



Submission to

The Ministry of Finance of British Columbia

On the *Real Estate Act* Review Discussion Paper

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British Columbia Branch
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PREFACE

The Canadian Bar Association nationally represents over 37,000 members and the British Columbia Branch (CBABC) itself has 10,000 members. CBA members practice law in many different areas and the Branch has established 72 different Sections of lawyers who practice in similar areas and choose to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the Branch.

The CBABC, through its Sections and senior members of the Bar, provides to government both confidential and public reviews of proposed legislative amendments and draft legislation.

EXECUTIVE SUMMARY

The Canadian Bar Association BC Branch (CBABC), on behalf of the 10,000 members it represents, welcomes the government's review of the existing *Real Estate Act*. The CBABC supports the government's objectives to "protect the public and preserve its confidence in the real estate sector" by providing a "least cost" regime, promoting "competition among participants", and providing a flexible, accountable regulatory framework.

However, the CBABC is concerned that the government's Discussion Paper on the Real Estate Act does not propose amendments which adequately meet the stated objectives of this review.

Real estate transactions require lawyers to provide a full scope of legal services. These include: negotiating the purchase or sale, taking into account the factors going into such negotiations, such as appraisals, development or redevelopment possibilities, and financing issues arising out of the granting of mortgages, security agreements, guarantees and covenants; advising clients with respect to purchase and sale; property description matter and the assessment of effect of charges on title including easements, riparian rights, statutory rights of way, construction defects and warranties; listing and marketing; the actual conveyancing involved in a contract of purchase and

sale; and administering the financial components of sale, including management of trust monies and discharge of financial obligations with respect to property.

For many years, members of the public have had access to the expertise and protections afforded by lawyers during all stages of their real estate transactions. This has occurred with full public protection through the Law Society of BC, and there has been no public demand for change among consumers. Any proposal to remove the ability of the public to access a lawyer during all stages of their real estate transactions is to the detriment of both the public interest and public choice in the marketplace.

Public protection must remain the purpose of a new *Real Estate Act*, and a number of specific proposals and considerations are recommended in this submission to strengthen the protections provided to the public in real estate transactions. Specifically, the current *Real Estate Act* provide insufficient protections with respect to the conduct of realtors in anti-competitive pricing, misrepresentation, dual agency, litigable conduct, poorly drawn contracts of purchase and sale, non-deposit of trust money, poorly drafted contractual provisions to waive trust deposits, failure to pay deposit, and regulation of independent contractors.

The CBABC has a longstanding role in working with government to develop good law to meet public policy objectives. We look forward to participating in the drafting and review of a new *Real Estate Act* following this initial review process.

TABLE OF CONTENTS

PREFACE.....	i
EXECUTIVE SUMMARY	ii
PURPOSE OF DISCUSSION PAPER.....	1
PURPOSE OF THE <i>REAL ESTATE ACT</i>	3
THE REAL ESTATE ACT AND LAWYERS	4
LAWYERS' EXEMPTION.....	6
Lawyers Exemption and Government Objectives	7
Least Cost	7
Promoting Competition	8
Protection of the Public Interest	9
Government Concerns with Solicitor Sales of Real Estate.....	10
Lawyers' Specialized Education.....	11
Trust Monies Protected.....	13
Solicitor-Client Privilege.....	14
Law Society Rules	15
Lawyers' Exemptions and Employees.....	15
Regulatory Conflict	17
Lawyers Exemption and the BCREA	18
PUBLIC PROTECTION ISSUES IN REAL ESTATE TRANSACTIONS	20
Anti-Competitive Conduct.....	21
Misrepresentation.....	23
Dual Agency	24
Litigation.....	25

Poorly Drawn Contracts of Purchase and Sale	26
Not Depositing Trust Money	27
Poorly Drafted Contractual Provision to Waive Trust Deposits.....	28
Buyer’s Failure to Pay Deposit.....	29
Independent Contractors.....	30
ACCOUNTANTS’ EXEMPTION	31
OTHER EXEMPTIONS: BUSINESS BROKERING AND STRATA MANAGERS	32
REAL ESTATE AGENTS AS SELF-REGULATED PROFESSION.....	32
PROTECTION OF TRUST MONIES HELD BY REAL ESTATE AGENTS	33
PART 2 OF THE REAL ESTATE ACT: MARKETING.....	34
ABILITY TO USE DEPOSIT MONEY.....	36
Better Protection of Deposit Money	36
ENHANCED ENFORCEMENT POWERS.....	36
BETTER REMEDIES FOR CONSUMERS	37
OTHER EXEMPTIONS AND DISCLOSURE REQUIREMENTS.....	38
CONCLUSION.....	39

PURPOSE OF DISCUSSION PAPER

The Ministry of Finance states in the *Real Estate Act Review Discussion Paper* (March 2003) (the “Discussion Paper”), that the government’s stated purpose in the proposed amendments is to “protect the public and preserve its confidence in the real estate sector” by providing a “least cost” regime, promoting “competition among participants”, providing a flexible, accountable regulatory framework.¹

The Discussion Paper states that a new statute is to replace the current *Real Estate Act*, R.S.B.C. 1996, c. 397 (the “Act”). The government intends to introduce a new Act in the 2004 Spring Session of the Legislature.

