WeirFoulds LLP

CLIENT UPDATE NEWSLETTER

FALL 2014

Inside this Issue:

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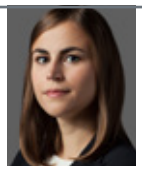
Welcome

Welcome to the Fall 2014 edition of our Client Update Newsletter. Here we provide you with articles on recent developments in business law from a WeirFoulds perspective, and always with your interests in mind. Whether you are a new or existing client, we're certain you'll find information of interest and value.

We hope you enjoy these insights and invite you to share the newsletter with your clients, colleagues and friends (provided you have their consent—see p. 2).



Competition Puts Trade Associations under the Microscope

Bronwyn Roe » *full bio*

The Supreme Court of Canada recently denied leave to appeal the Federal Court of Appeal's ("FCA") decision in *Commissioner of Competition v. Toronto Real Estate Board*. The FCA's decision marks a significant clarification of the *Competition Act*'s abuse of dominance provisions.

The decision confirms that a person can control a market in which it does not itself compete. This interpretation of the abuse of dominance provisions means that trade associations, as well as large customers or suppliers with significant market power, must ensure their practices do not exclude competitors or otherwise hinder competition.

The Commissioner's Allegations

The Commissioner of Competition ("Commissioner") applied pursuant to section 79 of the *Competition Act*—the abuse of dominant position provision—for orders prohibiting the Toronto Real Estate Board (the "Board") from engaging in what the Commissioner alleged were anti-competitive acts.

The Board, a trade association with realtor members concentrated in the Greater Toronto Area, had adopted a rule prohibiting members from posting historic residential property listing data from the Board's Multiple Listing Service online. The Commissioner alleged that the restrictions on Board members' permitted use of Multiple Listing Service listings and related data on the internet prevented or lessened competition substantially in the market for the supply of residential real estate brokerage services to vendors and purchasers in the Greater Toronto Area. The Commissioner also alleged these restrictions primarily harm Board members who conduct their business online.

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Importantly, the Board does not compete with its realtor members. The Commissioner's case asserted that the Board was abusing its position as a dominant trade association to harm competition by its members.

The Competition Tribunal

The Tribunal interpreted the leading case on abuse of dominance, *Commissioner of Competition v. Canada Pipe Co.*, to stand for the rule that, for an act to be an "anti-competitive act" for the purposes of section 79, the dominant firm must compete with the firm harmed by the dominant firm's practice of anti-competitive acts. Since the Board does not compete with its members, the Tribunal found that the abuse of dominant position provision could not apply to the Board.

The Federal Court of Appeal

On appeal, the FCA overturned the Tribunal's decision and sent the case back to the Tribunal to be decided on its merits. The FCA's key finding was that the Tribunal erred in its interpretation of *Canada Pipe*: a person does not need to be a "competitor" to engage in anti-competitive acts within the meaning of section 79.

Practical Implications

The FCA's decision in *Commissioner of Competition v. Toronto Real Estate Board* has clarified that the Commissioner may seek an order under section 79 against a firm that is not a competitor in the relevant market. In particular, trade associations and large customers and suppliers may be targets of complaints for abuse of dominant position, even where they do not compete in a relevant market.

Canada's Anti-Spam Legislation—Post July 1st Recap

Ralph Kroman » full bio

Canada's anti-spam law (CASL) came into effect on July 1st, and is one of the most stringent anti-spam regimes in the world.

An electronic communication (such as an e-mail or text message) that promotes commercial activities (such as marketing a business to its customers) is a "commercial electronic message" (CEM) that is subject to CASL.

CEMs may be sent only with the express or implied consent of the recipient, and they must contain certain identification information and an easy-to-use unsubscribe mechanism. Consent is implied under a few circumstances specified in CASL, and the onus is on the business to prove express or implied consent.

