CREA THE CANADIAN REAL ESTATE ASSOCIATION

Competition Law and REALTORS®: What You Say and Do Matters

A National Competition Law Compliance Course for REALTORS®

Alliance for Canadian Real Estate Education

acknowledgements

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This course was developed under the leadership and guidance of ACRE. The members are:

- Alberta Real Estate Association
- British Columbia Real Estate Association
- College de l'immobilier du Québec
- Manitoba Real Estate Association
- New Brunswick Real Estate Association
- Nova Scotia Association of REALTORS®
- The Real Estate Division of the Sauder School of Business, UBC
- Association of Saskatchewan REALTORS®
- Yukon Real Estate Association

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Competition Law and REALTORS®: What You Say and Do Matters, was prepared for ACRE by Steve Szentesi. Steve Szentesi is a Canadian competition lawyer working in association with Norton Stewart, Business Lawyers in Vancouver (www.competitionlawcanada.com). He has practiced competition law in Vancouver, Toronto and London (UK) and was formerly in-house competition counsel for CREA in Ottawa.

explanation
of our symbol

acre
Alliance for Canadian Real Estate Education

- The flame shape is widely recognized as the symbol of learning.
- The lines suggest the alliance of provincial associations and the joint development of educational materials.
- The turning page represents the learning process and access to resources.
- The ellipse represents the universal standards upheld by real estate professionals.

ACRE's mandate

- Reaseach and develop real estate education skills analyses and core curricula blueprints;
- Facilitate cooperation among jurisdictions to enhance efficiencies and reduce duplication of development and delivery costs;
- Develop, maintain and monitor standards to guide the administration and delivery of real estate education;
- Liaise with regulatory bodies and other professional associations on issues concerning registration/licensing education requirements; and
- Develop courses in support of the mandate, where appropriate.

learning outcomes

At the conclusion of this session, learners will be able to:

- Recognize competition law issues that may arise in the day-to-day practice of real estate
- Identify and describe three civil sections of the *Competition Act*
- Identify and describe three criminal sections of the *Competition Act*
- Describe specific potential penalties under the *Competition Act*
- Outline the enforcement powers of the federal Competition Bureau under the *Competition Act*
- Understand the effect of amendments to the criminal conspiracy offences under the *Competition Act*
- Apply the elements of key sections of the *Competition Act* to sample case studies
- Differentiate between competitively sensitive information and appropriate information exchanges in real estate business dealings and practices
- Incorporate identified strategies into their daily practice to ensure compliance with the *Competition Act*

legend

Indicates Legislation

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Canadian Competition Law

Overview

Competition Law and REALTORS®: What You Say and Do Matters has been designed by ACRE with the assistance of CREA to help Canadian REALTORS® understand and comply with Canadian competition law. While Canadian competition law applies to all real estate professionals, this material is designed specifically for REALTORS®. This course provides an overview in plain language of Canadian competition law, practical compliance guidelines to assist REALTORS® in complying with Canadian competition law and a number of illustrative competition law case studies.

This course on Canadian competition law is intended to give REALTORS® practical and clear guidance to assist them in recognizing and avoiding competition law issues while at the same time encouraging continued healthy, vigorous competition in the real estate services sector. It is also important to note that this course is meant to provide a basic overview of the fundamentals of Canadian competition law as it applies to organized real estate and is not meant as a comprehensive summary of a REALTOR®'s legal obligations, which may also include, among other things, provincial regulatory requirements and agency and fiduciary obligations.

This course does not provide a comprehensive summary of competition law and **does not constitute legal advice** and, accordingly, in the event of a legal issue REALTORS® should consult their local board or competent legal counsel.

Competition Act – Overview

Competition law in Canada is governed by the *Competition Act*. The *Competition Act* is federal legislation that contains both criminal and civil sections, applies to most business activities across Canada with few exceptions (including real estate services) and is administered and enforced by the federal Competition Bureau, which is a federal enforcement agency headed by the Commissioner of Competition.

Generally, the purpose of the *Competition Act* is to maintain and encourage competition in Canadian markets and is intended to promote competition, not to protect individual competitors.

Competition Law and Real Estate

Most real estate brokers and agents in Canada are members of provincial/territorial real estate boards and associations, which are industry trade associations. Trade associations serve many legitimate purposes including lobbying on legislative issues, product and market research, member education, improving services and products, and marketing and advertising on behalf of members.

However, because the very nature of trade associations involves interaction among direct competitors, trade association activities can also raise competition law issues:

> *"Given that an association provides a forum where competitors collaborate on association activities, trade associations are exposed to greater risks of anti-competitive conduct. A number of past Bureau cases have involved trade associations that were engaged in agreements to harm competition. It is therefore critical that trade associations implement credible and effective programs with strict codes of ethics and conduct. Such programs may allow trade associations and their members to avoid improper actions and to protect themselves from being used as a conduit for illegal activities."* (Competition Bureau)

In the context of organized real estate, while the real estate services industry is generally highly competitive, the fact that REALTORS® are competitors and cooperate in the listing and sale of real estate means that competition law issues can arise. The real estate industry has also been one of a number of priority industries for enforcement for the Competition Bureau. In this regard, one former Deputy Director of the Competition Bureau stated that "the Bureau gives high priority

to real estate issues because of the size of the industry and its direct impact on major purchases by consumers."

In addition, the Competition Bureau has frequently monitored or investigated segments of the real estate industry in Canada with significant investigations in the late 1980s (resulting in the 1988 Prohibition Order), the early 1990s (several Alberta criminal price maintenance cases involving Alberta firms) and most recently with the Bureau's investigation focussed on MLS® rules.

Given the potential issues that may arise, it is prudent for REALTORS® in Canada to be aware of the key competition law issues that can arise in their day-to-day business dealings.

Enforcement

The *Competition Act* is administered by the Competition Bureau, which is a federal enforcement agency. The Competition Bureau is headed by the Commissioner of Competition, who investigates complaints by consumers and businesses and conducts investigations on her own initiative.

Under the *Competition Act*, the Commissioner of Competition's enforcement powers include the power to obtain search warrants, injunctions and in some cases wiretaps, and to interview employees under oath. In addition, the Commissioner has the power to apply to the federal Competition Tribunal for orders (including orders for parties to stop conduct and/or pay civil penalties) and to refer criminal matters to the Director of Public Prosecutions for criminal prosecution. Proceedings may be commenced under the *Competition Act* either by the Bureau on its own initiative (i.e., as a result of its own investigation efforts) or as a result of a complaint (e.g., from a competitor, client/customer, etc.).

In addition to Competition Bureau investigations, private parties may in some cases commence private civil actions (including class actions) against persons contravening the criminal sections of the *Competition Act* (including the criminal conspiracy and criminal misleading advertising sections), or seek "private access" to the Competition Tribunal for a Tribunal order for a party to cease certain types of conduct or take remedial action.

For REALTORS® in Canada this means that, in the event of a contravention of the *Competition Act*, they may face enforcement not only from the Competition Bureau but also from private parties seeking damages or remedies from the Competition Tribunal.

The Competition Bureau also has formal immunity and leniency programs in place, which are intended to encourage participants in criminal competition law matters to disclose their conduct in exchange for either complete immunity from prosecution or partial leniency from competition

law penalties. Under the Competition Bureau's immunity program, the first party to disclose to the Bureau a criminal offence that the Bureau is not aware of (or is aware of but does not yet have sufficient evidence to warrant a referral for prosecution) may receive immunity from prosecution, assuming that all of the terms of the Bureau's immunity program are met. Under the Bureau's leniency program, parties that do not qualify for full immunity may nevertheless be able to qualify for leniency by cooperating with the Bureau's investigation.

Finally, as the Competition Bureau has wide powers of investigation, including the power to obtain and execute search warrants (as discussed above), included in the Compliance Guidelines Section are some basic guidelines describing what to do in the event of a search by the Bureau. Following these guidelines will help you protect your rights and avoid potential allegations of obstruction of justice.

Penalties

Contravention of the *Competition Act* can be a serious matter and result in significant penalties, lost time and negative publicity for organizations and their managers. The potential penalties under the Act include criminal fines, civil "administrative monetary penalties" (essentially civil fines), imprisonment, private damages, prohibition orders and injunctions to cease conduct, and in some cases "remedial orders" (i.e., orders to change conduct).

For example, some of the specific potential penalties under the *Competition Act* include criminal fines of up to $25 million (for criminal conspiracy), civil fines of up to $10 million (for abuse of dominance) and imprisonment for up to 14 years (for criminal conspiracy). Private parties (e.g., consumers or competitors) can also commence private actions for damages (including class actions) where they have suffered actual damage or loss as a result of a violation of the criminal offences under the *Competition Act* or failure to comply with a court or Tribunal order under the *Competition Act* (section 36).

In addition, there is also potential director and officer liability under the *Competition Act* for competition law violations. In other words, directors and officers of companies may, in addition to corporate liability, also be exposed personally to criminal or civil penalties including criminal or civil fines and imprisonment. This means that it is not only important for agents to have a basic awareness of Canadian competition law, but brokers/principals of firms who may also be exposed to potential liability in some cases, must also have such awareness.