The Canadian Bar Association (British Columbia) Branch (the “CBABC”) supports this overall public protection objective and welcomes the government’s attempts to strengthen the protection provided to the people of British Columbia under a new Act.

The CBABC has conducted a review of the issues raised in the Discussion Paper, and outstanding issues of concern with respect to the legislative and regulatory frameworks which govern real estate transactions in BC. Specifically, the Real Property

¹ Discussion Paper at pages 1-2.

Sections of the CBABC have provided comment through the CBABC Real Property (Vancouver) Subcommittee and (Vancouver Island) Subcommittee.

It is recognized that the Discussion Paper contains only proposals, and is intended to stimulate debate. We are very pleased to participate in this important review process, however, we look forward to a subsequent review of a government draft replacement statute for the Act. We note that a draft statute has been produced by the British Columbia Real Estate Association (the “BCREA”), however it necessarily reflects the restricted interests of the real estate agents, one of many stakeholders involved in the development, growth and management of the real estate industry in British Columbia.

We look forward to assisting the government in providing a thorough legal review of a draft statute created by government which provides detailed language to show how the government’s objectives are intended to be achieved.

PURPOSE OF THE *REAL ESTATE ACT*

At its core, the *Real Estate Act* is “a consumer protection statute intended to protect the public from unscrupulous or unqualified real estate agents”².

The CBABC believes that any replacement statute for the current Act should continue to have as its primary purpose the protection of the public.

The CBABC does not believe that the proposed changes as set out in the Discussion Paper adequately reflect changes which will meet these regulatory objectives.

In addition, there is concern that both the Act in its present form and in the form proposed in the Discussion Paper lack legislative focus. It seems that the two parts of the existing Act which are to be maintained in the proposed Act are devoted essentially to two different legislative objectives. The existing Act appears to recognize this by dividing the legislation into two, separate, stand-alone parts. The CBABC recommends that the purpose of the Act remain the same, and that the legislative intent of the government may be better served by having the matters addressed in Parts 1 and 2 of the existing Act addressed as separate statutes in any proposed new legislation.

² Ballex v. Peterson (1970), 75 W.W.R. 190 (B.C. S.C.).

THE REAL ESTATE ACT AND LAWYERS

Real estate transactions require lawyers to provide a full scope of legal services. These include: negotiating the purchase or sale, taking into account the factors going into such negotiations, such as appraisals, development or redevelopment possibilities, and financing issues arising out of the granting of mortgages, security agreements, guarantees and covenants; advising clients with respect to purchase and sale; property description matter and the assessment of effect of charges on title including easements, riparian rights, statutory rights of way, construction defects and warranties; listing and marketing; the actual conveyancing involved in a contract of purchase and sale; and administering the financial components of sale, including management of trust monies and discharge of financial obligations with respect to property.

For many years, members of the public have had access to the expertise and protections afforded by lawyers during all stages of their real estate transactions. This practice has ensured appropriate and comprehensive protection of the public. There has been no public demand for change.

Standard-form transaction documents have been developed through the cooperation of the legal and real estate professions. However, many transactions are still conditional on the transaction documents being reviewed by legal counsel before they become effective. This demonstrates a clear decision on the part of the public in the

marketplace that the experience and skills of licensed real estate professionals are not considered in themselves to be sufficient for the affected parties to make decisions which can be so personally significant.

The differentiation between the services provided by lawyers and realtors becomes even more pronounced when the transaction involves a business (with or without real estate). Very few principals would place a significant business transaction into the hands of a licensed realtor (except for those few who have specialized in these kinds of properties) and none would do so without legal counsel and assistance.

When one moves outside of the single-family residential transaction context, the role of licensed realtors appears in most circumstances to be limited to the marketing or searching for a particular property. These transactions are usually negotiated with a team of advisors to the parties (for example, legal, accounting and tax). This team of advisors is often under the leadership of a lawyer. This differentiation has resulted from the demands of the public, as expressed through the marketplace, and the appreciation of the interested parties of the professional skills that are needed to protect the public interest in the full scope of real estate transactions.

LAWYERS' EXEMPTION

With respect to proposed change to the existing wording of the lawyers' exemption in the *Real Estate Act*, there is grave concern among the legal profession with respect to unintended implications of changing an existing status that has operated successfully to the public's best interest for many years.

While not fully described in the Discussion Paper, a restriction of the current, longstanding scope of the lawyers' exemption strikes at the fundamental nature of the lawyer's role in advising clients about all aspects of their real property transactions. Lawyers must be able to provide their clients, the public, with advice and assistance to protect the public's legal interests in all matters associated with real estate trades. Any new restriction on the lawyers' exemption could necessarily limit the subject matter on which lawyers may provide advice to their clients. Any such restriction would not be in the public interest.

On a policy level, this may not be the government's intention. Unfortunately, on a strict application of the proposed change, lawyers might be prevented from adequately addressing all of their client's needs. Any attempt to narrow the existing exemption, and thus change the status quo, can have no effect other than to limit lawyers' ability to advise their clients in the context of real estate transactions. This cannot be seen as furthering the government's objective of protecting the public.

