered TREB to provide MLS data to all of its members on the same terms.[4]

II. ANTICOMPETITIVE INTENT

Consistent with the law in the U.S. and EC, the *TREB* panel confirmed that a subjective intention to restrict competition need not be shown for abuse of dominance to exist. Instead, the anticompetitive nature of conduct may be inferred using an objective standard, with evidence of subjective intention relevant to the Tribunal's consideration of the reason(s) for which certain acts were conducted.[5] Having said that, the *TREB* panel did hold that a party can be found to have engaged in "anti-competitive acts" if those acts are intended, subjectively or objectively, to have a predatory, exclusionary, or disciplinary effect on (potential) competitors.[6] Moreover, the Tribunal noted that evidence of subjective procompetitive intentions may provide a legitimate business justification for the conduct but only where such justification outweighs any anticompetitive effects that were either subjectively intended or reasonably foreseeable.[7]

This jurisprudence – particularly its emphasis on subjective intent – would seem to diverge somewhat from the prevailing U.S. monopolization law, which requires that the defendant must only be shown to have willfully acquired or maintained its monopoly by engaging in exclusionary conduct.[8] It would also seem to involve considerations (and evidence) beyond that prevailing in the European Union, wherein abuse of dominance is an objective concept,[9] and subjective intent, while relevant, is not sufficient in and of itself.[10]

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[3] I.e. amounted to an abuse of dominance.

[4] This decision has been appealed to Canada's Federal Court of Appeal.

[5] In *TREB*, the Competition Tribunal confirmed the requirement that the impugned conduct be intended to exclude, predate, or discipline a competitor or potential competitor, but noted that this intention could be objective rather than subjective and as such, the Commissioner of Competition does not need to prove a subjective intent to restrict competition in order to find an entity liable for abuse of dominance. *TREB* at paras 274 and 278. See also Brian A. Facey and Dany H. Assaf, "Monopolization and Abuse of Dominance in Canada, the US, and the EU: A Survey." *Antitrust Law Journal*, Vol. 70, No. 2 (2002), pp. 513-591 at p 544 [*Facey & Assaf*].

[6] *TREB* at para 275.

[7] *TREB* at para 285 (citing *Commissioner of Competition v. Canada Pipe Ltd,* 2006 FCA 233 at para 67).

[8] *United States v. Grinnell Corp*, 384 US 563, 570-71 (1966) [*Grinnell*]; *American Football League v. National Football League,* 205 F Supp 60, at p 79 (D Md 1962). See also Frank X. Schoen, "Exclusionary Conduct After *Trinko*," NYU Law Review, Vol. 80:1625, 1625-1664. [*Schoen*] (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws ...."); *Matushita*, 475 U.S. at 595-97,(ignores subjective intent and looks only at conduct); *United States v. Microsoft Corp.,* 253 F.3d 34, 59 (D.C. Cir. 2001) ("… intent…is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.").

[9] By which a dominant entity's recourse to methods different from those expected in the course of normal commercial competition hinders the maintenance or growth of competition: *Hoffmann-LaRoche*. T19791 3 C.M.L.R. 211 at p 541.

This potential divergence between the jurisdictions may, however, be of limited practical import, save perhaps as providing an additional test for the Commissioner of Competition to meet in Canada, because abuse of dominance can still only be found in Canada when the "anticompetitive act" has prevented or lessened or is likely to lessen or prevent competition in a relevant market, irrespective of the target's intent.

III. PARTICIPATION IN THE RELEVANT MARKET

In reliance on an appeal ruling of the Federal Court of Appeal, the *TREB* panel held that a party may abuse its dominant position even where it does not participate in the market affected, such as where the target controls a significant input (to competitors) in the affected market or makes rules that control the conduct of those competitors.[11]

This approach would seem to be consistent with EC abuse of dominance law, where an entity dominant in one market has been found liable if its conduct results in anticompetitive effects in another, for example downstream, market.[12] Indeed, the abuse of dominance enforcement guidelines also state that where a company "leverages" its market power from one market into another, Article 102 (abuse of dominance) is engaged.[13] Query, however, whether the *TREB* panel approach would be followed in the U.S. where the entity did not participate in the relevant market, or at least control an essential facility for that market. Said otherwise, if the target did not have price setting power in a market in which it did not participate, would liability under Section 2 of the Sherman Act be precluded?[14] In this regard, it is interesting to note that in *United States v. National Association of Realtors*,[15] a seemingly parallel enforcement action in the U.S. to *TREB* in Canada, the U.S. DOJ sued the National Association of Realtors ("NAR") for imposing restrictions on the ability of VOWs to use and supply MLS data to their customers under Section 1 of the Sherman Act relating to agreements in restraint of trade, not Section 2 relating to monopolization.[16] A further question arises as to whether the *TREB* decision could be explained as an application of the

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[10] I understand that, in the EC, intent has been considered relevant in certain types of abuse of dominance cases, notably regarding predatory pricing. (Case C-62/86 *AKZO Chemie BV v. EC Commission*, ECR I-3359, [72] (1991)) and vexatious litigation— (Case T-11/96 *ITT Promedia NV v. EC Commission*, ECR II-2937, [60]; [55] (1998)).