As a practical matter, the Bureau is more likely to proceed criminally (as opposed to civilly) where there has been intentional or fraudulent anti-competitive conduct, as opposed to where, for example, conduct has been engaged in accidentally or negligently and where an organization takes immediate remedial steps to correct the conduct. With respect to the size of penalties, while the potential fines and other penalties can be very significant, in most cases the maximum penalties are not imposed.

Having said that, the fines or other penalties that may be imposed for conduct that contravenes the *Competition Act* can have serious negative consequences for REALTORS® and firms. For example, in one recent case involving a Manitoba real estate investment company, the company paid more than $150,000 in penalties as a result of operating an allegedly misleading promotional contest to promote real estate investment opportunities. As such, these kinds of cases illustrate the value of taking some basic competition law compliance steps.

Civil Sections (Non-criminal)

The *Competition Act* contains a number of civil (non-criminal) sections. These include, among other sections, price maintenance (section 76), civil misleading advertising (section 74.01), and abuse of dominance (section 79). The *Competition Act* also includes a number of other civil sections, which are not discussed in this course as they are of limited relevance to the activities of Canadian REALTORS® (e.g., tied selling, exclusive dealing, refusal to deal and promotional contest provisions).

While there are no criminal fines or imprisonment under the civil sections of the *Competition Act*, contravention can result in Competition Tribunal orders to cease the conduct or to take remedial action, "administrative monetary penalties" (essentially civil fines), or negotiated settlements with the Competition Bureau.

Criminal Sections

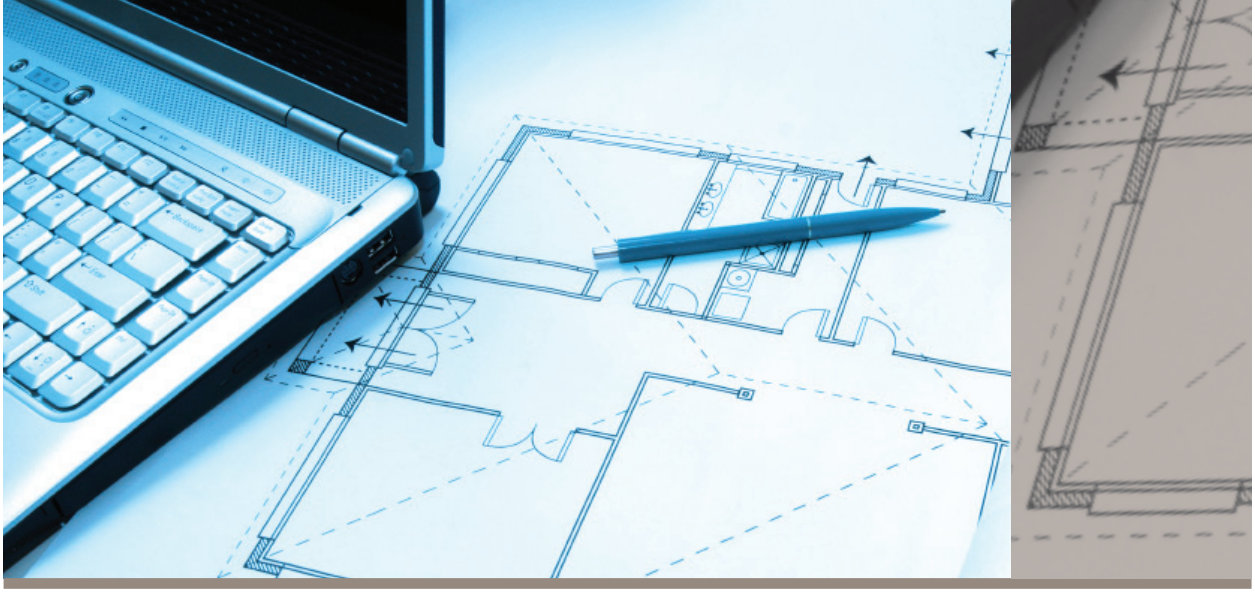
The *Competition Act* also contains a number of criminal sections. These include, among other sections, the criminal conspiracy (section 45), criminal misleading advertising (section 52) and deceptive telemarketing (section 52.1) sections. The *Competition Act* also includes a number of other criminal sections, which are not discussed in this course as they are of limited relevance to the activities of Canadian REALTORS® (e.g., bid rigging).

As a result of recent amendments, price maintenance, which has historically been a key section for organized real estate (as it deals, among other things, with refusals to deal and discrimination based on another person's low pricing policy), has been repealed and replaced with a new, narrower, non-criminal section (discussed in more detail below).

Key Sections for REALTORS®

Some of the key sections of the *Competition Act* for REALTORS® include the criminal conspiracy sections (dealing with price fixing, market allocation and supply restriction agreements) and the misleading advertising, price maintenance and abuse of dominance sections.

As a practical matter, **the two most important sections for REALTORS® to understand relate to criminal conspiracies and misleading advertising** both of which, if contravened, can potentially lead to criminal liability and significant penalties.



Conspiracy

Overview

Section 45 of the *Competition Act* sets out a number of criminal conspiracy offences. Section 45 is considered to be one of the "cornerstones" of the Act and remains a top enforcement priority for the Competition Bureau.

Until 2009, in order to prove a criminal conspiracy (e.g., an illegal price fixing agreement between competitors), it was necessary to show a certain adverse effect on a particular market as a result of the agreement (a so-called "undue" prevention or lessening of competition). The practical impact of this was that, generally speaking, smaller market players (e.g., some individual REALTORS®, smaller real estate firms, etc.) faced relatively little potential liability for agreements only among themselves.

This is now no longer the case, as recent amendments have introduced into Canada for the first time so-called "per se" criminal conspiracy provisions under which a conspiracy (e.g., an agreement between competitors to fix prices, divide markets or boycott another competitor) can now be illegal with no necessity to show any adverse market effects. As such, such an agreement even between two very small firms could be illegal under the new provisions.

This means that it is more important than ever for Canadian REALTORS® to be aware of the basic conspiracy-related issues that may arise to avoid potential criminal liability.

The criminal conspiracy sections of the Act are discussed below, with real estate industry examples and compliance guidelines for REALTORS® (dos and don'ts).

Types of Criminal Conspiracy Offences

Section 45 of the Act contains three "per se" criminal offences relating to certain types of anti-competitive agreements, which means that these offences can be proven without showing any negative effects on a particular market (i.e., merely proving the existence of an agreement on one of the three subject matters set out in the section is sufficient to prove an offence, unless a defence applies).

Section 45 makes it a criminal offence to enter into an agreement with a competitor (or with a potential competitor as defined in the Act) to:

- fix, maintain, increase or control the price of a product (price–fixing agreements);
- allocate sales, territories, customers or markets for a product (market allocation agreements); or
- fix, maintain, control, prevent, lessen or eliminate the production or supply of a product (output restriction agreements).

To prove a criminal conspiracy, it must be established that two or more competitors (or potential competitors) intentionally agreed to enter into one of the above three types of agreements.

(a) Price Fixing Agreements

Section 45 of the *Competition Act* makes it a criminal offence for two or more competitors (or potential competitors) to enter into an agreement to fix, maintain, increase or control the price for the supply of a product (including services).

"Price" for the purpose of this section is broad and includes, "any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product."

As such, the price fixing section makes it an offence for any two competitors (or potential competitors) to fix or control the price of a product including any component of price, such as commissions, discounts, rebates or other price concessions.

Examples of agreements between competing REALTORS® that could violate the criminal price–fixing provision include agreements to:

- fix commissions or minimum commissions;
- fix commission splits (e.g., generally, as opposed to negotiated on individual sales); or
- fix other aspects of price (e.g., discounts, rebates, other price-related terms, etc.).

Accordingly, commission rates, minimum commissions, splits, discounts, rebates and other pricing decisions must be made independently by competing REALTORS®. In addition, it is prudent for competing REALTORS® to avoid discussing commission rates and other price-related terms with competing agents as this can potentially raise price–fixing issues under the Act (although REALTORS® can discuss commission splits on a particular sale). Broker office policies to set commission rates may, in some circumstances, also raise issues under section 45.

(b) Market Allocation Agreements

Section 45 of the Act also makes it a criminal offence for two or more competitors (or potential competitors) to allocate sales, territories or sale areas, customers or markets. In other words, this section makes it a criminal offence to agree with a competitor (or potential competitor) not to compete for specific customers or types of customers or in particular geographic areas.

Examples of agreements between competing REALTORS® that could violate the criminal market allocation offence include agreements:

- not to compete for specific clients or types of clients (e.g., residential or commercial);
- not to compete in a particular geographic area; or
- not to compete in particular types of services.

As such, it is important that competing REALTORS® not agree to divide clients, geographic areas or service offerings. In addition, it is prudent for competing REALTORS® to avoid discussing dividing clients, geographic areas or service offerings as this could potentially lead the Bureau or a court to infer an agreement in relation to such matters.

(c) Supply Restriction Agreements

Finally, section 45 of the Act makes it a criminal offence for two or more competitors (or potential competitors) to agree to fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.

