



Competition in Residential Real Estate Brokerage Workshop Comments from the Competition Bureau of Canada

Introduction

Canada's Competition Bureau (the "Bureau") is pleased to submit comments in relation to the Competition in Residential Real Estate Brokerage Workshop put on by the United States Federal Trade Commission ("FTC") and Department of Justice ("DOJ"). The Bureau, headed by the Commissioner of Competition (the "Commissioner"), is an independent law enforcement agency responsible for the administration and enforcement of the Competition Act¹ (the "Act") and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

Real estate transactions are often the most important and largest purchase(s) of a consumers' lifetime. Antitrust can play a pivotal role in ensuring that home buyers and sellers have the ability to access a variety of innovative products and services at a competitive price. To this end, the Bureau has been involved in both enforcement and advocacy activities² related to the real estate market in Canada.

There are many similarities between Canada and the United States with respect to organized real estate. At the national level, the Canadian Real Estate Association ("CREA"), a trade association, owns the trademarks Multiple Listing Service® ("MLS®") and REALTOR®, and comprises over 100,000 real estate brokers and agents across 100 local real estate boards and associations across Canada.

This submission focusses on two noteworthy Bureau enforcement actions: a consent agreement reached with CREA³ regarding anti-competitive rules involving the MLS® system, and ongoing litigation against the Toronto Real Estate Board ("TREB") regarding rules imposed by TREB restricting its members' use of information online (*The Commissioner of Competition v The Toronto Real Estate Board*⁴, hereinafter the "TREB Decision").

The latter has many parallels to the case between the DOJ and the National Association of Realtors ("NAR") that was settled in 2008.⁵ In Canada, the TREB Decision presents notable implications

¹ R.S.C., c. C-34: <http://laws.justice.gc.ca/PDF/C-34.pdf>

² This submission focuses on the Bureau's recent enforcement activities in the residential real-estate sector. For an example of Bureau competition advocacy relating to the regulation of the real estate agent profession in Canada, see the Bureau's 2007 Report, *Self-Regulated Professions – Balancing Competition and Regulation*, chapter 7, "Real Estate Agents": <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/O2523.html>

³ The Commissioner of Competition and The Canadian Real Estate Association, Consent Agreement, CT-2010-02: http://www.ct-tc.gc.ca/CMFiles/CT-2010-002_Register%20Consent%20Agreement_75_38_10-25-2010_2647.pdf

⁴ *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7: http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20for%20Order%20and%20Order_385_66_4-27-2016_7296.pdf. As described below, the decision was upheld by the Federal Court of Appeal and TREB has sought leave to appeal from the Supreme Court of Canada.

⁵ U.S. v. National Association of Realtors, 2008, Civil Action No. 05 C 5140: <https://www.justice.gov/atr/case/us-v-national-association-realtors>



for current and future enforcement in the real estate market, as well as broader implications for the consideration of qualitative effects, particularly innovation, in assessing anti-competitive harm.

Consent Agreement with CREA

Background

In early 2010, the Commissioner brought an application to the Competition Tribunal (the “Tribunal”) alleging that CREA was abusing its dominant position in the market for residential real estate in Canada. In order to use the MLS® system to facilitate real estate transactions, agents must be a member of CREA and agree to comply with CREA’s rules. Some of these rules prevented real estate agents from offering more innovative services and pricing options to consumers and thus restricted the ability of consumers to choose the real estate services they want, forcing them to pay for services they did not need.

In particular, CREA's rules, prohibited agents from offering consumers the option to pay a flat fee for an agent to list a home on the MLS® system (known as a “mere posting”). Instead, all consumers looking to list a property on the MLS® system had to purchase a pre-determined set of additional services from a real estate agent, such as the presentation of offers and negotiation of a final deal.

