Professionalism, Self-Regulation, and the Problem of Dual Agency: The Residential Real Estate Industry in British Columbia

by

KAREN GEE

B.A. (Political Science), The University of British Columbia, 1988
LL.B., The University of British Columbia, 1992

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Douglas C. Harris

Bruce MacDougall

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Karen Gee
Name of Author (please print)

August 2004
Date (dd/mm/yyyy)


Masters of Law
Degree: Year: 2004

Faculty of Law
Department of

The University of British Columbia
Vancouver, BC Canada
Abstract

This paper contributes to the discussion about reforming the legislation governing real estate marketing in British Columbia. In March 2003, the government announced its proposals to amend the existing Real Estate Act with the objective of protecting the public and preserving its confidence in the real estate sector by providing a "least cost" regime, promoting competition among participants, and providing a flexible, accountable regulatory framework. Interested parties were invited to comment on a proposed direction for reform.

A recent public opinion survey conducted by the British Columbia Real Estate Association indicated significant concern about realtors acting for both a purchaser and a vendor of the same property. Those with concerns feared possible conflicts of interest between realtors and their clients. Despite these results, the real estate industry did not address these concerns. Instead, the industry endorsed dual agency – the practice of acting for both a purchaser and a vendor in a single transaction – and claimed that to ensure professionalism for realtors, the industry had to be self-regulating. In May 2004, the government passed the Real Estate Services Act granting self-regulation to the industry.

This paper questions the appropriateness of the government’s grant of self-regulation to the industry. It reviews the literature on professionalism and the conditions under which it is appropriate to grant self-regulation to an occupational group. It discusses how the real estate industry has attempted to gain recognition as a profession and the problems that the practice of dual agency poses to consumers if the industry is to be self-regulating. This paper concludes that the paramount purpose of occupational regulation should be to protect the public from harm, not to benefit or to reward practitioners. Self-regulation should only be granted to an
occupational group with a genuine and demonstrated willingness to act in the public interest. Recommendations are offered to the government to reconsider its actions and to consider abolishing the practice of dual agency and adopting reforms that favour consumer interests in residential real estate transactions.
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You have the right to remain silent. Anything you say can and will be used against you during contract negotiations. You have the right to be represented by your own agent. If you choose not to be represented by your own agent, all agents will represent the seller and attempt to get the highest possible price for their client. Do you understand these rights, Mr. and Mrs. Buyer?¹

**INTRODUCTION**

For most consumers, buying or selling real estate often represents the largest financial transaction of their lifetimes. But for most consumers, real estate transactions occur infrequently and are rather complex. Consumers generally do not have the knowledge or resources to make decisions which are advantageous to them. Also, in real estate transactions, vendors and purchasers usually have competing goals; vendors wish to sell quickly at high prices whereas potential purchasers seek desirable properties at low prices. Therefore, both vendors and purchasers contact realtors to help them achieve their differing goals. Since realtors claim to be professionals who specialize in negotiating real estate transactions, it is understandable that both vendors and purchasers rely on realtors for information, advice, and representation. Also, under the law, realtors are agents and are required to provide their principals with unbiased services in each transaction. Thus, the duty of a vendor’s agent is to secure the highest price obtainable for a property, whereas the obligation of a purchaser’s agent is to obtain a suitable property for the lowest price.² However, in order for consumers to ensure that their interests are actually being protected, they must know who represents their interests and have confidence that their


representative is able to act always in their best interests. Similarly, realtors must always know who they are legally obligated to represent. Unfortunately, the role of the realtor in residential real estate transactions is not well understood.

In residential real estate transactions, it is customary for a vendor to enter into a written listing agreement with their realtor, the listing agent. Under the typical listing agreement, the vendor agrees to pay the listing agent a commission based on a percentage of the selling price and authorizes the listing agent to employ other realtors to find a suitable purchaser. The realtor who finds the purchaser, the “selling agent,” is compensated by the vendor through a commission split with the listing agent. Thus, in law, both the listing agent and the selling agent are considered agents of the vendor. But, this legal reality has not always conformed with the expectations of purchasers or selling agents. In every day practice, the selling agent typically spends most of their time assisting the purchaser and rarely encounters the need to deal directly with the vendor. Although a selling agent may refer to a purchaser as their “client,” the selling

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3 See Appendix I for an example of a typical listing agreement.


5 Commentators have for some time agreed that the traditional listing/selling realtor model created by the multiple listing service creates agency relationships that are counterintuitive to the parties and that, all too often, neither consumer nor realtor seems to know exactly what is expected or required within the context of the legal relationship. Ann Morales Olazabal, “Redefining Realtor Relationships and Responsibilities: the Failure of State Regulatory Responses” (2003) 40 Harv. J. On Legis. 65 at 66. According to J. Clark Pendergrass, confusion among purchasers and vendors as to the realtor’s role in residential real estate transactions is problem common to the state of Alabama and the rest of the United States. See J. Clark Pendergrass, “The Real Estate Consumer’s Agency and Disclosure Act: The Case Against Dual Agency” (1996) 48 Ala. L. Rev. 277 at 277; Also see Barry A. Currier, “Finding the Broker’s Place in the Typical Residential Real Estate Transaction,” (1981) 33 U. Fl. L. Rev. 655; at 662.
agent is still an agent of the vendor. Nonetheless, most realtors, including listing agents, tend to create the impression by their words and behaviour that they are representing the purchaser's interests. Because agency relationships may be inferred from the course of dealings between the parties, realtors who represent the vendor, often inadvertently enter into implied agency relationships with purchasers, thereby creating unauthorized dual agencies. When an unauthorized dual agency is discovered, a transaction may be voided and the realtor who acted as the dual agent, may lose their right to a commission and be sued by their principals for disloyalty or failure to disclose pertinent information. Despite these significant consequences, realtors have often behaved as if they act for both parties to a transaction. Courts have described as “extra-ordinary” a realtor’s statement that they “could act for both vendor and purchaser in a real estate transaction, and that their prime function...[was] to bring both sides together.” This misconception about the role of the realtor is commonly held by realtors and consumers, and have been commented upon by the courts in a number of cases.

The results of two empirical surveys further confirm the existence of this common

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6 In *D'Atri v. Chilcott* (1975), 7 O.R. (2d) 249, 55 D.L.R. (3d) 30 at 35 (H.C.), the Court observed: “It was interesting to hear...[salespersons] refer to persons who might be prospective purchasers as their “clients.” The reference to a prospective purchaser as a client indicates to me a serious misconception on the part of the real estate agent of his duties towards the vendor who has hired him and who is responsible to pay him. If the word client is an appropriate one to be used in such circumstances, it is obvious that a real estate agent’s client is the vendor who has signed the listing agreement.” In that case, the contract negotiated by the “honest” salespersons was set aside.

7 Foster, *supra* note 4 at 85.


9 *Len Pugh, ibid.* 48 at 52.

misconception. A survey conducted in three major Canadian cities found that 40% of purchasers felt that the realtor with whom they dealt represented them, while another 40% thought that the agent represented both them and the vendor as a dual agent. A Federal Trade Commission survey showed that 71% of purchasers thought they were being represented by the selling agent and 31% of purchasers who dealt directly with the listing agent believed that the agent was representing them.

In 1995, to address consumer confusion over the role of realtors in real estate transactions and to prevent undisclosed dual agencies, the government of British Columbia amended the Real Estate Act (the "Act"), by introducing the requirement that realtors disclose their agency status upon contact with a consumer. When the government introduced this amendment, David Mitchell, a member of the legislative assembly, warned that the experience of American jurisdictions has indicated that a disclosure requirement would not resolve the problems of dual agency. He also said, "[A] number of real estate agents active in the province of British Columbia know that this kind of disclosure can be simply window dressing and is not necessarily

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11 B.J. Reiter, R. Prichard & Lauwers, *Housing Transaction Costs in Canada* (Ottawa: Department of Consumer and Corporate Affairs, 1982) cited in B.J. Reitter, Risk & B.N.McLellan, *Real Estate Law* (Toronto: Emond Montgomery, 1986) at 106. According to Jerry Jackman, the chairperson of the Real Estate Board of Vancouver’s agency study group, there are surveys that show that between 75 and 80 per cent of purchasers who believe the agent they work with represents them when the listing contract actually dictated that both sales people worked for the seller. See Bruce Constantineau, “Agents Must Disclose Relationships” *The Vancouver Sun* (2 November 1994).


13 Section 36 of the *Real Estate Act*, RSBC 1996, c. 397.

going to help the buyer or seller when it comes to making a real estate transaction.”

15 In response, the then Minister of Finance, Elizabeth Cull, said that there was not sufficient evidence
to suggest that the question of agency required regulation and that, at the time, the government
was making a conscious choice not to deal with dual agency in legislation. However, if
disclosure is not sufficient to deal with concerns, Cull said the government would consider
further regulation. 16 Thus, in British Columbia, the practice of dual agency is permitted if
disclosure requirements are met. However, even when disclosure is made, the inherent conflicts
of interest in a dual agency relationship are not resolved, only acknowledged. 17 Under these
circumstances, consumers are still at risk of being victims of poor representation, unfair dealing,
and potential fraud. 18

Despite its claims of professionalism, the real estate industry has endorsed the practice of
dual agency. To assist realtors in disclosing dual agency, local real estate boards have prepared
standardized forms and brochures for their members to use. Under the standard limited dual
agency agreement, the realtor claims that they will deal impartially with both a vendor and a
purchaser. However, the realtor’s fiduciary duty of full disclosure is modified so that the realtor
is not required to disclose information about the price a client is willing to accept, the motivation
of either client, or any personal information about either client. Because realtors usually earn

15 Ibid at 1472.

16 Ibid. at 1473 (Hon. E. Cull).

17 Robert E. Kroll, “Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in
Conflict” (1982), 12 Golden Gate U.L. Rev. 379 at 404.

