

**CREA
2009**



REAL ESTATE COMPETITION GUIDE
Promoting Free and Open Competition

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INTRODUCTION: WE'RE COMPETITIVE ENTREPRENEURS BY NATURE

The real estate industry is highly competitive; brokers, agents, and salespeople compete to secure listings and to find successful buyers for transactions. At the same time, brokers, agents, and salespeople co-operate on a regular basis to successfully sell real estate. The tug-of-war between co-operation and competition can create opportunities for anti-competitive activity. In order to minimize risk, sensitivity to competition law issues is a business necessity.

This document provides an overview of the *Competition Act* and highlights the sections of the Act that REALTORS® should be aware of and understand. It also sets out some general guidelines to minimize the risk of violating the *Competition Act* and the specific steps that brokers can take to promote compliance with the Act.

With knowledge and understanding of the laws comes the freedom to actively pursue legitimate business opportunities. There are many valuable services a REALTOR® or real estate company provides, and promotion and marketing of those services can translate into listing and selling advantages.

If you would like more information about competition issues, the CREA Competition Compliance Centre is available on the national page of REALTOR Link®. There is also an online Compliance Test that is included on this website.



THE *COMPETITION ACT*

The *Competition Act* is federal legislation that is designed to maintain and encourage competition in the marketplace. The Act contains a number of criminal offences and also provides for certain conduct that, while not constituting a criminal offence, may be reviewable by a quasi-judicial body called the Competition Tribunal. The Act applies to virtually all sectors of business – including real estate Boards and Associations, firms, brokers, agents, independent contractors, and salespeople.

It is essential, therefore, that REALTORS® have an understanding of Canada's competition laws and how they are applied in the real estate industry. Failure to recognize and avoid anti-competitive conduct could result in criminal prosecution, Competition Tribunal proceedings, and civil court actions for damages. The time and expense involved in defending yourself in these proceedings is obvious, however the damage to the reputation of an individual implicated in anti-competitive behaviour may also impose very real costs.

This document is not intended to be an exhaustive or technical statement of the law. Rather, it is designed to provide simple, clear and understandable guidelines for compliance with the provisions of the *Competition Act* that are of day-to-day concern to REALTORS®. In fact, it is through everyday interaction and conversations with customers, clients and competitors that members are most at risk of becoming implicated in competition law investigations and litigation. Statements and actions that are entirely innocuous may be misunderstood or taken out of context and lead to an investigation, which can be time-consuming and extremely expensive.

The relevant provisions of the *Competition Act* may be simplified to three basic rules:

- Don't collude. Make independent business decisions without discussion, consultation, or agreement with competitors.
- Don't discriminate. Do not discriminate against or refuse to do business with competitors or other persons because of their pricing policies.
- Don't mislead. Do not mislead the public in your advertising. Ensure that your advertising is truthful, accurate and, if making performance claims or statistical claims, supported by facts.

By understanding and following these three simple rules in dealing with competitors, customers, clients, and real estate Boards and Associations, REALTORS® can avoid issues that generate concerns involving compliance with the *Competition Act*.

DON'T COLLUDE



The Provisions

It is important for REALTORS® to make independent business decisions because agreements between competitors can violate the criminal and/or non-criminal conspiracy provisions of the *Competition Act*.

The criminal conspiracy provisions apply to agreements between competitors to fix or increase prices; allocate sales, customers, or territories; or reduce the supply of a service or product. The parties involved in an alleged conspiracy do not have to possess market power and there does not need to be proof that the agreement would be likely to lessen competition. The parties do not have to be actual competitors, as long as it is reasonable to believe that they would be likely to compete in the absence of the agreement.

There is an exception to the criminal conspiracy provisions called the ancillary restraints defence. This defence is applicable if the parties to an agreement can prove that the agreement or restraint in question is ancillary to a broader or separate agreement that includes the same parties; the agreement or restraint is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement; and the broader or separate agreement, when considered in the absence of the agreement or restraint, does not contravene the criminal conspiracy provisions. However, it should be kept in mind that agreements may still be reviewed under the non-criminal conspiracy provisions of the Act, even if the ancillary restraints defence applies to exempt the agreement from the criminal conspiracy provisions.

