

Real Estate Act Reform

Licensing Lawyers and Accountants

Presentation to the Ministry of Finance
Financial and Corporate Sector Policy Branch
May 12, 2003



BRITISH COLUMBIA
REAL ESTATE
ASSOCIATION

Who we are

The British Columbia Real Estate Association represents the interests of the real estate boards and their licensees on all provincial issues. The real estate boards throughout the province have as their members nearly 12,000 REALTORS.

To ensure high standards and serve the needs of real estate salespeople, BCREA provides an extensive communications network, required licensing and continuing education courses, standard forms and government relations.

REALTORS help consumers make some of the largest purchases of their lives. As professionals, REALTORS are committed to high standards of customer service, ethics and education.

Every real estate professional who joins a BC real estate board automatically becomes a member of BCREA and of The Canadian Real Estate Association. These organizations work together to represent REALTORS on the municipal, provincial and national stages, and to provide an array of services designed to further their careers.

REALTOR is a trademark which identifies real estate professionals who are members of The Canadian Real Estate Association and the National Association of REALTORS (US). These individuals subscribe to a high standard of professional service and a strict code of ethics.



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Licensing Lawyers and Accountants Executive Summary

The British Columbia Real Estate Association (BCREA) believes broad licensing exemptions from the *Real Estate Act* would result in confusion among real estate consumers, which would serve them poorly and could adversely affect confidence in this key economic sector.

Allowing other professionals to solicit, market and sell real estate without benefit of licensing will also severely limit the authority of the Real Estate Council of BC and the effectiveness of the current Act or new Act.

Lawyers and accountants

Lawyers believe their expertise, training, insurance and regulatory framework all support a full exemption from licensing to engage in real estate trading by listing and showing properties and advertising them for clients. BCREA suggests lawyers are trying to expand the scope of their legal practice, as opposed to resisting an entrenchment on legal practice by amendments proposed by government and BCREA.

Government believes an exemption for accountants may be appropriate in the context of a sale of a business, even though accountants have never been exempted from registration under the *Real Estate Act*. The lack of a singular regulatory regime for accountants, and the significant differences that exist between the regulatory regimes of accountants and real estate licensees indicate consumers are best served by the current system.

Consumers at risk

Neither lawyers nor accountants are sufficiently trained, regulated or insured to engage in real estate trading. Consumers deserve to know what to expect from the professional who lists and sells their property, and in what capacity that person acts. Broad licensing exemptions would weaken protection measures to which the real estate profession has subscribed for decades, including disclosure obligations, standard forms of agreement, prescribed commission types and irrefutable insurance coverage.

Recommendations

In the interests of public protection, BCREA stands by its initial recommendation, of April 9, 2003, that government require anyone performing the duties or functions of a REALTOR to be licensed.

With regard to lawyers and accountants, BCREA recommends the government:

- **Clarify that the lawyers' exemption only applies to real estate trades which arise in the ordinary course of law practice; for example, trades that are ancillary to settling an estate, administering a will or effecting a marriage settlement.**
- **Maintain the status quo of no exemptions for accountants under the current *Real Estate Act*, or its successor.**

Real Estate Act Reform – Licensing Lawyers and Accountants

The British Columbia Real Estate Association (BCREA) is concerned that broad licensing exemptions from the *Real Estate Act* would result in confusion among consumers, which would serve them poorly and could adversely affect confidence in this key economic sector. Moreover, allowing other professionals to solicit, market and sell real estate without benefit of licensing will severely limit the authority of the Real Estate Council of BC and the effectiveness of the current Act or new Act.

On April 9, 2003, BCREA submitted a brief to government entitled *Real Estate Act Reform: One Profession, One Voice*. That brief included many recommendations on various matters related to reform of the current *Real Estate Act*, including several related to licensing.

As a follow-up to that original submission, BCREA created this brief in response to a request from the Ministry of Finance's Financial and Corporate Sector Policy Branch for a further examination of the implications of lawyers and accountants performing the duties and functions of a licensed REALTOR, while remaining unlicensed.

This brief is organized in four sections: lawyers selling real estate, accountants selling businesses, consumer expectations and recommendations and conclusion.

For purposes of this discussion, the term "Current Act" is used when referring to the *Real Estate Act*, R.S.B.C. 1996, c. 397, and the term "Draft Act" refers to the draft *Real Estate Agents and Brokers Act* presented to government by BCREA on April 9, 2003. The Ministry of Finance's *Real Estate Act Review Discussion Paper*, dated March 2003, is referred to as the "Discussion Paper."

Lawyers Selling Real Estate¹

It is important to note that the changes proposed by government, and by BCREA in its Draft Act, would not prohibit lawyers from engaging in real estate trading. Rather, the changes would simply require lawyers to be licensed as real estate professionals to bring them under the regulatory umbrella of the Current Act, or its successor Act.

The Discussion Paper suggests a new Act will clarify that the lawyers' exemption only applies to real estate trades which arise in the ordinary course of law practice. That is, lawyers would not be allowed to solicit new listings, or show property outside of situations where the trade is ancillary to settling an estate, administering a will or effecting a marriage settlement.

¹ When referencing the regulatory regime governing lawyers, BCREA refers to the *Legal Profession Act*, S.B.C. 1998, c. 9, the *Law Society Rules* and the *Professional Conduct Handbook*.

BCREA submits that the wording of section 2(1)(f) of the Current Act does not give *carte blanche* to lawyers to trade in real estate outside the regulatory framework of the Current Act. That section reads as follows:

2(1) This Part does not apply ...

(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, (...)

BC lawyers play an active role in conveyancing and providing legal advice to consumers, developers and lenders in the context of real estate transactions. However, BCREA was unable to find any empirical evidence that the actual trading of real estate by the listing and showing of properties has been a traditional part of lawyers' practice.

