Can Someone Legally Access the Data in your Database? Challenges to Database Access in Canada

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On August 23, 2013, the Supreme Court of Canada denied the Toronto Real Estate Board's (the "**TREB**") application for leave to appeal from the Federal Court of Appeal's (the "**FCA**") decision in *TREB v Commissioner of Competition*, 2017 FCA 236. The Supreme Court's refusal to grant leave marks the end of TREB's journey in court to prevent the release of certain home sales data from the Greater Toronto Area (the "**GTA**"). While some applaud the decision for creating greater transparency for homebuyers and greater competition in the GTA's real estate market, companies that take part in data collection should take note: such data may not protected under the *Competition Act* or the *Copyright Act*. These issues may affect those companies in the oil and gas industry as well as real estate markets that create databases of data that they use in the operation of their businesses.

The Competition Tribunal's Order

TREB maintains an online database of current and previous property listings dating back to 1986 in the GTA. TREB's members have full access to the database; however, TREB's policies place restrictions upon its use and reproduction. Many of TREB's members populate their websites with information from the database through TREB's data feed. Potential clients may access listing information through the member brokers' websites. TREB's policies exclude certain data from the data feed. The excluded data include: sold data; pending sold data; withdrawn, expired, suspended or terminated listings; and offers of commission to the buyer's broker. TREB's policies do not place restrictions on the communication of the excluded data through traditional means. Thus, while excluded data cannot be shared with clients via a website, it can be shared with clients by other means, such as in person or through email.

In May 2011, the Commissioner of Competition (the "**Commissioner**") brought an application pursuant subsection 79(1) of the *Competition Act* for an order prohibiting TREB's restrictive distribution of its web-based data. Subsection 79(1), in short, prohibits the abuse of dominant position, wherein one person having substantial or complete control of a special species of business engages in a practice of anti-competitive acts which has or is likely to have the effect of preventing or lessening

competition. The Commissioner argued that TREB's exclusion of the disputed data from its video feed prevented innovative web-paged brokers from providing products and services in competition with brokers who rely on more traditional means of communication. TREB defended its practice on the grounds that its actions were motivated by privacy concerns constituting a legitimate business justification and that the data was protected by copyright.

Though the Competition Tribunal (the "**Tribunal**") initially dismissed the Commissioner's application on the basis that TREB could not engage in competition with its members, the FCA reversed such ruling and remitted the matter back to the Tribunal for reconsideration. The Tribunal ultimately made an order providing, among other things, that TREB shall not exclude the excluded data from its data feed. Specifically, the Tribunal found that TREB's practices substantially reduced competition, and rejected TREB's privacy and copyright claims.

The FCA Affirms the Tribunal's Decision

In dismissing TREB's appeal, the FCA found that the TREB's policies amounted to an abuse of dominant position under subsection 79(1) of the *Competition Act*. The FCA affirmed the Tribunal's "but for" approach, which compared the real world with the hypothetical world in which TREB's database restrictions did not exist. The FCA accepted the Tribunal's conclusion that TREB's restrictions prevented competition by, among other things, reducing new entrants and new forms of competition.

The FCA next considered the merits of TREB's privacy claim. TREB argued that privacy concerns in respect of the buyers and purchasers amounted to a business justification that precluded liability under, specifically, paragraph 79(1)(b). TREB further asserted that the restrictions were necessary for compliance with the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**"). The FCA rejected TREB's privacy claims, stating that a legitimate business justification within the meaning of paragraph 79(1)(b) had two requirements: first, there must be "a credible efficiency or pro-competitive rationale" for the impugned practice; second, the efficiencies or competitive advantages must accrue to the claimant, such that they enable it to better compete in the market.

In respect of the business justification issue, the FCA accepted the Tribunal's assessment of the evidence on record and its conclusion that "TREB was motivated by a desire to maintain control over the disputed data in an effort to forestall new forms of competition, and not by any efficiency, pro-competition, or genuine privacy concerns". Specifically, the Tribunal had found that there was no evidence that TREB considered its privacy policies when establishing the database use restrictions.

In considering the *PIPEDA* claim, the FCA examined the listing agreements used by TREB to determine whether its consent clause was effective in meeting *PIPEDA* requirements, and if additional policies were necessary for compliance. The FCA accepted that the property sale price constituted personal information the use of which required informed consent under the terms of *PIPEDA*. However, the wording in the listing agreements were found to constitute unequivocal consent and satisfied the requirements under *PIPEDA*. Accordingly, the FCA rejected the assertion that the database restrictions were required for compliance with *PIPEDA*.

Finally, the FCA rejected TREB's copyright claim. Subsection 79(5) protects intellectual property rights granted by federal statutes by providing that acts engaged pursuant only to the exercise of such intellectual property rights are not anti-competitive acts. Critical to subsection 79(5) is that an impugned act has the sole purpose of exercising, in this case, a copyright. Subsection 79(5) cannot be used to justify anti-competitive behaviour that has any other purpose. On the record, TREB's practice was found to be motivated by a desire to insulate members from competition; TREB's copyright claim was thus rejected.

Though not necessary to resolve the appeal, the FCA further considered whether TREB had a copyright claim in the database. Under the *Copyright Act*, copyright exists for compilations, which is defined to include works "resulting from the selection or arrangement of data". In order for a compilation to be protected by copyright, however, there must be originality; that is, the compilation must involve the exercise of skill and judgment, and must not be a mechanical exercise. In assessing originality, the FCA cited *Geophysical Service Inc v Encana Corp*, 2016 ABQB 230, wherein Justice Eidsvik stated that there was no steadfast rule that a copyright claimant's observance of industry standards precluded the conclusion that originality existed. Originality involves a factual determination of whether the impugned work was a result of sufficient skill and judgment.

In this case, data entries would appear instantaneously in the database. The FCA thus accepted the Tribunal's finding that the compilation of real estate listings were a mechanical exercise, and that no copyright exists for the database.

TREB's appeal was accordingly dismissed.

Implications of this Decision

TREB v Commissioner of Competition demonstrates that data collection does not automatically attract privacy and copyright protection for the purposes of avoiding competition regulation.

Allegations of privacy concerns without evidentiary support will not constitute a legitimate business justification so as to shelter behind subsection 79(1)(b). Courts will assess purported business justifications on two bases: first, whether the impugned practice had a credible efficient or pro-competition rationale; and second, whether any purported efficiencies and advantages accrued to the claimant so as to enable it to better compete. Companies, including oil and gas companies and service providers in the oil and gas industry, should bear in mind these two business justification elements in developing databases of information, including those related to data for land interests and wells, which may include information about property owners.

Another key determination arising from *TREB v Commissioner of Competition* is the scope of copyright protection for data. In order to claim copyright protection for a compilation of data, the compilation must be made out based on an assessment of whether there was an exercise of sufficient skill and judgment in the production of the compilation. Where the compilation is said to amount to a mere mechanical exercise, copyright does not arise. Further, the *Competition Act* only exempts an impugned practice to the extent that copyright protection constitutes its sole purpose. Companies that take part in collecting and selectively disseminating data, including data related to

land interests and wells, should consider whether sufficient skill and judgment is exercised in its collection, and ensure that any restriction on the use of such data is limited to the purpose of copyright protection with clear licensing arrangements protecting copyright, and not just confidentiality, when used by third parties.

By

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