Bid rigging can also raise concerns under the criminal conspiracy provisions of the *Competition Act*. Bid rigging is where a person agrees not to submit a bid or agrees to withdraw a bid submitted in response to a call for bids or tenders. Submitting a bid or tender that is arrived at by an agreement with another person can also raise concerns if the agreement is not made known to the person receiving the bids. No proof is required that the activity would actually limit competition.

The non-criminal conspiracy provision applies to agreements between competitors that substantially lessen competition in a market, or have the potential to substantially lessen competition in a market. The Competition Bureau has indicated that a substantial lessening of competition will be present if the parties to an agreement maintain or enhance their ability to exercise market power, or if the agreement hinders the development of future competition. As with the criminal provisions, the parties to the agreement do not have to be actual competitors, as long as it is reasonable to believe that they are likely to compete in the absence of the agreement. Unlike the criminal conspiracy provisions, however, the civil provisions take any pro-competitive effects of alleged conspiracies into consideration.

It is important to remember that the conspiracy provisions of the Act do not require agreements to be expressed in writing. Agreements or understandings that are written, oral, expressed, or implied from silence while others engage in improper discussions can all raise concerns under these provisions of the *Competition Act*. Further, an agreement does not have to be implemented or carried out; the offence is the act of the agreement itself.

REALTORS® should understand that an anti-competitive agreement may be found without any direct evidence of consultation or communication between the alleged conspirators. Investigators may rely on what is called “circumstantial evidence” to establish the existence of an agreement. For example, an exchange of price lists followed by a price increase would be circumstantial evidence.

Application in Real Estate

In the real estate industry, many business decisions that brokerages make have the potential to raise concerns under the conspiracy provisions of the Act. It is therefore essential that such decisions be made independently and without consultation, discussion, or agreement with competing offices. The following are examples of scenarios where REALTORS® and brokers need to be aware of potential competition risks.

Listings on a Board or Association’s MLS® System must contain an offer of compensation from the listing agent to a cooperating agent, referred to as a commission split. REALTORS® and brokers should avoid agreements with competitors that establish a fixed commission split. Further, two or more firms should not agree to offer to a third firm, or other particular offices, a lower commission split. The determination of commission splits should be handled on a case-by-case basis and subject to negotiation. Listing and cooperating offices may negotiate the compensation they will pay to each other, but such discussions should never include a third office. Brokers and real estate agents should also avoid conversations with competitors about commission fees and the formula used to calculate the compensation, such as a flat fee or a percentage of the sale price. Discussions with competitors about commission fees, calculation of compensation, and commission splits can result in allegations of price fixing, which is prohibited by the criminal conspiracy provisions.

REALTORS® and brokers should avoid agreements with competitors to allocate customers or territories. For example, two real estate brokerages should not agree to only provide real estate services in the area of town where their respective offices are located. Such an agreement could fall under the criminal conspiracy provisions of the Act.

DON'T DISCRIMINATE



The Provisions

The price maintenance provisions in the *Competition Act* are non-criminal provisions that apply where any person directly or indirectly influences upward, or discourages the reduction of, the price at which any other person engaged in business in Canada supplies, offers to supply, or advertises a product or service within Canada.

These provisions also apply where a person refuses to supply a product to or otherwise discriminates against any other person engaged in business in Canada because of the low pricing policy of that other person.

In each case, the Tribunal can make an order under these provisions where it finds that the conduct in question is likely to have an adverse effect on competition in a market. It should be noted that unlike the conspiracy provisions, a single person or firm can commit price maintenance.

Application in Real Estate

Simply put, the price maintenance provisions mean that a broker or REALTOR[®] cannot be part of any agreement, threat or promise, whether verbal or in writing, that can be interpreted as pushing up prices. It also means that a broker or REALTOR[®] cannot discourage the reduction of fees or the offering of discounts.

Similarly, brokers and REALTORS[®] should also not refuse to deal with or boycott a discount broker because of that broker's low pricing or commission policy. If a listing office offers a lower amount to some co-operating offices in the market, the listing broker should be prepared to explain the difference, in line with the rationale of securing a satisfactory offer. Such a decision should not be based on the low pricing policy of such offices. Also, sales representatives should never suggest to potential clients or customers that other brokers will not co-operate with a certain firm or that certain firms have agreed not to cooperate for less than a particular commission split. Doing so could raise price maintenance concerns and be in conflict with REALTORS[®] responsibilities as fiduciaries to their clients. Further, if two or more people agree not to deal with a discount broker, this could not only amount to price maintenance, but could also constitute a conspiracy.