The CBABC is also concerned that the government's proposals in the Discussion Paper will have the effect of limiting the public's right to choose between alternative services in the conduct of real estate transactions, thereby stifling the "competitive market" which the government seeks to promote, with no concurrent gain in public protection.

The CBABC sees no public policy imperative for changing the status quo with respect to the role of lawyers in real estate transactions in BC. In this, the CBABC fully endorses and concurs with the Law Society of BC's position on this matter.

Lawyers Exemption and Government Objectives

The government's stated purpose set out in the Discussion Paper is to "protect the public and preserve its confidence in the real estate sector" by providing a "least cost" regime, promoting "competition among participants", by providing a flexible, accountable regulatory framework.

Least Cost

If implemented, the proposed amendment to change the current lawyers' exemption will reduce the public's choice to retain lawyers to service the public in real

estate transactions. The “least cost” objective is not met when the proposed amendments preserve a regime where real estate agents’ commissions are generally significantly higher than lawyer fees. In addition, to require lawyers to register under the Act to conduct real estate transactions would be redundant and increase regulatory costs viz the Act and the *Legal Profession Act*.

Promoting Competition

The proposed amendments do not promote competition; they restrict it in favour of real estate agents by entrenching a further monopoly under the Act to sell real estate. This is contrary to the government’s objective to promote competition among participants in the real estate industry.

The proposed amendments restrict competition between lawyers and real estate agents by changing the nature of an established lawyers’ exemption which has operated very successfully, with no public protection concerns, for many years.

In BC, currently, there are about 12,000 licensed real estate agents in BC.³
The BC Real Estate Council observes a trend that:

³ British Columbia Real Estate Association website at www.bcrea.bc.ca/act/Factsheet.pdf.

Over the years, it has been observed that one of the problems in the real estate field is that it appears to be overcrowded. Another problem of a more chronic nature is the high rate of turnover or dropout of new licensees. Studies reveal that about 9% of newly licensed salespersons quit the business within 12 months. A further 16% leave during the next year, for a total of 25%.⁴

The Real Estate Council has identified that the pressing problems in the real estate field is overcrowding of real estate agents and the high rate of turnover or dropout of new real estate licensees -- not reform to the Act.

Protection of the Public Interest

The CBABC views protection of the public interest as being the most significant of the objectives to be pursued in reviewing and amending the current legislative and regulatory regimes with respect to real estate practice. Real estate purchases and sales are among the most significant financial transactions in a person's life, requiring a rigorous and cohesive set of protections to safeguard the rights and future considerations of the consumer from predatory or incompetent practitioners.

Protection of the public interest is not increased by narrowing the current lawyers' exemption and entrenching an expanded monopoly for realtors. Education standards, conduct standards and insurance standards imposed on lawyers are higher than

⁴ Turnover in Real Estate Personnel,
www.recbc.ca/factsfigures.html#Turnover%20in%20Real%20Estate%20Personnel.

those for real estate agents. There is no evidence of harm to the public while the lawyers' exemption has been in operation. There have been no public complaints or litigation, and there has been no public call to amend the exemption provision.

Government Concerns with Solicitor Sales of Real Estate

Some individuals within government have expressed concerns regarding soliciting of listings and the marketing of real estate by lawyers. The CBABC takes the position, as detailed below, that none of the areas of concern expressed would justify the removal of selling real estate through lawyers as a legitimate alternative to the public as a means of marketing and selling their real estate.

Five general concerns have been conveyed as the basis for introducing a new restriction on lawyers' activities in the areas of soliciting listings and showing homes:

1. ensuring sufficient specialized education to properly serve the public in these areas;
2. adequate protection of trust monies in such listing or sale activities;
3. disclosure relating to the sale of real estate, in the context of solicitor client privilege;

4. potential change to regulation under the *Legal Profession Act* and the rules of the Law Society which might affect lawyers conducting real estate transactions; and

5. the extension of exemption to persons employed by a lawyer in respect of transactions in the course of his or her practice.

Lawyers' Specialized Education

In terms of education, lawyers currently go through a rigorous education program which requires a minimum of six years of university training followed by a rigorous 12-month articling program. This includes mandatory testing and training conducted by the Professional Legal Training Course.

In virtually all cases, lawyers involved in the sale of real estate will have completed legal courses devoted specifically to issues that arise in the context of real estate transactions. These would include a fundamental understanding of issues concerning:

- title to property;
- contract drafting;
- acting as stakeholder or trustee;
- the law of misrepresentation;

- structuring the real estate transactions; and
- the rights and remedies of purchasers and vendors in the context of real estate transactions.

When compared to the current training required to obtain a real estate licence, lawyers who conduct real estate transactions have more than sufficient education and experience necessary to perform the full range of real estate transactions in the public interest. Specific training in areas such as property valuation may be required in certain aspects of such transactions, depending on their nature, however, there are many commercially available valuation services that can be called upon to meet this need.

In addition, an over-riding principle that protects the public in solicitor involvement in real property transactions is the professional conduct requirement of lawyers: under regulation and discipline by the Law Society of BC, lawyers are specifically required to be competent to perform any such work prior to undertaking it.