18 R. Litchfield, Unprofessional Conduct by Real Estate Brokers: Conflict of Interest and Conflict in the
Law, 11 Pacific L.J. 821 (1980); Comment, A Reexamination of the Real Estate Broker-Buyer-Seller Relationship,
18 Wayne L. Rev. 1343 (1972).
larger commissions and do less work when acting as dual agents, there are built-in incentives for
realtors to promote disclosed dual agency arrangements when assisting consumers. Dual agency
has also become the customary arrangement for residential real estate transactions largely
because of the wide-spread use of multiple-listing agreements and the customary practice of the
vendor paying the commissions for both sides.\textsuperscript{19} Since dual agency compromises the
representation which a consumer receives from a realtor, and consumers generally lack the
information and sophistication to evaluate the quality of a realtor’s services, the government
erred when it chose not to address this issue in 1995. The situation for consumers has not
improved.

In February 2003, a public opinion survey conducted by the British Columbia Real Estate
Association (the “BCREA”) found that 53\% of those surveyed expressed concern about realtors
acting for both a purchaser and a vendor of the same property.\textsuperscript{20} According to the survey report,
“those with concerns fear that realtors will be in some type of conflict of interest, for example,
seeking the largest commission possible or possibly putting their own interests before those of
their clients.”\textsuperscript{21} Despite these results, the BCREA claimed that the public survey indicates that
“citizens [of British Columbia] have many of the same concerns of the real estate profession.”\textsuperscript{22}

\textsuperscript{19} California Technical Assistance Associates, Inc., \textit{Dual Agency Problems in California Real Estate
Transactions} (Los Angeles: California Department of Real Estate, 1981) at 40-1 cited in Kroll, \textit{supra} note 17 at 382.
Cuttell, Wyne, Foster, \textit{supra} note 3.

\textsuperscript{20} CGT Research International, \textit{British Columbia Real Estate Association Public Consultation} (February

\textsuperscript{21} \textit{Ibid.} at 13.

\textsuperscript{22} BCREA, \textit{Real Estate Act Reform, One Profession - One Voice, Presentation to the Legislative Assembly},
(April 7, 2003) online <http://www.bcrea.bc.ca/news_room/media_kits.htm> at Executive Summary.
Instead of addressing the public's concerns about dual agency, however, the BCREA has endorsed the continued practice of dual agency and lobbied the government for full self-regulatory status.\(^{23}\)

In March 2003, the government issued a discussion paper entitled *Real Estate Act Review* (the "Discussion Paper") announcing its plans to reform the Act.\(^{24}\) The Discussion Paper described the importance of the real estate sector to the provincial economy and outlined the government's regulatory objectives and proposals for reforming the Act. The government's objectives were 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.\(^{25}\) The Discussion Paper observed that despite the economic significance of the real estate sector in British Columbia, the Act which governed real estate marketing, had not been significantly revised since 1958. Further, it suggested that the Act should be modernized to provide a solid basis for real estate activities.\(^{26}\) The Discussion Paper solicited comments from interested parties on the proposed direction for the revised Act and aroused significant interest; 56 written responses were submitted and, in some cases, detailed

\(^{23}\) BCREA, *Real Estate Act Reform: Licensing Lawyers and Accountants, A Presentation to the Ministry of Finance* (12 May 2003) online: http://www.bcrea.bc.ca/news_room/media_kits.htm at 21. In its revised definition of "listing agreement" for its Draft Statute, the BCREA said that one of the minimum provisions which must be included in a listing agreement is: "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 the broker."


\(^{25}\) Ministry of Finance, *supra* note 24 at 1.

\(^{26}\) *Ibid.* at 1.
suggestions were provided. The British Columbia Real Estate Association (the “BCREA”), the Law Society of British Columbia (the “Law Society”), and the Canadian Bar Association (the “CBA”) submitted extensive reports in response to the government’s proposed changes.

While most stakeholders expressed their concern for the public interest, their opinions about what best served that interest varied and, at times, conflicted. For example, while both the BCREA and the legal profession expressed their concern for the public interest, they held opposing positions concerning changes to the lawyer’s exemption under the Act. Lawyers in British Columbia have been exempt from the licensing requirements of the Act for real estate transactions which occur in the course of their practice. In the Discussion Paper, the government proposed changes to limit the application of the lawyers’ exemption. The legal profession, on the grounds of the public interest, expressed its opposition to this proposal. The BCREA, on the other hand, agreed wholeheartedly with this proposal, and openly criticized

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27 The Ministry of Finance invited interested parties to submit their comments before May 16, 2003. The written responses to the Discussion Paper can be found online at: http://www.fin.gov.bc.ca/PT/fscp/reaComment.shtml


29 Section 2(1)(f) of the Act exempts BC lawyers from the licencing requirements of the Act with the following wording: “This part does not apply: ...to a barrister or a 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.”

30 The Discussion Paper proposed that under the new legislation, the lawyer’s exemption will only apply to real estate trades which arise in the ordinary course of law practice. For example, a lawyer could sell property, without obtaining a real estate licence, where the sale is ancillary to settling an estate, administering a will, or effecting a marriage settlement, but would not be allowed to solicit new listings, or show property outside of these circumstances.
lawyers for attempting to expand the scope of their legal practice.\textsuperscript{31} The BCREA believed broad licensing exemptions from the Act would “result in confusion among real estate consumers, which serve them poorly and could adversely affect confidence in this key economic sector.”\textsuperscript{32}

In their brief to the government, the BCREA submitted a replacement statute, entitled \textit{Real Estate Brokers and Agents Act} (the “BCREA Draft Statute”). The BCREA invited the government to use their draft as a template in reforming the existing Act.\textsuperscript{33} The BCREA claimed that their draft “reflect[ed] the will of the public and the professionals who work in the real estate sector.” It also claimed that their draft reflected the values and stated philosophy of the government, namely, least cost, competitiveness, flexible frameworks and accountability. The CBA, on the other hand, said that the BCREA Draft Statute reflected the restricted interests of only one stakeholder, realtors.\textsuperscript{34}

\textsuperscript{31}BCREA, \textit{Licensing Lawyers and Accountants, supra} note 23 at Executive Summary; Patrick Chen, a lawyer, real estate reformer, and, at present, a provincial court judge, has said that he wants lawyers to become realtors. Chen’s vision of the future is that lawyers are listing properties. He disputes that selling properties is beneath the Bar’s dignity. See Sheldon Gordon, “Metamorphosis: The Transformation of Canadian Real Estate Conveyancing” \textit{National} 8:3 (May 1999) 10 at 15; The turf war between the BCREA and the legal profession illustrates Andrew Abbott’s theory that professions are interdependent and exist within a system of professions. Professions compete for jurisdiction within this system, and a profession’s success reflects as much the situation of its competitors and the system as it does the professions’ own efforts. For example, in the mid 1800s, mediums were organized in a way that fitted most basic definitions of a profession. But over time, the practice of mediumship fell out of vogue and esteem as mediums and spiritualist healers lost jurisdictional battles against their new competitor, psychiatry. See Andrew Abbott, \textit{The System of Professions: An Essay on the Division of Expert Labour} (Chicago: University of Chicago Press, 1988) at 29-30, and 33.

\textsuperscript{32}BCREA, \textit{Licensing Lawyers and Accountants, ibid.} at Executive Summary. The BCREA believes that active soliciting and marketing of real estate listings is not the ordinary course of business for lawyers. The Law Society, on the other hand, believes that these activities do fall under the practice of law. At this point, both parties have agreed to disagree. See Robert Liang, “Common Concerns” \textit{Bar Talk} 16:2 (April 2004) at 15.

\textsuperscript{33}BCREA, \textit{Real Estate Act Reform, One Profession - One Voice, supra, note 22} at 1.

BCREA, Draft \textit{Real Estate Brokers and Agents Act} online: www.bcrea.bc.ca/news_room/media_kits.htm.

\textsuperscript{34}The Canadian Bar Association, \textit{supra} note 28 at 2.
The Discussion Paper proposed that the Real Estate Council of British Columbia (the "Council")—the provincial regulatory body with responsibility for licensing realtors and supervising their conduct—have broader jurisdiction and greater independence from the government.\(^{35}\) The BCREA Draft Statute, however, was designed to convert the real estate industry into a fully self-regulating profession.\(^{36}\) The Law Society said that it would defer comments on the issue of delegating regulatory authority to the real estate industry until the legislation was prepared and circulated for comment.\(^{37}\) It claimed to be generally supportive of self-regulating professions provided that the protection of the public interest was maintained as a paramount concern.\(^{38}\)

However, the Law Society did argue that it was not in the public interest for the "realtor model" of property selling to be the only available model in the marketplace.\(^{39}\) To support its position of allowing lawyers to represent a client throughout a real estate transaction, the Law Society observed that under the realtor model, realtors for the vendor and the purchaser are typically all paid from the vendor’s commission. It also added that in some cases a realtor seeks permission to act for both parties to a transaction in the form of dual agency. The Law Society cited the results of the recent public opinion survey conducted by the BCREA emphasizing the

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\(^{35}\) Ministry of Finance, \textit{supra} note 24 at 4.

\(^{36}\) BCREA, \textit{Real Estate Act Reform, One Profession - One Voice}, \textit{supra} note 22 at 1.

\(^{37}\) Law Society, \textit{supra} note 28 at 5.

\(^{38}\) \textit{Ibid}.