BCREA suggests that lawyers are trying to expand the scope of their legal practice, as opposed to resisting an entrenchment on legal practice by the proposed amendments. In support of this position, BCREA cites a statement contained in a 2000 report of the Canadian Bar Association on the National Real Estate Project:

The Lawyers Property Exchange Committee is formed by conveyancing practitioners in British Columbia who wish to develop a model for lawyers to expand traditional real estate practices [emphasis added].²

The National Real Estate Project: *Regenerating Optimism Regarding the Role of Lawyers and Quebec Notaries in Residential Real Estate* report states:

The National Real Estate Project's second priority is to develop a framework which will allow the conveyancing Bar to expand their practices to include trading in real estate.³

The definition of "practice of law" in the *Legal Profession Act*, S.B.C. 1998, c. 9, reflects BCREA's assertion of the present reality. It includes "drawing, revising or settling . . . an instrument relating to real or personal estate that is intended, permitted or required to be registered, recorded or filed in a registry or other public office" and "giving legal advice." The definition does not encompass the actions that have been traditionally viewed as trading in real estate, such as advertising or listing real property for sale or showing real property. The same definition has formed part of the predecessor Acts to the *Legal Profession Act* since 1955.

² From *Preserving the Role of Lawyers in Residential Conveyancing* (www.cba.org) July 2000 (accessed May 18, 2001).

³ *Ibid*, page 7 of the report.

BCREA believes the wording of section 2(1)(f) of the Current Act was never intended to exempt lawyers engaging in real estate trading by listing and showing properties and advertising them for clients as opposed to carrying out conveyancing or other traditional areas of solicitors' practice. In this sense, the amendment proposed by government in the Discussion Paper and by the BCREA in the Draft Act is a clarification only, and will not change the status quo. Rather, it will simply serve to clarify the existing regime.

What are Legal Services?

BCREA notes that the Law Society has taken the position that the *Real Estate Act* and *Legal Profession Act* do not, with respect to the sale of real estate, define exclusive fields of practice, but rather define exclusive fields of regulatory authority. However, this begs the question of what is included in the term "legal services."

The Law Society has taken the view that legal services in connection with a real estate transaction include negotiating the purchase or sale and including evaluating factors going to the negotiation, such as appraisals, development or redevelopment possibilities and financing. Thus, in the Law Society's view, as long as the lawyer provides legal advice, does the conveyance for the client or provides some other recognized legal service of which the sale of real estate can form a part, the lawyer need not comply with the *Real Estate Act*.

Because lawyers give legal advice that touches on many different industries, it makes sense to exclude them from registration or licensing requirements under other statutes that regulate particular industries under either of two conditions: when the lawyers give legal advice about the transactions in that industry; or when they give advice usually provided by licensed professionals in that industry that is incidental to the legal advice and other legal services provided.

Thus, under the *Securities Act*, R.S.B.C. 1996, c. 418, lawyers are exempted from registering as "advisers," provided that the investment advice they give is solely incidental to the lawyer's principal business (section 44(2)(c) and (3)). If the lawyer in question advertises that they offer advising services with respect to investment in or the purchase or sale of securities or exchange contracts, they lose their exemption and must be registered as an adviser (section 44(3)). Lawyers are not exempted from registering as dealers or salespersons if they choose to trade in securities or exchange contracts as part of their business (section 45).

When lawyers choose to become traders and engage in selling property of any type, it makes sense to require them to be licensed or registered as such, and for them to make clear to the consumer in which capacity they are acting: as a salesperson of real or personal property or as a lawyer.

This perspective is reinforced by section 6 of Chapter 7 of the *Professional Conduct Handbook*, which applies to lawyers. It reads as follows:

Carrying on another business or occupation

6. A lawyer shall not carry on any business or occupation other than the practice of law in such a way that:

- (a) a person might reasonably find it difficult to determine whether in any matter the lawyer is acting as a lawyer, or
- (b) a person might reasonably expect that in the carrying on of the other business or occupation the lawyer will exercise legal judgement or skill for the protection of that person.

A lawyer who concurrently practises law and carries on another business or occupation shall not act for a client in a matter where the client's interests and the lawyer's business or occupational interests differ.

In the March-April 2002 *Benchers' Bulletin*, the Law Society describes a 1995 New Zealand Court of Appeal decision as being distinguishable. That decision, while dealing with a differently-worded exemption in another jurisdiction's statute, is nonetheless of interest and supports BCREA's position.

Lewis v. Real Estate Institute of New Zealand Inc., [1995] 3 N.Z.L.R. 385 (C.A.) dealt with solicitors who operated a "property centre" in Auckland. The centre was operated in conjunction with their legal practice and offered a range of services normally provided by real estate agents, such as property appraisal, advice as to sale price, placement of "for sale" signs and advertising on a display board. The solicitors were not licensed under the *Real Estate Agents Act 1976*.

The New Zealand Real Estate Institute sought a declaration as to the lawfulness of solicitors' property centres of this type. The *Real Estate Agents Act 1976* prohibited solicitors from holding a real estate license. It defined "real estate agent" broadly, as meaning every person who acts, or who holds himself or herself out to the public as ready to act, for reward as an agent in respect of the sale or other disposal of land or of businesses (either with or without any interest in land) or the purchase of other acquisition of lands or of businesses (either with or without any interest in land), or in respect of the leasing or letting of land, whether or not that person carries on any other business.

The Act also provided that no person shall be deemed to be a real estate agent for the purposes of the Act by reason only of the fact that "being a solicitor, he or she acts, in the course of his or her business as a solicitor, as agent in respect of the sale or purchase or other disposal or acquisition of land or of businesses (either with or without any interest in land) or in respect of the leasing or letting of land, unless he or

she is remunerated for so acting by commission in addition to, or instead of, his or her professional charges.”

Clearly this is a very different statutory scheme with very different wording from British Columbia. However, the approach taken by the Court is still of interest.