The section is broad enough to apply to agreements to prevent or lessen the supply of services and so may apply to agreements between REALTORS® not to provide certain services, limit office hours or limit advertising, for example. This section might also prohibit agreements among competing REALTORS® to withhold services from particular persons, including other REALTORS® (e.g., refusing to work on or show another REALTOR®'s listings). As such, it is important that competing REALTORS® not enter into agreements with competitors to restrict the supply of their services. In addition, it is prudent for competing REALTORS® to avoid discussing such supply restrictions as such discussions could potentially lead the Bureau or a court to infer an agreement in relation to such matters.

Proving a Conspiracy Agreement and Defences

There must be an agreement to prove a criminal conspiracy between two or more competitors (or potential competitors). However, an agreement does not need to be in writing and can be inferred from mere "circumstantial evidence" (e.g., meeting to discuss commissions followed by an increase or stabilization of rates could constitute circumstantial evidence of an agreement).

Moreover, the conspiracy section can apply to all forms of agreements, arrangements or mutual understandings regardless of the level of formality or enforceability in a contractual sense (i.e., even informal "gentlemen's agreements," oral arrangements, etc., can be caught). Finally, an agreement does not have to be actually carried out because the offence of conspiracy is in the agreement and not in the carrying out of the agreement.

With respect to defences, the *Competition Act* provides several defences to the offence of conspiracy, including for agreements among affiliates and agreements relating only to the export of products. In addition, there is also, as a result of the recent amendments, now a new "ancillary restraints" defence, which provides a defence where it can be shown that:

(i) the agreement is ancillary (i.e., subordinate) to a broader or separate agreement that includes the same parties;

(ii) the agreement is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement; and

(iii) the broader or separate agreement does not itself constitute an offence under section 45.

Depending on the particular circumstances, this new defence might apply to:

- joint ventures or specialization agreements between independent REALTORS® that allow them to serve their clients better or more comprehensively.
- broker office policies reasonably necessary for the establishment and operation of the office.

While there is as yet no case law interpreting the new criminal conspiracy sections or the ancillary restraints defence, the Competition Bureau has indicated in recently issued Competition Collaboration Guidelines that it would apply the new criminal conspiracy provisions only to "hardcore" anti-competitive agreements between competitors (e.g., price-fixing agreements between competitors) and not to restraints implemented in relation to legitimate collaborations, strategic alliances or joint ventures.

Information Exchanges and Board and Association Meetings

(a) Information Exchanges

One of the primary risk areas in relation to criminal conspiracies that REALTORS® need to be aware of relates to the exchange of "competitively sensitive information" between competitors.

Types of "competitively sensitive information" include current or future prices (e.g., commissions, splits, rebates, discounts, etc.), clients, costs, current or future business plans and marketing strategies.

The reason the exchange or discussion of such information can potentially raise issues under the *Competition Act* is because such information, when shared among competitors, can lead to the formation of an anti-competitive agreement (e.g., a price–fixing agreement). Similarly, sharing such competitively sensitive information can also lead the Competition Bureau or a court to infer an anti-competitive agreement—for example, the exchange of pricing information followed by a stabilization of commission rates or other aspects of price can create an inference that an anti-competitive agreement has been formed.

(b) Board and Association Meetings

Exchanges of competitively sensitive information at real estate board and association meetings and other gatherings of competing REALTORS® can also raise competition law concerns.

As with the exchange of competitively sensitive information generally, the discussion or exchange of such information in the board or association context can also potentially lead to anti-competitive agreements (or the inference of anti-competitive agreements).

As such, it is prudent for competing REALTORS® to avoid discussing or exchanging competitively sensitive information in their day-to-day business dealings, at board or association meetings, industry conferences and other similar events. This includes information relating to commissions, costs, current or future marketing, clients, business plans and of course refusing to deal with competing REALTORS®.

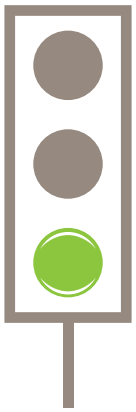
It is also worth noting that merely because topics are discussed during *in camera* or "off the record" sessions of board or other meetings, it does not automatically mean that there will be no risk arising from the discussion of competitively-sensitive information. For example, where commission rates are discussed during a meeting and rates stabilize shortly thereafter, such a prior meeting could be used as evidence of an agreement to raise or stabilize commission rates.

Penalties

The penalties for violating the criminal conspiracy sections of the *Competition Act* can be severe. They include criminal fines of up to $25 million (per count), imprisonment for up to 14 years, "prohibition orders" (i.e., orders to stop or modify conduct) for up to ten years and/or civil damages.

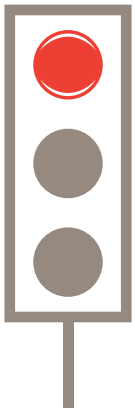
It is also worth noting that, in addition to potential corporate liability, directors and officers of organizations may also personally face potential criminal or civil liability for violations of the *Competition Act*.

Compliance Guidelines–Conspiracy



Dos

- Do ensure that all commission rates, splits and other pricing decisions are made independently of competing REALTORS®.
- Do ensure that there is a clear and written agenda before meetings with competing REALTORS® (e.g., board/association meetings, conventions, etc.).
- Do ensure that board or association meeting minutes are recorded and reviewed by board personnel.
- Do object to improper board or association discussions (e.g., in relation to commissions, prices, marketing, dividing markets or clients or refusing to deal with competitors). If such a conversation continues, object (ensuring that the objection is noted). If the conversation continues, leave the meeting ensuring that your objection is on the record and if you think that there is a serious issue, consider contacting competent legal counsel and/or your local board or association.



Don'ts

- Don't discuss commission rates, splits, discounts, rebates or other aspects of fees with competing REALTORS®, including during *in camera* sessions.
- Don't agree with competitors to fix commission rates, splits (fixed commission splits, as opposed to negotiated on a particular sale), discounts, rebates or any other aspects of fees.
- Don't make statements implying that commission rates have been fixed or that a particular REALTOR® has been or will be boycotted.
- Don't discuss other types of "competitively-sensitive information" with competing REALTORS® (e.g., current or future marketing plans, business plans, etc.), including during *in camera* sessions.
- Don't discuss dividing markets or clients with competing REALTORS®.
- Don't discuss refusing to deal with competing REALTORS®.
- Don't participate in board or association meetings without a clear written agenda.
- Don't use board or association meetings to discuss competitively-sensitive information (e.g., commissions, discounts, business plans, clients, etc.).
- Don't participate in private meetings with competitors where competitively-sensitive information is discussed or exchanged.

Case Study*

Conspiracy – Problem #1

The following is a Blackberry discussion during the CREA National Assembly between four REALTORS® (Bill, Bob, Axel and Annie) from four different Manitoba firms in a smaller Manitoba town.

Bill:	Great to be at assembly again, but I wish the market would pick up.
Bob:	Tough times – a little consistency of rates would do everyone a lot of good.
Axel:	I don't think we should be talking about commissions.
Bob:	We're not fixing commissions, just talking about how to add a little stability to this volatile market – that's good for the firms and good for our clients.
Bill:	I'm all for stability, but I don't want to get involved in anything illegal.
Axel:	Well, we could simply set some reasonable floor for commissions and splits, and trim rebates a little. That would mean we could ride out these tough times and it would also give clients more certainty in the market.
Bob:	I'm all for that.
Bill:	Sure, ok. Let's firm up the details when we get back.

- At a later assembly seminar Bill, Bob and Axel exchanged some of their firms' strategic marketing documents for "informational purposes" including their respective firms' plans for the coming year's commissions, splits and rebates.
- The agreement was never carried out. All of the REALTORS® continued to set their own commissions and splits independently (though their new rates after the conference were a lot closer and higher than before).
- Annie was cc'd on all emails and was at the later seminar for the information exchange but didn't comment on the emails and didn't exchange her firm's marketing information.
- All the REALTORS® deleted all their emails.

*All case studies are based on hypothetical situations.

Questions

- Was there an agreement?
- Does it matter that it wasn't carried out?
- Is there any problem simply discussing commissions (with rates later rising)?
- Is Annie a party to the agreement?
- What should Annie have done?
- How could the exchange or potential agreement be uncovered?
- Could the deleted emails be used as evidence?

Case Study

Conspiracy – Problem #2

The following is a conversation between two senior REALTORS® from large Richmond and Vancouver firms (Jim and Tim) and a third listing REALTOR® from a mid-size Vancouver firm (Lim) at a downtown Vancouver showing. Lim's broker, Kim, was also at the open house but didn't comment on the conversation.

Jim:	Hi Tim – how's business?
Tim:	This was a tough year, but things are picking up a little now.
Jim:	I'm not doing a lot in Vancouver – I can send you those clients and talk to my guys about steering clear of Vancouver if you do the same for us in Richmond. This would certainly be good for us and our clients.
Tim:	Yeah our guys get some listings out your way – I suppose if it's about even, we could steer clear and refer them over to you. Why don't we try it for awhile? What do you think, Lim?
Lim:	I'm not sure, but I guess our firm could also send Richmond listings your way Jim, if you send Vancouver listings our way.

- Lim dropped out of the arrangement after a couple of weeks.

Questions

- There was no written agreement or contract – does this matter?
- What kind of agreement is there here?
- Is this type of agreement illegal? Why?
- What are the penalties for criminal conspiracy?
- Lim dropped out of the arrangement early on – does this matter?
- The agreement would help the three firms weather the tough economic times so it would be good in the long run for clients (providing more choice) – does this matter?
- Kim (Lim's broker) was at the open house but didn't say anything – is there any potential risk for Kim? For the firm?
- What should Kim have done?