\(^{39}\) \textit{Ibid} at 8.
public’s concerns about dual agency. It then argued that if consumers chose to be represented by lawyers throughout a real estate transaction, they could be assured of independent representation and undivided loyalty.\footnote{Ibid.} Although the Law Society stressed the importance of dual agency as a public concern, no further comments have been made on this issue.\footnote{Ibid.}

Despite the public’s concerns about dual agency, the government proposed to delegate greater self-regulatory powers to the industry.\footnote{Ministry of Finance, supra note 24 at 4.} Under the current system, the real estate industry is partially self-regulating. The Superintendent of Real Estate has delegated the tasks of licensing and disciplining of realtors to the Council.\footnote{Real Estate Act, supra note 13 at section 13.} The Council is composed of 19 members: 17 members are realtors elected by the industry, and 2 members are non-industry participants appointed by the government to represent the public.\footnote{Ibid. at section 11.} In the Discussion Paper, the government proposed to increase the regulatory responsibilities of the Council, and to establish greater independence for the Council from government.\footnote{Ministry of Finance, supra note 24 at 4.} Under this framework, the Council would have direct and exclusive responsibility for the licensing, education and discipline of realtors.\footnote{Ibid. at 5.}

\footnote{In February 2004, the BCREA and the legal profession other interested parties sent a communique to the Deputy Minister of Finance saying, “it is the consensus of all involved that the introduction and passage of a new \textit{Real Estate Act} should proceed, with the lawyers exemption changed only by removal of the words “or a person employed by him or her.” Marguerite E. Shaw, “A Win-Win Deal on Real Estate: CBABC Brings Parties Together to Find Resolution” \textit{Bar Talk} 16:2 (April 2004) at 14.}
It would also be entirely self-funded from revenue generated through licensing fees.\textsuperscript{47} The government claimed that this enhanced role built upon the increased regulatory responsibility that the Council had already undertaken.\textsuperscript{48} The government said that significant independence from government would “enable the Council to establish a more flexible approach to regulation of the industry and the protection of consumers...” and would “generate a greater sense of ownership and compliance within the real estate industry by making the industry itself more responsible and more accountable for the regulation of licensees.” \textsuperscript{49}

According to the BCREA, “[r]ealtors 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.”\textsuperscript{50} As such, the industry welcomed greater independence from government but argued that “for the sake of consumers, and to ensure high levels of professionalism, the [Council] must be self-regulating.”\textsuperscript{51}

On May 6, 2004, the government introduced Bill 41, the \textit{Real Estate Services Act} (the “new Act”) as replacement legislation for part of the current Act.\textsuperscript{52} It passed through the legislature without debate, receiving royal assent on May 13, 2004. The existing Act remains in

\textsuperscript{47} Ibid.

\textsuperscript{48} Ibid.

\textsuperscript{49} Ibid.

\textsuperscript{50} BCREA, \textit{Real Estate Act Reform, One Profession, One Voice}, supra note 22 at 7 at “Who We Are.”

\textsuperscript{51} BCREA, “\textit{Real Estate Act on the Fast Track}” \textit{The Bulletin} 26:9 October 2003 at 1 online: http://www.bcrea.bc.ca/publications/2003-10.pdf

\textsuperscript{52} Bill 41, \textit{Real Estate Services Act}, 5\textsuperscript{th} Sess., 37\textsuperscript{th} Parl., British Columbia, 2004 (assented to 13 May 2004).
effect until the new Act comes into force on January 1, 2005.\textsuperscript{53}

At its core, the existing Act is “a consumer protection statute intended to protect the public from unscrupulous or unqualified real estate agents.”\textsuperscript{54} As noted by the CBA, any statute that replaces it should have the same purpose.\textsuperscript{55} The CBA recommended that while the purpose of the existing Act should remain the same, the legislative intent of the government would be better served by having the matters addressed in Parts 1 and 2 of the existing Act addressed as separate statutes. Part 1 of the existing Act establishes a licensing and regulatory regime for those engaged in the business of buying, selling and renting properties on behalf of others for a fee. Part 2 regulates the selling and offerings for sale of new developments by developers. In the new legislation, Part 1 and 2 of the existing Act have been replaced by two separate statutes as the CBA recommended.\textsuperscript{56} The new Act replaces Part 1 of the existing Act and the \textit{Real Estate Development Marketing Act} replaces Part 2.\textsuperscript{57} While it is important to ensure that consumers have adequate information when considering the purchase of new or pre-completion developments, I will not, in light of the ambit of my thesis, be commenting upon the \textit{Real Estate Development Marketing Act}.

The title of the new Act, the \textit{Real Estate Services Act}, reflects that it deals with trading in


\textsuperscript{55} CBA, \textit{supra} note 30 at 3.

\textsuperscript{56} \textit{Ibid.}

\textsuperscript{57} Bill 42, \textit{Real Estate Development Marketing Act}, 5\textsuperscript{th} Sess., 37\textsuperscript{th} Parl., British Columbia, 2004 (assented to 13 May 2004).
real estate as well as property management and strata management. Other noticeable changes include the introduction of new terminology. Under the existing Act, there are two types of licences: a salesperson’s licence and an agent’s licence. Under the new Act, the names of these licences have been changed to “representative” and “broker” respectively. As discussed in Chapter 3 of this thesis, the common law defines a “broker” as a middleperson who brings parties together in order that they may make their own contract without any further intervention or assistance. As such, the term “broker” does not define the actual role of a realtor in a real estate transaction and appears to contradict the professionalism claimed by realtors and yet, when practising dual agency, realtors are effectively reducing themselves to being brokers.

Other new terms which have been introduced include “conduct unbecoming” and “deceptive dealing.” Section 35(2) of the new Act defines “conduct unbecoming” as conduct that is contrary to the best interests of the public, undermines public confidence in the real estate industry, or brings the real estate industry into disrepute. “Deceptive dealing” is defined as any intentional misrepresentations of a material fact in relation to real estate services, a course of conduct intended to deceive a client, schemes intended to obtain a profit by illegal means or a promise or representation about the future that is beyond reasonable expectation and not made in good faith. The new Act does not define specific contraventions and therefore, it neither condones or prohibits dual agency. The question remains whether it is “conduct unbecoming” or, 

\[58\] W.F. Foster, Real Estate Agency Law in Canada, (Toronto: Carswell, 1994) at 5.

\[59\] Real Estate Services Act, supra note 55 at section 35(2).

\[60\] Ibid, at section 1.
in some respects, “deceptive dealing.”

Another new term is “false or misleading statement.” This is defined as “an omission in relation to information that is required or authorized to be provided under the [new] Act.”

Interestingly, unlike section 36 of the existing Act, the new Act does not contain a disclosure requirement for realtors. Thus, it is arguable that under the new Act, a realtor who fails to disclose the status of their agency relationships to a consumer, is not making a “false or misleading statement.”

Finally, as recommended by the BCREA, the Council will be self-regulating under the new Act. Part 6 of the new Act gives the Council direct responsibility for the licensing, education, and discipline of all licensees including, section 86 the power to make rules concerning the conduct and education of licensees. Part 4 equips the Council with a broad range of investigative and enforcement tools.

Overall, the BCREA is pleased that most of the industry’s recommendations to the government are reflected in the new Act. “We were confident the voice of our profession would be prominent throughout the legislation,” explains BCREA President, Gordon Maroney. “Therefore, we wanted the legislation passed this spring and not relegated to the sidelines.”

The Minister of Finance, Gary Collins is also proud of the new Act and has thanked the industry

61 Real Estate Services Act, supra note 55 at section 1.

for its extensive advice, particularly its recommendation to move towards self-regulation.\textsuperscript{63}

However, despite the celebratory mood of the BCREA and the Minister of Finance, there are certain assumptions underlying the claims made by the government and the real estate industry that require questioning and further exploration. First, it appears that both the government and the industry believe that, under the existing circumstances, it was appropriate and in the public interest to grant self-government to the industry. The public's concern that realtors acting as dual agents would be in some type of conflict of interest, possibly seeking the largest commission possible or putting their own interests before those of their clients, has not been addressed. On the individual level, a consumer entrusts a realtor with their confidential financial and personal information in order that their realtor may assist them in making decisions that are in the consumer's best interests. The BCREA says that as professionals, realtors are committed to high standards of customer service and ethics. Yet, in dual agency arrangements, consumers receive less advice and representation and realtors place themselves in a position in which they are tempted to give priority to their own interests. Although dual agency compromises the interests of consumers and the professionalism of realtors, the BCREA has preferred to maintain the status quo on dual agency and recommended to the government that, for the sake of consumers and to ensure high levels of professionalism, the industry had to be self-regulating. Interestingly, in professional self-governing regimes, practitioners who act as administrators, are also in a conflict of interest. In their position, they are tempted to put the

interests of their profession ahead of the public’s interest. Yet, despite the inherent conflicts of interest in dual agency relationships between individual consumers and realtors, the government believed it was appropriate to entrust the powers of self-government to realtors as an occupational group. The government’s decision assumed that the real estate industry had a genuine and demonstrated willingness to act in the public interest.\textsuperscript{64} In Chapter 1, I explore the nature of self-government in the context of professions, and I consider its advantages and disadvantages. This involves considering the “public interest” and when it is in the public interest for a government to grant self-regulatory powers to an occupational group.

Second, the real estate industry assumes that realtors are professionals and that self-regulation is essential for the consumer interest and for ensuring the group’s professionalism. This raises several questions: Are realtors professionals? What is a professional? Is self-government necessary for the consumer interest? Is self-government necessary for professionalism? What is the function of realtors in residential real estate transactions?