It should be noted as well that lawyers can provide a better alternative for members of the public selling real estate in circumstances where there are specific concerns relating to the real estate in question. For example, in circumstances involving “leaky condos” or property where there is potential environmental contamination, the involvement of a lawyer in the sale of such property from the outset helps ensure that the

vendor receives proper legal advice as to his or her obligations of disclosure to potential purchasers. Matters raised in the selling of such properties may not receive adequate consideration where an agent is involved, simply because the agent does not have the sufficient training to recognize the potential legal issues involved. The result is that neither the vendor nor the purchaser adequately manage the important legal issues involved at the time the contract is drafted, leaving both parties vulnerable to future legal difficulties.

Trust Monies Protected

With respect to the concerns regarding the protection of trust monies, in the CBABC's view this issue provides a strong argument for lawyers continuing to be involved in all aspects of real estate sales.

Lawyers, by virtue of their profession and their obligations to their clients under the *Legal Profession Act* and otherwise, have a long history of retaining trust funds in a variety of circumstances. A lawyer's obligations in dealing with trust funds are heavily regulated under the *Legal Profession Act* and the Rules of the Law Society with the specific intention of protecting the general public.

In the context of real estate transactions, under the present regime, lawyers are presently retaining millions of trust dollars daily in circumstances where they act for buyers and sellers in all types of real estate transactions. Indeed, where lawyers act for developers during the construction and sale of strata-titled developments, it is primarily lawyers who retain deposits paid by prospective purchasers in trust, in circumstances where a developer does not yet have a building permit or project financing in place to construct the development.

Clearly, given the fact that lawyers retain and deal with trust funds on behalf of clients and others on a regular basis, the public interest is well served with lawyers retaining trust funds in the context of selling real estate.

Solicitor-Client Privilege

In terms of the effect of solicitor-client privilege, a lawyer is obliged to advise his or her client as to the vendor's legal obligations in the context of disclosure in the sale of property. In addition, the Law Society has developed strict rules governing a lawyer's conduct in circumstances where he or she is dealing with an unrepresented party. Such rules provide the necessary protection to potentially unrepresented parties dealing with lawyers in the context of real estate transactions.

Law Society Rules

The obligations of lawyers selling real estate are subject to rules of the Law Society and changes to the *Legal Profession Act*. As the Law Society's primary purpose is protection of the public, it is highly unlikely that any changes would be proposed that in any way compromise public protection in real estate transactions. To the extent that any such changes might arise by virtue of the *Legal Profession Act*, the government, by necessity, will be involved in, and approve, any such changes. To the extent that such changes arise by virtue of the Law Society Rules, the Attorney General attends at Benchers meetings where such decisions are made, in person or by representative, and makes appointments to the Benchers to the Law Society.

Lawyers' Exemption and Employees

With respect to the extension of the lawyers' exemption to employees, this exemption is merely a recognition that the provision of timely, efficient and cost-effective legal services may involve the use of paralegals or employees under the supervision of a lawyer. The exemption only relates to employees of the barrister or solicitor operating in respect of transactions in the course of the barrister's or solicitor's practice. There is no independent exemption available to such employees.

The activities of such employees fall squarely within a lawyer's supervisory obligations of Chapter 12 of the *Professional Conduct Handbook*. As such, a lawyer who, in the context of the exemption, employs an employee for some function relating to a transaction in the course of his or her practice must ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer and that legal advice is not given by an unauthorized person whether in the lawyer's name or otherwise.⁵ Failure by a lawyer to abide by the terms of the *Professional Conduct Handbook* can and does trigger the disciplinary procedures contained within the *Legal Profession Act* which could result in serious penalties or disbarment.

In the circumstances therefore, given the potentially devastating consequences of a lawyer failing to supervise employees in the context of a real estate transaction, the wording of the existing Acts adequately protect the public.

It should also be noted that real estate licensees commonly employ non-licensed employees to assist them with such tasks as showing properties, meeting clients to measure and evaluate properties, and to assist in the preparation of documents including contract of purchase and sale.

⁵Section 2, Chapter 12 of the *Professional Conduct Handbook*.

Regulatory Conflict

To propose that a lawyer engaged in real estate sales become licensed under the existing or newly proposed licensing regime serves only to select out one narrow component of the wide scope of services involved in a real estate transaction, and would increase both the cost and complexity of regulation in the face of a stated desire by government to simplify and increase flexibility with respect to regulation.

Such an approach also gives rise to practical difficulties. A lawyer licensed under the existing or proposed Act would then be subject to two specific regulatory regimes and it would be difficult to determine which regime would take priority over the activities of a lawyer engaged in the process of selling real estate. This potential clash of regulatory regimes would lead to uncertainty both on the part of regulatory authorities and on the part of the public.

The potential clash between the licensing systems under the *Real Estate Act* and the *Legal Profession Act* could also result in uncertainty as to a lawyer's representation of his or her clients. In acting for a client in the context of a real estate dispute or transaction, neither the lawyer nor the client should be forced to engage in an unnecessary exercise of having to determine whether or not any particular aspect of the legal services being provided runs afoul of a narrowly drafted exemption, given the full range of services that legislative authority and public demand has required of lawyers.

Therefore, lawyers should remain governed by the *Legal Profession Act* and the regulatory regime developed under it. This regulatory regime has given a longstanding history of public protection in the context of real estate transactions, and should not be altered.

