



**SUBMISSION ON THE COMPETITION BUREAU'S
DRAFT INFORMATION BULLETIN ON TRADE ASSOCIATIONS**

January 9th, 2009



About Canada's Real Estate Industry

Real Estate Industry

The Canadian Real Estate Association (CREA) is one of Canada's largest single industry trade associations, representing more than 98,000 real estate Brokers, agents and salespeople working through various real estate Boards, provincial Associations and one territorial Association.

This includes more than 5,000 REALTORS® who deal with investment properties as members of the Association's Canadian Commercial Council of REALTORS® (CCC).

CREA's primary mission is to represent its members at the federal level of government and to act as a watchdog on national legislation that pertains to the real estate industry. CREA has frequently taken strong stands to defend the public's right to own and enjoy real property.

CREA owns the MLS® trademark and has a proprietary interest in the REALTOR® trademark. The REALTOR® trademark is an assurance of integrity. It can only be used in Canada by members of The Canadian Real Estate Association who accept and respect a strict Code of Ethics. The systems operated by our member Boards and Associations under the MLS® trademark provide an ongoing inventory of available exposure of properties listed for sale.



Involvement

CREA has also been a proud sponsor of the Parliamentary Internship Program for more than 20 years and continues to provide significant funding to the program. It offers university graduates an opportunity to supplement their theoretical knowledge with practical experience of the day-to-day work of Members of Parliament and the functioning of the parliament of Canada. As a result, the program's graduates are better able to make a significant contribution to public life.

REALTORS Care® Foundation

REALTORS® are also involved in their community. They volunteer hundreds of thousands of hours annually in support of a variety of community or fundraising efforts. Many of these community initiatives are promoted through the national REALTORS Care® Foundation.



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The Canadian Real Estate Association (CREA) is one of Canada's largest single-industry trade associations, representing more than 98,000 real estate brokers/agents and salespeople working through 91 real estate boards and 11 provincial and territorial associations.

CREA is pleased to provide the following comments on the Draft Information Bulletin on Trade Associations released for public comment by the Competition Bureau on October 24, 2008. CREA welcomes the Bureau's efforts to provide greater transparency to its enforcement process and policies and to provide the opportunity for public comment before finalizing enforcement guidance.

Part I of this submission sets out some comments on the main text of the Draft Bulletin itself. Part II sets out a number of serious concerns that CREA has with the description of the "Canadian Real Estate Case" in Appendix I of the Draft Bulletin. As noted below, CREA has serious concerns about inaccurate descriptions of that matter in Appendix 1 that require immediate attention.

CREA appreciates the opportunity to provide comments on this draft bulletin and would be pleased to amplify on any aspect of the submission if it would be helpful.

A handwritten signature in black ink, appearing to read 'P. Beauchamp'.

Pierre Beauchamp
Chief Executive Officer

Information Sharing - Data Collection

The last bullet on page 12 of the Draft Bulletin is too prescriptive in saying that data collected from industry participants “should be” collected by an independent firm. Whether that step is necessary will depend on the circumstances, such as the type of information involved and whether the relevant industry participants could conceivably be viewed as possessing market power. It would be more appropriate to say that collection by an independent firm reduces risks or “may be” appropriate. The same comments apply at page 20 where the Draft Bulletin suggests “[u]se an independent third party to conduct the information gathering and collection”.

Standard Setting Organizations

On page 18, the Draft Bulletin states that “[a]ssociations should generally avoid adopting standards that require members to gain access to intellectual property controlled by certain members of the association”. This sentence should either be deleted or significantly qualified, as it does not make sense. It is difficult to conceive of a context in which a trade association would “require” members to gain access to intellectual property. An association that owns intellectual property rights could, however, properly require members to adhere to certain standards in order to receive the right to use the intellectual property - this is the purpose of a certification trademark.

Board Composition

On page 19, the Draft Bulletin suggests that, to avoid raising competition concerns, trade associations should “[m]ake the board sufficiently diverse so as to minimize the risk of competition law violations. It is preferable if an association’s board of directors include more than competitors.” This comment should be qualified with words such as “where practicable” or removed altogether since most trade associations will not be able to control the composition of their boards. Many associations rely on volunteers to fill director positions and the boards are composed entirely of members that could be considered “competitors” in some sense. It would be impractical to identify volunteers from outside the industry who are willing and able to take on the significant responsibilities of a director.

