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## Supreme Court of Canada Denies Leave to Appeal in Abuse of Dominance Case Under the *Competition Act*

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On July 24, 2014, the Supreme Court of Canada refused to grant leave to appeal the Federal Court of Appeal's February 2014 decision regarding the Commissioner of Competition's abuse of dominance allegations against the Toronto Real Estate Board (TREB).

The [February 2014 decision of the Federal Court of Appeal](#) overturned the original decision of the Competition Tribunal (dismissing the Commissioner's allegations against TREB) and referred the case back for a re-hearing before the Tribunal.

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 recent guidance on the type of conduct that may be pursued under the *Competition Act's* abuse of dominance provisions.

The Federal Court of Appeal concluded that the abuse of dominance provisions can apply to conduct that impacts a market in which the dominant entity does not itself compete. Applying this approach to the specific fact scenario in the TREB case, the Court of Appeal determined that the abuse of dominance provisions could apply to conduct by TREB impacting the market for residential real estate brokerage services, a market in which TREB (a trade association of realtors) does not itself compete.

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. Pending further guidance, a company that may be considered dominant (under the Commissioner's guidelines, dominance generally requires a market share of at least 35%) may be wise to consider whether proposed conduct could give rise to anti-competitive effects in any related market (for instance, upstream or downstream markets).

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.<sup>1</sup>

<sup>1</sup>*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>

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