

## WHAT WE HEARD

### Feedback from the Public Consultation on the legislation that regulates The Real Estate Industry in Newfoundland and Labrador

#### Background

Service NL is currently reviewing the legislation that regulates the real estate industry. The *Real Estate Trading Act* (“the Act”) and the Real Estate Licensing Regulations (“the Regulations”) govern the licensing of real estate agents and salespersons and the regulation of trading in real estate in this province. The Act came into force in 1964 and although there have been some changes to this legislation there has not been a major review or update since that time. In May 2012, the Department issued a consultation document to gather information and views from the general public, industry stakeholders and any other persons or groups interested in providing comments as to how this industry should be regulated in future. Service NL received 23 submissions. Submissions were received from real estate councils from 2 western provinces while 3 submissions were made by industry associations. The remaining 18 submissions were made by licensed real estate agents and salespersons. Of these 18 submissions 13 of these were identical submissions received from individuals employed by the same Real Estate Agent.

To help guide participation in the consultation process, Service NL set out a number of issues, followed by discussion questions. The issues and questions provided were not intended to be a complete list of issues to be considered and individuals or groups could have brought forward any relevant issue for Service NL’s consideration during this review. This document outlines the responses received by the Department through the consultation process.

#### Conflict of Interest

Currently, a salesperson can represent both the seller of a property and a person interested in purchasing that property. There is a potential conflict of interest in this situation as the seller expects the salesperson to obtain the highest price possible whereas the purchaser expects the salesperson to get the lowest price possible.

#### Discussion Questions

Are consumers being harmed by this practice? If yes, in what way?

*Two submissions stated that consumers are being harmed. One of these submissions also stated that there is a large conflict of interest and moral hazard that is doing the whole industry harm.*

If this practice continues to be permitted, what measures should be put in place to address a potential conflict of interest situation?

*These same two submissions stated that there should be a complete ban on one salesperson acting on behalf of both parties, however having an agency act on behalf of both the vendor and the purchaser will better protect both parties and ensure everything is done properly. One of these submissions also stated that exclusive listings should be banned as this would provide consumers with greater choice and stop them from being forced to use the listing agent to buy property.*

## **Employee versus Independent Contractor**

The current legislation refers to an employer – employee relationship. This relationship includes the agent, as employer, being responsible for the actions of their employees, the salespersons. Many industry participants today refer to themselves as independent contractors, implying there is no longer an employer – employee relationship.

### Discussion Question

Should the employer – employee relationship be maintained in legislation for all salespersons? If not, what are the alternatives?

*One submission stated that an agent should not be responsible for every action of their salesperson as the salesperson carries their own bond. This submission did not provide any alternatives.*

## **Restricted business activities for new licensees**

Individuals who have just received their first real estate salesperson licence may, on the same day they receive their licence, represent a consumer in the purchase or sale of a home, a business or a commercial property. The current Act does not require the new licensee to be under supervision and there is no restriction on the size of the real estate transaction that the new licensee can deal with. For example, a new licensee on their first day can represent a consumer in the purchase or sale of a home with a value of \$1 million or more.

### Discussion Questions

Supervision - Should a new licensee be required to be under the supervision of an experienced salesperson for a period of time so as to receive mentoring on how best to conduct their real estate activities while gaining experience in the industry?

*A six month probationary period was suggested by one submission where their work is overseen and signed off by a supervisor.*

If yes, what would be the requirements that an individual would have to meet to be a supervisor, what obligations would the supervisor have, how long would the supervision last and how many new licencees should an individual be able to supervise at one time? Please outline any other concerns or issues?

*The only comment received is that the supervisor could be the agent or any licensee as long as the licensee accepts the responsibility and the agent or owner is in agreement for the licensee to be a supervisor.*

Scope of business - Should a new licensee to the real estate industry be permitted to represent consumers in the full scope of real estate transactions immediately upon being granted a licence or should there be some limitations or restrictions on their activities until additional education and / or training is completed?

*None of the submissions provided a response to these questions.*

Assuming new licensees would be subject to restrictions on the transactions they could do, what would be the restricted transactions and what would be the additional requirements that would have to be met before each type of transaction may be undertaken?

