



# The Canadian Real Estate Association Submission to the Competition Policy Review Panel

---

## Mémoire de l'Association canadienne de l'immeuble présenté au Groupe d'étude sur les politiques en matière de concurrence

January 11, 2008 / le 11 janvier 2008



# CREA

CANADIAN REAL ESTATE ASSOCIATION

# ACI

L'ASSOCIATION CANADIENNE DE L'IMMEUBLE

# INTRODUCTION

The Canadian Real Estate Association (CREA) is one of Canada's largest single-industry trade associations, representing more than 94,000 real estate brokers/agents and salespeople working through 109 real estate boards and 11 provincial and territorial associations. The majority of our members are small businesses.

CREA owns the Multiple Listing Service® (MLS®) trademark. Local boards and associations operate real estate database systems under the MLS® trademark. In 2006, 522,560 properties with a total value of more than \$143.3 billion were sold through the various board and association MLS® systems. The residential portion of MLS® sales, about 93 per cent of total MLS® sales, accounted for over 483,917 sales in 2006 worth more than \$134.0 billion. An average of 476,063 home sales are processed annually through the MLS® system which results in economic activity amounting to more than \$15.3 billion per year – a significant contribution to the total Canadian economy. Further, 158,600 jobs are estimated to have been generated by average annual MLS® resale housing activity in Canada over the period between 2004 and 2006.

In its national representative capacity, CREA has long assumed an intermediary role in relation to competition issues of concern to the real estate profession. In the past, we have participated in a number of consultation processes relating to various issues under the *Competition Act* (Canada) (the "Act"), including consultations conducted by the Competition Bureau (the "Bureau"), the House of Commons Standing Committee on Industry, Science and Technology, and the Public Policy Forum. We are pleased once again to have the opportunity to present the views of our members regarding competition law issues in Canada to the Competition Policy Review Panel (the "Panel") by way of comments on the October 30, 2007 consultation paper entitled *Sharpening Canada's Competitive Edge* (the "Consultation Paper").

As discussed in more detail below, we have comments about a number of issues raised in Chapter 4 of the Consultation Paper on Competition Law, as well as comments relating to recent proposals to amend certain provisions in the Act. Our membership is strongly in favor of efforts to improve the Act. However, in the view of our members, it is extremely important to ensure that any amendments do not have significant negative and unintended consequences. In particular, in order to ensure Canada's international competitiveness, it is extremely important that the Act provide predictability and clarity for the business community and not create unnecessary and excessive compliance and monitoring costs.

We appreciate the opportunity to provide our comments to the Panel. We would be pleased to amplify on any aspect of these comments if that would be helpful to the Panel.

# COMMENTS

Our comments to the Panel can be summarized as follows:

- Significantly amending the criminal conspiracy provisions by introducing an elective “two-track” system that would define “*per se*” illegal agreements that would be prosecuted criminally (without a competitive effects screen such as the current “undueness” element in section 45 of the Act), while also reserving a non-criminal approach for strategic alliances and other types of agreements, is neither required nor desirable. Any such change would likely result in the conspiracy provisions being overly broad. We recommend that the current provisions relating to conspiracy be maintained.
- Proposals to grant formal investigatory powers to the Bureau (or another independent government agency) to conduct market studies have been a subject of recent debate. We believe that a new market study power is unnecessary and would impose a high cost on businesses subject to such studies, in particular small businesses. Such a market study power would also raise *Charter* issues and concerns about necessary procedural safeguards and the potential use of information obtained for a study in subsequent proceedings under the Act. We believe that the investigatory powers already available to the Bureau are more than sufficient.
- We recommend that the *per se* price maintenance offence in section 61 of the Act be amended to make price maintenance a “rule of reason” offence (i.e., with a competitive effects screen) or, alternatively, to make vertical price maintenance arrangements only reviewable under the abuse of dominance provisions of the Act. The fact that price maintenance is a *per se* offence is inconsistent with the objectives of the Act and with current economic thinking, as evidenced by a recent change to the approach taken to vertical price agreements by Canada’s largest trading partner, the United States.
- Recent proposals to introduce administrative monetary penalties (“AMPs”) for civil offences under the Act and to expand section 36 of the Act should not be adopted.
- With respect to competition enforcement, we recommend that the practice of obtaining orders pursuant to section 11 of the Act on an *ex parte* basis be discontinued and that the breadth of such orders be more restricted and less burdensome on the receiving parties. Providing recipients of such orders the opportunity to make representations to a judge *before* the order is issued would help to limit the scope of such orders to avoid unnecessary costs and burdens on subjects of Bureau investigations and other industry participants.