The Court had to consider the meaning of the term “in the course of his or her business as a solicitor.” This led the Court to consider evidence given by senior lawyers as to the extent and nature of real estate trading carried out by solicitors during the time those senior lawyers had been practicing. This evidence, along with legislative history, convinced the Court that, when the statute spoke of real estate services rendered in the course of someone’s business as a solicitor, it was speaking of services conducted as a subsidiary activity to a solicitor’s business. It upheld the lower court decision that the activities of the defendants in systematically selling land as agents through a solicitors’ property centre, and also in promoting the centre as a provider of land marketing services, were unlawful and in breach of the Act.

The relatively few Canadian cases dealing with lawyers making claims for fees or commissions arising out of their involvement in real estate trades focus on the type of remuneration permitted, rather than the regulatory issues. They are not recent, which again suggests that selling real estate has not, in recent years, formed part of the practice of law.

Specific Positions Taken by Lawyers

In the most recent edition of *BarTalk* (April 2003), the Canadian Bar Association – BC Branch raised its concerns about the proposed changes to the lawyers’ exemption contained in section 2 of the Current Act, as described in the Discussion Paper. Some of these concerns are echoed in individual submissions made by law firms and lawyers in response to the government’s Discussion Paper that are posted on the Ministry of Finance’s website, and can be summarized in five points:

1. Lawyers have more than adequate skills and training to engage in the purchase and sale of real estate.
2. The regulatory framework governing lawyers is at least equal to that governing real estate professionals and, accordingly, the public will be protected.
3. Lawyers already carry adequate insurance.
4. Lawyers can provide real estate trading services at less cost to consumers.
5. Permitting lawyers to trade in real estate provides more options for consumers and enhances marketplace competition.

Lawyers clearly practice under a regulatory framework and hold significant insurance. However, it is too simplistic to assert that consumers engaging lawyers to trade in real

estate are adequately protected, and that requiring lawyers to be licensed as real estate brokers or agents under the new real estate legislation is unwarranted.

BCREA's response to each of the concerns raised by lawyers follows.

I. Lawyers have more than adequate skills and training to engage in the purchase and sale of real estate.

Lawyers do have training and expertise in real estate transactions. However, it is not sufficient to merit an expansion of their exemption under the Current Act.

This training and expertise is recognized when lawyers apply for licensing under the Current Act by way of exemptions from educational requirements. Lawyers are given easy access to the real estate profession in this fashion. They need only pass the requisite examination. This, despite the fact that the training of real estate professionals is very industry specific, whereas the training lawyers receive regarding real estate may only include a first year property law course and a small component of the Professional Legal Training Course.

However, by passing the examination, lawyers demonstrate that they have undertaken and satisfactorily mastered educational content related to salesmanship, appraisal, marketing knowledge, construction, cost estimating, accurate measurement of buildings and property management. As licensing requirements expand to include strata managers, so will the need to master materials related to this field.

The exemption under the Current Act is significant in that it also exempts lawyers' staff from licensing requirements. This has led to lawyers engaging staff who are not qualified as lawyers and who are not subject to the same regulatory framework as lawyers. There is no prohibition in the *Legal Profession Act* or *Law Society Rules* against lawyers engaging non-lawyers to carry out tasks that do not constitute the practice of law.⁴ Thus, hypothetically, a lawyer could have several staff members conducting real estate trades in their own names, and take the position that they need not be licensed because the lawyer is exempt from the Act and supervises the trading.

Real estate professionals cannot delegate real estate trading functions to non-licensed persons. While an individual salesperson may engage in real estate trading on behalf of an agent, he or she must nonetheless hold a salesperson's license under the Current Act. Therefore, unless the Current Act is clarified, there will be inconsistent practices in the industry. REALTORS licensed under the Current Act may not allow unlicensed assistants to:

- host an open house or solicit sellers or buyers in any manner;

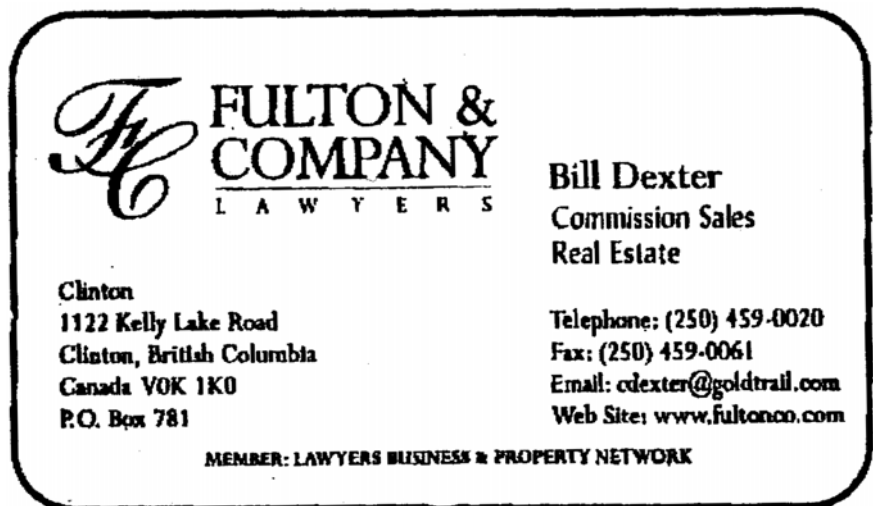
⁴ Note that Chapter 12 of the *Professional Conduct Handbook* requires lawyers to take complete responsibility for all business entrusted to them and to ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer.

- provide advice or guidance to a consumer with regard to a Multiple Listing Contract, property management contract or a Contract of Purchase and Sale;
- meet with owners to obtain or renew Multiple Listing Contracts or property management contracts;
- present or negotiate an offer;
- enter into a rental contract on behalf of the agent; or
- communicate with consumers about any real estate transaction.

However, lawyers believe their unlicensed staff may carry out all of the above functions. The risks to consumers associated with parallel, yet inconsistent, practices are obvious.

