

# BCxA ANTITRUST COMPLIANCE POLICY

The purpose of the antitrust laws is to preserve the competitive process. It is the policy of the Building Commissioning Association (BCxA) to strictly comply with the letter and the spirit of antitrust laws. This policy is not subject to compromise by anyone acting for BCxA. Any conduct that violates the federal or state antitrust laws is detrimental to the best interests of BCxA.

This document briefly explains antitrust rules and guidelines that apply to BCxA, as an association whose purpose is to further the legitimate interests of the building commissioning industry. This document will not make you an expert on the antitrust laws, but is intended to identify antitrust danger areas that you should avoid or about which you should ask BCxA leadership or your private antitrust counsel for guidance. It also identifies prohibited practices and activities as members of BCxA. Failure to be informed about the antitrust laws in the areas in which you have responsibility may subject you to criminal prosecution under those laws, as well as threaten the growth, good will, and financial condition of BCxA.

Trade associations like BCxA involve an opportunity for contact among competitors or entities with common business interests, which potentially entails an increased risk of violating antitrust laws. There is no immunity for trade association activities under the antitrust laws, and BCxA activities are subject to the same scrutiny that they would be in a situation unrelated to association activities. Certain corporate decisions -- such as determination of prices, selection of customers, or choice of markets – may be legal when they result simply from an individual company exercising its business decision, but can violate the antitrust laws if those decisions are the result of joint action by two or more competing companies, even when accomplished under BCxA’s auspices.

## ANTITRUST LAWS AND PENALTIES

There are two principle federal antitrust laws that may apply to BCxA in Canada. The Competition Act and The Competition Tribunal Act.

### **The Competition Tribunal Act:**

The Competition Tribunal is a specialized tribunal that combines expertise in economics and business with expertise in law. The Tribunal is strictly an adjudicative body that operates independently of any government department.

The cases it hears deal with matters such as business mergers; abuse of dominant position; agreements between competitors; refusal to comply; price maintenance; other restrictive trade practices; deceptive marketing practices; specialization agreements; delivered pricing; foreign judgments, law and directives that adversely affect economic activity in Canada; and refusals to supply by foreign suppliers.

Matters before the Tribunal are usually of national interest and large in scope and complexity, and can involve significant financial stakes and directly impact on the competitiveness of private enterprise and industry.

### Canadian Antitrust Laws - The Purpose of the Competition Act

“The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

Some of the issues addressed are:

* regulation of mergers and acquisitions among businesses with the policy goal of ensuring adequate and healthy competition within the economy;
* conspiracy to lessen competition;
* an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders;
* to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate;
* agreements to fix prices;
* knowingly or recklessly make a representation to the public that is false or misleading in a material respect;
* engaging in a scheme of pyramid selling;

### **Canadian Antitrust Laws - Enforcement of the Competition Act - The Competition Bureau**

The Commissioner of Competition heads the Competition Bureau and is Canada's chief antitrust enforcement official. The Commissioner is appointed by the federal cabinet and has exclusive statutory responsibility for administration and enforcement of the Competition Act. The Commissioner can launch inquiries, challenge civil matters before the Competition Tribunal and refer evidence of criminal offenses to Canada's Attorney General (who then decides whether to launch criminal proceedings).

The Commissioner is obliged to commence a formal inquiry whenever:

* a criminal offense has been, or is about to be, committed;
* grounds exist for the Tribunal to make an order regarding a reviewable practice;
* so directed by the federal Minister of Industry; or
* on the sworn application of six Canadian residents.

The Competition Bureau is part of the federal Department of Industry and provides administrative support to the Commissioner. Deputy Commissioners and Chief Officers are appointed to oversee separate branches which enforce the merger, marketing practices, civil matters, criminal matters and marketing practices portions of the Competition Act. There are also two support branches: Compliance and Operations and Economics and International Affairs. In addition, the Amendments Branch has responsibility to amend the Competition Act

### **Adjudicating Alleged Violations of the Competition Act**

The Competition Tribunal is Canada's adjudicative body for competition law and is governed by the Competition Tribunal Act. It is composed of both judges from the Federal Court - Trial Division and non-judicial members who are experts in the fields of business or economics.

The Tribunal has neither investigatory powers nor independent authority to consider a matter except on referral by the Commissioner of Competition who will first conduct a thorough investigation and attempt to resolve any antitrust concerns. Private parties do not have the right to initiate proceedings respecting a reviewable practice that the Commissioner has declined to challenge.

However, interested parties may "intervene" once the Commissioner has initiated a Tribunal proceeding. Parties may appeal a Tribunal decision as if it was a decision of the Federal Court - Trial Division.

