

## Heightened Enforcement Risks for Trade and Professional Associations in Canada

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Trade association conduct has long been a concern for competition authorities in Canada. Indeed, one of the incentives for enacting Canada's first competition legislation in 1889 was to address the conduct of trade associations and other anti-competitive "combinations". As one observer commented at the time "there are few branches of trade in this or any country which are not represented by associations which seek to prevent unprofitable competition".<sup>1</sup>

The same concerns remain relevant today. For example, two of the Competition Bureau's current enforcement proceedings are focussed on trade association conduct:

- **The TREB Case:** In May 2011, Canada's Competition Bureau (the "Bureau") brought an application alleging that the Toronto Real Estate Board ("TREB"), Canada's largest real estate board, had engaged in anti-competitive conduct under the Act's abuse of dominance provisions.<sup>2</sup> The Bureau claimed that certain rules enacted by TREB are anti-competitive because they prevent realtors from offering various services over the Internet, such as "virtual office websites" or VOWs. According to the Bureau, these restrictions have impeded the development of more innovative business models for realtors and more cost-effective services for customers. The Bureau's application was heard by the Competition Tribunal in September/October of 2012 and a decision is now pending.
- **The CWTA Case:** In September 2012, the Bureau commenced an action in the Ontario Superior Court of Justice alleging that certain Canadian telecommunications companies had made or permitted other third parties to make false or misleading representations to the Canadian public about the charges associated with third party "premium" text messaging programs and applications.<sup>3</sup> The Bureau also named the Canadian Wireless Telecommunications Association ("CWTA"), the industry group representing cellular, fixed wireless and mobile satellite carriers, as a defendant in this action (the three telecommunications company defendants are members of the CWTA). The Bureau's allegations are that the CWTA (i) facilitated the misleading representations made by the third party text services providers and permitted by the telecommunications company defendants, and (ii) made misleading representations of its own. The action is still in its preliminary stages.

Moreover, in remarks delivered on October 30, 2012, John Pecman, Canada's new Interim Commissioner of Competition, went out of his way to highlight the current enforcement risks

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<sup>1</sup> *Journal of Commerce*, July 15, 1887, quoted in Michael Bliss, "The Yolk of the Trusts: A Comparison of Canada's Competitive Environment in 1889 and 1989", in R.S. Khemani and W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (1991).

<sup>2</sup> *Commissioner of Competition v. Toronto Real Estate Board* (CT-2-11-003) (Comp. Trib.), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03379.html>.

<sup>3</sup> *Commissioner of Competition v. Rogers Communications Inc., Bell Canada, Telus Corporation, and the Canadian Wireless Telecommunications Association*, Ontario Superior Court of Justice, Court File No. 12-55497, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03498.html>.

that trade associations face under the *Competition Act* (the "Act").<sup>4</sup> Mr. Pecman's speech was intended to emphasize the importance of competition compliance generally for Canadian businesses. But he also took the opportunity to single out trade associations for special attention, commenting that "[w]hile the Competition Bureau does not believe that trade associations are inherently bad, it is also clear to us that there are practices they engage in which raise significant risks. Indeed, meetings and relationships formed between competitors through trade associations provide the forum and the temptation to engage in anti-competitive activity".

Mr. Pecman identified three types of association conduct that are particularly apt to attract Competition Bureau scrutiny:

- restricting the types of services members can offer;
- using mechanisms such as fee schedules or standard setting to limit competition between members or to make entry more difficult; and
- engaging in conduct that reduces the incentives to compete vigorously, such as creating transparency between members through the vehicle of information exchanges.

These areas of concern are not new. For example, the core dispute in the *TREB* proceeding referred to above is over the effect on competition of the association's restrictions on members' service offerings. The Bureau also published a study in 2007 on various self-regulated professions that highlighted the potential competition law issues with standard setting and fee schedules.<sup>5</sup> Finally, in its *Competitor Collaboration Guidelines* of 2009, the Bureau focussed on how information exchanges between competitors can be used for anticompetitive purposes, such as helping cartel participants monitor one another's prices to ensure adherence with the cartel agreement.<sup>6</sup>

That said, what *is* significant is that Mr. Pecman took the occasion of his first speech as the new Interim Commissioner to emphasize that trade associations will be an enforcement priority for the Bureau under his watch.