Price maintenance can also be a concern in the real estate industry with respect to advertising. Brokers and REALTORS[®] must not suggest that a newspaper should refuse to accept advertisements from discount brokers or advertisements that contain discounted fee claims.

DON'T MISLEAD



The Provisions

The *Competition Act* contains both civil and criminal provisions regarding misleading advertising.

It is a criminal offence for any person, for the purpose of promoting the supply or use of a product or any business interest, to knowingly or recklessly make a representation to the public that is false or misleading in a material respect. “Material respect” means that the advertising must be likely to influence a purchasing decision. Both the general impression conveyed by the representation and its literal meaning are taken into account in determining whether or not the representation is false or misleading in any material respect. It is not necessary that anyone actually be misled or suffer damages for an offence to occur, and it is also not necessary to show that the representation was made to anyone in Canada or in a place that the public had access.

The *Competition Act* also includes non-criminal provisions pursuant to which misleading representations can be dealt with more expeditiously before the Competition Tribunal, subject to a lower burden of proof, but without the prospect of imprisonment for offenders. These non-criminal provisions apply to representations that are false or misleading in a material respect, even if a representation has not been made knowingly or recklessly. Where performance claims are made, they must be based on tests that have already been carried out. In addition to the general non-criminal misleading advertising provision, there are also specific, non-criminal provisions that address testimonials, bargain prices, sales above advertised price and promotional contests.

Application in Real Estate

Misleading advertising reflects poorly on the real estate industry and may also be a violation of the REALTOR® Code that could subject the REALTOR® to discipline by his/her Board or Association. Unlike misleading advertising, truthful, non-deceptive advertising is pro-competitive, serves to enhance the image of all real estate practitioners, and is not restricted by the *Competition Act*.

An issue that frequently arises in practice is whether advertising that compares the accomplishments or skills of one member over another, called comparative advertising, may be restricted on the grounds of “discrediting a competitor” under the REALTOR® Code. Although an ad may be seen to be tacky or disparaging, comparative advertising, like other forms of advertising, may be restricted only if it is materially untrue or deceptive. An ad will be considered false or misleading if it contains representations that are untrue or representations that may be true but when taken in context but would lead a typical consumer to reach factually inaccurate conclusions. This test requires objective proof that the representations are false or misleading.

When describing real estate firms, use of superlatives may be misleading if the advertiser does not have proof of the claims. Unproven claims of superior performance of a firm’s service should therefore be avoided. Further, advertising may be subject to action by the Competition Bureau and Board or Association discipline if claims in advertisements reflect untrue information about average selling time for a company, or the percentage of market share held by a particular brokerage firm in relation to others.

Detailed information on various aspects of the law pertaining to misleading advertising is available in CREA’s Misleading Advertising Guide.

Consequences of Violations

Fines/Imprisonment

Penalties for violations of the criminal provisions of the *Competition Act* can be severe. They can be imposed not only on companies, but also directly on employees, agents, officers, and directors who authorize or participate in the unlawful conduct. Penalties for some offences have no maximum fine. The highest fine imposed to date in Canada for an offence under the *Competition Act* is \$50.9 million against a corporation and \$550,000 for an individual. Individuals can also be imprisoned for up to 14 years. In one case, an individual was sentenced to a prison term of one year for price fixing offences.

Administrative Monetary Penalties and Restitution

If a court or the Tribunal finds that a person has engaged in a reviewable practice it can, in the case of certain practices, order the payment of significant monetary penalties. For example, under the non-criminal misleading advertising provisions, a court or the Tribunal can, in certain circumstances:

- order an individual to pay a penalty of up to \$750,000 and, for each subsequent order, up to \$1 million; and
- order a corporation to pay a penalty of up to \$10 million and, for each subsequent order, up to \$15 million.

A court or the Tribunal can, in certain circumstances, also order the payment of restitution under these provisions.