### Penalties

The penalties for violating Canadian Competition act are severe and can be imposed on BCxA and on individual employees:

### A guide to amendments to the Competition Act

Important amendments to the Competition Act became law on March 12, 2009.

The changes will modernize the Competition Act and bring it more closely in line with the competition laws of our country’s major trading partners.

The amendments will increase the predictability, efficiency and effectiveness of the enforcement and administration of the Competition Act for both business and the Competition Bureau, and better protect Canadians from the harm caused by anti‑competitive conduct.

It is important to ensure that consumers and legitimate businesses do not fall prey to illegal activity, and that if they do, they have confidence the law will be enforced effectively and the penalties are tough enough to deter future illegal activity.

This document explains the most important changes to the [Competition Act](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html), in the areas of deceptive marketing, restitution for victims of false and misleading representations, pricing provisions, collaboration among competitors, merger review, and others.

### Deceptive marketing

The Competition Bureau promotes [truth in advertising](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00529.html) in the marketplace by discouraging deceptive business practices and by encouraging the provision of information to allow consumers to make informed choices.

* Administrative monetary penalties have been increased for non-criminal offences.
  + Individuals: maximum $750,000 for first-time offence and $1 million for subsequent offences (formerly $50,000 and $100,000, respectively).
  + Corporations: maximum $10 million for first-time offence and $15 million for subsequent offence (formerly $100,000 and $200,000, respectively).
* For criminal offences, the maximum term of imprisonment has been increased to 14 years from 5 years.
* A false or misleading representation is now clearly subject to action under the Competition Act even when made to the public outside Canada, or in a non-public setting.

### Restitution

This is a new provision in the Competition Act.

* The court or Tribunal may now order the person in violation to make restitution to purchasers.
  + The amount of restitution may not exceed the total paid by purchasers.
* The court or Tribunal may issue an injunction to prevent the disposal of property to ensure that there are funds available for restitution to victims.
* Restitution is already available for criminal offences, including criminal false or misleading representations, under the Criminal Code.

### Abuse of dominance

[Abuse of dominance](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html) continues to be dealt with under the non-criminal provisions of the Competition Act.

* Administrative monetary penalties (AMPs) have been introduced for abuse of dominance: maximum $10 million for first offence; maximum $15 million for subsequent offences.
* The airline-specific provisions have been repealed so that all industries are treated equally.

### Pricing provisions

* The former criminal pricing provisions have been repealed; such activities will be addressed under the civil abuse of dominance provisions
  + The criminal pricing provisions concerning price discrimination, predatory pricing, geographic price discrimination and promotional allowances have been repealed.
  + Pricing practices are now subject to review under a civil provision, but a remedy is only available where evidence of likely substantial anti‑competitive effect.
  + The removal of these offences promotes innovative pricing programs and increases certainty for Canadian businesses.

### Price maintenance

The price maintenance provisions are designed to provide resellers of products with the freedom to set their own prices and to provide suppliers with the ability to compete through low-pricing policies.

* The former criminal provision has been repealed and replaced with a new non-criminal provision.
  + Similar to the [refusal to deal](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00665.html) provision, it must be shown that there is an “adverse effect” on competition before the Tribunal can issue an order under the civil price maintenance provision (to prohibit conduct or accept a customer).
  + There is a right of access for private litigants to bring cases for price maintenance to the Competition Tribunal.
  + The decriminalization of the price maintenance provision promotes aggressive pricing with no threat of criminal sanctions.

### Competitor collaboration

The amendments create a more effective criminal enforcement regime for the most egregious forms of cartel agreements, while allowing other forms of potentially anti‑competitive competitor collaborations to be reviewed under a civil provision.

* True [cartel](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02760.html)-like behaviour (price-fixing, market allocation, output restriction) is subject to criminal prosecution and is prohibited outright.
  + The maximum fine for conviction is increased to $25 million from $10 million, and the maximum term of imprisonment to 14 years from 5 years.
* Other forms of potentially anti‑competitive agreements between or among competitors are subject to civil review and assessed to determine if they result in a substantial lessening or prevention of competition.
* These provisions are not in force until March 2010. Until then, parties may apply to the Commissioner for an opinion on the legality of existing or proposed agreements.
* The Bureau will issue draft Guidelines describing the Bureau’s proposed approach to assessing agreements among competitors. Following consultation with interested parties, the Guidelines will be issued in final form to provide predictability to business.

### Merger review

New merger review procedures will allow for a more efficient and effective review of mergers.