Open Meetings

The suggestion at page 20 of the Draft Bulletin with respect to “Agendas & Meetings” to “allow all members to attend meetings so as not to exclude a specific group or segment” is unrealistic and in many cases inappropriate, particularly with regard to executive or committee meetings.

Discipline

The suggestion on page 13, and repeated again on page 20, that sanctions should not be imposed if they would have “an anti-competitive effect” needs to be qualified by reference to a substantial or significant anti-competitive effect as any disciplinary action will have some restrictive effect on competition.

Legal Counsel

Finally, on page 21, the Draft Bulletin discusses the role that legal counsel should play in a trade association in order to avoid competition concerns. The first suggestion is “[e]nsure that legal counsel approve the agenda or minutes of any association meeting”. For many associations, this is not realistic either because of the frequency of meetings or the small budget of the association. Earlier in the Draft Bulletin, on page 13, the suggestion is made that “the association have legal counsel review agendas and minutes and attend all association meetings where there is potential for discussion of sensitive subjects”. Even this statement goes too far as there is always the “potential” for discussion of sensitive subjects. A more realistic suggestion would be for counsel to be consulted when competitively sensitive subjects are on the agenda, expected to arise, or in fact arose, in a meeting.

Appendix I of the Draft Bulletin contains a summary of the Order of Prohibition that was issued in 1988 naming CREA and nine real estate boards as respondents (the Real Estate Order). The summary contains a number of seriously misleading characterizations, inaccurate statements, and misuses CREA's trademarks. The following are the key errors:

1. The Appendix falsely suggests that the “Canadian Real Estate Case” involved convictions under the conspiracy offence in the *Competition Act* (the Act).
2. The Appendix conveys the misleading impression that the allegedly anti-competitive acts were engaged in on a national basis, or at least in all or most of the referenced geographic markets, when in fact some aspects of the challenged conduct related to the rules of only one or two real estate boards.
3. The Appendix conveys the false impression that CREA's conduct was challenged (as opposed to certain conduct of the respondent real estate boards).
4. The Appendix fails to denote that MLS® and Multiple Listing Service® are registered trademarks.

Background

The investigation that ultimately led to the Real Estate Order originated in 1986 when the Competition Bureau (the Bureau) conducted a search of a real estate board. Eight more boards as well as various broker offices were searched in 1987. CREA became involved in the matter to assist in negotiating an overall settlement that would resolve all the Bureau's concerns.

The result of the negotiations was the Real Estate Order, entered into pursuant to section 34(2) of the Act with the consent of all the respondents. An order under section 34(2) involves an admission of conduct directed towards the commission of an offence (in this case, offences under sections 45 and 61 of the Act), but involves no admission of any offence and no judicial finding of any offence. The Statement of Facts filed with the Court and admitted to by the respondents acknowledged certain conduct by the respondent boards (but not CREA) as having been directed toward the commission of offences under section 45 and 61 of the Act. Paragraph 6 of the preamble to the Real Estate Order is consistent with the foregoing. Thus, the “Canadian Real Estate Case” did not involve any charges under the Act and did not involve any guilty pleas or any finding that an offence had occurred.

With this background information in mind, the remainder of this submission identifies the language in the Bulletin's description of the “Canadian Real Estate Case” that requires amending and explains why.

False and Misleading Introduction and Headings

The introduction to the Draft Bulletin on page 4 states that “Appendix I provides a brief description of some cartel cases where associations were engaged in anti-competitive acts”. The introduction to Appendix I repeats this central idea:

This appendix provides a brief summary of three decisions rendered by various courts under the conspiracy provisions of the *Competition Act* (or its predecessor, the *Combines Investigation Act*). The summary of cases illustrates how associations can become involved in anti-competitive acts.

These references seriously misstate the facts with respect to the Real Estate Order. First, the assertions that the associations were “participants” engaged in anti-competitive acts and were the subjects of court decisions under the conspiracy provisions of the Act conveys an impression of findings of guilt. It appears that the ambulance operators' association case did in fact involve a guilty plea and a fine. The above-noted wording and placing of the Real Estate Order in the same grouping as the ambulance case reinforces the false impression that the Real Estate Order involved findings of guilt or guilty pleas. As noted above, however, the Real Estate Order involved no guilty pleas and no charges were laid. The references to “participants” and “conspiracy” in relation to the Real Estate Order are clear and serious errors that should be immediately deleted from the versions of the Draft Bulletin that the Bureau continues to make available to the public, including the version of the Draft Bulletin on the Bureau's website, as well as the final version of the Bulletin.