Injunctions or Other Orders

A court or the Tribunal may impose restrictions limiting a company's activities. Such an order may go substantially beyond merely prohibiting the conduct that gave rise to a proceeding and impose broad limitations on future practices and conduct, or require remedial action.

Civil Damages

In addition to the foregoing penalties that can result from governmental procedures, private enforcement actions are also possible. Anyone who has suffered damages as a result of conduct constituting a criminal offence under the *Competition Act* may sue for his or her damages and certain costs of bringing the action. In addition, most provinces have procedures in place to certify class action proceedings and it is common to see such actions being filed when an offence has been committed under the *Competition Act*.

Private parties may also apply to the Tribunal under several of the non-criminal reviewable practice provisions for a remedial order (but not damages).

High Cost of Investigations

The cost of defending a proceeding under the *Competition Act*, even if successful, can be enormous in terms of monetary expenditures arising from legal fees and the time of executives, employees and other persons required to participate in the defence. There can also be other costs, such as potentially adverse publicity, a negative impact on public and customer relations, and an emotional price paid by all concerned.

GUIDELINES FOR MINIMIZING COMPETITION CONCERNS

Dangerous Words and Phrases

In addition to refraining from conduct that is prohibited by the *Competition Act*, real estate brokers, agents, and salespeople should also avoid using language that could create the appearance of illegal activity. This is what is known as “loose language”, which is any conversation or phrase that can be interpreted as anti-competitive by nature. REALTORS® who use loose language in their dealings with customers and clients can be almost as dangerous as those who actually do fix commissions or conspire to boycott other real estate practitioners.

In relations with customers and clients, brokers, agents, and salespeople should explain and justify their pricing and other business policies in terms of the value their office provides. Promote your firm’s track record, detail your marketing or negotiating expertise, explain the functions and the value of the services performed by a real estate professional, defend your qualifications – use the language of competition, not conspiracy.

Brokers, agents, and salespeople should also avoid making statements in the course of soliciting or showing a listing which imply that commission rates have been fixed or that a particular broker has been or will be boycotted.

These are examples of statements that can suggest or imply that real estate practitioners are engaged in anti-competitive activity:

“I’d like to lower the commission rate, but the Board has a rule.”

“This is the rate that everyone charges.”

“I’d like to lower the commission, but no board member will show your house unless the commission is X%.”

“Before you list with ABC Realty, you should know that no one will work on their listings.”

Comments made between competitors in the course of their day-to-day dealings can easily implicate members and their Board/Association in claims of anti-competitive conduct. Brokers, agents and salespeople must recognize and avoid statements that suggest anti-competitive activity amongst firms. These are examples of words and phrases that can give the impression of anti-competitive activity:

“The best way to deal with John Doe is to boycott him.”

“Let him stay in his own market. This is our territory.”

“We should cooperate more with each other and all charge the same commission.”

“What are your firm’s commission rates?”

“We should agree to cooperate with XYZ Realty only if they agree to a higher commission split.”

“Our firm offers ABC Realty a lower commission split because they’re a discount broker.”

“ABC Realty shouldn’t be allowed to join our Board. Their ‘flat fee’ marketing approach just wouldn’t fit in with the way we do business around here.”

Working with Real Estate Boards and Associations

Any member who participates in the affairs of a real estate Board or Association should be cautious about discussions at meetings that may relate to commission fees, pricing structures, membership admissions policies and advertising or marketing practices of other members.

Members who are present during anti-competitive discussions should immediately request that the conversation be stopped or the topic be changed. Remember, silence may not protect you if anti-competitive allegations are subsequently made.

If the discussion continues, promptly leave the meeting and request that your departure be noted for the record. Ensure that you report your action to distance yourself from anti-competitive discussions in line with the reporting responsibilities required by your firm.

Members who serve on discipline/professional standards and arbitration committees must also be sensitive to their position. You must be cautious that no aspect of any proceeding gives the appearance or impression of bias or unfairness. A member who has been disciplined may allege the discipline was not based on the merits of the case, but rather was a competitive vendetta.

Competition and the REALTOR® Code

The REALTOR® Code is designed to promote professionalism, industry performance and efficiency. REALTORS® should not misuse or abuse the REALTOR® Code by filing complaints against competitors based on fee structure, comparative but truthful advertising, or acceptance of open or exclusive listings. Such misuse of the REALTOR® Code could expose the REALTOR® and even the Board to liability.

