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Canadian Federal Court of Appeal Expands Scope of *Competition Act's* Abuse of Dominance Provisions

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On February 3, 2014, the Federal Court of Appeal overturned the Competition Tribunal's 2013 decision dismissing the Commissioner of Competition's abuse of dominance allegations against the Toronto Real Estate Board (TREB) and referred the case back to the Tribunal. In so doing, the Court held 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. While the long-term effects of the decision remain to be determined, trade associations and companies that may be considered to control a market in which they do not compete should carefully consider the impact of the decision on their policies and practices.

TREB is an association comprising most of the realtors in the Greater Toronto Area. The Commissioner challenged a TREB rule restricting its members from posting certain historical data on virtual office websites, alleging that the rule substantially lessens or prevents competition in the market for residential real estate brokerage services.

The Competition Tribunal dismissed the case on the grounds that the abuse of dominance provisions of the *Competition Act* did not apply to TREB in this context because TREB did not compete in the market that it was alleged to control — a requirement that the Tribunal stated was established in an earlier Federal Court of Appeal decision (*Canada Pipe*). In its February 3 decision, the Court of Appeal held that the Tribunal had misinterpreted the *Canada Pipe* decision and that the abuse of dominance provisions could potentially apply to a person that controls a market even if that person does not compete in that market.

It remains to be seen how the Tribunal will now decide the TREB case on the specific facts before it. Under the *Competition Act's* abuse of dominance provisions, the Tribunal may exercise its discretion to issue an order only where the Commissioner has established not just control of the relevant market but also that the respondent is engaging in or has engaged in a practice of anti-competitive acts and that those anti-competitive acts have resulted in or are likely to result in a substantial lessening or prevention of competition in a market. The Tribunal will need to determine whether all of these requisite elements have been met.

More broadly, it also remains to be seen how the abuse of dominance provisions might be applied in practice to a person that does not compete in the relevant market. The TREB case involves a trade association that the Commissioner alleges controls a market in which it does not actually compete. However, it is not clear what other types of firms or entities the Commissioner or the Tribunal might consider to control a market in which they do not compete. Until more clarity is obtained from the Commissioner, the Tribunal or the courts, large customers or suppliers, for example, that might be considered to possess significant market power in an upstream or downstream market may be well advised to consider the potential application of the abuse of dominance provisions to any of their policies or practices that are likely to have the effect of excluding competitors from such a market.

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