False or Misleading Representations

Overview

The *Competition Act* contains criminal and civil sections that prohibit false or misleading representations (often referred to as "misleading advertising") for the purpose of promoting the supply or use of a product (including services, such as real estate services) or any business interest. The misleading advertising provisions of the Act are contained in sections 52 and 74.01 (reproduced at the end of this manual). The enforcement of the marketing provisions of the Act is also, together with criminal conspiracies, a top enforcement priority for the Competition Bureau.

It is worth noting that in addition to the *Competition Act*, provincial consumer protection laws, copyright and trademark legislation, other industry codes, such as the Canadian Code of Advertising Standards (administered by Advertising Standards Canada) and provincial regulatory requirements may apply to members' advertising activities. In addition, misleading advertising may in some cases be a violation of the REALTOR® Code and subject to discipline by a REALTOR®'s board or association. Advertising is specifically dealt with in three articles of the REALTOR® Code: Articles 13, 14 and 15. All legal and regulatory requirements should be considered by REALTORS® when they are advertising.

As such, it is important that REALTORS® ensure that they do not make false or misleading representations in their print, oral or online marketing, as the potential penalties for violating the false or misleading representations sections of the Act can be severe. In addition, REALTORS® should take steps to ensure that their advertising and marketing complies with the REALTOR® Code.

Having said that, it is also important for REALTORS® to understand what is not misleading advertising (i.e., claims that, while they may be seen as "tacky" or disparaging to competitors, are not false or misleading). This may include advertising of commission rates, comparative advertising that is hard-hitting but accurate and "mere puffery" (e.g., "Canada's favourite agents").

The civil misleading representations section of the Act (section 74.01(1)) prohibits any person from making a representation to the public for the purpose of promoting the supply or use of a product or business interest that is false or misleading in a material respect. The criminal misleading advertising section is substantially similar, except that in order to establish a criminal offence it must be proven that a representation was made with intent (i.e., knowingly or recklessly).

In addition to these "general" misleading advertising provisions, the *Competition Act* also contains a number of other sections that regulate specific forms of marketing practices. These include sections relating to deceptive telemarketing, bait-and-switch selling, deceptive prize notices, the sale of products above an advertised price, double ticketing, pyramid selling schemes, multi-level marketing plans and promotional contests.

The misleading advertising sections of the Act are discussed below, with real estate industry examples and compliance guidelines for REALTORS® (dos and don'ts).

Elements

Subsection 74.01(1) of the *Competition Act* contains the general civil prohibition against false or misleading representations. It provides:

> *"A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public that is false or misleading in a material respect."*

In order for a representation to be false or misleading, the following elements must be proven:

- a representation is made;
- to the public;
- to promote a product or business interest;
- the representation is false or misleading; and
- the representation is false or misleading in a "material" respect.

Each of these necessary elements is discussed in more detail below.

(a) Representation

The first element of misleading advertising is that a representation must be made to promote a product or business interest. This element is typically easily satisfied, is broader than merely advertising and includes claims made to the public regardless of form (i.e., a representation can be in printed, oral, broadcast, Internet or visual form).

It is also worth noting that the Competition Bureau has issued specific enforcement guidelines addressing misleading advertising in the context of online marketing (*Application of the Competition Act to Representations on the Internet*). As such, REALTORS® should ensure that their online advertising also complies with the *Competition Act*'s misleading advertising rules.

(b) To the Public

The second element of misleading advertising is that a representation must be made to the public. Canadian courts have taken a broad approach to defining "public." In this regard, it is possible that a statement made to a single person may be sufficient. In addition, the representation does not need to be made in a place where the public has access (and so the misleading advertising sections can apply, for example, to telemarketing).

(c) Promote Product or Business Interest

The third element of misleading advertising is that a representation must be made to promote either a product (including services, such as real estate services) or any business interest.

For this reason, representations made in connection with promoting real estate services, such as REALTOR® services, and representations made in connection with promoting other types of business interests (e.g., firm business activities, real estate franchise sales, real estate investment opportunities) can also be included.

Accordingly, it is important that REALTORS® ensure that all of their marketing in relation to all business activities (i.e., not only in relation to real estate services) complies with the general misleading advertising provisions of the *Competition Act*.

(d) False or Misleading

The fourth element of misleading advertising is that a representation must be false or misleading. In determining whether a representation is false or misleading, Canadian courts may consider not only the literal meaning (i.e., whether a representation is literally false) but also the "general impression" created by a representation.

For this reason, it is possible that in some cases the "general impression" of a literally true statement made in marketing could be misleading and caught by the misleading advertising provisions.

(e) False or Misleading in a "Material Respect"

The final element of misleading advertising is that a representation must be false or misleading in a "material respect." This does not depend on the monetary amount involved and no consumer needs to actually be deceived or misled. Instead, "materiality" depends on whether an average consumer would be influenced to purchase a product or service or otherwise change his or her conduct. As such, it is possible that a false or misleading claim made by a REALTOR® that is never actually relied upon could still be "material" if it would be likely to induce a consumer into purchasing services.

In addition, omitting important information can also be viewed as material–for example, important aspects of commission rates, the scope of real estate services provided, key limitations on services, etc.

Example:

A real estate investment company advertises a promotional contest to promote new real estate investment opportunities, stating that entrants may win a new SUV. In fact, what is available to be won is a lease on an SUV with strict conditions. This kind of claim is arguably "material" in that:

(i) the prospect of winning a new SUV would likely be important enough to induce an average consumer into entering the promotion and potentially investing; and

(ii) a limited lease is materially different from an outright award of an SUV (assuming that the general impression of the advertisement is that the winner receives full ownership of the SUV, and not merely of a limited lease).

Three specific types of advertising claims are discussed below (general misleading advertising claims, performance claims and comparative advertising claims).

Common Types of Advertising Claims

(a) General Misleading Advertising

The "general" misleading advertising provisions of the *Competition Act* prohibit representations that are false or misleading in a material respect made to promote a product or business interest.

As such, claims that are literally false made in relation to prices or services can raise misleading advertising issues. In addition, claims where the general impression is misleading can also raise issues (e.g., where a claim is literally true but misleading because it fails to disclose essential information; where a claim is partly true and partly false; or, where two meanings are possible, one of which is false).

Examples in a real estate context would include false or misleading claims in relation to commissions, other price-related claims (e.g., rebates), a REALTOR®'s experience or performance history, or in relation to the scope of services provided.

Examples:

- Literally false claims:
  - Advertising a false commission rate.
  - Advertising services that are not included in a stated commission rate.
  - Advertising a sale price other than the price actually agreed to between the parties.
- General impression is false or misleading:

> **XYZ Co. – Market Your Home for 3%**
>
> **(Available services include listing on the Board's MLS® System, open houses, newspaper ads, signs and negotiating offers)**

- Where the 3% is literally true for basic services, but does not include all of the services and no client ever retains XYZ based on this marketing, the claim may still be shown to be "material" because the claim relates to an important aspect of the services – i.e., price.

(b) Performance Claims

A second category of misleading advertising relates to performance claims. In addition to the "general" misleading advertising provisions, the *Competition Act* also specifically prohibits performance claims that are not based on adequate and proper tests conducted before the claims are made. Subsection 74.01(1)(b) of the *Competition Act* prohibits:

> *."... a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation."*

While performance claims can be a perfectly legitimate way of distinguishing services from competitors, it is important that before making any performance claims to the public (e.g., sales performance, number of properties sold, time to sell properties, other quantitative claims, etc.) REALTORS® ensure that they have relevant information (documentation as proof) to support the claim before making the claim. Depending on the type of claim, this could include board or association statistics, firm statistics, etc.

Example:

- "Sell Your Home with Halifax's Top Seller."
  - It is important to have information to support such a claim before making the claim and that the information is relevant (e.g., that such a claim is not made if the REALTOR® is, for example, only the top seller in Dartmouth, only in a part of Halifax, etc.).
  - Article 15.2 of the REALTOR® Code requires any advertisements containing performance representations to include the following information in the body of the advertisement:
    1. the geographical area;
    2. the relevant time-frame; and
    3. the source on which the claim is based.

(c) Comparative Advertising

A third category of misleading advertising relates to comparative advertising. Comparative advertising, for example is where a REALTOR® or firm compares its commissions, services or performance to another REALTOR® or firm, is not itself prohibited under the *Competition Act*. Accurate and truthful comparative advertising can be highly pro-competitive because it allows consumers to compare and evaluate the services of competing REALTORS®.

However, it is important that when making comparative advertising claims, such as sales comparison claims, that they are accurate and can be substantiated before making the claims.

It is also important that if such claims are only true for a particular time period, geographic region or service, etc., that the claims are clearly qualified.

Examples:

ABC Co. Sold More Condos in Calgary in 2009 than XYZ and Big Firm Combined. Market Your Home With High-Performing Condo Specialists.

*Based on total condos sold on the Calgary Real Estate Board's MLS® System in 2009.

