

COMPETITION LAW & TRADE ASSOCIATIONS

COMPETITION LAW DEVELOPMENTS FOR TRADE & PROFESSIONAL ASSOCIATIONS
BY STEVE SZENTESI OF HAKEMI & COMPANY LAW CORPORATION

WINTER 2012

IN THIS ISSUE

OVERVIEW	1
PRACTICAL STEPS TO REDUCE COMPETITION LAW RISK	1
RECENT CASES – THE <i>COMMISSIONER V. TREB</i>	2
RECENT REMARKS BY THE COMMISSIONER.....	2
NEW ASSOCIATION PUBLICATIONS	4

OVERVIEW

Most association activities are unlikely to raise any competition law issues. Associations are formed for many legitimate reasons, which may include updating members on industry developments, publishing trade publications, industry-wide advertising, market and product research, lobbying and advocacy, and public relations regarding industry issues and concerns.

The federal Competition Bureau (the “Bureau”) has also recognized that associations can, and frequently do, perform many beneficial and perfectly legal functions for their members.

However, because associations commonly involve interaction between direct competitors, serious competition law concerns can sometimes arise when association activities are not properly monitored and addressed.

The Bureau has also been more aggressive in enforcement and recent changes make it easier for private plaintiffs to commence civil actions and sue in court.

In this issue of *Competition Law & Trade Associations* we discuss recent competition law and enforcement developments that highlight the importance of basic competition law awareness and compliance for associations

PRACTICAL STEPS TO REDUCE COMPETITION LAW RISK

Most association activities are legitimate and unlikely to raise competition law concerns. However, given that many, if not most, association activities involve the direct interaction of competitors, it is prudent for association executives, staff and their advisors to take some practical steps to reduce potential competition law risk. These include:

Adopting and maintaining an effective compliance program. According to the Bureau, an effective compliance program “plays a crucial role for trade associations.” Some of the benefits of a compliance program include reducing the risk of violating the *Competition Act*, reducing the costs of investigations and proceedings and potentially mitigating penalties in the event of enforcement proceedings. Options for associations range from formal compliance programs encompassing all association activities to compliance guidelines

for key activities (e.g., meetings, information exchanges and specific initiatives such as benchmarking, research and development initiatives and joint negotiations).

Adopting agendas and minutes for all association meetings. Associations should prepare written agendas and keep minutes for all meetings. Discussions at meetings should also stay within the boundaries of legitimate agenda items and discussions (or exchanges) of competitively sensitive information should be avoided (e.g., discussions of pricing, costs, individual customers, markets, business or strategic plans and related “competitively sensitive” topics).

Conduct of meeting guidelines. One of the most practical steps an association can take to reduce competition law risk is to adopt and strictly follow conduct of meeting guidelines.

HAKEMI & COMPANY LAW CORPORATION

1500 – 885 West Georgia Street, Vancouver, BC, Canada V6C 3E8 • Main: (604) 601-2020 • Fax: (604) 648-9170
Hakemi.com • Competitionlawcanada.com • Canadianadvertisinglaw.com • Litigationbrief.ca

Such guidelines commonly include restrictions on the exchange of competitively sensitive information (of the types discussed above) and on discussions of topics that may lead to conspiracy risk under section 45 of the *Competition Act* (e.g., discussions relating to pricing, markets, concerted refusals to deal or limiting production or supply of goods or services). They also commonly include steps to take if inappropriate discussions or activities arise during association meetings or events.

Other practical steps associations can take include:

- Performing periodic compliance audits.
- Conducting competition law compliance orientations for new association executives and staff.
- Obtaining legal advice for key association initiatives.
- Avoiding informal or “off the record” meetings.
- Reviewing all association activities through a “competition lens”.

For more information about practical compliance visit the Associations page of our website: IPvancouverblog.com/associations

RECENT CASES – *THE COMMISSIONER v. TREB*

One of the most interesting ongoing competition cases, and one involving a trade association and the largest real estate board in Canada, is *The Commissioner v. TREB*. About a year after settling its case against The Canadian Real Estate Association (“CREA”), the Bureau brought a second abuse of dominance application challenging rules enacted by The Toronto Real Estate Board (“TREB”).

The Bureau is alleging that certain rules enacted by TREB governing the use of its MLS® data restrict members’ ability to offer services via the Internet, constituting an abuse of dominant position in the supply of residential real estate services in Greater Toronto.

Like its earlier challenge against CREA, the Bureau’s application focuses on TREB’s ability to exclude and discipline non-compliant members by foreclosing access to its Multiple Listing Service (“MLS®”) system.