* The Bureau may now only challenge a completed merger before the Competition Tribunal up until one year (previously three years) after the transaction has been substantially completed.
* There is a new merger review and information-gathering process:
  + The initial waiting period during which parties may not implement a notifiable merger is 30 days after notification by parties (subject to early termination of the waiting period by the Bureau).
  + If more information is needed, the Commissioner can issue a Supplementary Information Request any time during the initial waiting period.
  + A Supplementary Information Request triggers a second 30-day waiting period, which commences when all information required to be provided in the Supplementary Information Request has been received.
* The “size of transaction” asset/revenue threshold for mandatory merger notification is raised to $70 million (from $50 million for most kinds of transaction), and indexed based on changes to Canada’s GDP, subject to a different amount to be prescribed by regulations.
* Draft Revised Merger Review Process Guidelines describing the Bureau’s proposed approach were released for consultation on March 24, 2009.

### Bid-rigging

* Definition of [bid-rigging](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00110.html) is amended to explicitly prohibit the withdrawal of bids by agreement, and the maximum term of imprisonment has been increased to 14 years (from 5 years).

### Obstruction and non-compliance

Certain penalties were increased to promote compliance with the Competition Act and to deter conduct that would compromise the effective enforcement of the Act, such as destruction of evidence.

## Specific Areas of Practice

The following describes the manner in which BCxA conducts its business in order to ensure that its activities do not unreasonably restrain competition, including a non-exclusive list of the types of prohibited agreements and conduct under the antitrust laws.

1. Organization and Membership: Membership decisions must be based on qualifications that are uniform, non-discriminatory, and serve a legitimate purpose. The requirements for membership should be as objective as possible, and are set forth clearly in the BCxA bylaws, charter, or policy documents. Decisions shall be made in a non-arbitrary manner, and generally shall not exclude industry participants with a legitimate business interest in the association who meet the BCxA requirements for membership.
2. Voting Rights and Privileges: Voting rights of BCxA members shall be equal, without favoring any group with preferred voting rights or privileges. Positions as directors and officers are open to all members, and BCxA strives to have leadership who is representative of the BCxA membership.
3. Conduct of Meetings: BCxA meetings, either of the association or any of its committees or chapters, shall be regularly scheduled with advance written notice and proposed agenda sent to all members. Informal, unscheduled meetings shall be avoided. Each meeting of BCxA or any of its subparts must have a valid purpose related to accomplishing the stated goals of BCxA.
4. Conduct of Members: BCxA does not sanction any conduct or agreement by any of its members (regardless of the informality or non-binding nature of that agreement) that is intended to or may result in price-fixing, allocation of markets, customers, or products, or a boycott of any competitor, customer or supplier. Discussions at BCxA meetings or activities, as well as written communications shall be directly related to the lawful aims of BCxA, and should not relate, directly or indirectly, to any of the prohibited conduct described below.

## Group Boycotts are Prohibited

Group boycotts, or collective refusals to deal, are illegal in the United States and by extension other countries where BCxA has representation. In general, there are two types of group boycotts. In the first, competitors agree not to do business with a particular customer or supplier. In the second, a supplier agrees, directly or indirectly, with its customers not to sell to any other potential customer who desires to purchase the product.

BCxA members may not enter into agreements or understandings, formal or informal, to avoid selling to, purchasing from, or doing business with another firm. Such boycotts violate the antitrust laws. It is not illegal, however, for any individual firm to unilaterally refuse to deal with any present or potential customers or suppliers, unless that refusal is based on an anticompetitive purpose.

1. Statistical Activities: In the event that BCxA decides there is a legitimate need to gather industry data (e.g., for tracing supply and demand cycles on a national or international basis, or related to the public relations function of BCxA), BCxA will employ the services of an independent, outside organization to assemble and disseminate the data in question. BCxA will make every effort to ensure that data will be submitted anonymously and that competitive data will not be disclosed in a manner that allows identification of specific companies or individuals.
2. Antitrust Policy Compliance: The Executive Director will distribute the policy to all International Board Members, Committee Chairs, Chapters and Staff in January of each year for review and signature. These signatures should be collected no later than February 28 of that year. If any member refuses to sign the document, it will be considered grounds for their removal from their position.
3. All suspected conduct in violation of this policy should be communicated to counsel for BCxA if applicable, as well as a member(s) of BCxA Leadership (i.e., International and/or Chapter Board members, International and Chapter Committee Members).

## Conclusion

This document is part of BCxA’s continuing effort to help assure compliance with the antitrust laws. It is BCxA’s policy to fully comply with all Provincial antitrust laws. Anyone affiliated with BCxA in any way that creates the appearance or perception that antitrust violations are taking place is putting the association at great risk for unnecessary liability.

I hereby acknowledge that I have reviewed the BCxA Antitrust Compliance Policy, and I understand and agree to abide by its policies and guidelines.

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