# COMMENTS

## Criminal Conspiracy Provisions

Chapter 4 of the Consultation Paper does not discuss the various sections of the Act in great detail but does mention some particular issues that have been the subject of debate over the last decade. One issue that is highlighted in the Consultation Paper is the adequacy of the criminal conspiracy offence in section 45 of the Act. The Consultation Paper states that “concerns have been expressed that the provision fails to adequately deter anti-competitive behaviour” and questions “whether the current provisions might discourage businesses from forming pro-competitive alliances”. It also states that much of the debate has centered on the creation of a two-track system under which certain agreements would be prosecuted criminally while others would be reviewed under new civil provisions for conspiracy.

We believe that the current criminal conspiracy provisions are adequate to deter anti-competitive behaviour and therefore any amendments to section 45 of the Act that would result in the criminal conspiracy provisions becoming more restrictive are unnecessary. Furthermore, making the criminal conspiracy provisions stricter would likely have unintended and undesirable repercussions. Removing the “undue” lessening of competition requirement in order to enable more convictions would render the resulting provisions overly broad. If this were the case, all, or at least a very wide range of, agreements between competitors (or even between parties who “could reasonably be expected to compete”) would potentially fall within the scope of the offence.

An increased potential for agreements to fall under the scope of section 45, and a resulting increased threat of criminal sanctions, would likely increase the “chilling effect” on pro-competitive alliances, thus aggravating concerns that already exist regarding the current provisions.

As strengthening the criminal conspiracy provisions in this manner will likely deter the formation of pro-competitive alliances, and therefore decrease competition, any such amendment would be contrary to the objective of the Act of maintaining and encouraging competition in Canada. The Canadian real estate industry, being comprised of many small businesses, likely involves many collaborations between unaffiliated small business persons that enable them to provide better services to consumers more efficiently. Such arrangements could run afoul of a new “*per se*” offence for agreements among competitors that does not require proof of any anti-competitive effect. An example of such collaboration might be joint marketing by two small independent real estate brokers.

Some proposals for new civil strategic alliance provisions would make all agreements between any two persons (not just competitors) potentially subject to review, with the possibility that the Competition Tribunal could issue a prohibition or remedial order if the agreement is found to lessen or prevent competition substantially. We have significant concerns with respect to the implications of fundamentally changing the conspiracy provisions of the Act to significantly broaden their scope, even by means of non-criminal provisions, as such changes would risk significantly changing the dynamics of business relationships without any clear need or benefit.

In the event that the Panel recommends moving ahead with a two-track system despite these significant concerns, we believe that new civil strategic alliance provisions are not required, given that the merger and abuse of dominance provisions currently in the Act are broad enough to cover strategic alliances. The merger provisions, for example, apply not only where there has been an

acquisition of control, but also where a person acquires a “significant interest” in a business of another person (which the Bureau interprets to mean the ability to “materially influence the economic behaviour” of a business). Moreover, any doubt about the scope of the abuse of dominance provisions (which already include the concept of joint dominance by means of an agreement between two or more persons) could be addressed by a minor amendment to section 79, rather than creating a whole new provision. In particular, an amendment to section 79 could clarify that conduct intended to harm consumers, not just competitors, may be anti-competitive. The merger and abuse of dominance provisions also enable the Tribunal to order effective remedies to address joint anti-competitive conduct likely to result in a substantial lessening or prevention of competition.

While we strongly recommend that the current provisions relating to conspiracy be maintained, we further submit that, should a dual track system be proposed, an exemption should be added to both the criminal provision and the civil provision for agreements between principals and agents, in a manner that clearly exempts brokers and their agents.

# COMMENTS

## Market Study Power

Another issue raised in Chapter 4 of the Consultation Paper is the question of whether or not the Competition Bureau (or another government agency) should be given formal investigatory powers to conduct market studies. In CREA's view, a new market study power is unnecessary, would impose a high cost on businesses subject to such studies and would raise significant process and *Charter* issues relating to the use of information obtained for a study in subsequent proceedings under the Act.

There has been no evidence given to demonstrate that the Bureau currently lacks the necessary tools to investigate legitimate competition concerns. The existing thresholds for inquiries are already low. A formal inquiry can be undertaken on the Commissioner's own initiative if there is reason to believe that the Act has been or is likely to be contravened. Further, the Commissioner is obligated to initiate an inquiry if directed to do so by the Minister of Industry or petitioned to do so by six Canadian residents. It would be inappropriate for the Bureau (or another government agency) to conduct intrusive and expensive market studies without requiring any evidence of anti-competitive conduct. The Bureau's overarching priority is to ensure that there is competition in the marketplace. Using limited resources to investigate (and impose significant costs on) a sector where there is no evidence of anti-competitive conduct does not further this goal, nor would it ultimately benefit consumers.