Second, the heading of the section as the “Canadian Real Estate Case” and the listing of CREA as a “participant” convey the false impression that CREA engaged in anti-competitive conduct addressed in the Real Estate Order. However, nothing in the Statement of Facts, the Informations sworn to obtain the search warrants, or the Real Estate Order itself alleges that CREA engaged in any offence or even any conduct directed toward any offence.

The foregoing references also convey the impression that the allegedly anti-competitive conduct took place throughout Canada. In fact, as discussed below, some of the allegations related to the rules of only one or two real estate boards.

In this regard, CREA notes that the headings used for the other two case summaries in Appendix I reflect the proper citations of the proceedings. For the reasons noted above, the heading before the summary of the Real Estate Order should also reflect the case name in the citation. Alternatively, a heading such as “Certain Real Estate Boards” would also be acceptable.

Below the “Canadian Real Estate Case” heading are two more headings that must be changed, both in drafts that the Bureau continues to make available and in the final Bulletin. The headings “Timeframe of Conspiracy” and “Trade Association Activities and Conspiracy” falsely imply that a conspiracy was admitted or proven. As noted above, there were no charges laid, and there were no guilty pleas or findings of guilt. Headings such as “Timeframe of Conduct” and “Alleged Anti-Competitive Activity” would be appropriate.

Misuse of Trademarks

Throughout the summary of the Real Estate Order, CREA’s name and trademarks are misused.

The Bulletin refers to the “Multiple Listing System (“MLS”)”. However, CREA’s registered trademarks are Multiple Listing Service® (not “System”) and MLS®, both of which should be reproduced followed by the registered trademark symbol. Moreover, CREA’s trademarks should be used in the correct context. Trademarks are not nouns and should not be used as such; the phrase “the MLS” should be replaced with the wording “a board’s MLS® system”.

Further, the summary begins by referring to “the Canadian Real Estate Association”. While this is obviously a relatively minor point, CREA’s proper name includes the word “The” and therefore the “t” should be capitalized.

Inaccurate Statements in “Trade Association Activities and Conspiracy”

CREA Does Not Control Access to MLS® Systems

The first paragraph of the summary of the Real Estate Order begins with a description of CREA’s role in organized real estate. The statement that “[b]eing a member of CREA allowed each area board access to the Multiple Listing System” is incorrect.

Referring to “the Multiple Listing System” is not only incorrect usage of CREA’s trademark, but it also implies that there is only one central MLS® system. This is misleading as there are, and were at the time of the Real Estate Order, numerous MLS® systems in Canada operated by local real estate boards.

Further, CREA does not, and did not, provide access to boards’ MLS® systems as a result of membership; CREA licenses, and licensed, the use of the MLS® trademarks in association with the operation of an MLS® system. Also, boards do not “access” MLS® systems; boards operate MLS® systems that REALTORS® access by virtue of board memberships.

MLS® Systems Are Co-operative Selling Systems

The first paragraph on page 26 of the Draft Bulletin describes an MLS® system as “an information exchange system in which all the details of the real estate and accompanying personal property were gathered and circulated to all brokers”. While we acknowledge that this description of an MLS® system is found in the 1988 Statement of Facts, it is nevertheless incorrect and should be revised to reflect the following points.

First, an MLS® system is properly described as: A cooperative selling system operated and promoted by a board or association in association with the MLS® marks, which includes an inventory of listing of participating REALTORS® and ensures a certain level of accuracy of information, professionalism, and cooperation amongst REALTORS® to effect the purchase and sale of real estate. Personal property cannot, and could not, be listed on a board’s MLS® system. The amount of information about a property is dependant on what information the listing agent enters into the system; therefore, not “all the details” of the real estate may be available. Finally, MLS® listings are not, and were not, made available to “all brokers”. MLS® listings are made available to all brokers that are members of the real estate board where the property is listed. However, some boards have inter-board agreements with other boards to allow access to MLS® listings. In those cases, MLS® listings are not be available to “all brokers”, but are available to all members of the boards that have signed the inter-board agreement.