BCREA offers the following example. Figure I depicts a 2002 advertisement from the Clinton area. The advertisement appears under the heading of Fulton & Company lawyers with the contact being Bill Dexter. However, the address, phone and facsimile numbers on the advertisement are all for Mr. Dexter's home and not the law firm. At the time of the advertisement, Mr. Dexter was neither licensed under the *Real Estate Act* nor Called to the British Columbia Bar.

Figure I



BCREA submits that such a situation cannot be in the public's best interest and simply causes needless confusion. If left unchecked, the uncertainty created by such practices will clearly impact consumer confidence in the marketplace.

2. The regulatory framework governing lawyers is at least equal to that governing real estate professionals and, accordingly, the public will be protected.

BCREA believes the regulatory regime governing real estate licensees goes much further toward protecting buyers and sellers of real estate than the regulatory framework of lawyers.

Significant consumer protections and regulatory requirements in the Current Act, which are expected to be carried over into the new legislation, do not form part of the regulatory regime governing lawyers.

- Licensing requirement for all persons engaged in trading of real estate
Sections 40, 41, and 47 of the Current Act (sections 42, 41, and 50 in the Draft Act) ensure that all persons engaged in the trading of real estate are licensed. Section 40 prohibits the payment of commissions to unlicensed persons.

Section 41 provides that an agent must not act as agent for an unlicensed person (other than the principal to the transaction). Section 47 makes proof of a license a necessary precondition to the maintenance of an action for acts done or expenditures incurred by an agent or salesperson.

These sections either eliminate or greatly reduce the number of unlicensed persons trading in real estate. Therefore, members of the public deal with licensed agents or salespersons who are subject to the regulatory regime under the Act and Regulations, are appropriately insured and are subject to discipline by the Real Estate Council of BC.

- Forms of agreement

Section 57 of the Current Act (section 47 of the Draft Act) deals with the mandatory form and content of exclusive listing agreements. Currently this is the only mandatory provision in the regulatory framework dealing with the form and content of agreements and documents used in real estate transactions. The other standard forms used in the industry are approved and circulated by the BCREA Standard Forms Committee, which is comprised of real estate and legal professionals. However, under the new regime, Council may choose to make various forms of contracts mandatory, reflecting a trend in other provinces. Paragraphs 14(s), (xx) and (yy) of the Draft Act expressly empower Council to do so.

The public is best served by standardization of forms and the use of plain English. If lawyers are exempt from the Act when trading in real estate, do not have to comply with current section 57 in relation to exclusive listing agreements and are not required to use any future forms made mandatory under the Council bylaws, there will be a multiplicity of forms in use in the marketplace.

- Disclosure obligations

Section 36 of the Current Act (section 51 of the Draft Act) sets out what a licensee must disclose prior to assisting or representing any person in a real estate transaction. This provision ensures that the consumer understands:

- The nature of the assistance or representation the licensee will provide.
- Whether the licensee is, or will be, acting in the real estate transaction on behalf of any other person, in any capacity.
- Whether the licensee is, or will be, receiving remuneration relating to the real estate transaction from any other person and, if the licensee will, the nature of the licensee's relationship with that person.

While lawyers should make this type of disclosure to clients at the time of their retainer, and often do in the context of a retainer letter, there is no exact

equivalent to the Current Act disclosure requirements in the lawyers' regulatory framework.

Lawyers are required to make specific disclosures in circumstances where they act for more than one client in a matter, based on the conflict of interest rules found in Chapter 6 of the *Professional Conduct Handbook*. The *Professional Conduct Handbook* also contains specific rules concerning lawyers acting for more than one party in a real estate transaction. Section 8 of Chapter 6 requires disclosure by lawyers of finders' fees for making an introduction between a borrower and lender. However, in BCREA's view, the lawyers' regime does not contain disclosure requirements as comprehensive as those found in section 36 of the Current Act.

Section 38 of the Current Act (section 52 of the Draft Act) provides for a strict regime of disclosure in circumstances where the licensee or their associates acquire or offer to acquire real estate on their own behalf, rather than on behalf of an arm's length client. Complementing this section is the *Disclosure Regulation*, B.C. Reg. 124/84, which requires licensees to complete a form providing the disclosure mandated by section 38. This regime applies regardless of whether the person selling the property is a client of the licensee or their associates.

While Chapter 7 of the *Professional Conduct Handbook* sets out strict rules concerning lawyers entering into transactions with clients, these rules do not require the type of disclosure mandated by section 38 of the Current Act when they are engaged in transactions with persons who are not their clients.

BCREA believes the regime in the *Real Estate Act* is more specific on the particular disclosures that ought to be made where the professional, or a party related to them, has a stake in a real estate transaction.

- Prohibited representations and promises and prohibited acts
Section 35 of the Current Act (section 54 of the Draft Act) prohibits promises to resell by a licensee, promises to purchase or sell any of the purchaser's real estate, promises to procure a mortgage, extension of a mortgage, lease or extension of a lease and promises to purchase or sell a mortgage or procure a loan, unless details of the promise are provided in a statement signed by the licensee. This provision serves to protect consumers, who could be swayed by such promises made as an advertising gimmick, by ensuring that real estate licensees who make such promises put them in writing.

Section 37(2) of the Current Act (section 56 of the Draft Act) prohibits a licensee from inducing any party to a contract to break it for the purpose of entering into a contract with another principal. Obviously, the provision is meant to discourage or prevent unscrupulous practices by real estate licensees that may bring the profession into disrepute. There are no equivalents to sections 35 and 37(2) in the lawyers' regulatory regime.

- Sale of business

Section 39 of the Current Act (section 53 of the Draft Act) requires licensees negotiating a transaction involving a sale of a business to deliver specific information to the person acquiring the business.

A lawyer acting for the business seller, and owing an undivided duty of loyalty to that seller, is under no similar obligation to ensure that the business buyer is provided with the financial information listed in section 39. The risk is exacerbated where the business buyer is unsophisticated and does not have a professional acting on his or her behalf.