Lawyers Exemption and the BCREA

Prior to the public release of the Discussion Paper in March 2003, the BCREA submitted to government a draft *Real Estate Act*. Among other things, that draft Act proposed changing the current section 2(1)(f) to read:

2(i) a lawyer whose name is inscribed on the rolls of barristers or solicitors in British Columbia, or a person employed by him or her, where the dominant purpose for which the lawyer is engaged by his or her client is the provision of legal services to the client and the trade in real estate is incidental to and directly arising from the provision of such legal services.⁶

Currently, section 2(1)(f) of the Act provides that the Part of the Act requiring registration does not apply to:

⁶ BCREA submission at page 12, at www.bcrea.bc.ca/act/Act.pdf.

2(1) (f) to a barrister or solicitor whose name is inscribed on the rolls of barristers or solicitors in British Columbia, or to a person employed by him or her, in respect of transactions in the course of his or her practice.

The current exemption is simple to understand and has worked well in practice in the public interest over the many years that it has been in force. It also mirrors other exemptions in legislation which reflect the expertise and public protection regulations by which lawyers are bound (e.g. *Securities Act*, *Notaries Act*, *Financial Institutions Act*, *Mortgage Brokers Act*).

The BCREA changes proposed to the wording of the current exemption are fraught with interpretation problems that will increase uncertainty. For example, the phrases “dominant purpose” and “incidental to” are vague and undefined. The administration of the proposed new wording would result in a regulatory nightmare of increased regulation, conflicts, costs and time. The exemption would likely cause conflicts in interpretation and an increase in litigation. As a consequence, the public interest would be harmed.

There is no evidence that there is a compelling public need or demand at this time to change the wording of the exemption for lawyers as it exists in the current Act.

The necessary regulation of lawyers is, and historically has been, provided by the Law Society and it is in the best interest of the public to permit the freest access to the fullest range of legal advice in regard to trades in real estate, within the existing regulatory framework.

PUBLIC PROTECTION ISSUES IN REAL ESTATE TRANSACTIONS

In the current operation of the Act, issues have arisen regarding the conduct of real estate transactions which the government should consider in its drafting of the new Act in order to better protect the public, avoid confusion and limit uncertainty in the minds of the public.

Important public protection issues regarding the conduct of real estate transactions include:

- anti-competitive conduct;
- misrepresentation;
- dual agency;
- litigation;
- poorly drawn contracts of purchase and sale;
- not depositing trust money;
- poorly drafted contractual provision to waive trust deposits;
- buyer's failure to pay deposit; and
- independent contractor agreements in violation of the Act.

Anti-Competitive Conduct

In February 2003, the federal Competition Bureau under the Canadian *Competition Act* obtained a consent order from the Federal Court of Canada in a price fixing case involving Re/Max Ontario-Atlantic Canada Inc. (Re/Max Ontario), Re/Max of Western Canada (1998) (Re/Max Western) and Re/Max International Inc.⁷

Under the *Competition Act's* price fixing or maintenance provisions, it is a criminal offence to attempt to influence upward or discourage the reduction of resale prices by threat, promise, agreement or other like means or to refuse to supply or otherwise discriminate against a person because of their low pricing policy.

The consent court order:

- prohibits the realtors from adopting a policy or engaging in acts which prohibit their franchisees or their sales associates in Canada from setting independent commission rates or advertising such rates;
- prohibits the realtors from attempting to influence commission rates upwards by any means;

⁷ The *Queen v. Re/Max Ontario-Atlantic Canada Inc. (Re/Max Ontario), Re/Max of Western Canada (1998) (Re/Max Western) and Re/Max International Inc.* (Prohibition Order – T235-03), Federal Court of Canada (February 17, 2003).

- prohibits the realtors from pressuring independent publishers to refuse advertising from any Re/Max franchisee or sales associate because of the commission rates advertised;
- requires Re/Max organizations in Canada to pay the legal costs incurred by the Crown.

The Competition Bureau has continued its scrutiny of realtors' practices that may be criminal, anti-competitive or otherwise present a risk to the consumer as protected by the *Competition Act*. Recently, the President of the Canadian Real Estate Association highlighted for his members these concerns of the Competition Bureau, including concerns about:

- the membership-only factor for MLS;
- agency;
- the BCREA's interpretation that "agency means that the realtor has responsibilities"; and
- requirement for remuneration sharing.⁸

⁸ Tim Walsh, "Consumers and technology changing real estate", in REM (December 2002) at page C1.

The CBABC submits that the new Act should contain strong provisions to ensure fair competition, prevent monopolistic practices by realtors, increase consumer choice and reduce consumer cost regarding real estate transactions.

Misrepresentation

It is recommended that the public be better protected against misrepresentation of real estate property through a separate misrepresentations statute or increased consumer protection provisions.

For example, in the United Kingdom, the *Property Misdescriptions Act, 1991* is in force to protect the public from misrepresentations regarding property descriptions. Under that statute, it is an offence for a realtor to give misleading descriptions of properties in written details, photographs or verbal statements. An English government study found that real estate agents were not providing details except when they were able to substantiate them in order to comply with the *Property Misdescriptions Act, 1991*.⁹

Ontario has enacted the *Real Estate and Business Brokers Act, 2002* S.O. 2002, c. 30, Sch. C (Bill 180) with increased consumer protection provisions including:

⁹ Secretary of State for Trade and Industry (Monopolies and Mergers Commission), Solicitors' estate agency services in Scotland: A report on the supply of residential estate agency services in Scotland (Report to Parliament) (1997) at para. 3.99.