*None of the submissions provided a response to these questions.*

## **Trust deposit disputes**

On a regular basis, the Superintendent's office receives enquiries about the release of a deposit where the purchase of a property has fallen through. An example would be a purchase conditional upon the purchaser receiving mortgage financing and the financial institution saying the purchaser does not qualify for the requested mortgage. The Act states the agent may disburse that deposit from trust upon: (i) written notice from the vendor and purchaser authorizing the return of the deposit to the purchaser; or (ii) a court giving direction as to whom the deposit should be given to. As a result, deposits have been left in agents trust accounts and never returned to a consumer. Also, agents are being named in civil actions when the cause of the dispute and resolution of the dispute is beyond their control.

## Discussion Questions

Should the Act be changed to clarify the rules concerning return of deposits so these disputes can be minimized? If yes, how?

*There were 4 comments received on this topic. Two submissions stated that legislation should allow the deposit to be returned where the transaction does not proceed where all the conditions listed on the agreement of purchase and sale have not been met and one submission stated that a deposit should be permitted to be deposited to either company's trust account so that it could more easily be returned. Another submission stated that in certain circumstances the money, along with the documentation on file concerning the deposit, should be paid over to the Superintendent or designated authority.*

Is there a need for an alternate dispute resolution process? If yes, what alternate dispute resolution processes should be considered?

*None of the submissions provided a response to these questions.*

## **Bonding, Insurance and Protection Fund**

Currently, agents and salespersons must be bonded. The amounts of the bonds are \$15,000 and \$5,000 respectively. The bond is intended to protect consumers from financial loss in cases where the agent or salesperson is convicted of an offence, a civil judgment arising out of a trade in real estate is made against the agent or salesperson, or the agent or salesperson goes bankrupt. The regulatory experience in this area is that these bonds have been called upon very infrequently and in a couple of instances were insufficient to cover the financial losses.

Real estate agents or salespersons are not currently required to purchase an insurance policy that will respond to a claim from a consumer who incurred a financial loss due to (i) a negligent act or an error being made by the industry participant or the industry participant omitting to do something or (ii) a fraudulent act pertaining to the licensed activity.

In addition, an agency is not required under the Act to carry insurance coverage against losses arising from dishonesty of employees, a proprietor, partners, directors, officers or shareholders.

In some Canadian jurisdictions, a real estate industry protection fund has been established to respond to losses suffered from acts pertaining to the licensed activity other than a negligent act, error or omission. These are funded through industry assessments.

### Discussion Questions

Should the current bond requirement be kept or should the bond be replaced with a requirement to purchase insurance or should there be both?

*One submission stated that the bonding requirement is outdated. Errors and omissions insurance should be mandatory and there should be a requirement for the Newfoundland and Labrador Association of REALTORS® to relieve every licensee from having to acquire their own.*

Should a compensation fund be established where consumers can make claims against the fund for financial losses pertaining to the activities of real estate salespersons and agents where all real estate licensees pay an amount into the fund to cover such claims?

Who should set up and operate such a fund?

*None of the submissions provided a response to these questions.*

## **Suitability to be in the industry**

Currently the Superintendent of Real Estate may refuse to issue a licence, or suspend, revoke or cancel a licence where in his or her opinion that action is in the public interest. There are no guidelines as to what constitutes “in the public interest”. For example, is it appropriate to refuse to issue a licence to a person who has been convicted of a criminal offence, such as a theft of funds or violence?

Most jurisdictions have a Code of Ethics which licensees are required to adhere to in order to maintain their licence. Some of the items covered in a Code of Ethics are, duty to the client, service agreements, advertising, and discrimination.

### Discussion Questions

Should the “public interest” standard remain in legislation? If not, what should it be replaced with?

Should legislation provide guidance to the Superintendent as to what constitutes unsuitable activity that will prohibit an individual from entering the real estate industry? What would this guidance be?

*None of the submissions provided a response to these questions.*

Should a Code of Ethics be adopted as the measure of suitability for a person to remain in the real estate industry?

*One submission stated that a code of ethics does exist and further regulation of individual’s suitability is a difficult topic to police. This submission also stated that unless there are some restrictions about ones conduct or past criminal record, like serious offences, where do you draw the line? Many individuals have had a past conviction like D.U.I. or financial troubles such as bankruptcy, but that should not prohibit someone from working and earning a living.*

What specific matters should be addressed in a Code of Ethics?

Should a criminal records check be a mandatory part of the licensing application process?