- Trust accounting and books and records

The regulatory regime governing lawyers does contain extensive rules concerning trust accounting and the keeping of books and records, many of which have equivalents in the Current Act; for example, the requirement to deliver an accountant's report to the regulating body and a provision stipulating when funds can be paid out of a trust account.

The one significant difference between the two regimes is the stakeholder provision contained in section 59 of the Current Act and section 64 of the Draft Act. Unless there are written agreements to the contrary, agents hold monies received in connection with real estate transactions as stakeholders, and not as agents for one of the parties. This provision ultimately protects consumers, since the funds cannot be paid out to one of the parties without either the other party's consent or a court order.

The operating assumption when a lawyer hold funds in trust, absent an express agreement to the contrary, is that the funds are held on behalf of their client, and will be paid out on that client's instructions.

- Unclaimed money and interest

Under section 34 of the *Legal Profession Act*, unclaimed funds held in lawyers' trust accounts ultimately go to the Law Foundation. Under the Current Act, section 17.2, an agent may pay unclaimed funds over to the Minister of Finance. They are then dealt with pursuant to the *Unclaimed Property Act*. Under section 65 of the Draft Act, BCREA proposes that unclaimed monies in agents' trust accounts ultimately go to The Real Estate Foundation of BC.

Similarly, interest on lawyers' pooled trust accounts goes to the Law Foundation. In the real estate profession, such interest goes to The Real Estate Foundation under the Current Act and the Draft Act.

Both the Law Foundation and Real Estate Foundation use their funds for worthy causes. Where the unclaimed funds in question originated in a completed or aborted real estate trade, or constitute interest on funds deposited in trust as

part of a real estate trade, BCREA believes the public would be better served by the funds going to The Real Estate Foundation, where they will be directed to worthy real estate related projects.

- Advertising

The lawyers' regulatory regime contains rules prohibiting false advertising (Chapter 14 of the *Professional Conduct Handbook*) that are similar to those found in Division 5 of the *Real Estate Regulations*, B.C. Reg. 75/61. However, there are two sections in those regulations that do not have equivalents in the lawyers' regulatory regime:

No licensee shall place a "For Rent" or "For Sale" sign on property without the consent of the owner or the authorized agent of the owner. (section 5.03)

No nominee or salesman shall place outside his residence any sign indicating that he does business there as a real estate nominee or salesman. (section 9.01)

The issue of advertising and signage underscores the potential for consumer confusion as to the capacity in which a lawyer selling real estate is acting. Requiring a lawyer to be licensed under the Current Act, and to specify in signage that he or she is acting in that capacity when marketing real estate, would clarify this issue for consumers. Again, the confusion created by the Fulton & Company signage discussed earlier would be addressed through licensing under the Current Act.

- Privilege and confidentiality issues

BCREA has already alluded to problems that might arise in light of a lawyer's duty of undivided loyalty in the context of a sale of a business. The regulatory regime governing lawyers requires them to keep strictly confidential all information concerning their clients and their affairs, unless authorized to disclose such information by the client.

Communications between lawyers and their clients for the purpose of obtaining or giving legal advice are protected by solicitor-client privilege. While the duty of confidentiality and the mantle of solicitor-client privilege are an important part of the legal environment, they could be abused in the context of lawyers selling real estate.

Case law demonstrates that buyers have frequently been found entitled to rely on the statements of sellers' real estate agents, and have succeeded in actions in both fraudulent and negligent misrepresentation against such agents. Agents have been found liable even in circumstances where the sellers provided their

real estate agents with false information.⁵ If a person viewing the property asks questions about it, the seller's agent must answer those questions honestly and competently.⁶

Numerous cases cite the decision of Mr. Justice Prouse in *Grisack v. Smith and Lyle Real Estate Ltd.* (1985), 59 A.R. 243 (C.A.) when explaining how a real estate agent acting for a seller may nonetheless owe duties to a buyer who is not their client. At paragraph 28, he stated:

The position of real estate agents in showing properties to prospective purchasers is difficult, to say the least, in that they are the agent of the vendor from whom they will earn their commission and as such are anxious to conclude a sale. They know, or ought to know, that most information sought by a potential purchaser on such occasions is relevant to the purchaser and will be relied on by the purchaser in making a decision whether or not to purchase the property. I am satisfied that a competent real estate agent has that basic understanding and, therefore, the standard of care required of such an agent in performing his duty to a potential purchaser is to be not only honest in expressing an opinion but also to have some valid factual basis for any opinion expressed. If the agent has no valid factual basis for expressing an opinion, then the agent ought to state that fact or qualify the opinion expressed so that the purchaser knows what reliance can be given to the opinion or at least be warned not to rely solely on the same.

Sellers retaining lawyers to sell real estate may seek to limit disclosure to buyers by asserting privilege over negative information they have provided to their lawyers concerning the property, and insisting that their lawyers treat the information as privileged and confidential. Lawyers may, in turn, rely on their obligations to maintain client confidentiality and privilege as a defence to a misrepresentation action brought by buyers who later learn that aspects of the properties were misrepresented or not disclosed. The buyers may be left without remedies, or at least left with fewer potential defendants against whom they can claim.

Lawyers have successfully had their profession exempted from the duty imposed by the federal *Proceeds of Crime (Money Laundering) Act* to disclose suspicious transactions and cash transactions of \$10,000 or more. Real estate licensees have a positive duty to report such activities. If licensing requirements do not apply to lawyers, criminals wishing to engage in money laundering or terrorist

⁵ *Jakubke v. Sussex Group – SRC Realty Corp.* (1993), 31 R.P.R. (2d) 193 (B.C.S.C.) and *Sedgemore v. Block Brothers Realty Ltd.* (1985), 39 R.P.R. 38 (B.C.S.C.).

