

Agreement Between Competition Bureau and Canadian Real Estate Association

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Lawyers You Should Know: H. Todd Greenbloom

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A settlement between the Canadian Competition Bureau and the Canadian Real Estate Association (CREA) will have a major impact on the way business is done in Canada's residential real estate market by allowing real estate agents to offer clients a wider range of service options and models when using the Multiple Listing Service (MLS) controlled by CREA.

In recent years agents wanting to list properties on the MLS were obliged to provide a minimum bundle of services regardless of whether clients wanted or used every item in the bundle. The new agreement allows agents to pull specific items out of the bundle and charge for them alone.

This obviously means greater flexibility and economic efficiencies for sellers and agents alike.

In addition to what it portends for the residential real estate market, the Competition Bureau-CREA settlement could have implications for the way that trade associations like CREA, whose members are also competitors, write and apply their rules.

Here is the background to the Competition Bureau – CREA story.

In February, 2010, the Commissioner of Competition, Melanie Aitken, brought an application before the Competition Tribunal claiming that CREA and its members had used their control of the MLS and related trademarks to impose restrictions on the use of the MLS system and that this constituted an abuse of the dominant position of CREA and its members in the Canadian residential real estate market. (The MLS system accounts for about 90 per cent of all Canadian residential resales).

The Commissioner alleged that the rules that CREA imposed regarding the use of the MLS system effectively prohibited CREA members from providing alternatives to the traditional full-

service brokerage model, such as offering consumers individually-priced services, including a basic listing of a seller's property on the MLS for a flat fee, a so-called "mere posting," (for those who wanted to sell their property themselves).

As a result, in order to sell their homes using the MLS system, consumers had to hire a full service real estate broker who, because of CREA's restrictions regarding the use of the MLS system, was required to provide a bundle of services the consumer might not want to receive or pay for.

After months of negotiation, CREA and the Competition Bureau reached an agreement to settle the key concerns raised by the Commissioner in her application to the Competition Tribunal. CREA has in effect agreed that it will neither create nor enforce any rules that would penalize or discriminate against brokers who want to offer non-traditional services to consumers while using the MLS system.

CREA must also monitor member behaviour to ensure compliance with the agreement, which was ratified by CREA members on October 24, 2010 and registered with the Competition Tribunal. It remains in effect for 10 years.

IMPLICATIONS OF THE NEW AGREEMENT

As we indicated earlier, the settlement agreement allows home owners to choose from a variety of services that brokers may offer at different prices. While sellers are still not permitted to list on the MLS by themselves, they will now be able to pay a licensed broker a fee to have their property listed

on the MLS system and then sell the property themselves.

On the other hand, while brokers are not obliged to accept mere postings, they are now permitted to do so, and may also offer a range of unbundled services and fee-for-service arrangements, all while using the MLS system. For example, they can hire themselves out as consultants to sellers and provide advice for a flat fee on such matters as what price to list the house, what to do to conduct an effective "showing," and so on.

It is also possible, as happened in the United States after an anti-trust lawsuit against the American equivalent of CREA, that the settlement agreement may accelerate the creation of discount or internet based realtors, or other alternatives to the full service brokerages we are familiar with, since the MLS system will be accessible to CREA members who want to operate under those new models. The impact of the settlement agreement on the residential real estate industry could be felt widely.

Finally, one may ask what the CREA settlement agreement might mean for other trade associations. All of those organizations impose rules on their members, even though those members are competitors.

There is a clear line that trade associations must draw between rules for the benefit of the association itself (such as rules that insist on ethical business behaviour from members, or which create educational or other qualification standards that members must meet in order to belong) and rules that affect or limit competition among members.

The CREA case illustrates the consequences of crossing that line.