On the other hand, the U.S. does not have a consent requirement in its federal anti-spam legislation, and the focus is merely upon an unsubscribe mechanism.

photo credit: Biscarotte via photopin cc

CASL was subject to some controversy and debate prior to July 1st although it was not "top of mind" for many businesses. Several people expressed the opinion that the consent requirement was too onerous for Canadian businesses who conduct reasonable marketing activities, and that CASL would not in fact change the amount of spam Canadians receive from foreign jurisdictions. Views were also expressed that CASL was too complex, and that it was too costly for Canadian businesses to comply with it. Others thought that CASL was progressive and reasonably necessary to respect the privacy of individuals. In any event, CASL is now here, and appears to be here to stay.

A key situation where consent is implied is where the sender and the recipient have a "business relationship". A business relationship is deemed to exist if the recipient purchased products or services from the business within a two-year period prior to the date of the CEM. In other words, consent is implied regarding fairly recent customers.

A three-year grace period exists. For the first three years after July 1st, the two-year period will not apply, provided that the customer does not withdraw consent and the relationship included the exchange of CEMs.

CASL is enforced by the Canadian Radio-television and Telecommunications Commission (CRTC). Complaints may be filed by the public with the CRTC. According to several press reports, Manon Bombardier, the CRTC's Chief Compliance and Enforcement Officer, said that over 1,000 complaints were filed with the CRTC in the first few days after July 1st.

Overall, it is too early to tell whether CASL will make a material difference to the number of annoying e-mails and other electronic communications that Canadians receive.


No Hiding Behind Business Judgment Rule for Executive Compensation Matters

Wayne Egan » *full bio* | *Kim Lawton* » *full bio*

A recent Ontario Court of Appeal decision serves as an important reminder that when the board of directors makes decisions on executive compensation matters, their conclusions must be evidence-based and properly documented in order to discharge their fiduciary duties.

In *Unique Broadband Systems, Inc. (Re), 2014 ONCA 538*, the Court of Appeal affirmed the nature of directors' and officers' fiduciary duties and clarified the application of the business judgment rule in the context of a dispute regarding executive compensation. The case is significant from a corporate governance perspective for several reasons, including because of the following findings:

1. **Expert evidence and market data can support a board's decision.** The Court of Appeal specifically noted that "The UBS Board did not seek or receive any expert advice on an appropriate bonus structure. Nor did they have any comparable or other data regarding executive compensation in the marketplace."
2. **The 'Business Judgment Rule' is only a rebuttable presumption.** The courts will defer to the business judgment rule only where there is evidence that a decision was made on an informed basis, in good faith, and in the best interests of the corporation.

When making executive compensation decisions, directors and officers would be well-advised to ensure their process, evidence and underlying rationale are well-documented in order to create a contemporaneous record that they've fulfilled their fiduciary duties.

Notice Provisions in Real Estate Agreements

Brad McLellan » *full bio*

Most commercial real estate agreements contain a clause detailing how the parties are to give notice to one another if a notice needs to be sent under the agreement. Events triggering the need to send a notice might include waiver of a condition, extension of time periods, exercise of an option, or termination of the agreement. Notice clauses can become an issue if one party asserts that it was sent a notice that was not done properly or was not received in time. This risk underlines the importance of clear and unambiguous notice clauses.

The following are some technological and other "glitches" that may affect whether a notice was sent properly and received on time:

1. Notices sent by fax

- recipient's machine is out of paper
- recipient's machine is out of ink
- power outage
- fax machine not turned on
- date/time recording is incorrect
- paper jam

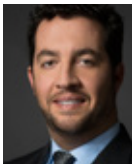
2. Notices sent by e-mail

- problem with server
- recipient's e-mail address incorrect
- e-mail blocked by junk mail program
- e-mail stuck in "cyberspace" due to length of attachments
- recipient does not read notice because it was from an unknown sender (e.g. the sender's assistant sent the e-mail and his or her name appeared as the sender)
- date/time recording is incorrect
- "out of the office reply" arrives from the recipient, raising uncertainty over whether the notice is considered to have been received (e.g. do you need to try another form of communication?)
- recipient declines to have a "read-receipt" sent back to you

In terms of the wording of notice clauses, the parties should consider the following types of issues:

- **Notices received after 5:00 p.m. on a business day**—are they deemed to be received that day or the next business day?
- **Notices received on non-business days**—are they deemed to be received on the next business day?
- **Notices sent to a particular person's attention when sent to a business**—what if the agreement is intended to be in force for a long period of time (e.g. 10–20 years) and the addressee no longer works at the business? Is it better to write "Attention: President [or some other officer]"?
- **Notice clauses cc'ing solicitors for the parties**—should a recipient's lawyer also receive a copy of the notice?