- prohibitions against engaging in false or misleading advertising;
- prohibitions against a registrant falsifying, or counseling another person to falsify, any information relating to a trade in real estate; and
- authority for the registrar to immediately suspend or revoke a registration if the registrar considers it in the public interest to do so.

The CBABC recommends that the government consider the application of the consumer protection provisions of the United Kingdom's *Property Misdescriptions Act, 1991* and Ontario's *Real Estate and Business Brokers Act* in the new Act as a further means to protect the public in British Columbia.

Dual Agency

There are disputes between realtors and the public over dual agency provided by the Act. Disputes arise when members of the public may not understand that their real estate agent may owe a competing duty to the other party in the transaction, even after the real estate agent has secured the consent of both parties to act as dual agent and disclosed all material facts to both parties.

To address this problem, in part, the British Columbia Real Estate Association has prepared a limited dual agency model agreement for use by realtors,

purchasers and vendors. This agreement was considered by the British Columbia Supreme Court in *Paul v. Jung* 1998 BCSC 844. In that case, Mr. Justice Davies considered that the model agreement, while perhaps unfair to the buyer, was at least an attempt to address the fundamental issue of conflict of interest by ensuring that written notice of the existence of such conflict is provided to the buyer.¹⁰

The CBABC recommends revisiting dual agency in the new Act, including the provisions for the protection of the public and to clarify the fundamental issue of conflict that exists in a dual agency.

Litigation

A recent study of the Canadian Real Estate Regulators Group Agency Task Force, an industry organized body, found that the majority of litigation in the real estate industry involve members of the real estate industry.¹¹ The study discovered that the majority of reported legal decisions involve members of the real estate industry, a minority of others involve relationships outside of the industry (i.e. stockbrokers).¹² This confirms previous

¹⁰ *Supra* at para. 65.

¹¹ William Foster, *Agency Law and Real Estate Brokerage: Current Issues: A Review of the Case Law and Some Industry Practices*. (January 2003)(available at: www.canadianregulators.ca/ATFindex.htm) at page 1. Professor Foster is author of Real Estate Agency Law in Canada and legal advisor to the CRG-ATF.

¹² *Ibid.*

industry studies that 80% of litigation in the real estate industry involves members of the real estate industry¹³.

Litigation can be very costly and time consuming for all stakeholders. A properly drafted Act can assist in reducing litigation by increasing certainty in interpretation and thus decreasing the incidence of litigation arising out of confusion, uncertainty or incompetent or deceptive practice.

Poorly Drawn Contracts of Purchase and Sale

One of the real estate industry regulators, the Real Estate Council of British Columbia (the “Real Estate Council”) has identified that “poorly drawn contracts of purchase and sale are a significant problem in real estate practice”¹⁴.

The CBABC recommends that the government consider enacting provisions in the new Act to redress this problem, either with additional educational requirements for real estate agents or increased fine and penalties to deter this practice by realtors.

¹³ *Ibid.*

¹⁴ Real Estate Council of British Columbia, Licensee Practice Manual (4d) (1999) at page. 13.

Not Depositing Trust Money

In addition, the Real Estate Council identified problems with the depositing of trust money by realtors. For example, section 16 of the Act requires a nominee or salesperson to deliver trust money to an agent in order that the agent shall, upon receipt, pay trust money into the trust account. The Real Estate Council's auditors frequently have found that:

(a) cheques have been held and not deposited until either certification or acceptance of the relative offer. This can be done only if specific written authorization is contained in the contract.

(b) cheques from related companies (e.g. subsidiary company or a private company owned by the licensee) acknowledged on Contracts of Purchase and Sale were never drawn and accordingly no payment was made into the agent's trust account.

(c) rental collections were being deposited into the general account when they should have been deposited into a trust account¹⁵

¹⁵ *Supra* at p. 19.

The Real Estate Council has advised the real estate industry that it is not prepared to accept practices of this nature.¹⁶

Practices such as these put at serious risk the legal rights of consumers who have paid money in good faith to real estate agents and expect that their deposits are being dealt with in a safe and legal manner as provided by the Act.

The CBABC recommends again that the government consider enacting provisions in the new Act to redress these practices so that they do not pose a risk to the public. This can be done either with additional record keeping requirements or increased fines and penalties against realtors who engage in such practices.

Poorly Drafted Contractual Provision to Waive Trust Deposits

The Act requires a deposit to go into a trust account immediately unless parties mutually agree to waive this requirement in contract. In this regard, three practices are commonly used in the real estate industry:

1. contract of purchase and sale may provide that the deposit is payable within a specified period of time after the acceptance of the offer; or

¹⁶ *Ibid.*

2. the contract may provide for an initial small deposit which is to be increased to a specified amount with notification of acceptance of an offer or removal of conditions precedent; or

3. the contract may provide that the salesperson may hold the buyer's deposit cheque and deposit it upon acceptance.¹⁷

To address the significant problem of poorly drawn contracts of purchase and sale as identified by the Real Estate Council, the CBABC recommends that the government consider enacting provisions in the new Act to correct this problem, including additional educational requirements for real estate agents so that they can consistently draft valid and subsisting contracts of purchase and sale.