No Board Conduct was “Deemed” Anti-Competitive

The next paragraph in the summary on page 26 of the Draft Bulletin states: “A number of rules and regulations adopted by various boards and deemed to be anti-competitive fell into four basic categories”. The use of the word “deemed” in that sentence is not appropriate as the rules were only alleged to be anti-competitive; they were not proven or admitted to be so. The word “deemed” should be changed to “alleged”.

Efforts to “Standardize” Related only to Selling Broker’s Commission

The first category of allegedly anti-competitive rules is “[e]fforts to standardize the commission rates for MLS and exclusive listings by influencing the price at which a commission was set”. This categorization is incorrect as the six board rules identified in the Statement of Facts that fall under this category deal only with MLS® listings and do not address exclusive listings. Further, the six relevant rules related to a minimum percentage of the commission payable to the selling broker; not the entire commission as suggested in the above-noted statement of the Draft Bulletin. A categorization of “efforts to standardize a minimum percentage of the commission due to the selling broker” would be more accurate.

Limited Restrictions on Advertising

The second category that the allegedly anti-competitive rules fell under is described as “[r]estrictions placed on the advertising of discounted commission rates and other advertising restrictions such as not advertising ‘For Sale by Owner’ consulting services and restrictions on what could be advertised on business cards (only real estate related services could be advertised on such cards)”. According to the Statement of Facts filed with the Court, only one board’s rules fell under this category: one rule prohibited members from advertising of For Sale By Owner consulting services and another rule prohibited the advertising of non-real estate services on business cards. No rules that restricted the advertising of discounted commission rates were identified in the Statement of Facts. Consequently, the comment about discounted commission rates should be removed and a categorization of “restrictions on advertising” would be more appropriate.

Limited Restrictions on Part-Time Members

The fourth category of allegedly anti-competitive rules is:

Unwarranted requirements for membership in the boards by implementing rules such as not being approved in a particular board unless the applicant undertook to carry on a full time business or occupation of trading in real estate and directly related services. Another board implemented a rule that no person would be admitted as a member of that board if that person engaged in additional employment which could interfere with his ability to service his clients, purchasers or others engaged in the real estate business. The rule also stipulated that to be a member of the board, a person would have to maintain full-time employment in the real estate business. Another board also applied a similar rule.

The reference in the first sentence to “the boards” and the use of the words “another board” twice in the above paragraph convey the false impression that numerous boards required that REALTORS® work full time. However, the Statement of Facts alleged that only two boards had rules that fell under this category. The wording of this category should be altered to reflect this fact.

Misdescriptions in the Highlights of the Real Estate Order

“Attempting”

The next portion of the Bulletin, “Order (Highlights)”, paraphrases some sections of the Real Estate Order. The fact that the exact wording of the Real Estate Order is not reproduced is not problematic for most of the points in this section. However, the third and fourth points start with the words “attempting to control”. This wording does not appear in the Real Estate Order and creates a negative connotation. The language of these points should be changed accordingly.

In particular, the third point refers to section 6(g) of the Real Estate Order, which prohibits “setting, as a condition of membership for Brokers or Salespersons, the obligation to work full time in real estate sales, brokerage or related industries”. The words “attempting to control entering into the industry by” in the third point should be removed in order to reflect the actual language of the Real Estate Order.

For the same reason, the words “attempting to control the advertising activities of board members or non-members by” should be removed from the beginning of the fourth point. This point refers to section 5 of the Real Estate Order, which does not include such a reference.

Finally, the wording of the fifth point, “attempting to fix prices for real estate brokerage services”, should be deleted or integrated into the second point as both the second and the fifth points seem to deal with section 4 of the Real Estate Order. If the second point and fifth point are integrated, the language from the Real Estate Order should be mirrored and the word “attempting” should be removed.

Expiry of Order

The discussions of the other two cases in Appendix I indicate the duration of the orders. Similarly, the discussion of the Real Estate Order should indicate that it ceased to have effect on March 18, 1999.

CONCLUSION



CREA appreciates the opportunity to comment on the Draft Bulletin and would welcome the opportunity to meet and discuss the foregoing comments with the Bureau and, in particular, to review any proposed revised description of the Real Estate Order and related proceedings. As noted above, CREA feels strongly that a number of references that falsely suggest that CREA and certain boards were found to have violated the Act must be changed.

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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