- It is important to have relevant information to support such a claim before making the claim. It is also important that key information about the claim, including time period, region, service and source also be included. This ad would be unlikely to raise any issues.

ABC Co. - #1 Performer in December – List With the Top Performer!

- This ad does not state where, when or for what criteria ABC was the #1 performer and does not include any source for the claim. As such, depending on the overall context and impression created by the ad, it could raise misleading advertising issues (because it may suggest that ABC was the top performer in all regions, for all periods and criteria with no qualifications).

Internet and Social Media Marketing

The *Competition Act* does not have specific sections relating to Internet or social media advertising and marketing. The misleading advertising provisions of the Act, however, apply regardless of the marketing medium used (i.e., they apply to print, oral and online marketing).

The Competition Bureau also has specific enforcement guidelines relating to online advertising (*Application of the Competition Act to Representations on the Internet*) and periodically conducts Internet enforcement sweeps to detect websites that violate the misleading representation provisions of the Act.

Given that advertising and marketing is critical to the businesses of REALTORS® in Canada, it is important that online marketing (including social media marketing, such as through Facebook, Twitter, Linkedin and MySpace, which is increasingly important for marketing real estate services) also complies with the misleading advertising provisions of the *Competition Act*. Taking steps to ensure compliance not only reduces the risk of potential penalties, but has reputational benefits for organized real estate as well.

Some basic guidelines for Internet and social media marketing include:

- **False or misleading claims.** Don't make false or misleading claims about important aspects of real estate services (e.g., commissions, scope of services, performance, etc.) in Internet or social media marketing.
- **Key information.** Ensure that all important information relating to commissions, services, limitations, etc., is clearly disclosed (or a clear disclaimer used). If the medium does not allow full disclosure of important information (e.g., Twitter, micro-blogging, etc.), then clearly indicate the existence of qualifications and direct consumers to where they can get further information (e.g., a REALTOR®'s website).
- **Disclosure.** Don't require consumers to take active steps to get important information about services (e.g., commissions, scope of services, limitations, etc.).
- **Hyperlinks.** Ensure that any hyperlinks used to direct consumers to important information about commissions, services, limitations, etc., are obvious and clearly labelled.
- **Disclaimers.** Ensure that any disclaimers used and related representations are in close proximity and on the same web page.

- **"General impression."** Ensure that the "general impression" of online marketing, including any combinations of text and graphics/images, is not misleading (e.g., images suggesting a commission rate includes services it does not provide, graphics creating a false impression of affiliations or accreditations, etc.).
- These requirements are in addition to any jurisdictional specific requirements such as clearly displaying the name of the salesperson's brokerage.

Deceptive Telemarketing

The *Competition Act* contains separate standalone deceptive telemarketing sections that make telemarketing subject to certain disclosure requirements. The deceptive telemarketing provisions of the Act are contained in section 52.1 (reproduced at the end of this course manual). Telemarketing is defined as "*the practice of using interactive telephone communications for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest*."

In particular, when a person engages in telemarketing, he or she must make certain disclosures at the beginning of each call and other disclosures at some time during the call (the key requirements are set out below).

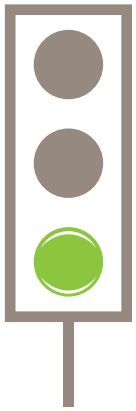
Violating the deceptive telemarketing provisions is a criminal offence and can result in significant criminal fines and other penalties. Corporations can also be legally liable for the illegal telemarketing activities of their employees and agents. As such, it is prudent that REALTORS® and their personnel that engage in telemarketing comply with the following basic guidelines:

- Do ensure that the following are disclosed at the beginning of each call:
  (i) the name of the company or person the caller is working for;
  (ii) the type of service or business interest the caller is promoting; and
  (iii) the purpose of the call.
- Do ensure that the following are disclosed at some time during each call:
  (i) the price of any product or service being promoted; and
  (ii) any important restrictions or conditions that must be met before the product is delivered or service provided.
- Do ensure that you comply with the National Do Not Call List (DNCL).
- Don't make false or misleading representations about the product or services.

Penalties

The potential penalties for violating the civil misleading advertising provisions of the *Competition Act* include Competition Tribunal and court orders to cease the conduct, orders to publish corrective notices, "administrative monetary penalties" (essentially civil fines) of up to $750,000 (for individuals) and $10 million (for corporations) and restitution orders to compensate consumers that have purchased products. Fines can be higher for subsequent orders. The potential penalties for violating the criminal misleading advertising provisions include unlimited criminal fines (i.e., fines in the discretion of a court) and/or imprisonment for up to 14 years.

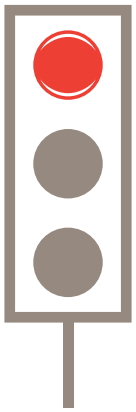
Compliance Guidelines – Misleading Advertising



Dos

- Do ensure that all marketing claims made to the public are true.
- Do ensure that all material and relevant information is fully and clearly disclosed (e.g., all important information in relation to commissions, discounts, the scope of services, contract terms, etc.). If the medium does not allow full disclosure of important information (e.g., Twitter, micro-blogging, etc.), clearly indicate the existence of qualifications and direct consumers to where they can get further information (e.g., a REALTOR®'s website, etc.).
- Do ensure that performance claims are not made unless they have been substantiated before making the claim (e.g., claims relating to number of units sold, sales performance, time to sell properties and other quantitative claims).
- Do ensure that information that may alter a principal representation in a claim to the public is not put in a disclaimer or hyperlink, but is clear and in close proximity to the claim.
- Do be aware that no one actually needs to be misled for a court to find that an advertisement is false or misleading.
- Do, if telemarketing, ensure that the following are disclosed at the beginning of each call:
  - (i) the name of the company or person the caller is working for;
  - (ii) the type of service or business interest the caller is promoting; and
  - (iii) the purpose of the call.
- Do, if telemarketing, ensure that the following are disclosed at some time during each call:
  - (i) the price of any product or service being promoted; and
  - (ii) any important restrictions or conditions that must be met before the product is delivered or service provided.

- Do, if telemarketing, ensure that you comply with the National Do Not Call List (DNCL).
- Do remember that false representations in any media, including the Internet and social media websites like Facebook, can be caught under the misleading advertising provisions of the Act.



Don'ts

- Don't make claims regarding commissions or services that are not true.
- Avoid or minimize the use of fine print disclaimers. If used, ensure the overall general impression created by the advertisement and disclaimer is not false or misleading.
- Don't make performance claims unless you can prove them, have substantiated them with relevant information before making the claim, and have included the basis for the claim in the advertisement.
- Don't make false or misleading representations if telemarketing.

Case Studies: Misleading Advertising

Misleading Advertising – Problem #1

Finding new listings was increasingly difficult in Mississauga, so Able Agent thought he would increase his marketing efforts to find a few more clients. To do this, Able thought it would be good to highlight his performance and his firm's performance to potential clients, and so he came up with the following two sales slogans for his new direct mail marketing campaign.

- "Sell Your Home with a Top 1% Seller"
- "Acme Sold More Homes in 2009 than XYZ and Big Firm Combined – Market Your Home With Top Performers!"

Questions

- What kind of advertising claim is the first claim?
- Are performance claims prohibited under the *Competition Act*?
- What should Able have before he makes this kind of claim?
- Are there any problems making this kind of claim the way it is?
- What additional information is required to comply with the REALTOR® Code?
- What kind of advertising claim is the second claim?
- Is comparative advertising prohibited by the *Competition Act*?
- What should Able have before he makes this claim?
- Are there any problems with making this kind of claim the way it is?
- How could Able improve the accuracy of this claim?

Misleading Advertising – Problem #2

Bricks and Mortar Realty was facing increasing pressure from online and low pricing competitors in Regina and so its broker and several of its leading REALTORS® prepared a new print and online marketing campaign to compete more aggressively on price and to market the advantages of its full service firm to prospective clients. Bricks and Mortar's new online marketing, on its home page and REALTORS®' individual pages, read as follows:

BRICKS and MORTAR REALTY

Call Us to Discuss the Advantages of Working With Us

6 Offices to Serve You

Sell Your Home With Bricks and Mortar for 3%

Some of our Services Include:

