

Competition Bureau releases updated Intellectual Property Guidelines

APRIL 1, 2019 3 MIN READ

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Consistent with its commitment to review its *Intellectual Property Enforcement Guidelines* (IPEGs) on a regular basis and revise them to maintain consistency with new legal decisions and relevant legislative changes, on March 13, 2019, the Competition Bureau (Bureau) issued updated IPEGs, reflecting recent changes in the law and an evolving jurisprudence.

The IPEGs provide guidance on how the Bureau generally addresses the often complex issues associated with intellectual property and the enforcement of the *Competition Act* (Act). As the Bureau stated in its [release of the draft for consultation](#) in November 2018, “[by] providing access to these guidelines, the Bureau makes it easier for those with a stake in intellectual property matters, such as the legal community and high-tech industries, to operate within the law.” The IPEGs were last significantly revised in March 2016 (refer to our [Osler Update on those revisions](#)).

The March 2019 update to the IPEGs reflects the following:

- Recent developments in jurisprudence on the application of the abuse of dominance provision in matters involving intellectual property, particularly in light of the Federal Court of Appeal’s (FCA) decision in *Toronto Real Estate Board v. Commissioner of Competition* (TREB); and
- Amendments to Canada’s *Patented Medicines (Notice of Compliance) Regulations* (PMNOC). The IPEGs were updated to align with the FCA’s discussion in TREB of the application of the exception to the Act’s general abuse of dominance framework, laid out in subsection 79(5). That subsection states that an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived from intellectual property is not an anti-competitive act for the purposes of identifying an abuse of dominance. In TREB, the Toronto Real Estate Board argued that it possessed a copyright interest over the real estate listing data that was the subject of the dispute, such that its refusal to share the data was within the scope of the subsection 79(5) exception. The FCA disagreed, holding that the exception did not apply. The IPEGs state at paragraph 41 that the FCA’s finding affirms that anti-competitive conditions placed on the use of intellectual property can constitute an abuse of dominance under section 79 of the Act, precluding the application of the subsection 79(5) exception:

subsection 79(5) does not state that any assertion of intellectual property right shields what would otherwise be an anti-competitive act. The FCA also noted that Parliament intended to insulate intellectual property rights from allegations of anti-competitive conduct where the IP right is the sole purpose of exercise or use. Finally, the Court held that because the conditions TREB imposed on its copyright licenses were anti-competitive, it could not rely on

copyright as a defence pursuant to subsection 79(5).

The IPEGs also introduce changes to reflect amendments to PMNOC that came into force on September 21, 2017. Importantly, these amendments removed the prospect of “dual litigation” that frequently resulted under PMNOC, where the application to introduce a generic equivalent of a patent-protected drug often led to two legal proceedings relating to that patent: the first, a summary proceeding under PMNOC, and the second, a proceeding under the *Patent Act*. The amendments replaced the PMNOC summary proceeding with a full action which leads to a final determination that is binding under the *Patent Act*. In the revised IPEGs, the Bureau has removed the discussion on dual litigation as a unique feature of Canada’s regulations governing generic entry. Moreover, in the context of considering whether a patent litigation settlement involving payment by the patent holder to the generic firm likely had the effect of delaying generic entry, the calculus will change as “dual litigation” will no longer be an expected cost.

Given the Bureau’s commitment to more actively maintain the IPEGs, we can expect additional revisions as jurisprudence evolves and legislative changes occur.