To better appreciate and understand the BCREA’s request for self-regulation, in Chapter 2, I explore the assumptions underlying its claims and attempt to address some questions that they raise.

Third, it appears that both the government and the real estate industry believe that despite the current practice of dual agency, it is appropriate to grant self-regulatory powers to the real

\textsuperscript{64} The Law Reform Commission of Manitoba says: “The power of self-government should only be granted when its advantages outweigh its disadvantages. This will only be the case when practitioners demonstrate the qualities needed to sustain self-government in the public interest and when adequate safeguards have been adopted to protect the public interest.” Manitoba Law Reform Commission, \textit{Report on Regulating Professions and Occupations} (Winnipeg: Law Reform Commission of Manitoba, Report #84, October 1994) at 107.
estate industry. This suggests a lack of understanding of dual agency and the problems it poses to consumers and to the professionalism that realtors claim. Chapter 3 explores the nature of dual agency and its effects. It will also discuss how the current solution to the problems of dual agency is inadequate.

Finally, this thesis argues that the common practice of dual agency in the real estate industry has negative implications for consumers as well realtors and government. In real estate transactions, the practice of dual agency results in inadequate advice and representation for consumers. For realtors, it damages their claim to professionalism and their reputation as a group. For the government, ignoring the public's concerns about dual agency will damage the government's image as a protector of the public interest and will undermine their primary objective of "maintaining and enhancing consumer confidence in the real estate sector." In the conclusion, I offer some recommendations for reform.

Unlike the real estate industry, consumers of real estate services are not represented by a body which is organized and funded to lobby for legislation in their favour. In its widely acclaimed report Regulating Professions and Occupations, the Law Reform Commission of Manitoba observed that:

In many cases, professional legislation is obtained without serious difficulty. The occupational group is often well organized and well financed; it can command the attention of legislators. Moreover, unless a significant group opposes the legislation, there is little reason not to grant it.

On those occasions when the request for regulation is opposed, opposition typically arises from other occupational groups whose interests are threatened by the regulation being sought. Although both groups typically claim to represent the public interest, the public interest is not clearly defined and the public is rarely heard from directly. The result is a political struggle which is usually resolved either by an accommodation between the groups or by a legislative choice as to which group to satisfy.\

In the current discussion about reforms to the Act, the only major debate between “significant groups” was between the real estate industry and the legal profession. Although the legal profession raised the issue of dual agency, its debate with the real industry was primarily concerned with changes to the lawyer’s exemption under the Act. After the BCREA and the legal profession agreed to a specific set of wording for the lawyer’s exemption, the legal profession has not pursued the issue of dual agency nor raised any opposition to the real industry’s pursuit of self-regulation. Therefore, unless the government seriously considers the problems of dual agency, it is likely that the Real Estate Services Act will come into force without much change or difficulty, and the industry will obtain self-regulatory authority. If this happens, the real estate industry will continue its self-serving practice of dual agency to the detriment of consumers. The issue of self-regulation for the real estate industry raises associated public protection issues such as dual agency as well as licensing exemptions, anti-competitive pricing, misrepresentation, and poorly drawn contracts of purchase and sale. The purpose of this thesis is to participate in the current discussion on law reform to the Act. Its goal is to

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66 Manitoba Law Reform Commission, Regulating Professions, supra note 70 at 6.
67 Shaw, supra note 44 at 14.
68 According to the CBA, the current Act provides “insufficient protections with respect to the conduct of realtors in anti-competitive, pricing, misrepresentation, dual agency, litigatable conduct, poorly drawn contracts of purchase and sale, non-deposit of trust money, poorly drafted contractual provisions to waive trust deposits, failure to pay deposits, and regulation of independent contractors.” See CBA, supra note 30 at iii.
question and to explore the assumptions underlying the various legislative changes made by the government, particularly the delegation of self-regulatory authority to the Council. It also questions the assumptions made by the real estate industry in its claims for professionalism and self-regulation. It is hoped that it will influence realtors to reflect upon the meaning of professionalism and provide the government some guidelines for when it is appropriate to delegate self-governing authority to an occupational group. Ultimately, the goal is to encourage the abolition of the practice of dual agency in residential real estate transactions and the adoption of reforms that favour consumers and their interests.
Chapter 1

All professions are conspiracies against the laity.

(George Bernard Shaw, Preface to The Doctor's Dilemma)

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices...Though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less render them necessary.


Professionalism, Self-Regulation, and the Public Interest

Introduction

Although the real estate industry in British Columbia claims that self-regulation is necessary for its professionalism and for the public interest, there are divergent opinions about the social and economic role of the self-governing professions. Critics argue that self-regulation in the professions is self-serving and aimed at increasing professional incomes beyond the levels that would be obtained in perfectly competitive service markets.¹ Professions have been viewed as monopolists who seek intellectual and organizational domination in areas of social concern.² Rather than serving disembodied social needs, the professions are forms of social control, imposing both definitions of needs and manner of service on atomized consumers.³ The professions have also been regarded as symbols of cultural authority. For individuals,

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¹ However, society permits these self-serving practices in exchange for a guarantee of a certain minimal level of professional competence. See Ira Horowitz, “The Economic Foundations of Self-Regulation in the Professions” in Roger D. Blair and Stephen Rubin, eds., Regulating the Professions: A Public-Policy Symposium (Toronto: DC Heath and Co., 1980) 3 at 16.


³ Johnson rejects the functionalist idea that professions are merely organized experts who apply specialized knowledge for the benefit of their clients. Terence J. Johnson, Professions and Power (London: MacMillan Press, 1972) at 45. A useful review of various understandings of "professions" is found in Andrew Abbott, The Systems of Professions (Chicago: University of Chicago Press, 1988).
professionalism is an ideal metaphor for vertical mobility and the means with which to attain it. Here, the implications of professionalism are defined in terms of external consequences, such as the status, money, and power.\(^4\)

However, the professions have also been esteemed as learned and noble callings, dedicated to ideals of public service before personal gain. According to T.H. Marshall, state control of the professions would threaten the very "essence" of professionalism which is not concerned with self-interest but with the welfare of the client.\(^5\) Durkheim argues that the professions are a positive force in social development because they stand against the excesses of both *laissez-faire* individualism and state collectivism.\(^6\) In the "acquisitive society," community interest is subverted by the primacy of individual self-interest, and professionalism is the major force capable of subjugating rampant individualism to the needs of the community in a truly "functional society."\(^7\)

Despite mixed opinions about the role of self-regulating professions in society, realtors in British Columbia, as many occupational groups, desire the material and immaterial advantages of self-regulation. According to Pue, "[t]he purpose of creating a fully self-regulating profession is to secure an artificial monopoly in the provision of services and to back this monopoly with

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legislative sanction.” However, the British Columbia Real Estate Association (the “BCREA”) claimed that the real estate industry must be self-regulating for the sake of consumers and to ensure high levels of professionalism among realtors. Self-regulation would allow the industry to address the changing marketplace without having to go through the legislature. It would also allow for the imposition of minimum standards of practice and mandatory continuing education for realtors. Ostensibly, the claims made by the real estate industry seem noble and motivated by altruistic concerns for consumers and professional excellence. They assume that realtors are professionals and that their primary concern is the interests of consumers. They also assume that self-regulation for an occupational group benefits consumers and is necessary for professionalism. Indeed, it is no surprise that the industry’s claims echo the ideals of medicine and law, the traditional professions. As “the oldest, highest status, wealthiest, and most powerful of professions,” medicine and law are the paradigm models of “professionalism” towards which other groups aspire. In the late nineteenth century, medicine and law pioneered the pattern for obtaining self-regulatory licensing regimes. As a result, the manner in which the traditional professions obtained self-regulation in the nineteenth century has become synonymous with professionalization. Although there has been growing cynicism about the role of professions in


10 Pue, supra note 8 at 283.

society and frequent attacks against medicine and law for neglecting the public welfare, occupational groups still attempt to emulate the attributes of the traditional professions in order to obtain professional and self-regulatory status.  

This chapter explores the ideals of traditional professionalism and asks whether self-regulation is necessary for professionalism. It argues that one of the major flaws in the traditional approach to occupational regulation is to link the existence of a voluntary group devoted to raising standards of education, competence and ethical behaviour of its members, with the decision to grant self-government. In other words, the historical connection between the attributes which are used to describe a “professional” and the form of regulation under which that person conducts their practice should be severed. Self-regulation should only be granted by the government to an occupational group when it is in the public interest. It should not be used just for administrative savings or to reward practitioners for their education or other achievements. The traditional process of professionalization concentrates on the attainment of organizational forms such as associations, licensure, and codes of ethics. However, the existence of these organizational forms does not mean that consumers are actually receiving professional services rendered in their best interests. While these organizational forms may advance the professions on a group level, the contents of professional activity on the individual level between a consumer and a professional should not be ignored. Before granting self-regulation to an occupational


\[\text{13 Manitoba Law Reform Commission, ibid. at 8.}\]

\[\text{14 Ibid.}\]
group, the government must examine the function of the relationship between an individual consumer and a professional. Unless the relationship between a consumer and professional functions in the best interests of consumers, it is not appropriate for the government to delegate self-regulatory powers to practitioners as an occupational group.

The Ideals of Professionalism

Although evidence of professions can be traced to the Middle Ages and even ancient times, today’s model of professionalism is informed by more recent influences. In early nineteenth century England, the professions were considered as careers that were suitable for aristocratic gentlemen. In that society, professions were innocuous occupations because they did not dull the brain, like manual labour, nor corrupt the soul, like commerce. The professions allowed for the “good life” of gentlemanly leisure. Although leisure, based on the ownership of land or of slaves, was the chief mark of aristocracy, the professions were only slightly inferior. Thus, the attainment of professional status, in modern times, have connoted ideas about gentry status and an elevation in class standing.

