

# COMPLIANCE GUIDELINE

## of the Canadian Real Estate Association for Real Estate Boards

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### Introduction

It is the policy of The Canadian Real Estate Association to ensure that all member Real Estate Boards comply with Canadian Competition law. A breach of this law can impose serious criminal and civil penalties on Boards and their members.

This Guideline is designed to assist the Boards and their members in recognizing competition problems and appreciating when legal advice is required.

The purpose of a Guideline is to provide reasonable and safe operating guidance to industry personnel. It is not intended to constitute an exhaustive or technically-accurate statement of precise legal rules, or else the Guideline would simply quote the Statute and the Order and say nothing more, and as such would serve no useful purpose,

### An Overview of Competition Law

Canada's competition laws are intended to eliminate artificial restraints on trade which impair economic efficiency. Real Estate Boards in Canada control access to the MLS® system. In many Boards in Canada, access to the MLS® system is important to licensed sales personnel who practice in the residential area. It is important, therefore, that Real Estate Boards through By-Laws, Rules, Codes of Ethics and Policy Guidelines not limit the ability of their members to compete fairly in the marketplace.

The Competition Act contains both criminal offences and civil remedies. In the case of criminal offences, there are severe penalties for a breach of the legislation. For example, in the case of agreements limiting competition, the maximum fine is ten million dollars or five years imprisonment, or both. In the case of other offences, the fine is at the discretion of the Court, with a maximum prison term applicable to an individual being five years.

A breach of the law can also result in the issuance of civil Prohibition Orders by the Competition Tribunal. In addition, the law provides for private damage actions in which individuals or firms can claim damages resulting from anti-competitive practices that contravene the legislation.

Basically, there are two types of offences. The first type is called a "per se" offence. For these offences, the Government does not have to prove that the anti-competitive practice actually reduced competition. The mere act gives rise to an offence. The main examples are bid-rigging, price maintenance and misleading advertising.

However, in most cases, an illegal act occurs only where the practice would lessen competition unduly. This includes agreements between competitors and predatory pricing, in addition to various distribution practices such as refusal to sell, exclusive dealing, tied selling and market restriction.

The Guideline is not an exhaustive statement of the law. It deals with the main provisions of Canada's competition laws that are of direct day-to-day concern to Real Estate Boards and their members.

While the Competition Act contains a number of criminal offences and civil prohibitions, there are three main areas of concern to Real Estate Boards: agreements that limit competition between members; price maintenance; and, misleading advertising. The latter is likely to be of greater concern to members of Boards than to the Boards themselves.

## Anti-Competitive Agreements

The most serious offences under the competition laws are agreements which restrict competition unduly. Normally, these arise as a result of discussions or agreements with competitors. In the context of Real Estate Boards, the agreement may be found in Board ByLaws limiting the ability of the members to compete. The most serious restriction relates to fee-setting or price fixing, but an agreement with respect to any competitive activity may limit competition unduly and contravene the legislation.

It is important to remember that the agreement or understanding does not have to be written and may include any agreement or understanding, oral or written, expressed or implied.

As all the members of a Real Estate Board compete with each other in the sale of real estate, Boards or their members should not reveal or seek sensitive market information from their competitors such as fees, proposed fees, profit margins or costs. The aforesaid is not meant to curtail negotiations between agents on an individual transaction.

Similarly, agreements between real estate firms to refuse to deal with certain customers or to allocate territories or customers amongst real estate firms can create similar problems. Likewise, any agreement or understanding, whether formal or informal, between competitors to restrict or prohibit business with particular customers or sellers is strictly prohibited.

The second potential area of concern is bid-rigging. This would be of more concern to the members of a Real Estate Board than the Board itself. Bid-rigging is a "per se" offence, which means that there is no need to prove that the restriction limited competition. Criminal liability results if, in response to a call for a bid or tenders, the parties submit a bid or tender on the basis of an agreement or arrangement between two or more bidders. An agreement to not submit a bid can also give rise to an offence. However, an offence does not arise if the agreement or arrangement is made known to the person calling for the bids or tenders before the bid or tender is made.

## Price Maintenance

It is a criminal offence to influence or even attempt to influence upwards the price or fees other parties charge for products or services. It is also an offence to discourage the reduction of fees or the offering of discounts. Accordingly, an action by a Real Estate Board through a By-Law or otherwise to prohibit its members from discounting fees or offering inducements could be a criminal offence.

It is also a criminal offence to refuse to supply articles or services to another party, or to discriminate against another party, because of that person's low pricing policies. Accordingly, an action by a member of members of a Real Estate Board to refuse to co-operate with or show properties to a discounting broker would likely be a criminal offence.

Similarly, the Boards of members must not attempt to discourage publishers from offering advertising containing discounted fees.