Mr. Pecman continued with a similar theme in subsequent remarks delivered on December 5, 2012.<sup>7</sup> On this occasion, he commented that the Bureau is looking at expanding its efforts to increase competition in regulated sectors in Canada. This was a priority under former Commissioner Sheridan Scott, who, among other things, published the 2007 study on professions referred to above, and also invested considerable energies in opening up competition in the

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<sup>4</sup> Competition Bureau, "Remarks by John Pecman, Interim Commissioner of Competition" (October 30, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02834.html>.

<sup>5</sup> Competition Bureau, "Self-Regulated Professions – Balancing Competition and Regulation" (December 2007), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/\\$FILE/Professions%20study%20final%20E.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf).

<sup>6</sup> Competition Bureau, "Competitor Collaboration Guidelines" (December 23, 2009), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf).

<sup>7</sup> Competition Bureau, "Remarks by John Pecman, Interim Commissioner of Competition" (December 5, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03514.html>.

dental industry. However, these types of advocacy efforts in the regulated sector were shelved under Ms Scott's successor as Commissioner, Melanie Aitken, who focussed much more on litigation rather than advocacy. Mr. Pecman's comments would seem to presage a return to former priorities and thus renewed competition law attention on the practices of professional associations and bodies.<sup>8</sup>

Based on these recent comments, it seems that trade and professional associations should brace themselves for a heightened level of scrutiny under the new Interim Commissioner's administration. What makes this even more sobering is that the penalties for violating the Act have been increased and broadened in recent years. Since 2010, for example, parties convicted of cartel offences in Canada can face fines of up to CDN \$25 million and prison sentences of up to 14 years.<sup>9</sup> Moreover, by virtue of new legislation that came into effect in November of this year, judges will no longer be able to sentence persons convicted of cartel offences to "community service" rather than actual time served in prison.<sup>10</sup> To date, sentences for criminal violations of the Act have typically involved "community service" rather than prison time, so this represents a significant escalation in the type of penalties offenders may face.

The penalties for contravening the Act's "civil reviewable" practices provisions also have been made more robust recently. For example, parties found to have contravened the Act's abuse of dominance provisions (the ones at issue in the *TREB* case referred to above) now can be subject to "administrative monetary penalties" ("AMPs") of up to CDN \$10 million (CDN \$15 million for repeat infractions).<sup>11</sup> Similarly, corporations found to have contravened the Act's civil misleading advertising provisions (the ones at issue in the *CWTA* case) also face potential AMPs of up to CDN \$10 million (CDN \$15 million for repeat infractions) as well as orders to provide restitution to injured consumers.<sup>12</sup>

All of this serves to reinforce Mr. Pecman's remarks of October 30, 2012, emphasizing the need for compliance education in respect of trade association conduct in Canada. Companies whose employees participate in trade associations in Canada should ensure that they have a firm handle on what these activities entail and what steps are being taken to avoid potentially anti-competitive conduct. As an example, companies should make sure that their legal departments are advised of all trade association memberships; agendas of proposed meetings are circulated and reviewed in advance; and company personnel are trained to identify potential issues and know how to conduct themselves if problems arise. Companies involved in trade association

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<sup>8</sup> Mr. Pecman's comments may have been influenced by the recommendations of a leading Canadian "think tank" that the Bureau "should actively engage in competition matters in regulated sectors of the economy, where anti-competitive conduct may be protected by government legislation or authority". C.D. Howe Institute, Report of the Competition Policy Council, "Closing the Back Door Route to Cartels: The Need to Clarify the Regulated Conduct Doctrine", November 20, 2012, available at [http://cdhowe.org/pdf/Competition\\_Policy\\_Council\\_Nov\\_2012\\_Report.pdf](http://cdhowe.org/pdf/Competition_Policy_Council_Nov_2012_Report.pdf).

<sup>9</sup> See section 45 of the Act.

<sup>10</sup> *Safe Streets and Communities Act*, S.C. 2012, c.1.

<sup>11</sup> See section 79 of the Act.

<sup>12</sup> See section 74.1(1) of the Act. In *CWTA*, the Bureau is seeking CDN\$10 million in AMPs from the telecom company defendants and CDN \$1 million in AMPs from the association.

activity also should insist that the associations themselves have compliance programs in place that involve the training of association staff and member participants as appropriate.