Consent Agreement

In October of 2010, a consent agreement with CREA was reached that resolved the Commissioner's concerns.⁶ Under the consent agreement, which was registered with the Tribunal to remain in force for a 10-year period, CREA is required not to adopt, maintain, or enforce rules that deny real estate agents the ability to provide mere postings, or that discriminate against real estate agents who might offer mere postings. In addition, the consent agreement encompassed areas such as negotiations regarding the cooperating seller’s commission and where a seller’s information can be displayed.⁷

Conclusion

The execution of this consent agreement helps to ensure that Canadians have the ability to choose which services they want from a real estate agent when selling their home, and to pay only for those selected services. At the same time it ensures that real estate agents have the flexibility to provide innovative services and pricing options to customers.

⁶ The Commissioner of Competition and The Canadian Real Estate Association, Consent Agreement, CT-2010-02: http://www.ct-tc.gc.ca/CMFiles/CT-2010-002_Registered%20Consent%20Agreement_75_38_10-25-2010_2647.pdf

⁷ In 2014 CREA and the Commissioner returned to the Tribunal regarding the interpretation of the consent agreement; CREA had implemented rule changes that limited where a seller’s contact information can be displayed on a Realtor’s own website. The Tribunal ruled that the changes did not contravene clause 3 of the consent agreement. *The Commissioner of Competition v. The Canadian Real Estate Association*, Registry Document No.: 103: http://www.ct-tc.gc.ca/CMFiles/CT-2010-002_Reasons%20for%20Order%20and%20Order%20Regarding%20the%20Interpretation%20of%20the%20Consent%20Agreement_103_38_4-30-2015_2061.pdf



Litigation with TREB

Background

TREB, the respondent in the TREB Decision, is Canada's largest real estate board, with over 50,000 licensed real estate brokers and agents across the Greater Toronto Area ("GTA").

Real estate agents and brokers can become members of CREA either directly or through membership in their local real estate board, such as TREB. While joining a trade association is not mandatory in Canada, agents and brokers must become members of a local real estate board and CREA in order to access the MLS® system, a comprehensive database of current and historical listing information that is crucial in the provision of residential real estate brokerage services. Consequently, member real estate agents and brokers must adhere to both the rules of CREA, such as the REALTOR® Code, which outlines standards for professional conduct, as well as the rules of their respective local real estate boards. At the heart of the Commissioner's litigation was a series of rules enacted by TREB targeting real estate agents and brokers that wish to offer innovative online services to real estate customers.

Litigation

In April 2011⁸, the Commissioner applied to the Tribunal alleging that, owing to its control over the MLS® and related Virtual Office Website ("VOW") Policy, TREB had abused its dominant position.⁹ Three elements must be established to constitute a violation of section 79 of the Act, which is the abuse of dominance provision:

- one or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof;
- that person or those persons must have engaged in (within the previous three years) or be engaging in a practice of anti-competitive acts; and
- the practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market.

The first element, dominance, focuses on whether a person (or persons) possesses a substantial degree of market power in a relevant product and geographic market. The second element considers whether the dominant person (or persons) has engaged in conduct intended to have a predatory, exclusionary or disciplinary effect on a competitor. This analysis considers both subjective evidence of intent and the reasonably foreseeable consequences of a practice, as well as any business justifications. The final element involves an analysis of whether competition – on price, quality, innovation, or any other dimension of competition – would be substantially greater in a relevant market in the absence of the anti-competitive conduct.

⁸ The Tribunal dismissed the April 2011 application. In February 2014, the Federal Court of Appeal referred the Commissioner's application back to the Tribunal for reconsideration on the merits.