⁶ *Jung v. Ip* (1988), 47 R.P.R. 113 (Ont. Dist. Ct.).

activities may seek the services of unsuspecting lawyers to avoid the provisions of the federal legislation.

In short, the duties and role of a lawyer and the duties and role of a real estate licensee do not fit together well. The consumer is best served by knowing the capacity in which the particular professional is acting. Thus, if lawyers wish to sell real estate, they should become licensed under the *Real Estate Act*, and disclose to the consumer that they act in that capacity when listing and showing real property.

The regulatory regime applying to persons trading in real estate already exists. In BCREA's opinion, it is not a question of overlapping regimes, but of parallel regimes. If lawyers choose to engage in activities outside the traditional practice of law, it is not overly onerous to require them to be licensed.

The organizations responsible for the two regulatory regimes can work together to minimize any duplicitous obligations imposed on persons acting as lawyers and real estate professionals, and to deal with issues such as the appropriate level of insurance coverage, special compensation levies and educational requirements. The fact that lawyers and real estate professionals already work together on BCREA's Standard Forms Committee demonstrates that such cooperation should be expected.

3. Lawyers already carry adequate insurance.

Whether lawyers currently selling real estate are covered by their liability insurance is an unresolved question. This lack of certainty is not in the public's best interest.

In the April-May 2002 *Benchers' Bulletin*, the Law Society notes that the coverage under lawyers' mandatory liability insurance policy includes coverage for errors made by lawyers acting for buyers and sellers in the purchase and sale of property and goods. It indicates that the Lawyers Insurance Fund has provided some assurances that members engaged in the sale of real estate would be covered.

The Benchers go on to encourage lawyers to obtain a specific advance ruling in relation to their activities, and to note that if "it is ultimately determined that lawyers are precluded from engaging in these activities without separate licensing, . . . any services for which lawyers are required to be licensed would no longer fall within coverage."

A review of the actual insurance policy reveals that lawyers are only insured for claims arising out of errors made in performing or failing to perform professional services for others.

Professional services relevant to this discussion are defined in the policy as meaning:

- a) the practice of law as defined in the *Legal Profession Act* of British Columbia;
- b) pro bono legal services; (. . .)

- e) performing any other activity deemed to be the practice of law by the Law Society.

Presumably the Law Society and, in turn, the insurer are either giving a broad definition to the term “practice of law” in the *Legal Profession Act* and taking the position that it includes real estate trading (consistent with the Law Society’s public position described above), or have expressly deemed all actions in relation to a real estate transaction to be “the practice of law” for the purposes of the policy.

Because the lawyers’ insurer is controlled by the Law Society, the risk to the public may be minimized or eliminated since the insurer will not refuse coverage even if the Law Society is found to have been overreaching in its definition of the practice of law. In addition, if it has not already done so, the Law Society can deem real estate trading activities to be the practice of law for insurance purposes.

4. Lawyers can provide real estate trading services at less cost to consumers.

Unlike the *Legal Profession Act*, the Current Act and Draft Act contain specific provisions regarding the remuneration of real estate licensees. These provisions allow members of the public to fairly compare the rates of competing licensees.

Section 45 and 46 of the Current Act (sections 48 and 49 of the Draft Act) deal with permissible and impermissible types of commission agreements and payments. Section 45 provides that the commission or remuneration payable to an agent must be on an amount or percentage of the sale price. Section 46 provides that a licensee must not request or enter into an agreement for the payment to the licensee of commission or other remuneration based on the difference between the listing price and the actual sale price.

Section 45 enables the consumer to understand what they pay for the real estate professional’s services, and to compare the rates with those offered elsewhere by comparing the percentage claimed. Section 46, which is found in virtually every province’s real estate legislation, ensures that the real estate professional, who has superior knowledge of the marketplace, does not take advantage of the consumer by suggesting a low listing price and then making their commission the difference between that price and the sale price. Again, this is a matter of consumer protection. No such provision is included in the *Legal Profession Act*.

If lawyers are not governed by the real estate regime, they can be inventive with their fee arrangements for real estate trades, making it more difficult for consumers to assess the best value.

5. Permitting lawyers to trade in real estate provides more options for consumers and enhances marketplace competition.

REALTORS welcome competition on an even playing field. The changes proposed by government in the Discussion Paper, and by BCREA in its Draft Act, would not prohibit lawyers from engaging in real estate trading and, thereby, offer options to consumers.

Accountants Selling Businesses

Accountants have never been exempted from registration under the *Real Estate Act*. The lack of a singular accountants' regulatory regime, and the significant differences that exist between the regulatory regimes of accountants and real estate licensees indicate consumers are best served by the current system. BCREA believes the status quo is in the best interest of the public.

The definition of "real estate" in the Current Act includes "a business and the goodwill and assets of it, and an interest, partnership or share in a business or in the goodwill or assets of it."

The definition of "real estate" in BCREA's Draft Act includes:

- (...)
- (d) a business with or without premises, and the fixtures, goodwill, stock-in-trade, goods or chattels used in connection with the operation of the business, (...)
- (g) an interest in a business or in the assets or goodwill of a business,
- (h) all of the issued shares of a corporation owning a business.

Therefore, if government accepts BCREA's revised definition of real estate, the sale of a business clearly requires a real estate license under the successor to the Current Act.

However, government believes an exemption for accountants may be appropriate in the context of a sale of a business. According to the Discussion Paper,

The new Act will provide an exemption for accountants for real estate trades which occur as part of a business sale arising in the ordinary course of accountancy practice. Since accountants are trained in financial analysis, these professionals have sufficient expertise in the sale of businesses, and are already subject to a licensing regime.

Practice of Public Accounting

There are three accounting bodies in British Columbia. Accountants must be licensed with at least one of these accounting bodies to carry on the practice of public accounting.