In particular, the Bureau’s position is that TREB has used this ability to restrict and prevent brokers from offering innovative services, such as operating “virtual office websites”, which would allow them to perform their own property searches on a broker’s password

protected website (without the initial assistance of a broker or real estate salesperson).

According to the Bureau, TREB’s restrictions on the use of its MLS® data has prevented the development of more efficient business models by forcing existing members to use a traditional “bricks and mortar” brokerage model and preventing potential members from joining TREB to launch new innovative models.

TREB has defended its rules on several grounds, including contending that the MLS® terms of use for members are a legitimate exercise of its intellectual property rights and do not prevent or lessen competition substantially. Also, according to TREB, because as a trade association it does not itself provide residential real estate services it cannot be dominant in the alleged relevant market (residential real estate services in Greater Toronto).

At the time of writing, the TREB case was still ongoing and may, if it indeed proceeds to the Competition Tribunal in the Spring, test whether (and to what extent) an association may use its control over a potentially “essential facility” to regulate competition.

RECENT REMARKS BY THE COMMISSIONER

The Commissioner of Competition (the “**Commissioner**”), Melanie Aitken, addressed current enforcement priorities in two recent and engaging talks in Vancouver hosted by the National Centre for Business Law. Some highlights include:

GENERAL ENFORCEMENT APPROACH

• The Commissioner’s general preference is for “consensual resolution” to competition law issues.

• The Bureau would not, however, hesitate to seek remedies before the Competition Tribunal (the “**Tribunal**”) or the courts where parties were unwilling to discuss reasonable settlement options or no viable remedy was available.

• The Commissioner views the Bureau as “first and foremost” an enforcement agency and indicated the federal Government’s position was that, as the new Commissioner, she should “get in

COMPETITION LAW & TRADE ASSOCIATIONS

1500 – 885 West Georgia Street, Vancouver, BC, Canada V6C 3E8 • Main: (604) 601-2020 • Fax: (604) 648-9170
Hakemi.com • Competitionlawcanada.com • Canadianadvertisinglaw.com • Litigationbrief.ca

there and enforce the law”. In this regard, she said that, unlike some previous Commissioners, her priority was enforcement not advocacy.

- She also reiterated a common theme from other recent remarks – namely the Bureau’s interest in bringing new cases to court to clarify Canada’s competition laws, including the new rules resulting from the significant amendments to the *Competition Act* in 2009 (e.g., the new criminal conspiracy offences).

CIVIL MATTERS

- With respect to civil matters, the Commissioner spoke about some recent cases, including the Bureau’s challenges against CREA and TREB and the ongoing Visa/MasterCard merchant fees price maintenance case.

- With respect to real estate, the Commissioner said the Bureau was “very pleased” with the CREA settlement and that its concerns had been “fully addressed” in the consent agreement negotiated with CREA in late 2010.

- The Commissioner also said that the Bureau had been seeing “innovation in the real estate market” following the CREA settlement. She also described some of the new business models the Bureau was seeing in the real estate services market, including “*a la carte*” (i.e., unbundled) real estate services.

CRIMINAL OFFENCES

In general, the Commissioner indicated that following the 2009 amendments to the *Competition Act*, it has proven “much tougher to effect change” relating to the Act’s criminal offences (e.g., conspiracy offences, including price-fixing agreements) mainly based on the higher procedural protections required in criminal matters.

- In particular, she said that while it takes time for criminal cases to “come through and mature”, the Bureau was preparing to announce several new criminal cartel cases under the amended section 45.

- The Commissioner also said that the Bureau had a “real commitment to change the game” with respect to criminal competition law matters and would “be more appropriately aggressive” in bringing new criminal cases and testing the new rules.

- She also noted that the “amendments came not a moment too soon” as Canada was at risk of “falling off of the serious

cartel enforcement jurisdiction radar” based on the difficult legal test under the former conspiracy section.

MISLEADING ADVERTISING

- With respect to misleading advertising and deceptive marketing, the Commissioner confirmed this remains an enforcement priority for the Bureau – or, as she put it, “an area of concern.”

- The Commissioner did indicate, however, that the Bureau did not have the resources to pursue all misleading advertising matters and, with respect to fraudulent marketing, enforcement was akin to the “whack a mole” game (i.e., once a deceptive marketer was hit in one jurisdiction, they popped up in another).