The Competition Bureau's October 2005 Review of Market Studies did not explain why a new market study power is needed. Instead it focused on the fact that many foreign regulators have market study powers. However, a close look at the investigatory powers of foreign regulators reveals that these powers generally cannot be invoked without evidence of competition being adversely affected in a market. Moreover, many foreign regulators do not have the power to compel evidence or, if they do, the power is never or only rarely used. The Canadian Commissioner of Competition already has powers comparable to those granted to regulators in foreign jurisdictions: the power to conduct inquiries and to compel the production of information. As such, Canada's competition regime is already in line with regimes in foreign jurisdictions with respect to investigatory powers.

Another serious concern with a new market study power is the likelihood of significant negative unintended economic consequences to businesses subject to such a study, in particular to small businesses. Responding to enquiries for a market study could be extremely expensive for a business. The business would effectively be forced to focus its energies on responding to enquiries, thus diverting attention from regular operations. Lawyers would likely have to be retained. An inquiry also has the potential to be an extremely intrusive process. It could involve hearings with oral examinations under oath, the production of confidential business records (including minutes of meetings, sales reports, electronic records and pricing and marketing plans) and written submissions requiring compilation and creation of detailed information. Finally, the fact that an industry is the target of a market study may taint that industry in the eye of the public, even in the absence of wrongdoing.

We believe that the existing investigatory powers under the Act are more than sufficient, and therefore, without further evidence, we do not support the granting of a new market study power to the Competition Bureau or another government agency.

Finally, we note that the granting of a new market study power to the Competition Bureau would raise significant process and *Charter* issues relating to the use of information obtained for the study in subsequent proceedings under the Act, including possible use in criminal proceedings. When she gave evidence before the Industry Committee on November 18, 2004, the Commissioner acknowledged that giving the Bureau the power to conduct market studies could raise *Charter* issues if the information collected by the Bureau as part of a market study led to a criminal investigation. The Commissioner specifically mentioned concerns about the possibility of self-incrimination.

## Price Maintenance Provisions

We believe that the price maintenance provisions found in section 61 of the Act should be modernized. Although this is an issue that is not specifically addressed in the Consultation Paper, we feel that this issue is related to Canada's competitiveness. The fact that price maintenance is a *per se* offence reflects an outdated view that vertical price maintenance lacks any redeeming social virtue. The reality is that there can be pro-competitive justifications for a manufacturer's use of resale price maintenance or other "vertical" pricing restrictions. (Note that section 61 prohibits not just manufacturers, but anyone, including lenders or licensors of intellectual property, from seeking to control pricing by any other person, including licensees, borrowers and joint venture partners, whether or not the parties possess any power to influence prices in the market as a whole and whether or not the arrangement has any adverse effect on competition.) As a result, section 61 may unnecessarily restrict collaboration by small business persons who possess no market power. We therefore recommend that section 61 of the Act be amended to make price maintenance a "rule of reason" offence, or alternatively, to make vertical price maintenance arrangements only reviewable under the non-criminal abuse of dominance provisions of the Act.

Decriminalization of Canada's price maintenance provisions was suggested in a 1999 report commissioned by the Competition Bureau (the "VanDuzer Report"),<sup>1</sup> a 2002 House of Commons Committee Report,<sup>2</sup> and a 2004 OECD report on Canadian competition law (the "OECD Report").<sup>3</sup> The 1999 VanDuzer Report stated: "one may be concerned that [the price maintenance] provisions are not well adapted to be responsive to the changes currently transforming the Canadian economy". This comment is even more relevant today, almost ten years later, given the rapid rate of globalization and change.

Section 61 is overly broad because it catches not only anti-competitive practices but also arrangements that have pro-competitive justifications. In the real estate context, section 61 can impose unnecessary costs on small business people by, for example, artificially restricting the scope of possible business arrangements between real estate agents and/or brokerages who may otherwise prefer to organize themselves in ways that do not formally constitute affiliate or employee relationships (which are exempt from section 61). The potential for pro-competitive arrangements to fall under the scope of section 61, which carries the threat of criminal sanctions, creates a "chilling effect". As a result, the price maintenance provisions frustrate the objective of the Act to maintain and encourage competition.

