CANADIAN Lawyer

Competition Bureau targets trade associations

Recent decisions provide ammunition for bureau's stated goal of scrutinizing associations for anti-competitive practices.

By Michael McKiernan

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Trade associations can look forward to more attention from the Competition Bureau following two major victories for the regulator this spring, according to a Toronto competition lawyer.

In May, the Canadian Wireless Telecommunications Association settled with the bureau over its role in allegedly misleading premium text message advertising, bringing an end to a proceeding that saw the CWTA's three largest members agree to pay more than $25 million in refunds to customers and donations to consumer groups.

Meanwhile, in April, the bureau also finally prevailed over the Toronto Real Estate Board at the Competition Tribunal in its long-standing dispute over the board's restriction on members' use of data from its Multiple Listing Service.

"I think the message is that trade associations really are part of the bureau's enforcement mandate," says Steve Szentesi, a Toronto lawyer and former in-house competition counsel for the Canadian Real Estate Association.

"The focus on trade and professional associations has really increased in the last three to five years. Even when they pursue individual companies, the bureau seems to want to understand if the association had a role, and then bring them into the litigation. I think it's a great thing, because there are some uncertainties in competition law regarding how it applies to associations," Szentesi adds.

Trade associations can't say they weren't warned about the extra scrutiny: Commissioner of Competition John Pecman has worked in references to them in a large chunk of his public remarks since taking over from Melanie Aitken in late 2012. During one of his very first speeches as interim commissioner, he took the opportunity to damn them fulsomely with faint praise:

"The bureau does not believe that trade associations are inherently bad," he said in the October 2012 address at the Toronto offices of Blake Cassels and Graydon LLP.

But, Pecman went on, "It is also clear to us that there are practices they engage in which raise significant risks."

Still, the TREB and CWTA cases marked a departure from the bureau's traditional concerns about trade associations, according to Lawson Hunter, a former civil servant who led the federal government's competition policy and enforcement in the 1970s. Historically, he says, trade associations were viewed as the potential "hub of a hub-and-spoke conspiracy;" providing the forum for competitors to meet and forge relationships that could easily result in anti-competitive behaviour.

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"They were the places where competitors could sit down and agree on price, or on market allocation, or whatever else. If you look at a lot of the cases brought under the old Combines Investigation Act, most of them came out of activities at trade associations," says Hunter, who is now counsel to the Ottawa office of Stikeman Elliott LLP.

But that wasn't the scenario in either the TREB or CWTA cases, according to James Musgrove, the co-chair of the competition and antitrust practice group at McMillan LLP in Toronto.

"It was the activities of the associations themselves that were challenged, not just their members," Musgrove says. "The bureau is saying that if it sees something that it thinks has crossed the line, it is prepared to take action. Just because it happens to involve an association doesn't insulate you from enforcement."

The bureau kicked off its premium text messaging investigation in 2012 after complaints from cellphone customers that they had been charged by third parties for services, including ringtones, horoscopes, and trivia questions, without ever intending or agreeing to purchase them.

Civil legal proceedings followed later that year against the CWTA and its three largest members, telecommunications giants Bell Canada, Rogers Communications Inc., and Telus Corp., accusing them of misleading consumers into believing the content was free, and that measures were in place to prevent unauthorized charges. Although the CWTA was not involved in the actual billing of consumers, it established and managed the framework for premium text message services through its Common Short Code Council.

None ultimately admitted wrongdoing, but Rogers was the first to settle last year, agreeing to pay back more than $5 million to customers, followed by Telus, which reached an agreement to refund $7.3 million in December. The biggest settlement was saved for last when Bell agreed to reimburse its customers up to $11.8 million in May this year. The CWTA settled at the same time, agreeing to develop a public awareness campaign around the issue, and committing to update its corporate compliance program with a particular focus on practices relating to billing customers on behalf of third parties.

The bureau's case against TREB dates back even further, with proceedings launched at the Competition Tribunal in 2011 claiming the group's restrictive rules on the use of MLS listings and related data violated the abuse of dominance provisions in s. 79 of the Competition Act by suppressing innovation in the sector. Online brokers, who wanted to provide consumers with access to information about older listings and previous sale prices via virtual office web sites, were particularly hard-hit by the rules, according to the bureau.

However, the regulator needed some help from the Federal Court of Appeal along the way, since the tribunal originally dismissed its case against TREB in 2013 for failing to comply with the rule in *Canada (Commissioner of Competition) v Canada Pipe Co.*, a 2006 case in which the appeal court concluded a dominant firm must be a competitor of the firms harmed by its anti-competitive behaviour in order to violate s. 79.

In 2014, the court of appeal sent the TREB case back to the tribunal for reconsideration after concluding that non-competitors in particular markets, such as trade associations, can still be subject to abuse of dominance proceedings. The decision also provided a measure of personal vindication for Pecman, who spearheaded the bureau's unsuccessful case against Canada Pipe back in 2006.

In April, the Competition Tribunal finally sided with the bureau, finding that TREB's control over the MLS service gave it power over the market, and that its VOW restrictions had substantially prevented competition, creating a "considerable adverse impact on innovation, quality and the range of residential estate brokerage services" available in the Greater Toronto Area.

The tribunal ordered TREB to lift the restrictions within 60 days, and to pay the competition commissioner nearly $2 million in costs, although the decision is currently under appeal to the Federal Court of Appeal.

Micah Wood, a partner in Blakes' competition and antitrust practice group, says the TREB case in particular is "the most important case for trade associations in a long time."

"It's going to add an extra layer when it comes to assessing risks," he says. "What it really re-emphasizes is the importance of trade associations and other collaborative relationships being implemented properly. You have to make sure there are guidelines in place so that parties are not seen to be using them for anti-competitive purposes."

Thankfully for those running trade associations, Pecman and the Competition Bureau have not devoted their efforts exclusively to waving the enforcement stick at them, according to Szentesi. He says the compliance carrot also makes frequent appearances in bureau materials, in the form of association-specific advice and model guidelines.

Mark Katz, a partner at Davies Ward Phillips and Vineberg LLP, and co-author of the *Competition Law Guide for Trade Associations in Canada*, says the bureau's list of "Dos and Don'ts" for minimizing competition law risks is a particularly useful resource for trade associations. They include:

Do: Establish an effective compliance program, and appoint a compliance officer;

Do: Appoint a third party to collect competitively sensitive information, and share it only in aggregated form to avoid attribution to any competitor;

Do: Make sure association meeting agendas, and minutes accurately reflect attendance and discussions;

Don't: Allow private meetings between competitors under the pretext of association business;

Don't: Establish arbitrary membership criteria that effectively exclude certain competitors;

Don't: Engage in communications about competitively sensitive information during association meetings or social events.

Looking to the future, Katz says codes of ethics could provide the next emerging threat for trade associations, noting that the Competition Bureau's U.S. counterpart, the Federal Trade Commission, has cracked down on the practice in recent years. **CL**

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