Notice clauses are critical in real estate agreements. Parties to the agreement need to be sure that the notice clause clearly sets out how they expect notices to be sent and received.



Volunteering to Pay Taxes? It Could Save You Money!

Part I—Recent Enhancements to CRA's Access to Information

Ryan Morris » *full bio*

Through the Canada Revenue Agency's (CRA) voluntary disclosure program (VDP), taxpayers can avoid penalties and prosecution and may also be entitled to partial interest relief in respect of past non-compliance with tax obligations. While the VDP is not new, a number of recent developments may increase the chances of the CRA detecting the non-compliance or taking other actions that could foreclose the possibility of making a valid voluntary disclosure.

These developments include:

1. **A new initiative to share information about border crossings.** On June 30, 2014, Canada and the U.S. commenced a new joint initiative to share information about when individuals cross the Canada-U.S. border. Amongst other things, the CRA could use the information to target (a) non-resident employees and service providers who do not comply with their Canadian tax filing obligations, and (b) persons who do not comply with their obligations to withhold and remit tax on payments to such employees and services providers.

2. **The Offshore Tax Information Program ("OTIP").** Launched in January 2014, OTIP allows the CRA to make financial awards to individuals who provide information related to international tax non-compliance that leads to the collection of at least $100,000 of federal taxes.

3. **The continued negotiation with foreign countries of Tax Information Exchange Agreements and Tax Treaties with exchange-of-information provisions.** These agreements permit, and in some cases require, the sharing of information between Canada and foreign jurisdictions for purposes of verifying tax compliance. In this connection, the *Canada-United States Enhanced Tax Information Exchange Agreement* was brought into law in Canada as of June 27, 2014 and, among other things, requires the U.S. to provide the CRA with information on Canadian residents who hold accounts at U.S. financial institutions. With the OECD (of which Canada is a member) developing a global standard for the automatic exchange of financial account information, these sorts of agreements are expected to become more common.

4. **Reporting requirements for electronic transfers of funds.** Starting in 2015, certain entities (generally financial intermediaries) will be required to report to the Minister of National Revenue certain electronic transfers of funds of $10,000 or more into or out of Canada.

5. **Changes to information requirement rules.** With judicial authorization, the CRA is permitted to require third parties to provide information or documents for the purposes of verifying tax compliance of unnamed persons. With the intention of obtaining the information and documents more quickly, these rules were changed in 2013 to require the CRA to provide notice to the third parties of the judicial application and eliminate the ability of the third parties to seek a subsequent review of the authorization.

These developments add to, and do not replace, existing mechanisms at the CRA's disposal to uncover non-compliance, such as audits. The CRA also continues to encourage "whistleblowing" through its Informant Leads Program.

These developments are relevant in considering whether and when to make a voluntary disclosure because in order to be accepted under the VDP, the disclosure must be voluntary. Where the CRA uncovers the non-compliance or undertakes an enforcement action that *might* lead to uncovering the non-compliance, the opportunity to access the voluntary disclosure program is generally foreclosed because the CRA would likely not view the disclosure as voluntary.

Part II of this article will appear in the next Client Update Newsletter and will discuss other conditions for making a valid disclosure and how to participate in the VDP.

ABOUT THIS NEWSLETTER

For over 150 years, the lawyers of WeirFoulds have been proud to serve our clients in their most difficult and complex matters. We are the firm of choice for discerning clients within our core areas of practice: (1) Litigation; (2) Corporate; (3) Property; and (4) Government Law. Within these core areas, as well as key sub-specialties, we address highly sophisticated legal challenges. We have acted in some of Canada's most significant mandates and have represented clients in many landmark cases. Reflecting the firm's focus, our lawyers are consistently recognized as leaders in their chosen areas of practice and in the profession at large. To learn more about our firm, visit www.weirfoulds.com.