Listing on a Board's MLS® System

Bricks and Mortar flyers

10 real estate publications

Listing on Bricks and Mortar website

Showings

Exterior and interior photographs

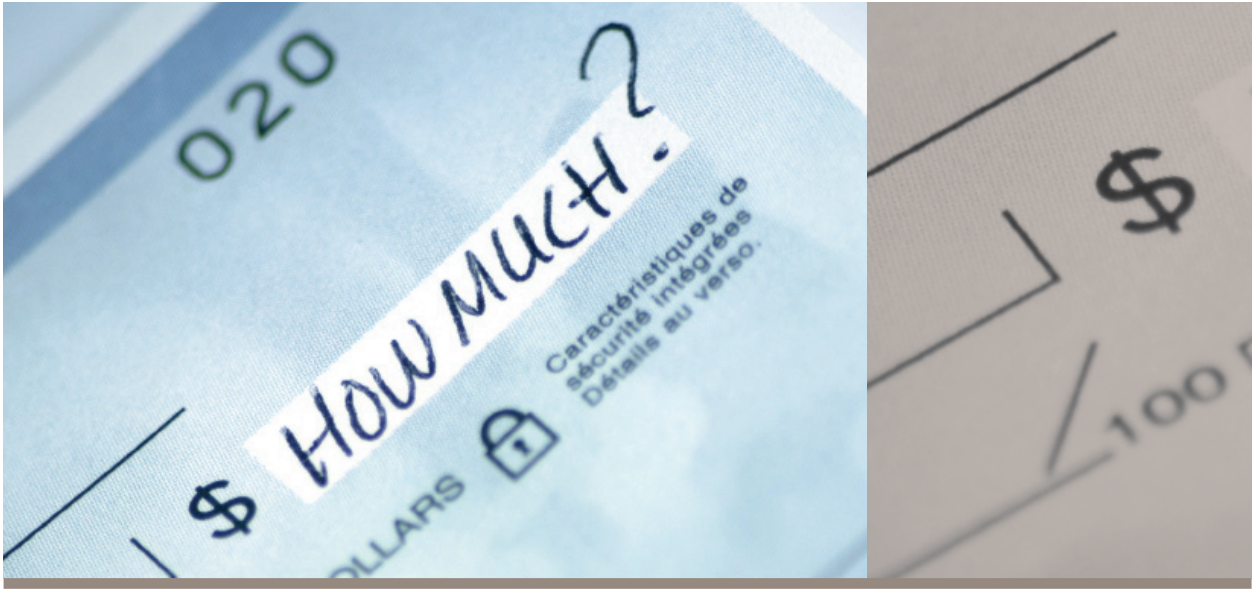
For sale sign

CLICK HERE FOR MORE INFORMATION

While Bricks and Mortar does offer a 3% service (in addition to other offerings), its 3% service includes only an MLS® listing, one real estate publication, listing on its website and one showing. The rate for all services listed in the ad is 7% / 3.5%, which is described in detail on a subpage by clicking the "Click Here . . . " hyperlink. Also, Bricks and Mortar only has five offices. In addition, the full rate stated on the subpage, when you click on the hyperlink, states 5% / 2.5% (both pages are out of date, but since they are generating leads Bricks and Mortar's broker decided to leave them unchanged for the moment).

Questions

- Are these statements being made to the public?
- Are there any literally false statements here?
- Are there any misleading statements here?
- If so, are any of the false or misleading statements "material"?
- Could the Bureau, if it decided to investigate, pursue this matter criminally?
- What are the potential penalties for breaching the misleading advertising sections?
- What could be done to improve these ads?
- Does the ad comply with Article 15 of the REALTOR® Code?



Price Maintenance

Overview

Until recently, the *Competition Act* contained criminal price maintenance sections which made it a criminal offence to, among other things, refuse to deal or otherwise discriminate against other business persons based on their low pricing policy. In the context of real estate services, this raised the possibility of criminal liability for REALTORS® that, for example, offered low pricing agents lower selling commissions than the commission splits they otherwise made available (based on several Alberta real estate firm price maintenance cases in the 1990s).

However, as a result of recent amendments to the *Competition Act*, the criminal price maintenance sections of the Act have now been repealed and replaced with new civil (i.e., non-criminal) sections. The new price maintenance provisions of the Act are contained in section 76 (reproduced at the end of this course manual). Two important changes are that first, these sections are no longer subject to criminal penalties (i.e., fines or imprisonment), but only to a potential Competition Tribunal order to cease the conduct, and second, that it is now necessary to show an "adverse effect" on competition in a market.

The impact for Canadian REALTORS® is that, while the price maintenance sections may still apply in some cases (discussed below), the potential liability is now, as a practical matter, narrower than before. However, it should be noted that although the criminal fines and imprisonment penalties for price maintenance have been repealed, private parties (e.g., competing REALTORS®) now have "private access" rights to seek Competition Tribunal orders for persons violating these sections to stop the conduct.

Types of Price Maintenance

(a) Refusals to Deal and Discrimination

The first type of price maintenance that is relevant to REALTORS® relates to refusals to supply products (including services) or discrimination against other persons engaged in business based on their low pricing policy, where the refusal to deal or discriminatory conduct has an adverse effect on competition in a market. What is considered to be a relevant market will vary depending on the circumstances and may include a city or town or a broader geographic area.

As a practical matter, as a result of the new "competitive effects" test that has recently been added (i.e., the requirement that the refusal to supply or discrimination results in an "adverse effect" on competition), the new provisions are likely to apply for the most part only in cases where the conduct is engaged in by a REALTOR® with a significant presence in the relevant market.

Where the elements for the new price maintenance sections are established, the Competition Tribunal may make an order prohibiting a person from continuing the conduct.

For this reason, REALTORS® that want to reduce the potential risk under these sections should avoid refusing to supply services to (or otherwise discriminating against) low pricing competitors. As discussed above, these new provisions are likely to be particularly relevant to REALTORS® (e.g., larger firms) with a significant market presence.

Examples of conduct that could provide grounds for an order under the price maintenance provisions if it has an adverse effect on competition:

- A firm with a significant market share refuses to allow a low pricing competitor to work on its listings based on the competitor's low commissions.
- A firm with a significant market share refuses to show a low pricing competitor's listings to clients based on the competitor's low pricing.
- A board member with a significant market share refuses to deal with a non-board member because of the non-member's low pricing.

(b) Inducing Suppliers to Cease Supply

The second type of price maintenance that is potentially relevant to REALTORS® relates to inducing a supplier by agreement, threat, promise or any like means, as a condition of doing business with the supplier, to refuse to supply to another person based on the other person's low pricing policy.

Where these elements are established, the Competition Tribunal may make an order prohibiting the conduct (or ordering that they do business with the supplier on usual trade terms).

These sections could apply, for example, where a REALTOR® induces a supplier of services (e.g., advertising, appraisal, survey or mortgage brokerage services, etc.) to refuse to supply such services to another REALTOR® based on that REALTOR®'s or firm's low pricing. Like the first type of price maintenance discussed above, to make out this type of price maintenance, it is necessary to show that the conduct has had an adverse effect on competition. As such, these new provisions are likely to apply for the most part only in cases where a REALTOR® with a significant market share engages in this type of conduct.

For this reason, REALTORS® that want to reduce the potential risk under these provisions should avoid inducing suppliers to refuse to supply products or services to low pricing competitors.

Examples:

- Agreeing with or threatening a service provider (e.g., real estate publication, mortgage broker, real estate appraiser, etc.) to refuse to supply goods or services to a low pricing competitor.
- Agreeing with or threatening a real estate board to refuse to admit a low pricing competitor for membership.

Penalties

Despite the potential risk that may arise in some cases under the new price maintenance provisions of the *Competition Act*, it should be pointed out that these sections are now civil (i.e., non-criminal) and that an adverse effect must now be shown on a market as a result of the conduct.

For this reason, the potential risk to REALTORS® is now less than under the former criminal sections. Having said that, there is still some potential risk to REALTORS® under these sections (the potential penalty being a Competition Tribunal order to cease the conduct as a result of a Competition Bureau or private party application to the Tribunal).

Moreover, competition law investigations and proceedings can be time consuming and expensive, and so the following are some basic compliance guidelines for REALTORS® that wish to avoid potential risk under these new sections:

Price Maintenance – Compliance Guidelines

- Don't refuse to deal with competitors based on their low-pricing policies (e.g., refusing to deal with low pricing REALTORS® or non-member firms).
- Don't discriminate against competitors based on their low-pricing policies (e.g., treating low pricing competitors differently based on their low commission rates).
- Don't induce suppliers to refuse to supply competing individuals or firms based on the competitor's low-pricing policy (e.g., inducing real estate publications, mortgage brokers, appraisers, real estate boards, etc., to refuse to supply services).