ABUSE OF DOMINANCE

- With respect to abuse of dominance (section 79 of the *Competition Act*), the Commissioner indicated that based on further changes the Bureau has made to the existing *Abuse of Dominance Enforcement Guidelines*, it may issue another revised draft for public consultations.

ADVISORY OPINIONS

- Regarding the Bureau’s practice of issuing binding advisory opinions, the Commissioner discussed the fact that the Bureau’s new narrower policy, under which it now only states the provision under which conduct falls in its view (and in respect of criminal matters, whether it has any present intention to commence proceedings), is intended to more accurately reflect its powers to issue such opinions.

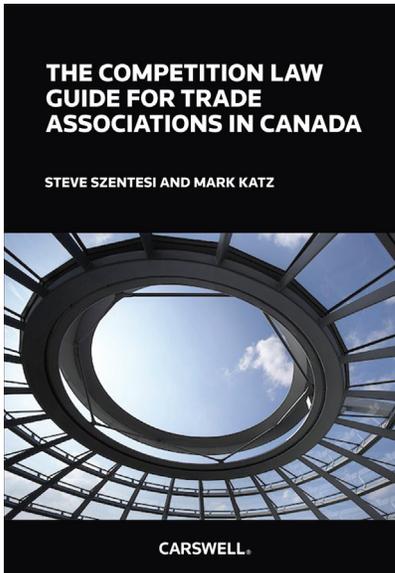
SELF-REGULATED PROFESSIONS

- Finally, the Commissioner answered several questions regarding the Bureau’s work in the self-regulated professions area (for example, its 2007 Self-Regulated Professions study that examined competition in a number of Canadian professions: accountants, lawyers, optometrists, pharmacists and real estate agents).

- The Commissioner indicated that the Bureau’s advocacy work in this area was finished for the moment, as this had been largely an initiative of the former Commissioner, Sheridan Scott.

COMPETITION LAW & TRADE ASSOCIATIONS

NEW PUBLICATIONS



The Competition Law Guide for Trade Associations in Canada

We are pleased to announce the publication by Carswell of *The Competition Law Guide for Trade Associations in Canada*. The *Guide*, the most detailed book of its kind in Canada, is a practical and concise summary of Canadian competition law as it applies to trade, professional and other associations. Included are overviews of the major areas of Canadian competition law that apply to associations, including the conspiracy, bid-rigging, abuse of dominance and misleading advertising provisions of the *Competition Act*.

The *Guide* also includes discussions of some of the specific association activities that can raise competition law concerns including membership criteria and discipline, codes of conduct and standard setting, meetings and information exchanges and joint association activities (e.g., joint negotiation and marketing, joint purchasing activities and lobbying). A compendium of “best practices” is also included with sample guidelines for the conduct of association meetings, document creation and responding to government investigations (search and seizures).

For more information see: Carswell.com/whatsnew/newlypublished

ABOUT US

Hakemi & Company Law Corporation is a Vancouver-based law firm with a focus on civil litigation and regulatory proceedings, particularly in the areas of securities and competition/antitrust law.

Our clients contact us when they need to pursue or defend a claim or address regulatory issues; or they seek our advice on how to comply with their legal obligations.

They want objective, experienced and candid advice on their options. They also want effective and efficient representation in any proceedings. Our services include:

ASSOCIATIONS

We offer a full range of competition law and compliance services for associations including:

- Competition law compliance programs
- Competition law compliance seminars and talks

- Audits and compliance reviews
- Advice on the application of the *Competition Act*
- Vetting trade association meetings and events
- Reviewing association rules, bylaws and codes

COMPETITION & ADVERTISING LAW

We provide federal competition law services to clients across Canada and internationally including:

- Advertising law and contests
- The new anti-spam legislation (Bill C-28)
- Competition Bureau investigations
- Competition law compliance programs
- Competition litigation and complaints
- Competition policy, courses and seminars
- Conspiracy law advice
- Merger and *Investment Canada Act* advice

CONTACT

For more about our firm and practices please contact



Steve Szentesi
604.601.2047
sszentesi@hakemi.com



Tom Hakemi
604.601.2021
thakemi@hakemi.com

HAKEMI & COMPANY LAW CORPORATION

1500 – 885 West Georgia St,
Vancouver, BC, CAN V6C 3E8
Main: (604) 601-2020
Fax: (604) 648-9170

Hakemi.com
Competitionlawcanada.com
Canadianadvertisinglaw.com
Litigationbrief.ca

To receive this newsletter electronically or unsubscribe e-mail: lsiemens@hakemi.com