

# Competition Tribunal Dismisses Abuse of Dominance Case Against The Toronto Real Estate Board

Kluwer Competition Law Blog

April 16, 2013

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada)

*Please refer to this post as: Mark Katz, 'Competition Tribunal Dismisses Abuse of Dominance Case Against The Toronto Real Estate Board', Kluwer Competition Law Blog, April 16 2013, <http://competitionlawblog.kluwercompetitionlaw.com/2013/04/16/competition-tribunal-dismisses-abuse-of-dominance-case-against-the-toronto-real-estate-board/>*

Here is an item on an important decision of Canada's Competition Tribunal written by my partners George Addy, Sandra Forbes, John Bodrug and Jim Dinning. It is especially relevant for trade associations - Mark On April 15, 2013, the Canadian Competition Tribunal released its decision dismissing the Commissioner of Competition's application against the Toronto Real Estate Board ("TREB"). The Commissioner had alleged that TREB had abused a dominant position in the market for residential real estate brokerage services by implementing rules that limit how its member brokers and agents can provide certain information to consumers over the Internet. Davies was counsel to an intervenor, The Canadian Real Estate Association, in the proceedings.

The case, which garnered attention for its potential impact on home buyers and their agents, was also relevant to the activities of trade associations and their members.

The Tribunal's decision disposed of the matter succinctly, holding that the abuse of dominance provisions of the Competition Act (the "Act") did not apply to the facts of the case. However, the Tribunal did not rule out that similar conduct may be subject to the newly enacted civil provision of the Act that allows the Commissioner to challenge certain agreements among competitors. (The Tribunal did not assess the likely merits of such a claim against TREB.)

## Background

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®, 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 Commissioner filed an application against TREB, arguing that it had abused a 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 Commissioner claimed, would improve productivity and lower costs to consumers.

Shortly after the application was filed, TREB amended its rules to allow for the provision of certain MLS® information to consumers over the Internet through VOWs. However, TREB still maintained restrictions on members making certain information available to consumers through a VOW, including certain data concerning previously sold properties and "pending sold" properties.

The Commissioner amended the application, arguing that the steps taken by TREB were insufficient to remedy the substantial lessening of competition caused by TREB's rules.

In response to the Commissioner's amended application, TREB argued, among other things, that since TREB does not compete in the market for residential real estate brokerage services it could not abuse a dominant position in that market.

## The Tribunal's Decision

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

- one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
- that person or persons have engaged in or are engaging in a practice of anti-competitive acts; and
- the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

The Tribunal found that, because TREB does not compete with its members (which was not disputed by the parties in the case), none of the above requirements could be met in the context of the Commissioner's allegations.

Notably, 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 anti-competitive 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. Further, since there was no anti-competitive act, the Tribunal held that the requirements of (c), above, also could not be met on the facts of the case.

Finally, since TREB does not compete in the market for residential real estate brokerage services, the Commissioner could not show that TREB controlled a relevant market as required by (a), above.

The Tribunal's decision did not address any other aspects of the case, including whether, if TREB did compete in the relevant market, its restrictions on the data permitted to be provided to consumers on a VOW would have resulted in a substantial lessening of competition.

The Tribunal did observe that, while the abuse of dominance provisions did not apply, it may be open to the Commissioner to seek an order in similar circumstances under s. 90.1 of the Act, which prohibits agreements among persons, two or more of whom are competitors, that have the effect of substantially lessening or preventing competition. (The Tribunal did not assess the likely merits of such a claim against TREB.) Thus, while trade associations may find some comfort in the Tribunal's holding that TREB could not have violated the abuse of dominance provisions of the Act since it does not compete with its members, they must still consider whether the Act's prohibition on agreements among competitors that substantially lessen or prevent competition could render certain behaviour subject to challenge.