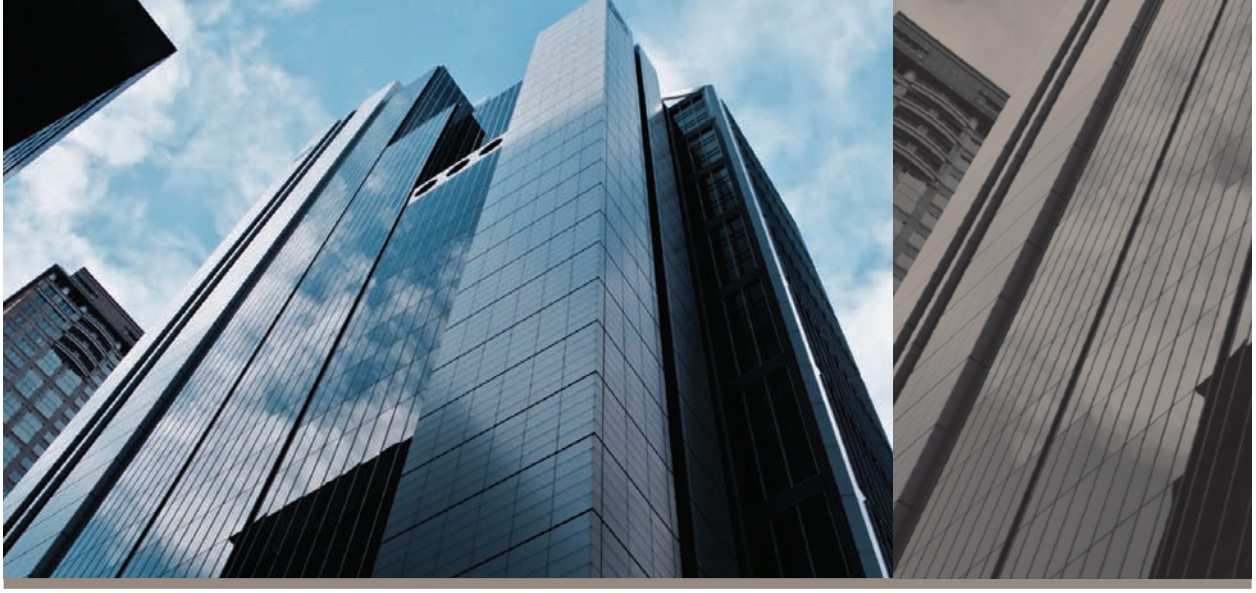
Case Study

Price Maintenance Problem

The REALTORS® at Big Firm (one of the larger firms in a mid-sized town) were getting tired of the cut-throat competition from Flat Rate Agents. At one of their weekly sales meetings, Bill Broker and a number of his REALTORS® thought they would even the playing field a little by adopting a new "informal policy" by refusing to allow any low pricing competitor (in their opinion, this meant competitors with commissions under 3%) to work on their listings and apply a little "strategic pressure" to the local appraisers, mortgage brokers and real estate publications to consider whose business was more important; i.e., Big Firm or the lower pricing competition. Two of the local real estate publications, "saw it their way" and stopped dealing with Flat Rate Agents and another lower rate firm.

Questions

- Are there any problems with the new Big Firm policy?
- What kinds of price maintenance issues does the new policy raise?
- What are the penalties for price maintenance?
- What would be a better approach for Big Firm to take?



Abuse of Dominance

Overview

The abuse of dominance sections of the *Competition Act* are also potentially relevant to the activities of REALTORS® and in particular to larger firms. Under sections 78 and 79 of the Act, abuse of dominance occurs where:

- A dominant firm (or firms) has market power (i.e., the ability to set prices above competitive levels in a defined market for a sustainable period of time);
- The dominant firm (or firms) engages in a practice of anti-competitive acts (i.e., conduct that has an intended negative effect on a competitor that is exclusionary, disciplinary or predatory, such as acquiring a competitor's customers/suppliers, employing long-term contracts to prevent customers from changing suppliers, etc.); and
- The practice of anti-competitive acts has substantially prevented or lessened competition or is likely to do so (e.g., the anti-competitive acts eliminate competition or prevent or impede a competitor's entry into a market or its ability to compete).

The abuse of dominance provisions are intended to establish boundaries of legitimate competition and allow the Bureau to seek remedies when a dominant firm (or firms) engages in conduct that eliminates or damages competitors and which maintains, entrenches or enhances the firm's (or firms') market power.

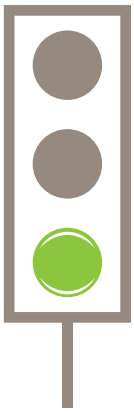
With respect to firms, the abuse of dominance provisions could apply where, for example, a dominant firm (or multiple firms) engages in a practice of predatory, exclusionary or disciplinary conduct towards a competitor (or class of competitor) with the result that the firm's (or firms') market power is or is likely to be strengthened or maintained.

The types of conduct that could potentially constitute anti-competitive acts include refusing to provide services, entering into long-term supply arrangements with key suppliers or providing below-cost services. As there are many potential types of conduct which, if engaged in by a dominant firm, could be seen as anti-competitive (section 78 of the *Competition Act* sets out a non-exhaustive list of anti-competitive acts, with case law having set out other examples), it is important that dominant firms review conduct that could be seen as anti-competitive. Having said that, anti-competitive conduct can be the subject of a remedial order by the Tribunal only if it results in a substantial prevention or lessening of competition or is likely to do so.

Penalties

The penalties for abuse of dominance include "administrative monetary penalties" (essentially civil fines) of up to $10 million ($15 million for subsequent orders), orders to cease the conduct and orders for the divestiture of assets or shares.

Abuse of Dominance – Compliance Guidelines



Dos

- Do, if you or your firm possesses a significant market presence and may be engaging in conduct that is predatory, exclusionary or disciplinary toward a competitor (or a class of competitors), seek competent legal advice in relation to the potential application of the abuse of dominance sections of the *Competition Act*.

Conclusion

It is generally lawful and appropriate to aggressively compete. However, as the federal *Competition Act* governs certain types of competitive activities, it is prudent for REALTORS® in Canada to have a basic understanding of some of the kinds of competition law issues that can arise in their day-to-day business activities. Moreover, as a competition law investigation, prosecution or other legal proceedings can be time consuming, expensive and result in severe penalties and negative publicity, and may also be contrary to other legislative or association requirements, it makes good business sense to follow basic competition compliance guidelines.

In this regard, the remainder of this competition law compliance course manual sets out some key sections of the *Competition Act* relevant to Canadian real estate professionals, key compliance resources and a set of compliance guidelines for most of the relevant sections of the *Competition Act* that are relevant to REALTORS®.

Relevant Provisions of the *Competition Act*

Section 45 (Criminal Conspiracy)

Conspiracies, agreements or arrangements between competitors

Sec. 45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Penalty

Sec. 45. (2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

Evidence of conspiracy, agreement or arrangement

Sec. 45. (3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

Defence

Sec. 45. (4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Defence

Sec. 45. (5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) is in respect only of the supply of services that facilitate the export of products from Canada.

Exception

Sec. 45. (6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

(a) is entered into only by companies each of which is, in respect of every one of the others, an affiliate; or

(b) is between federal financial institutions and is described in subsection 49(1).

Common law principles — regulated conduct

Sec. 45. (7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Definitions

Sec. 45. (8) The following definitions apply in this section.

"competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

"price" includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.

Sections 52 and 74.01 (False or Misleading Representations)

(a) Section 52 (Criminal Section)

False or misleading representations

Sec. 52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Proof of certain matters not required

Sec. 52 (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

(a) any person was deceived or misled;

(b) any member of the public to whom the representation was made was within Canada; or

(c) the representation was made in a place to which the public had access.

Permitted representations

Sec. 52 (1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes permitting a representation to be made.

General impression to be considered

Sec. 52 (4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Offence and punishment

Sec. 52 (5) Any person who contravenes subsection (1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

(b) Section 74.01 (Civil Section)

Misrepresentations to public

Sec. 74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(c) makes a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

Representation as to reasonable test and publication of testimonials

Sec. 74.02 A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest, makes a representation to the public that a test has been made as to the performance, efficacy or length of life of a product by any person, or publishes a testimonial with respect to a product, unless the person making the representation or publishing the testimonial can establish that

(a) such a representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, or

(b) such a representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given, and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

General impression to be considered

Sec. 74.03 (5) In proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

Determination of reviewable conduct and judicial order

Sec. 74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, $750,000 and, for each subsequent order, $1,000,000, or

(ii) in the case of a corporation, $10,000,000 and, for each subsequent order, $15,000,000; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

Duration of order

Sec. 74.1(5) (2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

Section 52.1 (Deceptive Telemarketing)

Definition of "telemarketing"

Sec. 52.1 (1) In this section, "telemarketing" means the practice of using interactive telephone communications for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest.

Required disclosures

Sec. 52.1 (2) No person shall engage in telemarketing unless

(a) disclosure is made, in a fair and reasonable manner at the beginning of each telephone communication, of the identity of the person on behalf of whom the communication is made, the nature of the product or business interest being promoted and the purposes of the communication;

(b) disclosure is made, in a fair, reasonable and timely manner, of the price of any product whose supply or use is being promoted and any material restrictions, terms or conditions applicable to its delivery; and

(c) disclosure is made, in a fair, reasonable and timely manner, of such other information in relation to the product as may be prescribed by the regulations.

Deceptive telemarketing

Sec. 52.1 (3) No person who engages in telemarketing shall

(a) make a representation that is false or misleading in a material respect;

(b) conduct or purport to conduct a contest, lottery or game of chance, skill or mixed chance and skill, where

(i) the delivery of a prize or other benefit to a participant in the contest, lottery or game is, or is represented to be, conditional on the prior payment of any amount by the participant, or

(ii) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the person's knowledge, that affects materially the chances of winning;

(c) offer a product at no cost, or at a price less than the fair market value of the product, in consideration of the supply or use of another product, unless fair, reasonable and timely disclosure is made of the fair market value of the first product and of any restrictions, terms or conditions applicable to its supply to the purchaser; or

(d) offer a product for sale at a price grossly in excess of its fair market value, where delivery of the product is, or is represented to be, conditional on prior payment by the purchaser.

General impression to be considered

(4) In a prosecution for a contravention of paragraph (3)(a), the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Exception

(5) The disclosure of information referred to in paragraph (2)(b) or (c) or (3)(b) or (c) must be made during the course of a telephone communication unless it is established by the accused that the information was disclosed within a reasonable time before the communication, by any means, and the information was not requested during the telephone communication.

Due diligence

Sec. 52.1 (6) No person shall be convicted of an offence under this section who establishes that the person exercised due diligence to prevent the commission of the offence.

