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*In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same.*

~ Albert Einstein  
(1879 - 1955)

## COMPETITION LAW

### White paper reveals Bureau's approach to big data issues

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**The Competition Bureau's white paper acknowledges that there may be challenges in analyzing big data cases under the *Competition Act*.**

In recent years, the treatment of "big data" under competition laws has become a hot topic of debate. Some argue that the harnessing of big data will lead to significant benefits for consumers and businesses through productivity growth and increased innovation.

Others are more pessimistic, believing that the improper use of big data has the potential to harm the competitive process. In light of this debate, competition authorities around the world have been grappling with whether current enforcement approaches and competition laws themselves are sufficient to address big data issues.

#### White paper

In late 2017, with a view to commencing further dialogue on the issue, the Competition Bureau published a white paper titled, "Big Data and Innovation: Implications for Competition Policy in Canada."

*See Competition Law, page 82*

## DIRECTORS' AND OFFICERS' LIABILITY

### Hostile board and rogue director impact material decisions

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**Where there is internal strife among Board members and an allegedly rogue director in action, proper corporate governance and record-keeping are critical in assessing corporate decision-making.**

Boards of directors are not monolithic. While board members often act in unison, disputes amongst board members will arise occasionally. In most cases, even if some directors express disagreement with a particular corporate action, the view of the majority of the board governs and corporate activity is clearly authorized.

But, what if corporate action is alleged to be unauthorized because it was not approved by a majority of the board of directors? What happens if a

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### Privacy rights

Further, the Bureau notes that in addition to assessing the price effects and typical non-price effects (such as impact on quality or innovation) of a merger or conduct, cases involving data may also require an assessment of the impact upon privacy rights.

While the Bureau frequently evaluates non-price effects, the Bureau acknowledges that the assessment of such effects is challenging and could have consequences for provisions of the *Act* (such as the merger provision) that include an efficiencies defence.

### Collusion

The development of algorithms to harness big data has led to questions about whether those algorithms may facilitate tacit co-ordination or collusion between firms, such as where one

firm's prices can instantly and automatically be updated to react to changes in a competitor's prices.

Certain commentators have suggested considering whether amendments to competition laws are required to address this heightened risk of parallelism brought about by the increased ability to use data to monitor and react to competitors.

The Bureau largely rejects these calls, noting that there is a "broad consensus that the unilateral monitoring and responding to data collected on one's competitors is legal" and that even with more sophisticated tools being used, the offence is in the agreement to collude and not in the fact of responding to changes in prices by competitors.

However, an agreement between competitors to use algorithms to

implement an agreement on pricing could be an offence.

### Significance

The discussion about the treatment of big data under competition laws is likely to evolve as regulators increasingly grapple with these issues in their investigations. The Bureau's white paper provides helpful insight to businesses and their advisors into the Bureau's current approach to these issues.

REFERENCES: *Competition Act*, R.S.C. 1985, c. C-34; Competition Bureau white paper titled, "Big Data and Innovation: Implications for Competition Policy in Canada", <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04304.html>.

## Directors' and Officers' Liability *continued from page 81*

material corporate decision is alleged to be the result of a "rogue director?"

### Ongoing dispute

This issue was considered by the Ontario Superior Court of Justice in its recent decision in *Sri Guru Nanak Sikh Centre Brampton v. Rexdale Singh Sabha Religious Centre*. In this case, the plaintiff ("SGN") and the two defendants ("SSCT" and "Rexdale") were not-for-profit corporations engaged in religious activities.

This lawsuit was part of an ongoing saga among SSCT, Rexdale and their Boards of Directors which resulted in several prior decisions dealing with disputes involving the parties and an entity that had been incorporated to run a funeral home.

The hostility between SSCT's board members, and SSCT's corporate governance failures, had become so extreme that the court made a declaration in 2013 fixing SSCT's membership and directors, and appointing a monitor.

### Record-keeping

SSCT's poor record-keeping habits became a factor in this case. One of the questions before the court was whether one of SSCT's directors had accepted a settlement offer without authority from the Board. This case highlights the importance of good record-keeping, particularly when there is internal strife among Board members.

### Alleged settlement

SGN sued SSCT and Rexdale for failing to repay a \$375,000 loan. SSCT made monthly installment payments to SGN totalling \$15,000, but after a few months, the payments stopped.