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15 For a brief historical retrospect of the professions in ancient times, see Morris L. Cogan, “Toward a Definition of Profession” (1953), 23 Harv. Educ. Rev. 33 at 33. For a discussion on the historical matrix of modern professions see Larson, supra, note 2 at 4-8.

16 Marshall, supra note 5 at 325.


18 Marshall, supra note 5 at 325.

19 Larson, supra note 2 at 4-5. Modern concepts of professions have been influenced early nineteenth century ideas of gentlemanly status. For example, in Canada, it has been observed that legal education in the first third of the twentieth century was informed by assumptions taken as common sense by colonial British masculinities. See Wes W. Pue, "British Masculinities, Canadian Lawyers: Canadian Legal Education, 1900-1930" (1998) 16 Law in Context 80.
In the late nineteenth and early twentieth centuries, the idea of professionalism in Canada and the United States was based on the belief that, properly applied, science, and rationality would result in something approaching a perfect world.\textsuperscript{20} It has been said that in the early years of the twentieth century, professionals embodied this ideal.\textsuperscript{21} These individuals sought to discover scientific principles which explained every aspect of life and applied those principles in practical ways for the benefit of humanity.\textsuperscript{22} The project of professionals was also intended to temper the ills of unbridled capitalism.\textsuperscript{23} Contrary to attitudes in the industrial and commercial

\textsuperscript{20} After the outbreak of the atomic bomb, science and scientists were suddenly viewed by politicians and the public as a major social force that could be harnessed for the benefit of society. Some examples of politicians viewing scientists as superior beings are:

"There are few men...or maybe several thousand in the world whose mental development in many lines--and particularly in the scientific line--is like comparing a mountain to a molehill when you compare them to the rest of us."  (Senator Tydings)

"I have one further observation to make, and that is that you scientists have gotten a long way ahead of human conduct, and until human conduct catches up to you, we are in a precarious way unless you scientists slow up a little and let us catch up."  (Senator Johnson of Colorado)


\textsuperscript{21} "The idea was to use the accumulation of knowledge generated by many individuals working freely and creatively for the pursuit of human emancipation and the enrichment of daily life. The scientific domination of nature promised freedom from scarcity, want, and the arbitrariness [sic] of natural calamity. The development of rational forms of social organization and rational myths of thought promised liberation from the irrationalities of myth, religion, superstition, release from the arbitrary use of power as well as from the dark side of our own human natures. Only through such a project could the universal, eternal, and the immutable qualities of all humanity be revealed."; D. Harvey, \textit{The Condition of Postmodernity: An Inquiry into the Origins of Cultural Change} (1989) 12, as quoted in W.W. Pue, "Trajectories of Professionalism?: Legal Professionalism After Abel" in A. Esau, ed., \textit{Manitoba Law Annual 1989-90} (1990) 57 at 80-81.

\textsuperscript{22} Bledstein, \textit{supra} note 4.

\textsuperscript{23} E. Durkheim, \textit{Professional Ethics and Civic Morals} (London: Routledge & Paul, 1957); Tawney, \textit{supra} note 7; Some commentators have said that the free-market system is not in all cases the system that best serves the public interest. Professional self-regulation may restrict competition in a free enterprise system but what society gets in exchange is a guarantee of a certain minimal level of competence from professionals. See Horowitz, \textit{supra} note 1 at 16. Also see Eliot Friedson, \textit{Professional Powers: A Study of the Institutionalization of Formal Knowledge} (Chicago: University of Chicago Press, 1986) at 33.
world, the prevailing ideal in the professional setting was not caveat emptor, may the buyer beware, but one of credat emptor, may the buyer trust.

**High Levels of Education**

To ensure practitioner competence and distinction from non-professional occupations, the modern concept of professionalism became associated with high levels of education and scholarship. It was not practical skill that differentiated a professional and a non-professional, but levels and types of education. A true professional, for example, could not be educated through an apprenticeship or at a trade school. The skills that characterized a profession were said to "flow from and are supported by a fund of knowledge that has been organized into an internally consistent system, called a body of theory." Acquisition of professional skill required

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24 F.A.R. Bennion, Professional Ethics: The Consultant Professions and Their Code (London: Charles Knight, 1969) at 7:

"It has long been an obsession with professional men, and still is today, that if they indulge in any activity which is "commercial" they are to that extent less 'professional'. The two are seen as opposites and the true professional man is obliged to refrain from all acts bearing the taint of commerce or run the risk of losing his professional status. The brokerage activities, such as estate agency, are particularly suspect."

Talcott Parsons argues that, in industrial societies, the professions are distinguished from the self-orientation of the business community. See T. Parsons, "The Professions and Social Structure" in Essays in Sociological Theory (New York: Free Press, 1954) at 34.


26 Manitoba Law Reform Commission, supra note 12 at 3.

27 Ernest Greenwood, "Attributes of a Profession" (1957), 1 Social Work 45 at 47.

28 Ibid. at 46.
a prior or simultaneous mastery of the theory underlying that skill.\textsuperscript{29} Therefore, professionals required a university or equivalent education where they could learn the theory underlying the practice of law, medicine, engineering, or other professional activities. University education in the systematic theory of their discipline imparted to professionals a type of knowledge that highlighted the comparative ignorance of lay persons and trades persons.\textsuperscript{30}

\textit{Commitment to the Public Welfare}

Although professionals were scholars, they were also called to apply their knowledge to practical life. Unlike non-professional occupations and trades, professionals were said to possess a unique, selfless commitment to the public welfare. Self-seeking motives such as financial gain were the secondary benefits of professional knowledge and skill. Professionals viewed their work as a calling and devoted themselves to their work primarily for the psychic satisfactions of the work itself and for the benefit of society.\textsuperscript{31} As such, professionals were

\begin{itemize}
\item \textsuperscript{29} \textit{Ibid.}
\item \textsuperscript{30} \textit{Ibid.} at 47.
\item \textsuperscript{31} \textit{Ibid.} at 53:
\end{itemize}

The term career is, as a rule, employed only in reference to a professional occupation. Thus, we do not talk about the career of a bricklayer or of a mechanic; but we do talk about the career of architect or of a clergyman. At the heart of the career concept is a certain attitude toward work which is peculiarly professional. A career is essentially a \textit{calling}, a life devoted to “good works.” Professional work is never viewed as a means to an end; it is the end itself. Curing the ill, educating the young, advancing science are values in themselves. The professional performs his services primarily for the psychic satisfactions and secondarily for the monetary compensations. Self-seeking motives feature minimally in the choice of a profession; of a maximal importance is affinity for the work. It is this devotion to the work itself which imparts to professional activity the service orientation and the element of disinterestedness.

Addressing the American Bar Association in 1916, Elihu Root, Dean of Harvard Law School, described the ideal legal profession as one which is not “commercialized”. A later but equally well known Harvard Law Dean, Roscoe Pound, claimed that “...the concept of professionalism involved
motivated by the impulse to perform maximally and were prepared to render their services upon request, even at the sacrifice of personal convenience. For professionals, their work became their life. The act of embarking upon a professional career bore likeness to entering a religious order.

**Written Codes of Ethics**

To entrench their commitment to the public welfare, professions began establishing written codes of ethics. This made their commitment to the public welfare a matter of public record, thereby insuring for itself the continued confidence of the community. All members of a profession were bound by its code of ethics and could be punished for breaching it. These codes frequently encompassed more than the individual’s behaviour while conducting their practice. In keeping with the notion that a professional was devoted to a life of “good works,” codes of ethics also imposed high standards of conduct on the professional’s personal life. Any activity which would reflect badly on the profession was prohibited and could be punished.

As for the relationships between professional colleagues, codes of ethics often demanded

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32 Greenwood, *ibid.* at 50.

33 Ibid. at 53.

34 Ibid. at 50.

behaviour that was co-operative, equalitarian, and supportive. Professionals were expected to share their knowledge and discoveries with colleagues. The proprietary attitudes of the industrial and commercial world were considered improper for professionals.\textsuperscript{36} It was also unseemly for professionals to blatantly compete for clients and, in some cases, even to advertise.

\textit{Selfless Dedication to Clients}

While the profession as a whole was committed to acting in the public’s interest, individual professionals served the public interest by committing themselves to the best interests of each of their clients.\textsuperscript{37} Because of the “asymmetry of expertise” between professionals and their clients, individual clients were forced to trust professionals with important and often confidential matters.\textsuperscript{38} To facilitate efficient performance, professionals encouraged clients to volunteer information that the client would otherwise not divulge.\textsuperscript{39} As such, confidentiality in professional and client communications was regarded as a professional privilege. This confidentiality was respected by society and has been protected in law.\textsuperscript{40} Professionals, in turn, were ethically and legally bound to respect this trust and were prohibited from revealing

\begin{itemize}
\item \textsuperscript{36} Greenwood, \textit{supra} note 27 at 51.
\item \textsuperscript{37} Manitoba Law Reform Commission, \textit{Regulating Professions, supra} note 12 at 4.
\item \textsuperscript{38} Abbott, \textit{supra} note 3 at 5. These important, confidential matters may include information about the client’s finances and business or intimate personal details about the client’s health or life.
\item \textsuperscript{39} Greenwood, \textit{supra} note 27 at 49.
\item \textsuperscript{40} Examples of professions which enjoy this immunity are medicine and law.
\end{itemize}
confidences or making personal use of the information imparted to them. As fiduciaries, professionals were expected to avoid any actual or perceived conflicts of interests. Foremost in the creation of public trust is that the client's best interest must take priority over the interests of the professional or any other person.