Buyer's Failure to Pay Deposit

The Real Estate Council has obtained a legal opinion regarding when a cheque for a deposit must be deposited into an agent's trust account. The legal opinion considered whether or not, in all cases, a cheque for a deposit must be deposited into an agent's trust account or whether it was acceptable, if the offer accompanying the deposit cheque was rejected, to give the cheque back to the person who made the offer.

¹⁷ *Supra* at page 21.

The Real Estate Council lawyer's opinion is that:

If a cheque is received accompanying an offer made on a Friday evening it is sometimes impossible to pay it immediately into the bank. It cannot be deposited until Monday morning...If an offer made on a Friday evening is rejected that evening or before the banks open Monday morning, it would seem to defy reason that the cheque could not be returned in specie to the offeror, and I incline to view that such return of the cheque would be a proper course and not leave the agent open to criticism or to a charge of breach of the Act. Once the offer is rejected, no one has any rights in the cheque other than the offeror and I do not see how there could be any wrongdoing in returning the cheque to him. If, on the other hand, a cheque is received during banking hours, or it is possible to deposit the cheque in the bank before the offer is rejected, then in my view, the cheque should be deposited even though the offer may still be open and in spite of the inconvenience in obtaining certification and so on.¹⁸

To eliminate the real risk to the consumer for a real estate agent's failure to make a trust cheque deposit as required under the Act, the CBABC recommends that the government consider enacting provisions in the new Act to codify the Real Estate Council's legal opinion in this regard.

Independent Contractors

The Act defines a salesperson in section 1 as someone "employed" by an agent but it is common for salespersons to be independent contractors with their employing agents in order to gain preferential treatment for income tax, Canada Pension Plan and employment insurance purposes.

¹⁸ *Supra* at page 20.

The British Columbia Court of Appeal in *FWC The Land Co. (Receiver of) v. Bohun* (1997), 29 B.C.L.R. (3d) 179, has held that the independent contractor agreements are a breach of the trust account provisions in sections 16 and 17 of the Act.

The CBABC recommends that the government consider enacting provisions in the new Act to clarify the direction provided by the British Columbia Court of Appeal in *FWC The Land Co. (Receiver of) v. Bohun, supra* in its interpretation of the Act.

ACCOUNTANTS' EXEMPTION

In terms of the proposed inclusion of an “accountants’ exemption”, the CBABC has concerns as to the assumptions on which such an exemption is based. It would appear from the brief references contained in the Discussion Paper that the exemption is based on the assumption that accountants, having had some training in financial analysis, have sufficient expertise to be involved in and advise on real estate trades. Such an exemption ignores the specific knowledge, training and education required to protect the public in real estate transactions. Nothing in the Discussion Paper, or in consumer experience in BC, would support the introduction of such an amendment.

OTHER EXEMPTIONS: BUSINESS BROKERING AND STRATA MANAGERS

The rationale behind the comments contained in the Discussion Paper is unclear with respect to “business brokering”. There does not appear to be any provision within the Act which triggers the licensing requirements contained therein in circumstances where there was a sale of a business not involving real estate. As such, it is the CBABC’s view that no amendment to the existing Act is required. The proposed exemptions relating to the “provision of information alone” in the form of items akin to self-help sales kits or publishing of listing information, and the exemption relating to residential caretakers, are supported

With respect to the licensing of strata managers, the CBABC does not have available to it information concerning the number of complaints from the general public in this particular area. In general, there is support for regulation of strata managers where the strata manager is not governed by a professional regulatory framework that would protect the public interest, and with exemptions or special considerations provided to managers of small strata corporations.

REAL ESTATE AGENTS AS SELF-REGULATED PROFESSION

Sufficient evidence has not been proposed that would support a conclusion that a self-regulated real estate industry is necessarily an improvement over a

government-regulated real estate industry. However, there is no strong opposition within the CBABC to such a change.

There is some concern that, unlike other self-regulated professions such as doctors, dentists, lawyers and others, the real estate industry does not come from a tradition of self-regulation and a change such as the one proposed in the proposed Act could present unanticipated challenges to the real estate industry. If self-regulation is permitted, this will require careful monitoring on the part of government to ensure adequate public protection.

PROTECTION OF TRUST MONIES HELD BY REAL ESTATE AGENTS

There are some reservations about replacing the existing bonding requirements with a special assurance fund in order to better protect trust monies. Whether such an assurance fund would offer enhanced protection is dependent upon the manner in which the fund is administered and the circumstances under which payment will be made from such a fund.

PART 2 OF THE REAL ESTATE ACT: MARKETING

With respect to Part 2 of the proposed amendments to the Act, there is general support for streamlining the disclosure and pre-selling requirements currently contained in the existing Act. In particular, there is support for the government's proposal that disclosure statements be used in all circumstances for any type of development and that compliance would be maintained by means of spot audits on the part of the Superintendent's office. In particular, out of province offerings should be subject to stringent regulation.