*None of the submissions provided a response to this question.*

### **People Regulated**

A person is required to obtain a licence where their activities fall under the definition of trade or trading in real estate unless the Act provides for an exemption from licensing. The Act states that trade or trading includes:

- (a) a disposition or acquisition of, or transaction in, real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise,
- (b) an offer or attempt to list real estate for the purpose of a disposition, acquisition or transaction, and
- (c) an act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of a disposition, acquisition, transaction, offer or attempt.

The Act exempts certain persons from regulation as follows:

- (a) an assignee, custodian, liquidator, receiver, trustee or other person acting under a statute, a person acting under an order of a court, or an administrator of an estate or an

executor or trustee selling under the terms of a will, marriage settlement or deed of trust;

- (b) a bank, loan, trust or insurance company trading in real estate in the ordinary course of its business;
- (c) a person who completes not more than 3 trades in a calendar year in real estate owned by him or her or in which that person has a substantial interest, or a person who rents property owned by that person, or in which that person has a substantial interest;
- (d) a person who holds a valid certificate to practice as a solicitor in the province and who trades in real estate in the course of and as part of his or her practice;
- (e) a person in the business of property management who arranges a lease or rental agreement;

### Discussion Questions

Should these exemptions be maintained? If not, why?

*We received one response which stated that the law as it exists is satisfactory and should be maintained as is and one other submission felt that the parameters for lawyers to trade in real estate should be defined to eliminate the possibility of such professionals trading in real estate beyond the normal course of their business.*

*Two other submissions stated that property management should not be exempt from the Act and that separate licensing provisions for commercial property managers must be developed and imposed to protect both the tenant and landlord due to the nature of commercial leases, many of which have long term implications. One other submission stated that there is an imbalance in that you must be licensed to sell commercial real estate but not to lease it.*

Are there other exemptions that should be considered? If yes, why should there be an exemption?

*One submission believes that an exemption should exist for regulated and large institutions governed by other acts, i.e., publically listed companies, thereby reducing layers of red tape.*

Does the current definition of “trade or trading” in real estate appropriately reflect the activities within the real estate industry that should be the subject of regulation? If not, what changes should be made?

*One submission felt that in the eyes of the public self help firms are operating as realtors and that the public perceives that government has rules and guides in place for their protection which is not the case when unlicensed real estate self help firms are engaged with the public to trade in real estate.*

### **Salespersons and Agents carrying on other business**

An individual or corporation licensed as an insurance representative or insurance agent/ broker,

respectively, must receive the written permission of the Superintendent of Real Estate to be licensed as a real estate salesperson or agent.

Where an individual holds a real estate salesperson or agents licence, an insurance licence cannot be issued to that salesperson or agent without the written permission of the Superintendent of Real Estate.

### Discussion Questions

Should real estate agents and salespersons be prohibited from selling insurance? If yes, why?

*One submission responded stating that salespersons should be permitted to carry on any other business they are qualified/licensed to do and that when cross-selling of other products it should be disclosed to the client. Another questioned whether there was a conflict with having an insurance and a real estate licence.*

Are there other business activities that real estate agents and salespersons should be prohibited from doing? If yes, what would be the reasons for prohibiting the other business activity?

*None of the submissions provided a response to these questions.*

### **Administrative Penalties**

Licenses are currently required to file an annual information return with the Superintendent and pay an annual fee. In addition, agents who maintain a trust bank account for deposits are required to file a semi-annual financial report and an audited annual financial report on the trust. The process to deal with non-compliance is for the Superintendent to suspend, revoke or cancel the salesperson's or agent's licence or have them charged with a violation under the Act with the court deciding if a fine should be imposed and the amount of that fine.

Administrative penalties would allow the Superintendent to issue a fine without having to go through the court. It has been suggested that administrative penalties are a better approach to obtain compliance with legislation allowing more regulatory resources to deal with more serious consumer concerns.

### Discussion Questions

Should administrative penalties be introduced for failure to file an annual information return and financial returns on time?

*One submission stated that penalties should be applied for non-compliance and incomplete filings.*

Are there other areas administrative penalties could be applied to?

For each area of non-compliance by a salesperson, what should be the amount of the administrative penalty?

For each area of non-compliance by an agent, what should be the amount of the administrative penalty?