In summary, modern ideals of professionalism have included a high level of education, a commitment to the public welfare, a written code of ethics, and a selfless dedication to one's clients. Although these ideals of professionalism have been questioned and criticized by sociological writers, the model of professionalism which emerged around the nineteenth and early twentieth centuries remains the image of professionalism for most people today. Also, for many people, belonging to a profession brings the respect of being associated with traditional gentry status.

41 Manitoba Law Reform Commission, Regulating Professions, supra note 12 at 4.


43 Bennion, supra note 24 at 81:

It is obviously of the greatest public concern that anyone who consults a professional practitioner should feel completely confident that the advice he receives will be impartial, and it is a paramount duty of the practitioner to decline to act if he has any commitments or connections whatever which might prevent, or appear to prevent, this being. The last qualification is important, for he must not only be impartial, he must manifestly appear to be impartial.

44 Wexler, supra note 25 at 13.


The Process of Professionalization

To obtain professional and ultimately self-regulatory status, occupational groups typically follow a traditional process known as *professionalization.* At first, a voluntary group of practitioners establishes an association, with definite membership requirements to bar the unqualified. The goal of the association is to raise the public profile and practice standards of the occupation. If necessary, the next step is to change the name of the occupational group. This serves the multiple function of reducing identification with the previous occupational status, asserting a technological monopoly, and providing a title which can be monopolized. If no university program exists for the study of the particular occupational service, the association for the occupational group would make efforts to establish one or seek affiliation with a university.

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49 In order to stake their claim to professional status, Lieberman observed that: "The professional estate is open to anyone with a claim to skill. Thus real-estate agents have become realtors; undertakers, morticians; junk dealers, salvage consultants; laboratory technicians, medical technologists. Thus the ditch digger and sewer worker have become drainage engineers. Thus the salesman of burial plots is no longer merely a salesman; he is a 'professional memorial' consultant and has a diploma issued after one-week training course to prove it." See Jethro K. Lieberman, *The Tyranny of the Experts: How Professionals are Closing the Open Society* (New York: Walker and Co., 1970) at 52.

50 Caplow, *supra* note 47.

51 L.S. Bohen, "*The Sociology of the Professions in Canada*" in Consumer Research Council Canada, *Four Aspects of Professionalism* (Ottawa: Consumer Research Council Canada, 1977) 1 at 10:

The rise of professionalism at this time was also facilitated by the rise of the university. Just as the three traditional professions has been closely connected with universities – law with universities on the Continent, medicine with the nineteenth century British universities and theology with American and the older British universities – the new professions continued to seek legitimation within the university. The university affiliation perpetuated the notion that professional wisdom is based on and interconnected with the move generalized learning of the humane disciplines, and not merely on craft factors, which are nevertheless important in learning the techniques of each profession. Thus, the university added new authority to the ideals of attachment and public service.
As further evidence of professional dedication to self-improvement and work, continuing education programs are usually created and members are encouraged to attend. The next step involves developing and promulgating a written code of ethics which asserts the social utility of the occupation, sets up public welfare rationale, and develops rules which serve as further criteria to bar the unqualified and unscrupulous. If an occupational group is successful, membership in the group's association becomes prestigious and may become a practical, economic necessity for practitioners. This may be so even if practitioners are not required in law to be members of the association. The final step is public campaigning and political lobbying for occupational self-government. Here, the group will emphasize that, unlike mere occupations, its members are educated in a specialized and organized body of knowledge that is taught at a university or in affiliation with a university. The group's association will highlight its members high standards of competence and ethics and the association's own efforts and dedication in maintaining practice standards. In essence, the group's case is that it is similar to respectable, professional groups – even as the professional schools added prestige to the young and aspiring universities.

Universities themselves are usually receptive to having professional faculties because they enhance the prestige of the university and support the university's claim to being a truly centre of learning.


53 Caplow, *supra* note 47.

54 Realtors, for example, are not legally required to become members of their local real estate boards or the BCREA. However, membership in local real estate boards are pre-requisites to gaining access to the lucrative multiple listing service and to membership in the BCREA. Also, although membership in the BCREA and the CREA are not required for licensing under the Act, membership in these professional associations are necessary if a real estate practitioner wishes to refer to themself by the trademarked term "realtor".

55 Manitoba Law Reform Commission, *Regulating Professions*, supra note 12 at 5

which have already been granted self-governing status, and dissimilar to mere occupations.\textsuperscript{57}

**Justifications for Self-Regulation**

The traditional process of professionalization has had important implications for government policy on self-regulation.\textsuperscript{58} Historically, occupational groups who have emulated attributes of professionalism have successfully argued that their conduct and performance could only be evaluated by their professional peers.\textsuperscript{59} Because standards of professional performance are reached by consensus within the profession and are based upon a body of theory that can only be learned through university or equivalent education, the lay community is presumed incapable of comprehending appropriate standards and using them to identify malpractice.\textsuperscript{60} Therefore, while the government may be able to administer regulatory regimes for other occupations, the government's only option when it comes to professions is to delegate to that profession the power to administer its own affairs.\textsuperscript{61}

Moreover, it has been argued that since professionals are individually and collectively devoted to the public interest, a delegation of self-governing authority to a professional body is justifiable.\textsuperscript{62} It is in the public interest for professionals to set and enforce their own standards. As such, government legislatures have routinely delegated to professional bodies the authority to

\textsuperscript{57} Manitoba Law Reform Commission, *Regulating Professions*, \textit{supra} note 12 at 6.

\textsuperscript{58} Rubin, \textit{supra} note 11 at 35-6.

\textsuperscript{59} Manitoba Law Reform Commission, *Regulating Professions*, \textit{supra} note 12 at 4.

\textsuperscript{60} Greenwood, \textit{supra} note 27 at 49.

\textsuperscript{61} Manitoba Law Reform Commission, *Regulating Professions*, \textit{supra} note 12 at 4.

\textsuperscript{62} \textit{Ibid.} at 4
set and enforce standards for initial membership in the body and for standards of professional conduct after entry.\textsuperscript{63} Professions that have been granted a licensing regime, have also been given the authority under their professional legislation to define the services which their members have the exclusive right to perform and to prosecute non-members for unlicensed practice.\textsuperscript{64}

The Advantages and Disadvantages of Self-Regulation

In Canada, the traditional approach to occupational regulation has resulted in the proliferation of professions, especially since the Second World War.\textsuperscript{65} Today, governments face growing demands by occupational groups for self-regulatory legislation.\textsuperscript{66} There are several reasons why self-government by an occupational group might serve the public better than administration by a government department or agency.

\textit{Advantages of Self-Regulation}

The first reason often identified by government administrators is that self-government by practitioners offers financial savings to taxpayers. It has been noted that:

In theory, the state could always choose to regulate professional services directly. But it would have to hire experts to assist it in the task... The costs of replicating

\textsuperscript{63} \textit{Ibid.} at 4.

\textsuperscript{64} \textit{Ibid.} at 5


within government knowledge that which exists within professions are not negligible. It is less costly to place the responsibility for regulation in the hands of the professions themselves.67

In order to operate a self-regulatory regime, practitioners often volunteer their time and services as a contribution to their profession. The administrative costs of operating the professions’ regulatory body are usually paid by the members of the profession through their annual dues. Although the administrative costs may be passed to consumers through higher fees, it has been argued that this system is more fair than requiring all taxpayers to pay for this protection. Only consumers who use the service pay for the protection they receive.68

Second, it has been argued that self-government results in more efficient administration.69 In a self-governing regime, practitioners are usually elected to act as members of a governing council. By virtue of their training and experience in their fields, practitioners will be familiar with the services being governed and will less likely make errors in regulating services. Since practitioners usually maintain a practice while serving on a governing council, they also remain in touch with the realities of everyday practice. This helps to ensure that regulations are relevant to the working lives of the practitioners.70

Third, it has been argued that self-government is more likely to result in compliance from practitioners than would a government administered regime.71 Self-government may result in a


69 Ibid.

70 Ibid.

71 Ibid.
sense of community among practitioners which strengthens a commitment to high standards of competence and ethical conduct.\textsuperscript{72} Fear of disapproval by colleagues could be a greater motivation for compliance than the deterrence of penal sanctions.\textsuperscript{73}

Finally, it has been contended that self-government is important for occupational services which require a consumer to place trust in a practitioner. By granting self-government to a profession the government indicates its trust in the profession. This encourages individual clients and the public at large to place their confidence in the profession.\textsuperscript{74}

**Disadvantages of Self-Regulation**

Despite the advantages of self-regulation, there are also arguments for government administration of professions.

**Conflict of Interests**

Occupations are regulated to protect the public. However, although practitioners who act as administrators for a self-governing regime may intend to serve the public interest, they are elected by fellow practitioners, not by the public\textsuperscript{75} Their decisions affect their working lives and that of their fellow practitioners, and this creates the potential for conflict between the interests of


\textsuperscript{73} Manitoba Law Reform Commission, *The Future of Occupational Regulation in Manitoba*, supra note 67 at 40.


\textsuperscript{75} Manitoba Law Reform Commission, *The Future of Occupational Regulation in Manitoba*, supra note 67 at 41.
the public and the profession.