Offences by employees or agents

(7) Notwithstanding subsection (6), in the prosecution of a corporation for an offence under this section, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the corporation, whether or not the employee or agent is identified, unless the corporation establishes that the corporation exercised due diligence to prevent the commission of the offence.

Liability of officers and directors

(8) Where a corporation commits an offence under this section, any officer or director of the corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by this section is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence.

Offence and punishment

(9) Any person who contravenes subsection (2) or (3) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

Section 76 (Price Maintenance)

Price maintenance

Sec. 76(1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

Order

(2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.

Persons subject to order

(3) An order may be made under subsection (2) against a person who

(a) is engaged in the business of producing or supplying a product;

(b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or

(c) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.

Where no order may be made

(4) No order may be made under subsection (2) if the person referred to in subsection (3) and the customer or other person referred to in subparagraph (1)(a)(i) or (ii) are principal and agent or mandator and mandatary, or are affiliated corporations or directors, agents, mandataries, officers or employees of

(a) the same corporation, partnership or sole proprietorship; or

(b) corporations, partnerships or sole proprietorships that are affiliated.

Refusal to supply

Sec. 76 (8) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

Sections 78 and 79 (Abuse of Dominant Position)

Definition of "anti-competitive act"

Sec. 78.(1) For the purposes of section 79, "anti-competitive act," without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Prohibition where abuse of dominant position

Sec. 79.(1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

Competition Law Compliance Resources

General

- The Canadian Real Estate Association (CREA), *Real Estate Competition Guide*.
- The Canadian Real Estate Association (CREA), REALTOR® Code.
- Competition Bureau Canada website: www.competitionbureau.gc.ca.
- Canadian Bar Association, *Fundamentals of Canadian Competition Law* (Thomson Carswell, Toronto, 2007).
- Bodrug and Goldman eds., *Competition Law of Canada* (Juris, New York, 2008).
- *Competition Act* (Department of Justice: www.justice.gc.ca).
- Competition Bureau, Draft Trade Associations Bulletin (2008).
- Competition Bureau, Bulletin on Corporate Compliance Programs (2008).

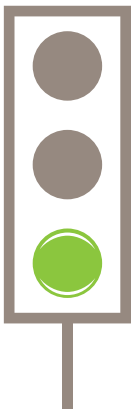
Conspiracy

- Competition Bureau, Competitor Collaboration Guidelines (2009).
- Competition Bureau, Pamphlet, Reaching an Agreement with Competitors (2003).
- Competition Bureau, Pamphlet, Setting Your Own Price (2003).

Misleading Advertising

- Competition Bureau, Pamphlet, False or Misleading Representations and Deceptive Marketing Practices (2009).
- Competition Bureau, Bulletin, Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act* (1999).
- Competition Bureau, Enforcement Guidelines, *Application of the Competition Act to Representations on the Internet* (2009).
- Competition Bureau, Enforcement Guidelines, Telemarketing – Section 52.1 of the *Competition Act* (2009).
- Competition Bureau, Pamphlet, What You Should Know About Telemarketing (2009).

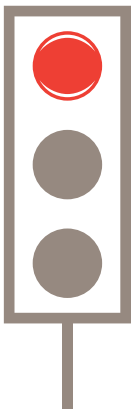
Compliance Guidelines – All Sections



Dos

- Do ensure that all commission rates, splits and other pricing decisions are made independently of competing REALTORS®.
- Do ensure that there is a clear and written agenda before meetings with competing REALTORS® (e.g., board/association meetings, conventions, etc.).
- Do ensure that board or association meeting minutes are recorded and reviewed by board personnel.
- Do object to improper board or association discussions (e.g., in relation to commissions, prices, marketing, dividing markets or clients or refusing to deal with competitors). If such a conversation continues, object (ensuring that the objection is noted). If the conversation continues, leave the meeting ensuring that your objection is on the record and if you think that there is a serious issue consider contacting competent legal counsel and/or your local board or association.
- Do ensure that all marketing claims made to the public are true.
- Do ensure that all material and relevant information is fully and clearly disclosed in marketing regardless of the medium (e.g., all important information in relation to commissions, discounts, the scope of services, contract terms, etc.). If the medium does not allow full disclosure of important information (e.g., Twitter, micro-blogging, etc.) then clearly indicate the existence of qualifications and direct consumers to where they can get further information (e.g., a REALTOR®'s website).
- Do ensure that performance claims are not made unless they have been substantiated before making the claim (e.g., claims relating to number of units sold, sales performance, time to sell properties and other quantitative claims).
- Do ensure that information that may alter a principal representation in a claim to the public is not put in a disclaimer or hyperlink but is clear and in close proximity to the claim.
- Do be aware that no one actually needs to be misled for a court to find that an advertisement is false or misleading.
- Do, if telemarketing, ensure that the following are disclosed at the beginning of each call: (i) the name of the company or person the caller is working for, (ii) the type of service or business interest the caller is promoting, and (iii) the purpose of the call.
- Do, if telemarketing, ensure that the following are disclosed at some time during each call: (i) the price of any product or service being promoted, and (ii) any important restrictions or conditions that must be met before the product is delivered or service provided.
- Do, if telemarketing, ensure that you comply with the National Do Not Call List.

- Do, if you or your firm possesses a significant market presence and may be engaging in conduct that is predatory, exclusionary or disciplinary toward a competitor (or a class of competitors), seek competent legal advice in relation to the potential application of the abuse of dominance sections of the *Competition Act.*



Don'ts

- Don't discuss commission rates, splits, discounts, rebates or other aspects of fees with competing REALTORS®, including during *in camera* sessions.
- Don't agree with competitors to fix commission rates, splits (fixed commission splits, as opposed to those negotiated on a particular sale), discounts, rebates or any other aspects of fees.
- Don't make statements implying that commission rates have been fixed or that a particular REALTOR® has been or will be boycotted.
- Don't discuss other types of "competitively sensitive information" with competing REALTORS® (e.g., current or future marketing plans, business plans, etc.), including during *in camera* sessions.
- Don't discuss dividing markets or clients with competing REALTORS®.
- Don't discuss refusing to deal with competing REALTORS®.
- Don't participate in board or association meetings without a clear written agenda.
- Don't use board or association meetings to discuss competitively sensitive information (e.g., commissions, discounts, business plans, clients, etc.).
- Don't participate in private meetings with competitors where competitively sensitive information is discussed or exchanged.
- Don't make claims regarding commissions or services that are not true.
- Avoid or minimize the use of fine print disclaimers. If used, ensure the overall general impression created by the advertisement and disclaimer is not false or misleading.
- Don't make performance claims unless you can prove them, have substantiated them with relevant information before making the claim, and have included the basis for the claim in the advertisement.
- Don't refuse to deal with competitors based on their low pricing policies.
- Don't discriminate against competitors based on their low pricing policies (e.g., treating low pricing competitors differently based on their low commission rates).
- Don't induce suppliers to refuse to supply to competitors based on that competitor's low pricing policy (e.g., inducing real estate publications, mortgage brokers, appraisers, real estate boards, etc., to refuse to supply services).
- Don't make false or misleading representations about the product or services if telemarketing.

Search and Seizure Guidelines

- Obtain a copy of the search warrant and immediately send it to legal counsel. Ask the key representatives of the Bureau for their business cards.
- Request that the Bureau officers wait in a boardroom located away from the public areas and employees. If possible, provide the Bureau officers with use of a boardroom for their review of documents during the search.
- Inform the key representatives of the Bureau that you have contacted legal counsel and ask them to wait for legal counsel to arrive before starting their search. Bureau officers will often agree to wait for some limited period of time before starting their search, but are under no obligation to do so. If they insist on starting their search right away, allow them to do so and do not obstruct them in any way.
- Be courteous and cooperate with the investigators. At the same time, do not discuss the company's or board's commercial policies or activities. Officers and employees should not discuss the substance of the allegations of the search warrant or engage in extended discussions with the Bureau officers until after conferring with legal counsel.
- Do not hide, destroy or remove documents from the premises during the search. All paper shredders on the premises should be disconnected and locked away, and all electronic documents (including email) should be preserved.
- Keep detailed notes of all discussions with investigators and of who is present during discussions. Include notations of who asks what. To the extent possible, always have at least two personnel present during discussions.
- Bureau officers typically place documents in sealed boxes or packages. It is critical that no seal be broken by anyone other than a Bureau representative.
- If any of the seized documents are required by the company or board for the purpose of carrying on its business, ensure that, under the supervision of the Bureau, copies of any such documents are made before the Bureau representatives remove them from the premises.
- Claim solicitor-client privilege on all correspondence, memoranda, etc., to and from lawyers (including in-house counsel) where it relates to seeking or giving legal advice. It is prudent to have a practice of keeping all privileged documents (i.e., correspondence, memoranda, etc., to and from lawyers relating to seeking or giving legal advice) in separate, segregated files to make it easier to claim privilege in the event of a search. This is also true for electronic documents (i.e., emails) that can also be subject to seizure during a search.

- Advise employees that the investigation is confidential and that they are not to speak to the media, competitors, co-workers, friends or family regarding the search.
- Instruct employees to refer all questions and inquiries to a designated staff person or preferably counsel.

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