In this section of the brief, the following abbreviations are used to refer to the various regulating bodies and documents governing accountants:

Institute of Chartered Accountants of British Columbia ("CA")
Bylaws ("B (CA)")

Bylaw Regulations ("BR (CA)")

Rules of Professional Conduct (“Rules (CA)”)

Council Interpretation of the Rules of Professional Conduct (“Interpretation (CA)”)

Certified General Accountants Association of British Columbia (“CGA”) Bylaws (“B (CGA)”)

Code of Ethical Principles and Rules of Conduct (“Rules (CGA)”)

Certified Management Accountants of British Columbia (“CMA”) Bylaws (“B (CMA)”)

Rules of Professional Conduct (“Rules (CMA)”)

The term “practice of public accounting” is defined differently by each organization, but the sale of a business is not included in the definition of either the CGA or CMA, is expressly excluded by the CA and is not explicitly regulated by any of the accounting bodies.

I. CA

The term “practice of public accounting” is defined by the CA to mean providing or offering to provide one or more of the following services to the public:

- performing an assurance engagement as defined in the [Canadian Institute of Chartered Accountants] CICA Handbook;
- performing a specified auditing procedures engagement as defined in the CICA Handbook;
- performing a compilation engagement as defined in the CICA Handbook;
- providing an accounting service insofar as it involves summarization, analysis, advice, counsel or interpretation, but excluding an accounting service which is part of but incidental to the provider's primary occupation which is not accounting;
- providing a forensic accounting, financial investigation or financial litigation support service;
- providing advice, counsel or interpretation with respect to taxation matters; and
- preparing a tax return or other statutory information filing when such preparation is in connection with a practice offering or

providing a service described in paragraph (i), (ii), (iii), (iv), (v) or (vi).

For greater certainty, the practice of public accounting does not include:

(...)

- xiii. business brokerage, negotiating and advising on the sale, financing, merger or acquisition of business organizations; (...) [emphasis added]⁷

2. CGA

The CGA defines “practice of public accounting” as:

Offering to perform or performing for a client one or more types of professional services involving the use of accounting or auditing skills or the furnishing of tax services. A member who is “employed” in the practice of public accounting is not considered to be “engaged” in the practice of public accounting.

A member would not be considered to be engaged in the practice of public accounting for the purpose of Rules R516, R517 and R518 if the member is solely providing bookkeeping services that do not involve the preparation of financial statements or the member is solely providing tax preparation services without a fee.⁸

The term “professional services” means “any services performed or offered to be performed by a member for a client or employer, where the public or the member’s employer is entitled to rely on the member’s membership in the Association as giving particular competence.”

3. CMA

For the CMA, the “practice of public accounting” means the application of acquired skills to the affairs of others for a fee, excluding activities related solely to bookkeeping, cost accounting or the installation of systems or procedures relative thereto, and includes the following:

the performance of services including preparing, signing, delivering or issuing any financial, accounting or related statement,

⁷ B (CA).

⁸ Rules (CGA).

the issue of any written opinion, report or certificate concerning any such statement where by reason of form, signature or wording it is indicated that the statement, opinion, report or certificate purports that the issuer is acting as an independent accountant or auditor or has expert knowledge in accounting or auditing matters,

accounting, insofar as it involves analysis, advice or interpretation in an expert capacity, but excluding such activities where the application of the required skills is incidental to the expert's primary occupation, and

advice and counselling in an expert capacity insofar as it involves taxation but excluding mechanical processing of returns. [emphasis added]⁹

Differences in Regulatory Frameworks of Accountants and Real Estate Professionals

Although accountants are already “subject to a licensing regime,” as stated in the Discussion Paper, there are several areas where the regulatory framework governing real estate professionals are not covered by the regulatory frameworks governing accountants.

- Licensing requirement for all persons engaged in trading of real estate
Accountants engaged in the practice of public accounting, or in a related business or practice, are responsible for any non-accountants they employ.¹⁰ However, it is unclear whether a “related business or practice” includes the sale of a business. Furthermore, no rules in the accountants’ regulatory regimes are as comprehensive as sections 40, 41, and 47 of the Current Act regarding the treatment of unlicensed persons employed by a licensee to engage in the sale of a business.
- Forms of agreement
If accountants are given an exemption under the *Real Estate Act* when selling businesses, they would not have to utilize the mandatory forms dealt with in section 57 and, similar to the situation with lawyers, the public would not be well served by the potential use of numerous non-conforming documents in the sale of a business.
- Commission types and prohibitions
As in the lawyers’ regulatory framework, the consumer protection measures in sections 45 and 46 of the Current Act are not dealt with by the accountants’

⁹ B (CMA).

¹⁰ Rules (CA) 406-407, Rules (CMA) 406.

regulatory frameworks. Furthermore, the CA regulatory regime prohibits the performance of a professional service for a fee that is payable only where there is a specified determination, or where the amount is fixed by reference to the result of the service, if the service would impair the accountant's professional judgment.¹¹ Indeed, Interpretation (CA) 215/5 explicitly lists "assisting with the purchase or sale of all or part of a business" as an example of an engagement which, if undertaken on a contingent fee basis, may be seen to impair professional judgment or objectivity.

Similarly, the CMA regulatory regime does not permit the rendering of a professional service where the fee is contingent on the results of the service.¹² Accepting a fee for the brokering of a purchase or sale of a business would run afoul of these provisions, since commission for such a transaction would be contingent on the outcome of the transaction.

- Disclosure obligations
Although accountants have general disclosure obligations when they have a conflict of interest,¹³ they do not have the strict disclosure obligations set out in sections 36, 37 and 38 of the Current Act, as discussed above in more detail in relation to lawyers.
- Prohibited representations and promises and prohibited acts
As with the lawyers' situation, the accountants' regulatory frameworks have no provisions similar to those in the Current Act that prohibit certain promises by a licensee¹⁴ and prohibit a licensee from inducing a party to a contract to break it for the purpose of entering into a contract with another principal.¹⁵
- Sale of business
Section 39 of the Current Act mandates that a licensee acting for the seller in the sale of a business must deliver certain statements to the purchaser, including an income statement, balance sheet and a list of all the assets relating to the business that are not included in the transaction. If accountants were exempt from the *Real Estate Act* when selling businesses, they would be under no obligation to deliver such important information to buyers. There is no statutory equivalent to this provision in the regulatory regimes governing accountants.
- Trust accounting and books and records
Because accountants do not handle trust funds on a regular basis, and only do so if given a specific engagement, their rules relating to trust accounts are not

¹¹ Rules (CA) 215.1.