[11] *TREB* at para 179, citing *Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29, [*TREB FCA*] at para 13. One such example noted by the *TREB* panel was through setting product standards or making rules that insulate certain competitors from competition. *TREB* at para 181.

[12] Sweet & Maxwell, "Market where abuse occurs", *EC Competition Law Reporter,* 2012 [*ECCLR*]. In one such case, a decision by a manufacturer of a raw material used in the production of a drug by another firm to stop supplying the raw material was held to be an abuse of dominance despite the fact that the supplier did not have a dominant position in the market for the finished drug. *ECCLR* (citing *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp v. EC Commission (6 & 7/73)* [1974] E.C.R. 223).

[13] European Commission, "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses", December 2005, at para 17.

[14] See, for example, *Grinnell* at p 570-571 and *Verizon Communications Inc. v. Law Offices of Curtis V Trinko, LLP*, 540 US 398, 407 [*Trinko*].

[15] *US v. National Association of Realtors*, amended complaint at https://www.justice.gov/atr/case-document/file/505861/download [*NAR Complaint*]; final judgment at https://www.justice.gov/atr/case-document/final-judgment-142 [*NAR Judgment*].

[16] See, e.g. *NAR Complaint* paras 1-6; *NAR Judgment* pages 5-9. *Sherman Act*, 26 Stat 209, 15 USC s 1 [*Sherman Act*].

U.S. "essential facilities doctrine", which could lead to liability for conduct by an entity that does not participate in the relevant market;[17] although, the USSC in *Trinko* held that access to the essential facility must denied outright for the doctrine to apply, even assuming the Court were to recognize the doctrine.[18]

IV. IPRs

A unique feature of the *TREB* case involved TREB's assertion that it had copyright over the real estate data at issue, and that its restrictions were a mere exercise of copyright exempt from sanction and not subject to (what it claimed would amount to) a compulsory license.[19] The *TREB* panel concluded that TREB failed to establish any copyright in the relevant MLS database but that even if copyright existed, all of the impugned restrictions on the MLS data, which included an access restriction, constituted more than the mere exercise of any IPR because they "attache[d] anticompetitive conditions to the use of its intellectual property"[20] and thereby "…confer[ed] on TREB and its above-mentioned Members advantages beyond those derived from the Copyright Act."[21] This *obiter dicta* would seem to go beyond that in the U.S. and perhaps even the EC.

Under U.S. law, absent exceptional circumstances, a unilateral refusal to license generally will not be a basis for liability.[22] The high value placed on the right to refuse to license competitors and customers is consistent with the USSC jurisprudence on refusals to deal generally, although a refusal to license that terminates a voluntary and profitable course of dealing, forsaking short-term profits to achieve an anticompetitive end may result in antitrust liability.[23]

Under EC law, a refusal to license can constitute an abuse, but again this is an exceptional circumstance.[24] An EC court has held that a refusal to license an IP right is an abuse where the refusal is not objectively justified and the refusal: a) relates to a product or service indispensable to the exercise of a particular activity on a neighboring market; b) is of such a kind as to exclude any effective competition on that neighboring market; and c)

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[17] *NYU LAW Review* at pp 1638, 1641. See also *Facey & Assaf* at p 559 and *Schoen* at p 1641.
[18] *Trinko* at p 11.
[19] Canada's *Competition Act* includes an express exemption from the abuse of dominance provisions, for "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under" Canada's various intellectual property statutes (s. 79(5), *Competition Act*).
[20] *TREB* at paras 721, 754. The *TREB* panel also rejected the suggestion that any order it issued would involve the imposition of a compulsory license on the grounds that TREB makes "the components of the Disputed Data available to its Members in other ways" and "it is settled law that the Tribunal has the jurisdiction to order the supply of a proprietary product." *TREB* at paras 760-761.
[21] *TREB* at paras 757-758. It remains unclear whether an outright refusal of access would be exempt given the *TREB* panel's reference to two of the three restrictions as going beyond mere access while finding all three impugned restrictions contrary to the abuse of dominance provisions.
[22] http://globalcompetitionreview.com/know-how/topics/80/jurisdictions/23/united-states/.
[23] http://globalcompetitionreview.com/know-how/topics/80/jurisdictions/23/united-states/.
[24] https://www.slaughterandmay.com/media/64581/the-eu-competition-rules-on-intellectual-property-licensing.pdf at pp 17.

prevents the appearance of a new product for which there is potential consumer demand.[25] This standard, like the U.S. standard, may be more stringent than that outlined in *TREB*.

V. CONCLUSION

While Canadian, U.S. and EC "abuse of dominance" law would seem to be generally aligned, the recent *TREB* decision raises – at least in three areas – a potential source of divergence between the jurisdictions. While some of these differences may not be of practical import or simply reflect a unique statutory aspect of Canadian law, only further case law – ideally covering transnational practices - will confirm the (in)consistency of Canadian law with that of its major trading partners in this important area.

[25] https://www.slaughterandmay.com/media/64581/the-eu-competition-rules-on-intellectual-property-licensing.pdf at p 18.