*None of the submissions provided a response to these questions.*

## **Duties and Responsibilities of Agents**

An individual who has been licensed for two years as a salesperson and who successfully completes additional education may be granted an agents licence. As a licensed agent, the individual acting as a sole proprietor, or a partner in a partnership or an owner or a member of the Board of Directors of a corporation, may sponsor the application for a salesperson's licence of an individual they wish to hire. The agent is obligated to be actively engaged in the business, to ensure the salespersons they hire are appropriate individuals to be in the industry, to provide immediate notice to the Superintendent when the salesperson ceases to be employed by the agent and include in the notice whether the salesperson was dismissed for cause.

There is no provision for another person to act in the capacity of the agent where the agent is absent or incapacitated. Also, there is no provision allowing the agent to delegate sponsorship and termination responsibilities on an ongoing basis to another person.

## Discussion Questions

Should an agent be allowed to delegate responsibility for sponsorship and termination of sponsorship to another person? If not, why?

*One submission stated that an Agent should be allowed to have a second person act as a designated representative as only allowing one designated representative is difficult. Having more than one designated representative is a good business practice and should be allowed.*

Assuming delegation is permitted, should delegation be restricted to only those times when the agent is absent from the business (e.g., vacation) or incapacitated (e.g. illness)?

What would be the requirements that an individual would have to meet to be granted such a delegation?

*One submission recommended that a licence be issued to an agent and a designated representative who would be authorized to trade on behalf of the agent.*

## **Holding out to the public**

Currently there are advertisements where industry participants are saying to the public they are a Realtor®, a specialist of some kind or a licensed assistant. There are also advertisements for real estate teams, brokerages and individual names followed by the words "and Associates". The Act only refers to salesperson, agent, restricted salesperson and restricted agent.



An agent is currently obligated when advertising to clearly indicate his or her name as the party that is doing the advertising, that he or she is an agent, and where the name of the salesperson is shown, the ad must indicate the agent is the employer of the salesperson. We often hear there should be a general principle for advertising, e.g., it should be true and accurate and should not mislead the public.

### Discussion Questions

Should the manner in which licencees represent or hold themselves out to the public be regulated? If yes, how should it be regulated?

Should only certain terms be permitted to be used by licencees? If yes, what terms should be permitted and why?

Should individuals be permitted to represent or hold themselves out in a name other than their legal name, i.e. trade names? If not, why?

*None of the submissions provided a response to these questions.*

Should teams be regulated? If yes, why should they be regulated and how should they be regulated?

*One submission stated that there should be additional regulation for teams with regards to advertising so that it is clear to the public which Agent they work for.*

### **Licensed Assistants**

Agents and salespersons are hiring individuals to assist them with their real estate activities and these individuals are generally referred to as “licensed assistants”. These individuals often interact with the public, however the Act does not contain any references to “licensed assistants”.

### Discussion Questions

Should there be a licensing category for these individuals? If yes, what would be the requirements that an individual would have to meet to be granted such a licence?

*One submission stated that licensed assistants are merely individuals that hold a real estate salespersons licence that are not true salespersons but more administrative or sales support people and as such should not have any restrictions placed on them. Assistants that are not licensed seems to be an issue yet it should not if they are doing administrative duties. Another submission recommended that the Newfoundland and Labrador Association of Realtors (“NLAR”) devise a training program for unlicensed assistants.*

What obligations, if any, should there be on the individual hiring the assistant with respect to the work being carried out by the assistant?

*None of the submissions provided a response to this question.*

What would be the permitted activities of a licensed assistant?

*One submission stated that the role of an unlicensed assistant (a person who has done the unlicensed assistants training program) would be taking care of much of the crucial day-to-day administrative tasks.*

Are there activities that could be carried out by an assistant that would not require licensing? If yes, what would they be?

*None of the submissions provided a response to this question.*

## **Commissions and Referrals**

### Commissions

The Act states that a commission or other remuneration to be paid to an agent for a real estate transaction must be an amount agreed upon between the agent and consumer or an agreed upon percentage of the sale price or rental.

Both an agent and a salesperson are prohibited from requesting or receiving a commission that is calculated as the difference between the price the real estate is listed for sale at and the actual sale price of the real estate.

### Referrals

Many industries have arrangements where an individual not in the industry can receive some form of compensation (called a referral fee) for referring business to the industry participant. There are also referral arrangements where the industry participant receives some form of compensation for referring or recommending a consumer use a particular individual or company for a service they need. Generally consumers are not aware that these arrangements exist and where a consumer is aware of an arrangement they are not aware of the amount of compensation being paid to the referring individual or to the referring industry participant.

