

EMERGING COMPETITION & DATA PRIVACY ISSUES FOR REAL ESTATE ORGANIZATIONS

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Despite continued warnings about overvaluation of residential real estate, home prices continue to rise across the country as Canadians and foreigners alike find safety in owning real estate in Canada. With rising prices, issues relating to real estate brokerage services and transactions will continue to attract the attention of Canadian regulators including the Canadian Competition Bureau and federal and provincial Privacy Commissioners. Upcoming legislative changes will also have an impact on how buyers and sellers interact with realtors, brokers and real estate associations (“real estate organizations”) going forward.

In this series of bulletins, we will outline some of the changes that have occurred in the regulatory environment and some additional changes on the horizon. In this first bulletin, we cover pending changes to Canada’s privacy regime, developments with low-commission brokerages and changes to short-term rental regulations.

Digital Charter and Privacy

As part of the federal government’s agenda to modernize Canada’s privacy laws, the Minister of Innovation introduced new legislation before Parliament in November 2020. If passed, the [new legislation](#) will strengthen existing privacy rights and impose new obligations on businesses related to the collection, use, protection and disclosure of personal information.

These proposed changes would give consumers a greater ability to control what happens to their personal information, such as photos of their current home, and place new responsibilities on real estate organizations to handle requests related to such personal information posted online. Buyers and sellers would have greater rights to ask real estate organizations how they use personal information, to obtain access to this information, and to compel real estate organizations to delete, destroy or transfer personal information. On a practical level, the new obligations – especially related to data transfer obligations – have the potential to create material technical and operational challenges for real estate associations as well as brokers operating virtual office websites or VOWs.

Real estate organizations will also need to make sure that their privacy policies are readily available to consumers and assess whether the transfer of personal information to cloud-based providers outside of their

province or outside of Canada altogether could raise concerns about the security of this information. The proposed law would also impose greater transparency requirements around automated decision-making systems or AI that interact with buyers and sellers, again creating technical and operational burdens on those running such systems.

While passage of this legislation is subject to the realities of a minority government, this legislation is a political priority for the federal government and one it would like to see passed before a possible election later this year. If passed in its current form, the new legislation would grant the federal Privacy Commissioner additional powers to investigate privacy related complaints and a new Tribunal would be able to impose significant financial penalties for non-compliance in the millions of dollars.

Low-Commission Brokerages

The Competition Bureau has historically followed the U.S. lead in challenging rules of real estate associations that limit competition between brokerages, including most recently, rules around the ability of brokers to post “sold” information on password-protected virtual office websites or VOWs.

Real estate associations should pay close attention to the [recent settlement](#) between the U.S. Department of Justice and the National Association of Realtors® that will require NAR to change its rules to provide greater transparency to buyers and remove barriers to low-commission brokers. The settlement prevents NAR from implementing rules or policies that (i) conceal commissions paid to buyers’ brokers from home buyers, (ii) allow buyer brokers to represent that their services are “free” because the commission is paid by the seller, (iii) allow buyer brokers to filter MLS® listings based on the level of commission offered and (iv) limit lock-box access to brokers that are members of an association.

The NAR settlement is a good reminder that real estate associations and their directors need to be cautious when enacting rules or policies that might make it harder for low-commission or digital brokerages to compete with more established brokers. Canada’s Federal Court of Appeal has determined that where a board controls access to the MLS® data in its territory, the board could face a potential challenge under section 79 of the *Competition Act* if it enacts or enforces rules that harm certain brokerages without a valid, procompetitive reason for the rule. Real estate associations should also be careful when documenting rule changes and should conduct periodic reviews of their rules to ensure fair treatment of brokerages operating in their territory.

Short Term Rentals

The emergence of online platforms including Airbnb and VRBO has transformed how people book short-term accommodations. Changes to the City of Toronto’s by-laws came into effect in January 2021 requiring that

short-term rental operators register their homes or rooms with the City if they plan to rent them for periods of fewer than 28 days. The by-laws require that operators obtain a valid registration, restrict their rental activity to their primary residence, collect and remit a Municipal Accommodation Tax and [adhere to other requirements](#). Similar rules may soon come into effect in the City of Ottawa following a study by city staff. The Toronto by-law changes [seem to have precipitated](#) a material increase in the number of furnished condominium units in the downtown core listed for 12-month leases, demonstrating the significant and rapid effect that regulatory changes can effect on real estate markets. Real estate professionals and their associations ignore such changes – and other regulatory actions by governments at every level – at their peril.

For more information on these developments or other developments in the industry, please don't hesitate to reach out to us.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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