¹² B (CMA) 215.

¹³ Rules (CA) 210, Rules (CGA) 202, Rules (CMA) 207.

¹⁴ Section 35 of the Current Act.

¹⁵ Section 37(2) of the Current Act.

extensive. The trust accounting rules generally speak to how trust monies should be handled (that is, in accordance with the terms of the engagement and applicable laws, and kept in a separate account), and mandate that proper records should be maintained to account for the monies.¹⁶

The Current Act, on the other hand, details the records to be kept in relation to every transaction,¹⁷ and enumerates what exactly may be withdrawn from a trust account.¹⁸ As with lawyers, accountants are not subject to a statutory provision equivalent to the stakeholder provision in section 59 of the Current Act.

- Unclaimed money and interest
As noted above, accountants deal with trust monies only in specific circumstances, and any trust monies they handle must be kept in a separate account. As such, their regimes do not have mechanisms to deal with pooled trust funds and how interest from such pooled accounts should be handled. Currently, the interest in accountants' trust accounts goes to their clients.¹⁹
- Advertising
There are similar rules regarding false advertising in both the accountants' and the real estate professionals' regulatory regimes.²⁰ However, as in the lawyers' regulatory regime, the accountants have no equivalent of sections 5.03 and 9.01 of the *Real Estate Regulations*, B.C. Reg. 75/61. This could create confusion for a consumer as to whether they are dealing with an accountant in their capacity as an accountant or as a real estate professional selling a business.
- Insurance issues
Members of the accounting bodies must carry professional liability insurance,²¹ but such insurance may only cover the "practice of public accounting," which does not specifically include brokering a sale of a business. Such coverage cannot be verified without reviewing the individual insurance policy in each circumstance. Accountants must obtain their own insurance, because they do not have an industry specific insurance fund to which they can subscribe.
- Privilege and confidentiality issues
While communications between accountants and their clients are not protected by privilege, accountants do have a duty of confidentiality that precludes them from disclosing clients' affairs without the clients' knowledge and consent.²² As

¹⁶ Rules (CA) 212.1, Rules (CGA) R206-206.1, B (CMA) 212.1.

¹⁷ Section 15 of the Current Act, section 57 of the Draft Act.

¹⁸ Section 17 of the Current Act, section 62 of the Draft Act.

¹⁹ Interpretation (CA) 212.1/2, Rules (CGA) R206.1.

²⁰ Rules (CA) 217.1, Rules (CGA) R508, B (CMA) 217.1.

²¹ B (CA) 250-251, Rules (CGA) R518, B (CMA) 2.22.

²² Rules (CA) 208, Rules (CGA) 201, Rules (CMA) 210.

discussed above in relation to the lawyers' situation, such a duty is at odds with the disclosure ordinarily required in the trade of real estate.

Although accountants are governed by rules that deal with false or misleading documents and oral representations,²³ accountants and their clients could hide behind the duty of confidentiality in avoiding the disclosure of certain information.

Consumer Expectations

BCREA believes there is confusion among consumers regarding what they should rightfully expect from the professional listing and selling their property.

BCREA, its member boards and the REALTORS of British Columbia believe the public will be best served by new legislation that establishes the responsibilities of any licensee under the Act in any dealings with seller or buyer clients.

Therefore, BCREA recommends replacing the short, concise definition for a listing agreement included in its Draft Act with the following, more complete definition:

“Listing agreement” shall mean a written agreement between an owner and a brokerage whereby the brokerage for specified compensation endeavours to obtain an agreement for sale, rental, lease, option or exchange of real property of the owner. A listing agreement must contain at a minimum the following provisions, all of which must be adhered to throughout the term of the listing agreement:

- the broker is responsible for the accuracy of any information relating to the property contained in the listing;
- the broker is obliged to convey all information of which the broker has knowledge and which may affect the owner's decision provided where there is dual representation, the disclosure of such information has not been limited by law or by contract between the owner and broker;
- the broker will act in the best interests of the owner;
- the broker will provide for the proper handling of trust monies;
- the broker will assist the owner in developing, communicating and presenting any offers, counter-offers and notices;
- the broker will present to the owner any offers and counter-offers and advise the owner in respect thereto; and

²³ Rules (CGA) 403 prohibits the omission of information that would make financial information misleading; Rules (CA) 205 and Rules (CMA) 205 prohibit statements or representations that are false or misleading.

- the broker will answer any questions of the owner relating to any offers, counter-offers and notices or any other matter relating to the listing agreement.

Recommendations and Conclusion

In the interests of public protection, BCREA stands by its initial recommendation, of April 9, 2003, that government require anyone performing the duties or functions of a REALTOR to be licensed.

With regard to lawyers and accountants, BCREA recommends the government:

- **Clarify that the lawyers' exemption only applies to real estate trades which arise in the ordinary course of law practice; for example, trades that are ancillary to settling an estate, administering a will or effecting a marriage settlement.**
- **Maintain the status quo of no exemptions for accountants under the current *Real Estate Act*, or its successor.**

The Association looks forward to continuing to work with government in an open and transparent fashion. To create new legislation that responds to the regulatory needs of the public and the real estate sector, and that contributes to the government's goal of overall regulatory reduction in the province, the Association also asks government to:

- Adopt BCREA's draft *Real Estate Brokers and Agents Act* as a template for new legislation to replace the current *Real Estate Act*.
- Invite BCREA to partner with government in drafting the enabling legislation that will accompany the new Act.

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