### Discussion Questions

Is the current regulation of commissions, as set out above, providing adequate protections to consumers? If no, what additional protections should be added to the Act?

*One submission stated that the current regulation seems fine.*

Should referral fees paid to individuals not in the real estate industry be regulated? If yes, how?

*One submission stated that paying a commission to non-licensed people is not allowed but perhaps could use some clarification.*

Should referral arrangements that industry participants are involved in be regulated? If yes, how?

*None of the submissions provided a response to this question.*

## **Forms**

There are a number of forms in use in the real estate industry, one of the most important being the Agreement of Purchase and Sale. The Act does not contain any provisions permitting the Superintendent to prohibit the use of a particular form or to require a form be changed where the Superintendent believes the form or a provision on the form is not in the best interests of the public.

### Discussion Question

Should forms used by the real estate industry be regulated? If yes how?

*One submission stated that the current policy is adequate. Another submission stated that they would be in favour of an open form system that effectively represents both the commercial and residential sides of real estate as many of the forms in use are irrelevant to the commercial side of the industry. This submission advocated for the use of property management software in lieu of forms.*

## **Offices**

Under the Act, an office or branch office of a licensed agent shall be in a place of business satisfactory to the Superintendent. Also, each location must have a sign on the building or outside the building that clearly identifies the agent has an office there. In addition, a branch office cannot be opened without the written authorization of the Superintendent and must be under the direct and continuous supervision of a licensed salesperson of at least 2 years experience. Some agencies, however, have salespersons operating out of locations that may not be considered an office or branch office such as a model home or kiosk.

### Discussion Question

Should offices, branch offices, kiosks, model homes and similar locations be regulated? If yes, what conditions should be placed on their operations, and should they be supervised by a person meeting certain criteria.

*One submission stated that the regulations as they are seems fine, however, a branch office is quite different from a 'model home' which should not be regulated as it is no different than an 'open house'.*

## **Continuing Education**

Many occupations require its members to keep themselves up to date with changes in the industry through a requirement to complete continuing education. In those cases, failure to complete continuing education results in the individual losing the right to practice his or her occupation.

## Discussion Question

Should individuals in the real estate industry be required to complete continuing education? If yes, how and who should administer a continuing education program?

*One submission stated that all licensees should be required to do a minimum number of hours of continuing education annually, administered by NLAR and government, so that they can keep up with any changes in the industry. Another submission stated that it was in favour of continuing education courses, but only when relevant to the day-to-day activities of the individual.*

## **General Comments**

### Back up Services

*One submission felt that it would be beneficial for small real estate agencies if a salesperson or agency should have the option of using a salesperson from another agency for back up service and should be able to receive invoices for those services directly from that salesperson and pay that salesperson directly.*

### Education

*It is the belief of one individual that the licensing requirements should be waived when there is evidence of significant related work experience and that individuals that have surrendered their licences should be allowed to re-acquire them without further requirements as commercial real estate has become increasingly sophisticated and the advanced degrees and certifications that are more relevant to the commercial sector should be recognized in lieu of the basic educational requirements.*

### Advisory Board and Disciplinary Board

*One submission recommended that there be an advisory board and a disciplinary board established.*

### Appointment of an Administrator

*One submission suggested that a provision, similar to appointing an administrator where a licensed agent dies, be added that allows the appointment of an administrator to deal with a situation where the agent will be out of the office for an extended period of time.*

### Offense and Limitation Period

*One submission recommended that the fine for the first offence be no more than \$5,000 and for a second offence the penalty would be not more than 1 year in jail. This submission also questioned whether the limitation period for starting a prosecution under the Act, which is 2 years from the date on which the offence is alleged to have been committed, is sufficient.*

### Self Regulatory Structure

*It is the opinion of one individual that the management practices of NLAR lack transparency to the members at large and that delays in resolution of complaints lodged against members go on for years and years with no communication on progress or status given to the members involved.*

### Overall Regulation

*One submission expressed the view that regulation implies that adequate accountability frameworks are required at the various levels of responsibility and that performance is monitored and evaluated. This submission further stated that it is the Superintendent's job to administer and enforce the Real Estate Trading Act, however, adequate accountability frameworks and performance evaluation in this overall responsibility area are lacking.*