Tips for Compliance

- Brokerage firms should establish their fees and commission splits or bids on tenders unilaterally.
- Avoid any discussion with competitors about the brokerage firm's intention to modify fees or commission splits.
- If a brokerage firm is modifying its rates (i.e., commission or fees for services), document the business reasons for the decision. This correspondence should be clear in stating that the decision was made unilaterally, based upon particular or specific economic circumstances. Any distribution of the memo should be limited to members of that brokerage firm.
- Sales people working for a particular brokerage firm should be able to explain the services provided for the fees charged and never infer or suggest that fees were fixed in co-operation with other firms or that they are standard for all brokerage offices.
- Brokers/agents must determine their cooperative compensation policies, also known as commission splits, in a unilateral and independent manner.
- Sales people should be instructed never to suggest to others in the real estate industry, including competitors, potential clients, or customers that they should not do business with a particular competitor because other brokers/agents will not cooperate with that firm.
- Do not discriminate against discount brokers because of their low pricing policy.

BROKER OFFICE COMPLIANCE

Ignorance of the law is no excuse. Brokers and agents should institute an office compliance program because they could be held responsible for the actions of their salespeople. They should also ensure there is monitoring of the implementation of the compliance program.

Document Retention Programs for Brokerage Firms

Numerous hard copy and electronic documents are created in real estate brokerages every day. To properly manage these documents, each real estate brokerage firm should implement a document retention and review program that includes not only correspondence and minutes from meetings, but emails or electronic correspondence as well. Legal implications notwithstanding, a document retention and review program makes day-to-day administrative sense and is a more efficient use of existing record keeping and storage technologies.

Brokers must ensure that their document retention program is actively enforced and that documents are destroyed in accordance with that program. However, it is essential to remember that a document retention program may not be used for destruction of documents when there is imminent or pending litigation or government investigation. The destruction of documents, despite imminent or pending litigation or government investigation, may result in adverse findings and charges of obstruction of justice.

Generally, documents should be retained no longer than reasonably necessary and should be destroyed when their useful life is over. This general rule is subject to requirements on record retention as stipulated by law (e.g. *Income Tax Act* and the *Proceeds of Crime (Money Laundering) and Terrorism Financing Act*). Brokers should consult their own legal counsel for advice in this regard.

For the purposes of the *Income Tax Act*, the general rule is that books and records must be retained for a minimum of six years from the end of the last taxation year to which they relate. Exceptions to this general rule include minutes of meetings of directors and general ledgers or other books of final entry. These records must be retained for a period of two years following the dissolution of a corporation. All of these retention rules may be waived by obtaining written ministerial permission for early disposal.

Remember that all communications, including email, are potentially part of the record that may be subject to disclosure in the event of an investigation or litigation. It is also generally good practice to limit distribution of correspondence and memoranda to those who need to receive them. Documentation is subject to misinterpretation, and limited distribution of documents is encouraged so as to minimize the risks of misinterpretation. Any documentation that is widely circulated, including emails, carries the risk of misinterpretation.

Correspondence and memoranda to and from any lawyers should generally be kept in a segregated file marked “Privileged and Confidential” and should not be distributed unless approved in advance by the relevant lawyer. Distribution of this type of correspondence outside your office may affect whether or not solicitor-client privilege may be claimed should the firm ever be searched or become involved in litigation.

Salesperson Education and Available Resources

The ability of real estate brokers and agents to comply with the *Competition Act* is directly related to their ability and willingness to educate their sales people. Because brokers or agents may be held accountable for the actions and statements of their sales representatives, it is essential that sales representatives in each office have at least a basic knowledge and understanding of Canada’s competition laws and how they are applied in the real estate industry.

CREA has developed a number of materials for member offices to use in educating their brokers, agents and salespeople about the *Competition Act*. These include the CREA competition law video, the Competition Law Compliance Centre available at www.realtorlink.ca and this brochure. Additional materials and competition law sessions are made available to REALTORS® through real estate Boards and Associations.