### Misleading Advertising Offers

The third area of competition law which is important to the real estate profession is the general prohibition against misleading advertising. This is a criminal offence, and it is not necessary to prove that the advertiser intended to mislead or that there was any adverse affect on competition. Nor is it necessary to prove that somebody was actually mislead. Again, this is likely to be more of a concern to members of Real Estate Boards than to the Boards themselves.

In determining whether the advertisement is misleading, the Courts look not to the technical wording but rather the "general impression" of the advertisement. The advertisement can occur in any type of media and liability can extend to employees, advertising agencies and franchises.

In addition to the general prohibition against misleading advertising, there are special rules regarding misleading advertising in connection with false performance claims, testimonials, bait-and-switch advertising, multiple ticketing, and promotional contests.

### The Prohibition Order

Various Real Estate Boards in Canada have been subject to an inquiry under the Competition Act.

While neither the Boards involved or the Canadian Real Estate Association have admitted that they have breached the legislation, the Canadian Real Estate Association has consented to a Prohibition Order by which Real Estate Boards in Canada, directly or indirectly, are prohibited from engaging in certain practices.

It is a policy of The Canadian Real Estate Association to require all members to comply with both the Competition Act and the terms of the Prohibition Order. Any Board that is convicted of a breach of the Competition Act shall be subject to appropriate disciplinary proceedings within CREA which may lead to termination of their membership in The Canadian Real Estate Association.

The Prohibition Order issued by the Court, is detailed; however, it essentially deals with five matters: fees and commissions, services offered by members, advertising restrictions, acceptance of listings and conditions of membership.

## Fees and Commissions

Boards should not, in any way, fix or control the fees for services to be rendered by their members. Nor should Boards control the split or division of fees between listing brokers and/or selling brokers.

Just as Boards must not control fees charged by their members, they cannot limit the discounts or rebates offered by members. As a result, Boards are specifically prohibited from restricting their members from offering or advertising inducements, incentives, gifts, prizes, refunds or rebates on services such as evaluation fees, moving fees and legal fees, unless provincial legislation provides otherwise.

While, as a general rule, the Board should not be involved in fee-setting or commissions, Boards are not prohibited from arbitrating disputes regarding these matters.

In order to ensure that Boards have no incentive to influence fees upwards, Boards are prohibited from requiring financial support of a Multiple Listing Service@ by any formula based on commissions charged by members. In addition, Boards may not require financial support of MLS@ by any formula based on selling price, unless that fee does not exceed \$300.00.

## Restrictions on Services

Boards should not restrict the services that their members offer if restricting those services lessens competition unduly, unless such restrictions are authorized by law. For example, Boards should not discourage co-operation or co-brokering with non-members. Nor should they prevent or restrict the offering or advertising of "for sale by owner" services or similar consultation services.

However, Boards may restrict non-members from offering MLS@ listings or having access to MLS@ services.

Boards also should not prevent the solicitation of real estate personnel working for members or non-members unless these solicitations occur during Board or Association meetings, educational seminars or open house showings of listed properties.

## Acceptance of Listings

Boards should not prohibit or discourage members from offering any type of real estate on the MLS@ system. However, where listings have unusual conditions, Boards may require that such conditions be identified in the listing which appears in the MLS@ catalogue. As indicated, Boards may also restrict non-members from offering MLS@ listings or having access to MLS@ services.

Boards may require that listings contain certain basic information relating to the price and description of property. Boards may require that listings have a minimum term of duration, provided that such minimum term does not exceed sixty days, and Boards may further require that this information be submitted on standard forms.

Boards should exercise particular care to ensure that listings submitted to an MLS@ system by a member are not rejected on the basis of price, commission rate or fees contained in the listing.

In order to ensure the maximum degree of competition, Boards must not indicate in the MLS@ catalogue any information concerning commission rates or fees, other than the commission or fee available to the selling broker.

### Advertising Restrictions

Just as members of Real Estate Boards must be free to individually set the fees they charge and the services they offer, they must also be free to advertise their services in a manner they consider to be appropriate. Accordingly, Real Estate Boards are prohibited from preventing or restricting any advertising by members or non-members. There are, however, three exceptions. Boards can restrict advertising by members if the advertising is: (i) false or misleading, (ii) prohibited by law, or (iii) the advertising restriction is requested by the vendor.

There is one further exception. When a Board acts as a publisher and publishes a real estate publication, the Board may restrict advertising to advertising submitted by members. The Board may also restrict advertising to certain size limitations and minimum periods necessary for the efficient operation of the publication. However, Boards can not refuse any advertising of real estate by members on the basis of the commission rates or fees contained in the advertising.

It is important to recognize that these permissible restrictions relate only to publications by a Board. Where the publication is published by an independent publisher, the Boards must not attempt to influence, by agreement or otherwise, the type of advertising to be carried by that publication. This includes attempts to prevent advertising containing discounted commission rates or fees. An independent publication is a publication in which the Board has no financial interest.