Notably, the United States Supreme Court recently issued a decision in *Leegin Creative Products, Inc. v. PSKS, Inc.*<sup>4</sup> that overturned a long-standing precedent in U.S. antitrust law that made it *per se* illegal for manufacturers and retailers to agree on minimum resale prices. The majority decision of the U.S. Supreme Court noted that resort to *per se* rules should be confined to restraints on competition that would always, or almost always, tend to restrict competition and decrease output, but that economics literature is replete with pro-competitive justifications for a manufacturer's use of resale price maintenance. (In fact, the majority decision cited, among other sources, papers by some Canadian economists in support of some of the possible pro-competitive benefits of vertical price restraints.) Consequently, resale price maintenance agreements in the United States must now be analysed according to the "rule of reason" – i.e., a fact finder must weigh all of the circumstances of the particular case, including whether the businesses involved have market power, in determining whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.<sup>5</sup>

---

<sup>1</sup> Anti-competitive Pricing Practices and the Competition Act: Theory, Law and Practice, J. Anthony VanDuzer, Gilles Paquet, University of Ottawa, October 22, 1999.

<sup>2</sup> House of Commons, Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*, 1st Session, 37th Parliament, April 2002 at xviii.

<sup>3</sup> OECD, *Canada – Report on Competition Law and Institutions* (2004) at 34. The OECD Report states at paragraph 72: "Price maintenance, like the conduct covered by Sections 50 and 51, can be pro-competitive and is best treated as a civil reviewable matter."

<sup>4</sup> No. 06-480, 551 US (2007) ("Leegin").

<sup>5</sup> For a good discussion of the Leegin decision and its implications for Canada, see Dufour, Eric J. and Litt, C., "Leegin Decision – A New Beacon for Change in Canada?", paper presented at the Canadian Bar Association, National Competition Law Section, 2007 Annual Fall Conference on Competition Law, September 2007, Gatineau, Quebec.

# COMMENTS

## Administrative Monetary Penalties

We have concerns regarding any introduction of new administrative monetary penalties (“AMPs”). Although this issue is not explicitly raised in the Consultation Paper, it is an issue that has been the subject of considerable debate in recent years. The debate over AMPs has centered on whether AMPs should be introduced for the reviewable trade practice provisions of the Act and whether the existing AMPs for deceptive marketing practices should be increased. We feel that these proposals are unwarranted.

In 2003, the Bureau issued a discussion paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace* (“2003 Discussion Paper”) which proposed giving the Competition Tribunal a new right to impose AMPs on persons subject to Tribunal orders under the reviewable trade practice provisions of the Act (e.g., abuse of dominance, exclusive dealing, tied selling and market restriction). The stated purpose of this proposal was to increase the incentives for businesses to comply with such provisions of the Act. Similar proposals have been included in Bills introduced in Parliament, but have not been enacted into legislation.

We believe that the addition of AMPs to the reviewable trade practice provisions of the Act would represent a significant transformation of the Act’s present structure. In our view, such AMPs would be punitive in nature. When the reviewable trade practice provisions were originally enacted, no such penalties were provided because it was recognized that such conduct was not inherently anti-competitive and, in fact, was usually pro-competitive and efficiency enhancing. Accordingly, it was considered appropriate that remedies for such conduct (in rare instances where it is anti-competitive) be limited to orders designed to restore competition, rather than to punish the parties.

In our view, there is no demonstrated need for additional deterrence for the reviewable trade practice provisions. AMPs for reviewable trade practices could also have the undesirable impact of deterring pro-competitive business practices, as well as undermining incentives to develop new products.

Although we do not believe that any persuasive rationale supports a need for additional AMPs in the Act, in the event that AMPs are ultimately added to the Act, and in any event in the context of existing AMPs for misleading advertising, we believe that one factor the Tribunal should take into account in deciding whether to impose an AMP (and, if so, the amount) is the degree to which the respondent is already subject to industry specific regulation (e.g., provincial legislation governing real estate brokers). For example, in the context of the civil misleading advertising provisions, there is a strong possibility of over-deterrence and unnecessary multiple penalties where a person is also subject to other regulatory regimes with regard to the same representations to the public.

We are also of the view that existing penalties for deceptive marketing practices, a maximum of \$200,000, are sufficient to address deceptive marketing practices that do not meet a criminal standard. The Competition Bureau’s 2003 Discussion Paper does not adequately support the Bureau’s position that the current level of AMPs for misleading advertising fails to provide proper incentives to encourage compliance for non-criminal conduct. Yet, it has been proposed to increase the maximum AMP to \$15 million. The risk of such a large AMP could cause small business persons to be excessively cautious (and less informative) in their advertising. Accordingly, the issue of increased AMPs is a significant concern since the majority of our members own or work for small businesses.