Brokers are encouraged familiarize their salespeople with this brochure, ensure they view the CREA competition law video at least once annually, and encourage regular participation in Board functions on competition law and business practices. The company’s brokerage manual should also clearly outline the firm’s own compliance program. It is recommended that each salesperson be required to sign an acknowledgement indicating they have read, understood and agree to abide by the policy. A sample office policy is posted at the Competition Compliance Centre on REALTOR Link® and is included at the back of this brochure.

Legal Counsel

Each real estate firm should have access to competent legal counsel. If the firm’s regular solicitor does not have competition law expertise, they should be asked to identify other lawyers to be consulted when and if competition law matters arise. Legal advice should be obtained whenever the office intends to engage in any conduct that might give rise to questions regarding anti-competitive behaviour.

Boards and Associations can also use the legal services available through CREA’s legal department for competition law concerns.

Reporting Potential Liability

As part of regular training and review, salespeople should be instructed to report to their broker, agent or office manager any incidents that could lead to an inference or interpretation of anti-competitive conduct such as commission-fixing or boycotting of a competitor. Once an incident is reported, the broker, agent, or manager should take immediate steps to disassociate their firm from the anti-competitive conduct. If it is determined one of the firm's own salespeople initiated the anti-competitive discussions, that person should be disciplined.

Responding to an Investigation/Complaint

Despite all efforts to comply with the *Competition Act*, your firm may nevertheless be subject to an investigation or complaint under the Act. Brokers should have an office policy that requires salespeople and other staff to direct all inquiries from the Competition Bureau or any other government agency to the broker/agent or office manager. In addition, any inquiries or complaints should be referred immediately to the firm's lawyer.

If you are contacted without notice by investigators under the *Competition Act* with a search warrant authorizing the search of your premises, keep in mind that investigators have the right (and it is their job) to be there, to review any files that are within the scope of their order/search warrant and to take away (temporarily) anything that is relevant. It is an offence to refuse investigators access or to hide or destroy documents or files relevant to their inquiry.

Efforts must be made, however, to ensure that documents that are subject to claims of solicitor-client privilege are not shown to or reviewed by investigators. If necessary, all documents that may be privileged should be placed in sealed envelopes, without investigators seeing or reviewing them, until a court can determine the claims of privilege.

If investigators arrive at your office, call your lawyer and ask them to come to your office immediately. If your lawyer cannot appear in person, provide details of the search by telephone, email, or fax. If possible, your lawyer should speak with the head investigator before the search begins.

Broker Office Compliance Form

The following is recommended text for a competition compliance agreement for broker offices. A printable version of this document is available in the Competition Compliance Centre on REALTOR Link®.

Competition Compliance Policy of (name of firm)

1. The commission rates or fees charged by our firm are based upon the cost and value of the services we provide our clients and customers. Our rates or fees are not determined by any agreement, understanding, recommendation or suggestion involving a competitor or any other person who is not a party to a listing agreement with our firm.
2. The amount of compensation that this firm offers to co-operating offices is determined by the level of service to be performed by those offices in addition to the amount of compensation necessary to foster co-operation. The compensation offered to co-operating offices is not intended, and is not to be used, to encourage or compel any competing firm to raise or lower its commission rates or fees.
3. Salespersons and brokers/agents affiliated with this firm shall not discuss with any person affiliated with another real estate firm the commission rates or fees charged by this or any other real estate office within our marketing and sales area. Notwithstanding the foregoing, salespersons and brokers/agents affiliated with this firm may negotiate the compensation to be paid to a co-operating salesperson or broker/agent on an individual transaction.
4. Listing presentations shall focus exclusively on the level and quality of service provided by this office, the results we have achieved for customers and clients and the performance the client can expect in exchange for the fees we charge. Any salesperson or broker/agent who is requested to compare our services with those of a competing firm should do so by emphasizing the value of the services we provide, not by disparaging competitors.
5. Whenever a salesperson is uncertain about a proper response to the concerns of an actual or potential client or customer, or whenever a salesperson has been present during an unauthorized discussion on commissions or fees, he/she should immediately contact the firm's principal broker/agent or sales manager and advise of the situation.

I have read, understand, and agree to comply with the policies and procedures outlined above.

Signed: _____ (REALTOR®/Sales agent)

Date: _____

Any questions or comments about the service or products CREA provides?
You can contact us on-line at info@crea.ca.

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