### Conditions of Membership

Boards must accept as members all applicants who have been duly licensed by the relevant provincial authorities, subject only to meeting objective and reasonable financial and educational requirements or standards of competence and integrity that are necessary for the protection of the public.

Unless provincial legislation provides otherwise, Boards may not refuse membership solely on the grounds that the applicant is not engaged in the sale of real estate on a full-time basis. However, Boards may terminate membership on the basis of complaints from the public in the case of members who have proven not to be available to serve the public on a regular basis and provide adequate service to the public.

Similarly, Boards are prohibited from discouraging co-operation with licensed non-members. Non-members are defined as provincially-licensed brokers or salespersons who are not members of a Real Estate Board of a Provincial Association.

However, Boards may restrict access to MLS@ services to members of the Boards. Boards may also restrict advertising in Board publications to members of a Board. This restriction is permitted only in Board publications; that is, a publication in which the Board has a financial interest.

In addition, Boards may require that all salespersons in an office or a related office become members of the Board so as to avoid use of the Board's service by non-members without payment. Boards may refuse membership or expel members who have been convicted of an indictable criminal offence and have not obtained a pardon.

### Activities of Individual Firms

The terms of the Prohibition Order relate only to activities by Boards. Individual companies are free to determine company policies regarding commission rates, advertising, incentives and employment and require their sales personnel to follow these policies provided, of course, that these policies are not reached through agreement or arrangement with other firms or companies.

### A Final Reminder

Failure to comply with the Competition Act can impose serious penalties on Real Estate Boards and their members, This concern is not restricted to the amount of fines that can result in a criminal prosecution. The publicity surrounding these events can seriously damage the reputation of both Boards and their members in the market place.

The time involved by executive officers and members of the Board of Directors, as well as the legal expense incurred in such investigations, can also impose a serious burden on the Board.

It is important to remember that individuals can be prosecuted. This is of particular concern to senior management or members of the Board of Directors who are directly involved in any practice that offends these laws. Finally, a breach of competition law can expose both the Board and their members to private damage actions instituted by both customers and other Board members. Again, in addition to the expense involved in defending such proceedings, the damage to the reputation of Boards and their members in the marketplace imposes a very real cost.

# APPENDIX "A"

## 86 POINTS" - THE COMPETITION LAW RULES

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A Real Estate Board should not operate a Multiple Listing Service@ in a manner which would restrict, limit or interfere with the ability of members to compete with each other. In particular, Boards should not enact rules, by-laws or policies contrary to the following rules unless such rules are authorized by provincial or federal law:

- 1 . Boards must not, in any way, fix or control the fees for services to be rendered by their members.
2. Boards must not fix or control the split or division of fees between listing brokers and/or selling brokers.
3. Boards should not publish any information regarding fees, other than fees or commission percentage to be paid to the selling broker.
4. Boards must not prohibit or restrict their members from offering or advertising discounts or rebates including inducements, gifts, prizes, refunds or rebates or services unless provincial legislation provides otherwise.
5. Boards must not finance a Multiple Listing Service@ by any formula based on commissions charged by members.
6. Boards must not finance a Multiple Listing Service@ by any formula based on sales price, unless that fee does not exceed \$300.00.

The limit of \$300.00 may be increased in accordance with any increases in the Consumer Price Index, as published by Statistics Canada, and experienced after the date of the Prohibition Order.

7. Boards should not restrict the services that their members may offer if restricting those services lessens competition, unduly unless such restrictions are authorized by law.
8. Boards must not restrict the type or form of advertising by their members unless the advertising is: (a) false or misleading, or (b) prohibited by law, or (c) the advertising restriction is requested by the vendor.
9. In the case of real estate publications published by the Board, the Board may restrict advertising to advertising concerning real property, certain size limitations and minimum periods as necessary for operation of a publication. In such cases, the Board may restrict advertising to members but must not restrict advertising on the basis of commission rates displayed in the advertising.

10. In the case of real estate publications published by an independent publisher (a publication in which the Board has no financial interest), Real Estate Boards and their members must not require or recommend the type of advertising carried or displayed by that publication in any way.





Receipt of Compliance Guideline Form

I, \_\_\_\_\_ OF \_\_\_\_\_  
(NAME) (COMPANY)

HAVE RECEIVED THE COMPLIANCE GUIDELINE OF THE CANADIAN REAL ESTATE ASSOCIATION ON THIS DAY OF

\_\_\_\_\_ , \_\_\_\_\_

SIGNATURE

\_\_\_\_\_

PLEASE RETURN THIS FORM TO THE CENTRAL ALBERTA REALTORS@ ASSOCIATION