⁹ In contrast, The DOJ pled that the NRA's VOW Policy constituted "...a contract, combination, or conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1." *U.S. v. National Association of Realtors*, Civil Action No. 05 C 5140, Amended Complaint at para. 44



The Commissioner argued that, by controlling a key input for the supply of residential real estate services (the MLS®), TREB controls the market for MLS®-based residential real estate brokerage services. TREB implemented certain policies and rules that impacted its members' use of information for display on VOWs. Specifically, these restrictions prohibit VOWs from displaying information regarding: sold and 'pending sold' homes; offers to the cooperating broker; and withdrawn, expired, suspended, or terminated listings. The Commissioner asserted that, but for TREB's restrictions, its members could also use the real estate data to provide analysis and innovative tools for consumers. Consequently, the Commissioner argued that TREB's restrictions have had the effect of restricting the ability of certain members to use technology and online platforms to deliver more and higher quality services at lower cost to home buyers and sellers in the GTA.

2016 Decision

Substantial or Complete Control

Regarding TREB's control of the market, the Tribunal agreed with the Commissioner that the relevant product market was the supply of MLS®-based residential real estate brokerage services in the GTA. The Tribunal also agreed with the Commissioner on the assessment of TREB's control of the market (i.e., TREB's market power). The Tribunal held that the power to exclude falls squarely within the definition of market power to the extent that it "...comprises an ability to restrict the output of other actual or potential market participants, and thereby to profitably influence price..."¹⁰

By controlling access to the MLS® system, the Tribunal found that TREB was able to set and enforce rules, thereby insulating "...its Members from competition by excluding the innovative products of actual or potential competitors who threaten to disrupt the status quo."¹¹ The Tribunal also accepted the Commissioner's argument that brokers and agents cannot compete effectively in the market without access to the MLS® system. In reaching this conclusion, the Tribunal dismissed TREB's argument that the many brokers competing in the relevant market suggested that barriers to entry are low. Instead, the Tribunal emphasized that, even in a market with many competitors, a dominant entity can engage in conduct that results in a less competitive market than may otherwise exist.

Practice of Anti-Competitive Acts

The Commissioner argued that TREB had restricted the use and display of MLS® information online specifically to exclude VOW-based competitors in the GTA. The Tribunal agreed. It categorically rejected TREB's argument that its restrictions were primarily motivated by concerns regarding consumer privacy, particularly regarding sold information of properties. Instead, the Tribunal held that TREB's concerns about privacy "were an afterthought and continue to be a pretext for TREB's adoption and maintenance of the VOW restrictions."¹² The Tribunal held that TREB had resisted the emergence of VOW brokerages — not because of privacy concerns — but because of concerns that VOWs could lead to increased price and non-price competition and reduce the role of TREB's members in the real estate transaction.

¹⁰ *TREB 2016 CT* at para 176

¹¹ *TREB 2016 CT* at para 198

¹² *TREB 2016 CT* at para 390



In reaching this determination, the Tribunal considered the circumstances that led to the adoption of TREB's VOW Policy. It noted the strong and consistent concerns expressed by TREB members and other brokers regarding competition from VOWs and the absence of concerns regarding consumer privacy. The Tribunal could not reconcile TREB's alleged privacy concerns with the fact that 42,500 members have access to this information and provide it to consumers by fax or by email. On this point, the Tribunal agreed with the Commissioner that, if TREB were truly concerned about privacy, it would, at a minimum, ensure that information such as sold information is not distributed beyond its members, which it found is not the case.¹³

In addition to justifying its VOW Policy on privacy grounds, TREB also argued several "efficiency justifications" – including that the VOW Policy and Rules promote the liquidity of the MLS® system by maintaining incentives to participate for consumers and agents. The Tribunal found that "there is no persuasive evidence that any of [TREB's efficiency justifications] played a principal role in the development and implementation of TREB's VOW Policy and Rules, let alone the VOW Restrictions."¹⁴

Substantial Prevention of Competition

With respect to whether competition has been lessened or prevented substantially, the Tribunal noted five anti-competitive effects of TREB's VOW restrictions in their decision:

- **Increased barriers to entry and expansion:** There has been a significant adverse impact on entry into, and expansion within, the relevant market by web-based and other brokerages in the GTA.¹⁵
- **Increased costs imposed on VOWs:** TREB's VOW restrictions undermine the ability of brokerages operating full information VOWs to compete by discriminating against them, raising their costs, and reducing their chances of success.
- **Reduced range of brokerage services:** But for TREB's VOW restrictions, there would have been, and likely would be, a greater range of innovative and value-added tools, features, and other services.
- **Reduced quality of brokerage service offerings:** The quality of certain important service offerings in the market would likely be significantly greater but for TREB's VOW restrictions. For instance, market analysis could be based on more comprehensive information, adding value to both the home sellers and the home buyers.
- **Reduced Innovation:** But for TREB's VOW restrictions, there would have been, and likely would be, considerably more innovation in the relevant market, and brokerages operating full-information VOWs likely would have an important impact on how dynamic competition unfolds.

The Tribunal held that — in the aggregate — these five effects demonstrated that TREB's restrictions had substantially prevented competition in the GTA residential real estate market. The Tribunal noted that dynamic competition, including innovation, is the most important type of competition and consumers are deprived of the benefits of enhanced services when members are shielded from disruptive competition. The Tribunal concluded that "by preventing competition from determining how innovation should be introduced to the supply of residential real estate brokerage services in the GTA, TREB has substantially distorted the competitive market process and prevented innovative brokers [...] from considerably increasing the range of brokerage services, increasing the

¹³ *TREB 2016 CT* at para 391

¹⁴ *TREB 2016 CT* at para 421

¹⁵ As supported by the Commissioner's witnesses, TREB's VOW restrictions prevented TheRedPin, Sam & Andy, and Realosophy from expanding and Viewpoint from entering the relevant market.



quality of existing services, and considerably increasing the degree of innovation in the Relevant Market.”¹⁶ In reaching the above conclusion, the Tribunal also recognized the value of qualitative evidence in assessing anti-competitive harm.

Remedy

The specific terms of the Tribunal order were determined following further written submissions and a hearing on remedy in June 2016. Among other things, the Tribunal’s remedy¹⁷ required TREB to: provide certain data fields in VOW feeds; allow the data to be displayed on VOWs; allow the data to be displayed on any device; make information available in the VOW data feed at the same time it is made available through other means; and give notice to the Commissioner of any proposed changes to their VOW Policy and Rules.

Appeal

In May 2016, TREB filed a notice of appeal with the Federal Court of Appeal (“FCA”) and the Tribunal’s order was stayed pending the outcome. Following the hearing, the FCA dismissed TREB’s appeal and agreed with the Tribunal’s determinations in respect of several key areas.¹⁸ This included, but was not limited to, the adequacy of the Commissioner’s qualitative evidence on effects as well as the shortcomings of TREB’s privacy and copyright justifications.

The Tribunal’s order continues to be stayed pending TREB’s application for leave to appeal to the Supreme Court of Canada.

Conclusion

The TREB Decision highlights the importance of innovation and dynamic competition in assessing whether TREB’s anti-competitive practices in the GTA resulted in substantial harm to competition. While the Tribunal’s decision is significant for competition and innovation in the Greater Toronto real estate market, there may be broader implications for real estate boards and associations across Canada. The Tribunal’s determination on anti-competitive effects and the importance of qualitative evidence in assessing innovation as a component of effects also has significant implications for the Bureau’s enforcement action in other parts of the digital economy.

As the Bureau continues to promote competition and enforce the Act, it values the opportunity to partake in this FTC / DOJ initiative and welcomes the opportunity for further dialogue.

¹⁶ *TREB 2016 CT* at para 713

¹⁷ *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 8: http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Order%20Further%20to%20the%20Reasons%20Issued%20on%20April%2027,%202016_409_38_6-3-2016_9939.pdf

¹⁸ *The Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236. <https://www.ippractice.ca/blog/wp-content/uploads/2017/12/2017FCA236.pdf>