First, practitioner-administrators will often have a direct economic interest in many of the decisions they make concerning admission requirements and the definitions of standards to be observed by members. It is in the financial interest of practitioners to minimize competition.\(^76\) Competition can be controlled by restricting the supply of practitioners, the number of students admitted into mandatory training programs, or the recognition of credentials of applicants from other jurisdictions.\(^77\) Competition can also be reduced by controlling the competitive behaviour of practitioners. For example, restrictions or prohibitions can be placed upon competitive behaviours such as advertising, pricing, and related competitive practices. Anti-competitive restrictions such as these tend to result in higher prices for consumers.\(^78\)

Second, conflicts of interest may arise because of the supportive and cooperative behaviour which is encouraged within the occupational community.\(^79\) While allegiance to a community may result in greater regulatory compliance, "close ties between practitioners could also result in an inappropriate unwillingness to report or act upon the incompetent or unethical

\(^76\) Horowitz, *supra* note 1 at 8-9. It has been said that those who value the benefits of a market system, will find the structure and role of the self-governing professions to be disturbing. Self-regulation is inimical to the concept of a competitive system where the market sets the terms of production and establishes the required discipline. See Sylvia Ostry, "Competition Policy and the Self-Regulating Professions" in P. Slayton and M.J. Trebilcock, *The Professions and Public Policy* (Toronto: University of Toronto Press, 1976) 17 at 19.


\(^79\) Greenwood, *supra* note 27 at 51.
behaviour of colleagues and might even cause practitioners to cover up for one another. Also, practitioner-administrators may also be tempted to overlook or deal lightly with offences and minimize publicity about unethical behaviour in an effort to protect the image of the occupational community.

Third, because of the conflict of interest inherent in the structure of self-government, practitioner-administrators must also deal with public skepticism about their function. Although practitioner-administrators may recognize conflicts of interest and carefully resolve them in favour of the public interest, they will always face the perception that self-government is used to protect practitioners and to further their financial interests.

BREAKING THE LINK: PROFESSIONALISM AND SELF-REGULATION

Professional self-regulation proliferated since the Second World War. Occupational

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80 Manitoba Law Reform Commission, The Future of Occupational Regulation in Manitoba, supra note 67 at 42.


S. M. Cherniack, "Governing Professional Bodies", Winnipeg Free Press, May 4, 1979 at 6:

"[T]here is a prevalent attitude of suspicion, a notion that, whatever the professionals, among themselves, may be up to, it is probably not done in the general public's interest. Expressions such as 'conspiracy of silence' with reference to the professional associations' powers of self-discipline, enjoy considerable popular currency."

Cited in Manitoba Law Reform Commission, ibid.

82 A. Paul, "Disgruntled Clients Urge Lawyer Accountability", Winnipeg Free Press, January 28, 1990 1 at 4: "[T]he public is skeptical about the ability of professionals to protect the public interest. The image of licensing bodies...has been tarnished by public suspicion that professionals cover up their mistakes behind closed doors..."

Cited in the Manitoba Law Reform, ibid.

groups have emulated the attributes of existing “professions” in order to secure self-government. However, growing public concern and cynicism about the selflessness of professionals and the means by which professional legislation is obtained have led several governments in Canada to initiate studies of occupational regulation. As a result, the flaws and inadequacies of the traditional approach to occupational regulation have become more apparent. One of the major logical flaws is to link the existence of a voluntary group devoted to raising standards of education, competence and ethical behaviour of its members, with the decision to grant self-government. It is likely that this connection has been hardly questioned because governments have assumed that the costs of regulation are primarily administrative in nature. By this reasoning, if practitioners of an occupational group assume the costs of administration, the public can only benefit from the administrative savings and from the high levels of competence and ethical behaviour demanded of the group’s members. However, the costs of self-regulation are not only administrative. For example, one of the high non-administrative costs of self-government is its inherent conflict of interest. Practitioners usually have a financial interest in various aspects of occupational regulation. It has been observed that practitioners

84 A.M. Carr-Saunders, “Professionalization in Historical Perspective” in H.M. Vollmer and D.L. Mills, eds., Professionalization supra note 20 at 3-5; Caplow, supra note 47 at 45; Greenwood, supra note 27 at 45; Bohen, supra note 51.

85 For a summary of reforms in occupational regulation in Canada see Manitoba Law Reform Commission, The Future of Occupational Regulation in Manitoba, supra note 67. Quebec, Alberta, and Ontario have legislation has been enacted which alters the traditional approach. British Columbia has re-examined its ad hoc approach. For example, British Columbia, Royal Commission on Health Care and Costs, Closer to Home (Report, 1991).

86 Manitoba Law Reform Commission, Regulating Professions, supra note 12 at 8.

87 Ibid.

88 Ibid.
benefit from rising entry standards, especially if they are not personally required to comply with the new standards. The effects of higher standards tend to raise the price existing practitioners can charge for their services. In this case, the overall level of service received by the public may not have risen but the price for the services have.

The historical connection between the attributes which are used to describe a “professional” and the form of regulation under which that person conducts their practice should be severed. In other words, the qualities of “professionalism” must be treated as distinct from the form of regulation under which an occupational group may operate. Regulation should not be used to reward a university education or affiliation, a code of ethics, or the admirable traits of an occupational group or individual practitioners. Nor should regulation be used to confer status or financial benefits on a particular group. Indeed, the impact on practitioners should be disregarded. Instead, self-regulation should only be delegated to an occupational group if it extends a net benefit to the public.

The Public Interest and the Appropriateness of Self-Regulation

In debates over regulatory policy, virtually all participants will claim to be promoting the public interest. However, despite what appears to be a shared concern for the public interest,

89 Ibid.
90 Ibid.
91 Ibid.
92 Ibid. at 2-10.
opinions about what would best serve the public interest vary, and, at times, conflict. Indeed, it seems that different opinions about what is best for the public interest arise from different definitions of the public interest. Therefore, it is helpful for any discussion on occupational regulation to include some elaboration on the concept of the public interest.

The Public Interest

The “public interest” is an elusive, relative, and elastic concept which varies with different audiences, issues, and contexts. The “public” includes all people in general, but in the context of occupational regulation, it may consist of many subgroups. These subgroups may include: (1) consumers and potential consumers of services in question; (2) members of the occupational group; (3) related occupational groups with overlapping stakes or ambitions in the area; (4) aspiring entrants to the occupational group; (5) educational institutions and professional educators; (6) third parties affected by externalities to professional-client relationships; (7) taxpayers; and (8) the government.94 The specific interests of each of these subgroups vary depending upon what issues and situations are involved. To determine the public interest on a specific issue, the interests of each affected subgroup must be identified. Once all relevant interests are identified, these interests must be weighed. The question of how these various interests should be weighted is in part a function of one’s disciplinary perspective.95 However, despite obvious conflicting interests, representatives of subgroups in a regulatory policy debate will, in addition to advocating their own stakes, claim that their primary concerns are for the best

94 Trebilcock, supra note 66 at 12.

95 Ibid.
interests of the first subgroup, namely, consumers. If these expressions of concern for consumers are genuine, it ought to be a widely accepted principle that when weighing relevant interests on regulatory policy issues, the most weight should always be given to consumers of the services in question. This would acknowledge that the purpose of occupational regulation should always be to protect consumers and third parties from harm.\textsuperscript{96} As such, the government should only grant self-regulatory powers to an occupational group when it is in the interests of consumers to do so.

In addition to protection from harm, consumers of professional services have an interest in having available to them a wide selection of services of varying qualities and quantities at competitive prices.\textsuperscript{97} Also, when faced with making important decisions in areas in which they lack knowledge or expertise, consumers have an interest in forming trust based relationships with professional advisors. From the consumer's perspective, professional ideals such as high levels of education, a commitment to the public welfare, codes of ethics, and selfless dedication to clients are important professional attributes. However, what is of utmost importance to consumers is that genuine, reliable professional expertise is brought to bear in making certain decisions and that the consumer's interests are fully protected in the making of these decisions.\textsuperscript{98}

\textsuperscript{96} Manitoba Law Reform Commission, \textit{Regulating Professions}, \textit{supra} note 12 at 19.

\textsuperscript{97} Trebilcock, Tuohy, and Wolfson, \textit{supra} note 93 at 37.

\textsuperscript{98} Edmond Cahn, "Law in the Consumer Perspective," (1863) 112 U. Pa. L. Rev. 1 at 14: "In the consumer perspective, the significance of any principle, rule, or concept, however exalted, is investigated by observing the specific human targets of its impacts and the occasions when it becomes material to concrete experiences of the members of the community. It was this method that disclosed that sense of injustice—rather than a purposed sense of justice—exerted vital influence within the operations of law."
Appropriateness of Self-Regulation

Because of the political and economic powers that come with self-regulation, many occupational groups desire self-regulatory status. It is important, therefore, to ask when is it in the public interest for the government to grant self-regulatory status to a particular occupational group. Whether the advantages outweigh the costs of granting self-regulation will depend upon the decision-making process within the relationships formed between individual consumers and practitioners and the possible biases in this relationship.99 Tuohy and Wolfson say that self-regulation is a dimension of professionalism. They contend that professionalism is best defined in terms of the relationship between the providers and the consumer of a service. Although professionalism may mean high levels of competence and altruism, professionalism is essentially a relationship which is established to ensure that specialized knowledge and competence is brought to bear in making certain decisions and to ensure that the client’s interests are fully protected in the making of these decisions. In other words, professionalism is an agency relationship. The client delegates to the professional the authority to bring specialized knowledge to bear in making decisions on behalf of the client. The professional acts as the agent of the client and is expected to make decisions in the best interest of the client.100

Professional agency relationships exist at two levels: between the individual professional and client, and between the professional group and the state. The latter relationship forms the basis of self-regulation. The professional group acts as the agent of the state in regulating its own members. The state delegates decision-making authority to the professional group, on condition


100 Ibid. at 112-113.
that this authority be exercised in the public interest. Self-regulation is appropriate under conditions analogous to those which influence an individual consumer to establish an agency relationship with an individual producer.\textsuperscript{101}

\textit{Professionalism at the Individual Level}

At the level of professional and client, a client delegates decision-making authority to a professional with the expectation that decisions will be made with specialized competence and with the client’s best interests in mind.\textsuperscript{102} Professional relationships are appropriately established where the client requires information which is costly to acquire and to do without.\textsuperscript{103} By transferring decision-making authority to a professional agent in such circumstances, the client reduces the likelihood that costly errors will be made, without having to acquire costly information themselves.\textsuperscript{104} For example, a patient would find that consulting their medical doctor regarding a physical ailment reduces the likelihood that a costly error in judgment would be made. It would also save the patient the high cost and inconvenience of personally attending medical school and undergoing clinical training in order to properly diagnose and treat their particular medical condition.