SGN then demanded repayment of the entire amount of the loan. While there was a dispute regarding the amount of money actually loaned and which defendant was responsible for repayment, minutes of one of SSCT's board meetings stated, "It was agreed [that the SGN] loan will be paid soon."

Ultimately, SGN offered to settle the claim for \$350,000, with each side bearing its own costs (the "Offer"). SSCT's lawyer forwarded the Offer to one of its directors ("Deol") for consideration. The Offer was accepted after SGN agreed to amend the proposed timetable for repayment. A consent order was taken out that implemented the terms of the settlement.

### Dispute

The Board of SSCT denied that it approved the settlement or that it was ever consulted by Deol regarding the Offer and moved to set aside the consent order. Among other things, SSCT argued that there was no settlement because Deol acted as a rogue director by accepting the Offer without the Board's authority.

SGN argued that the settlement was valid and that even if it was not properly authorized, SGN was entitled to rely upon the indoor management rule.

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Broadly speaking, this principle establishes that a person engaged in a transaction with a company is entitled to assume that a company's internal requirements have been complied with in connection with the transaction.

## Corporate authority

The court found that Deol had consulted the Board of Directors and, therefore, had accepted the Offer with SSCT's authority. The court's analysis was punctuated with references to the dysfunctional nature of SSCT's Board and the lack of credibility of the directors involved.

In arguing that Deol acted without authority, SSCT had relied on the absence of documentary evidence recording any approval of the settlement. In particular, there was neither a resolution by the Board approving the settlement, nor any indication in the minutes of the Board's meetings that indicated such approval.

Nonetheless, the court held that Deol had the Board's authority to act. The court found that the absence of these records was in keeping with the board's poor record-keeping practices and was not dispositive of the issue. The court also relied on other evidence that demonstrated Deol's authority.

## Evidence

The court accepted Deol's evidence that he was appointed to hire a lawyer to defend SGN's claim. This was

corroborated by the minutes of one of SSCT's Board meetings and Deol's recollection that the Offer was provided to him by the lawyer.

The court also accepted Deol's evidence (over contradictory evidence given by another director, Singh) that he discussed the Offer with the Board despite the lack of confirming documentary evidence.

Deol stated that he knew he had to get Board approval because the court-appointed monitor would not have allowed him to make the decision without the Board's approval. The court found that this was consistent with the monitor's mandate.

## Credibility

Further, SSCT's argument that Deol should not be believed as he had previously been found by the court as lacking credibility in another case was not accepted. This assertion was mitigated by the fact that the same doubts had been expressed about Singh's testimony in the same case.

## Indoor management rule

Given the court's finding that Deol had authority from the Board, it was unnecessary for the court to address the application of the indoor management rule.

## Significance

This case highlights the need for maintaining good corporate governance and

record-keeping practices, particularly where there is hostility among board members. In such cases, the Board's minutes and resolutions (or other corporate records) can be relied upon in the event there is a disagreement regarding whether a director acted in accordance with the wishes of the Board.

Such documents would have been valuable as an objective record in a case like this, where the warring directors had both previously been found as lacking in credibility.

## Considerations

The decision also demonstrates that where there is a dispute amongst board members as to the authority of a particular board member to act on behalf of the company, the court will consider any relevant documents and also whether the surrounding circumstances are more consistent with the evidence of the alleged rogue director, or the evidence of the majority of the board.

## Reputational risk

In any event, if board disputes devolve into litigation, there is a risk that the credibility and reputation of some (or all) of the directors will be called into question by a court.

REFERENCE: *Sri Guru Nanak Sikh Centre Brampton v. Rexdale Singh Sabha Religious Centre*, 2017 ONSC 6252, 2017 CarswellOnt 16291 (Ont. S.C.J.).

## BUSINESS IMMIGRATION

# GTS program offers new hiring option for employers

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**The Global Talent Stream program provides a new option for Canadian employers looking to hire certain foreign talent.**

As of June 12, 2017, employers have had a new option for the hiring of certain foreign talent. The Global Talent Stream ("GTS") program is intended to provide a quick path to retaining "unique and specialized temporary foreign workers" for innovative Canadian firms, as well as highly-skilled foreign workers.

## Categories

An employer may apply under one of two categories. Category A of the Global Talent Stream requires a referral to the program by a designated referral partner. Such partners have the ability to refer innovative employers with whom they have an existing relationship and that

*See Business Immigration, page 85*