The Discussion Paper does appear to be inconsistent in terms of the requirement relating to local government approval prior to marketing. Initially, the Discussion Paper states that one of the three fundamental requirements to market any development is that the developer has preliminary local approval for the project and is in a position to provide clear title to the purchaser. Later on, the Discussion Paper appears to indicate a desire on the part of the government to, where possible, remove the requirement for local governmental approvals before selling. According to the Discussion Paper, this would permit more pre-selling so long as there is full disclosure and protection of the purchaser's money.

There is divided opinion on the degree to which some form of local government approval should be a requirement of pre-selling. Some members are of the

opinion that so long as there is full disclosure to potential purchasers that local governmental approval has not been obtained and the deposits of such purchasers are protected, developers should not be precluded from pre-selling units. Other members are of the view that some rudimentary local government approval should be necessary prior to the developer being able to market units.

A compromise position might involve a requirement that actual deposits be retained until local government approval is available, at which point the developer can, on posting the appropriate insurance, make use of the deposits for the purposes of proceeding with development.

A specific concern has been raised about the general requirement of the developer being in a position to provide clear title prior to being able to market any development. In order to be in a position to provide clear title, a developer would have to obtain the necessary financing commitment and the necessary covenants from its lenders to permit partial discharge of the construction financing as units are sold. In practice, as is contemplated by Policy Statement 6 issued under the Act, developers are permitted to market without having their construction financing commitment in place. Presumably the reference to the general requirement that the developer be in a position to provide clear title would not, under the proposed amendments referred to in the Discussion Paper, require the developer to have construction financing in place as a condition of marketing.

ABILITY TO USE DEPOSIT MONEY

In terms of the ability to use deposit monies, whether or not the enhanced ability to use deposit monies by developers would be helpful to the industry, the majority opinion was that it should be dependent upon the availability in the marketplace of the type of insurance referred to in the Discussion Paper.

In order for there to be a more thorough assessment of the impact of this proposed change, a more detailed version of the government's proposal would have to be reviewed by all stakeholders.

Better Protection of Deposit Money

There is general agreement with the requirement that deposit monies be held by real estate agents, lawyers or other regulated professionals rather than the developers themselves in circumstances where the developers have not obtained deposit insurance.

ENHANCED ENFORCEMENT POWERS

With respect to the enhanced enforcement powers available to the Superintendent, there was a general view that any ability on the part of the Superintendent to order that the sale of units cease under the Act should be

counter-balanced by an expedited right of appeal on the part of the developer to the Financial Institutions Commission. This expedited right of appeal should be available so that differences of interpretation between developers and the Superintendent's office, as to compliance with the disclosure requirements of the Act, could be addressed with a minimum of delay.

BETTER REMEDIES FOR CONSUMERS

Cooling off periods exist because it is recognized that the interest and rights of consumers may be jeopardized in circumstances where they are unrepresented in negotiations, may be unduly pressured through unscrupulous sales and marketing tactics, and/or where there is a conflict in the interests being represented by the realtor. While a cooling off period is supported, it is recommended that a concurrent, and perhaps more important, protection for consumers is to ensure choice and access to agents that are regulated to protect their interests without conflict. Consumers have the right to have confidence and fair market choice in selecting a lawyer or regulated realtor to represent their interests.

There is general agreement that there should be a single standard cooling off period in all circumstances. The majority opinion was that the 7 day period was too long and would create an excessive level of uncertainty for developer(s) who in essence could

be prevented from marketing a unit for the entire seven day period while the purchaser made his or her determination as to whether to proceed. The impact of this uncertainty on the developer would be magnified in circumstances where only a small number of units were being marketed.

A shorter cooling off period could be coupled with an expansion of the existing acknowledgement on the part of the purchaser of his or her receipt of the disclosure statement relating to a development. In the expanded acknowledgement, the purchaser would confirm that the contract to be executed for the property to be purchased was, subject to the cooling off period, a binding contract and that prior to the purchaser's execution he or she had reviewed all applicable disclosure statements and other information relating to the purchase.

OTHER EXEMPTIONS AND DISCLOSURE REQUIREMENTS

As a final comment concerning revisions to Part 2 of the Act, it is proposed that the current exemptions to this Part and the disclosure requirements contained therein should be reexamined.

For example, the sale of any industrial or commercially zoned lands or lands that are zoned residential but are essentially a commercial property, such as apartment buildings, should be exempted entirely from Part 2 of the Act.

Similarly, the exemption as it relates to the sale of subdivided land within the boundaries of a municipality should be extended to apply to strata lots as well. There was also a suggestion that the Superintendent's current practice of using Policy Statements creates uncertainty in the industry as such statements are often vague and do not have the force of law. The obligations of developers and others under the Act should be specific and should be set out clearly in regulations promulgated under the statute.

CONCLUSION

The CBABC appreciates the opportunity to provide advice and comment to the government with respect to proposed amendments to the *Real Estate Act*, in furtherance of the government's objectives to protect the public and preserve its confidence in the real estate sector by providing a least cost regime, promoting competition among participants and providing a flexible, accountable regulatory framework. Crucial to these objectives is the ability of lawyers to advise their clients on the full spectrum of a real estate transaction's components, and for the public to be able to freely choose, in a competitive environment, representation of the public's choice.

The CBABC looks forward to working with government to ensure the creation of an effective and efficient new Act.