# COMMENTS

## Expanded Civil Cause of Action

There have been recent suggestions to expand the private right of action created by section 36 of the Act to create a new cause of action for damages resulting from conduct in respect of which an order is subsequently made by the Tribunal under the civil provisions of the Act, most notably in the Bureau's 2003 Discussion Paper. Section 36 of the Act currently enables private parties to sue for damages suffered only as a result of conduct contrary to any of the criminal provisions of the Act or a violation of a Tribunal order. In other words, today, civil damages in respect of reviewable trade practices are available only in respect of conduct engaged in *after* the Tribunal issues an order (and which violates such order); whereas the proposal would provide for damages with respect to prior conduct that the Tribunal subsequently determines to have provided grounds for an order under the reviewable trade practices provisions of the Act.

Like AMPs, such an expansion of section 36 would represent a significant departure from the current reviewable trade practice provisions of the Act, which are based on the premise that such reviewable conduct is not unlawful until and unless prohibited by the Tribunal. This approach was adopted after extensive consultation and deliberate recognition that conduct within the scope of the reviewable trade practice provisions is usually not anti-competitive and should not be subject to over-deterrence. Such an extension of section 36 risks over-deterrence.

For the same reasons discussed above with respect to AMPs, we believe that there is no demonstrated need for additional deterrence with regard to reviewable trade practices in the Act and that the proposed expansion of civil damages could have the undesirable impact of deterring pro-competitive business practices and undermining the incentives to develop new products. In short, the case has not been made for either AMPs or an expanded civil cause of action.

# COMMENTS

## Competition Enforcement: Use of Section 11 Orders

Another issue that we are concerned about, but which is not specifically raised in the Consultation Paper, is the manner in which the Bureau uses the investigatory powers under section 11 of the Act. We recommend that section 11 orders no longer be obtained on an *ex parte* basis and that the breadth of such orders be more restricted and less burdensome on the receiving parties.

Pursuant to section 11 of the Act, the Bureau can apply to a court without notice to the respondent for an order requiring one or more of the following: (a) oral examination of specified individuals under oath, (b) production of specified records or categories of records (including both hard copy documents and electronic records), and (c) submission of written returns under oath with requested information or responses to questions.

The threshold for the Commissioner to obtain a section 11 order is low – merely requiring that an inquiry is being made under the Act and a person is likely to have information that is relevant to the inquiry. Because these orders are made on an *ex parte* basis, the recipient of the order has no opportunity before the order is issued to make any representations to the judge about the burden of searching for and assembling documents and information, the potential relevance of the requested documents and information, or the time frame within which such production must be made.

We believe that the use of section 11 orders is a growing concern in the Canadian business community. It appears that the Bureau has, in the last number of years, resorted to section 11 orders with increasing frequency, and that many such orders are very broad in scope, both with respect to the types of documents (including electronic documents) required to be provided and the time frame, often many years, covered by the orders. Recipients of section 11 orders may have to search hard copy and electronic records going back many years to respond to a section 11 order. It is very time consuming to review a large volume of business records to identify and cross-reference those that are relevant to the Bureau's specific document requirements in a section 11 order, and to identify information and draft responses to specific interrogatories. Complying with a section 11 order can be a full time job for several employees (or more) and possibly also legal counsel for several weeks (or months), and require significant time and attention of senior managers. This process can be extremely expensive. Businesses, particularly small businesses, do not typically have excess staff that can quickly be allocated to responding to such orders without other aspects of the business suffering significantly.

Unfortunately, it is difficult to document the Bureau's use of section 11 orders as the Bureau no longer, to our knowledge, reports on the frequency of its resort to such orders or the volume of material provided in response. A review of Federal Court files suggests that at least 97 applications were made (and all granted) in 2007, although the Bureau regularly obtains section 11 orders from Provincial Courts as well.

After a section 11 order is issued, it is difficult to challenge the order, and it is also costly for the recipient to retain counsel and bring motions seeking amendments or extensions to the order. The section 11 order process would be more transparent, fair, and efficient if respondents were permitted to make representations to the judge *before* an order is issued. There is a concern that judges issuing section 11 orders may not appreciate the significant costs and burden imposed on respondents in complying with such orders. Even persons whose conduct is not being investigated can be subjected to section 11 orders of significant scope and breadth. (Needless to say, the Bureau does not compensate recipients of section 11 orders for the significant costs of responding to these orders).

Finally, it is difficult to understand why *ex parte* applications are needed for section 11 orders. In cases where there is concern about destruction of documents such that even an extra day or two for a hearing on a section 11 order would be problematic, the Bureau can obtain search warrants under sections 15 and 16 of the Act, in which case the respondent has no prior notice of the Bureau's search and the Bureau can seize documents before they can be destroyed.