\textsuperscript{101} Professionalism, therefore, is a way of controlling the application of specialized knowledge. It is not the only mechanism. The government could choose to rely upon the market to protect the public or consider other modes of intervention. Tuohy and Wolfson, “Self-Regulation: Who Qualifies?,” supra note 72 at 115.

\textsuperscript{102} \textit{Ibid.} at 113.


\textsuperscript{104} \textit{Ibid.}
Also, for the agency relationship to function properly, it is imperative that only the best interests of the client are relevant to the professional’s decision-making process. When a client makes their own decisions, the client naturally promotes their own interests. However, when a client transfers their own decision-making authority to a professional, the interests of a client will be promoted only insofar as the new decision-maker assumes this responsibility.\textsuperscript{105} Ideally, a professional will give a client access to the specialized information necessary to make certain decisions by assuming the decision-making authority and the responsibility for promoting the client’s interests.\textsuperscript{106}

When making decisions on behalf of a client, a professional will tap three basic sources of information: the professional’s knowledge base, the client’s particular circumstances, and the client’s preferences or values.\textsuperscript{107} In practice, actual professional decision-making is likely to be less than ideal because of information transaction costs, mis-specification of information requirements, and conflicts of interest.\textsuperscript{108} Regardless, a professional may still be faithful to a client so long as only the client’s interests are promoted in making professional decisions. In almost every profession, however, the conflict of interest between the professional as an agent of a client and the professional as a provider of a service poses a central problem.

\textsuperscript{105} \textit{Ibid.}

\textsuperscript{106} Unless the client is the primary beneficiary of the professional relationship, the professed ideals of professionalism will, from the consumer’s perspective, be regarded as the empty rhetoric of self-serving professional groups.

\textsuperscript{107} Tuohy and Wolfson, “The Political Economy of Professionalism” supra note 103 at 50.

\textsuperscript{108} \textit{Ibid.} at 54.
Professionalism at the Group/State Level

On the professional group and state level, self-regulatory status is granted by the state to a professional group on the condition that this authority be exercised in the public interest.109 The professional group is charged to act as the state would act given relevant information and expertise.110 Professional groups, therefore, must always bear in mind that the power to regulate a professional group or service belongs to the state and continues to belong to the state even after regulatory authority has been delegated. In other words, “what the state giveth the state can take away.”111 Also, government decision-makers who promote consumer confidence as a motivator for law reform, must ensure that their decisions and policies will actually favour consumers interests. If consumer interests are compromised, the government will, in the eyes of consumers, be perceived as submitting to the lobbying pressures of professional groups or to be beholden to industry stakeholders.112 Ultimately, consumer confidence in a market sector

109 Before considering whether self-government is appropriate for a particular occupational group, the government must first determine whether any regulation is required for the area of activities and services in question. In other words, are there interests which are significantly affected by the transactions between practitioners and their clients which are not protected within the practitioner-client relationship in the absence of government intervention? If so, the government must determine the appropriate mode of intervention for the protection of these interests. If it is determined that some form of regulation is necessary, the next consideration is the conditions under which it is appropriate for the government to delegate regulatory authority to an occupational group. See Tuohy and Wolfson, “Self-Regulation: Who Qualifies?” supra note 72 at 115.

Regulation is not the only means available to the government to protect these interests. The government also has at its disposal judicial instruments, such as the definition of civil liability, and fiscal instruments such as subsidies for training or service. In some cases, these options may be preferable to or supplementary to regulation. The choice of what makes the appropriate mix of these policies requires an assessment of the nature of the unprotected interests and the organization of the industry in question. For example, deciding whether government intervention is required for the practice of dual agency in residential real estate transactions requires an assessment of the unprotected interests at stake and the organization of the real estate brokerage industry in British Columbia.


112 Law Reform Commission of Manitoba, Regulating Professions and Occupations, supra note 12 at 6.
depends greatly upon perceptions of fairness and justice in government policy and the operations of law.\textsuperscript{113} 

Self-regulation implies an agency relationship between the professional group and the government. It is appropriate under conditions analogous to those which influence an individual consumer in deciding to establish an agency relationship with an individual practitioner.\textsuperscript{114} The government, like the individual consumer, wishes to choose an option which maximizes benefits subject to cost constraints. However, like the consumer, the state may also have no measure of the benefits of the services provided. It has been observed that when the state is fundamentally ignorant of the benefits involved, the state's decision tends to turn upon estimates of cost.\textsuperscript{115} Estimates of cost include the costs of the information upon which decisions must be based, the costs of enforcing these decisions, and the probable costs of error in making these decisions without sufficient knowledge. Where estimates of regulatory authority are seen as reducing any of these types of costs without an offsetting increase in the others, it is often seen as the preferred option.\textsuperscript{116} The cost of information will, for a number of reasons, be viewed by the state as especially high where the distinctive competence of a professional group consists in the practical application of a specific body of knowledge and the regulation of that service activity requires, among other things, access to that body of knowledge. However, although it is important for the state to estimate and weigh how the costs of the information, error, and enforcement could be

\textsuperscript{113} Cahn, \textit{supra} note 95 at 14.

\textsuperscript{114} Tuohy and Wolfson, "Self-Regulation: Who Qualifies?" supra note 72 at 115.

\textsuperscript{115} \textit{Ibid.}

\textsuperscript{116} \textit{Ibid.}
Like individual consumers, the state must consider not only the costs reduced by delegating decision-making authority, but also the potential costs incurred through imperfections in the agency relationship. The interests which the state is seeking to protect may be misperceived by the profession or the profession may unduly promote its own private interests in making decisions. For example, a profession might define the exclusive scope of practice more broadly than is warranted by its specialized knowledge base. As a result, it may inhibit a rational and cost-effective allocation of functions in its sphere. A profession might also maintain the price of professional services at artificially high levels. It might also police individual agency relationships so as to only protect certain consumer interests such as quality, while ignoring other aspects of the consumer interest. It has also been long recognized that self-regulatory powers constitute a monopoly granted by society to an occupational group. This monopoly can be abused and the powers and privileges can be used to protect vested interests against the public will.

Therefore, an appreciation of the potential costs of delegating regulatory powers requires an understanding of the decision-making process within a particular agency relationship, and the biases towards which it is susceptible. The interests, and organizational framework of the occupational group must also be considered. In the next chapter, the relationship between the

117 Ibid.
118 Ibid. at 116.
119 Greenwood, supra note 27 at 49-50.
120 Tuohy and Wolfson, "Self-Regulation: Who Qualifies?" supra note 72 at 118.
realtor and the consumer and the strengths and weaknesses of this relationship will be examined.

The interests and organizational framework of the real estate industry will also be considered.
Chapter 2

The real estate broker is brought by [their] calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost.

(Cardozo, J., in Roman v. Lobe)\(^1\)

**Professionalism and the Residential Real Estate Industry**

**Introduction**

For over a century, realtors as an occupational group have striven for professional status following the traditional, learned professions, medicine, law, and engineering.\(^2\) To emulate the traditional professions, realtors have organized their own boards and associations, education and licensing programs, and codes of ethics.\(^3\) They have also promoted their concern for the public interest.\(^4\) In the early part of the twentieth century, they sought the aid of legislatures to bring a measure of respectability and professionalism to an occupation that had been largely unregulated.\(^5\) Overall, the goal of professionalism, and the broad use of the term, have been

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\(^2\) One commentator says: “From its inception in the late nineteenth century, modern state licensure has assumed a consistent pattern. Indeed, so ingrained is the self-regulatory licensing mode pioneered by the medical and legal professions that it has become synonymous with professionalization in the United States.” It was also noted that licensing is almost always sought by the profession and not by the public. See Stephen Rubin, “The Legal Web of Professional Regulation” in Roger D. Blair and Stephen Rubin, eds., *Regulating the Professions: A Public-Policy Symposium* (Toronto: DC Heath and Co., 1980) 29 at 35-6.

\(^3\) One commentator suggests that the early national real estate organization in 1913 was “the second trade or business group in the United States to follow the example of the professions of medicine, law, and engineering in formulating a code of ethics.” Pearl Janet Davies, *Real Estate in American History* (Washington, D.C.: Public Affairs Press, 1958) at 101; Also see Canadian Real Estate Association, *History of Real Estate*, online: http://crea.ca/public/crea/history.htm

\(^4\) Davies, *ibid*. 3 at 26 says that “from their very beginning real estate boards have, necessarily, concerned themselves as well with the ethics of real estate business, and that means protection of the public in its real estate transactions.”

recurring themes in the realtors’ efforts to cope with the problems of the real estate industry.\(^6\) Like other occupational groups who desire professional status, realtors have used professionalism to justify their activities, the industry organization, and their desires for self-regulation.\(^7\) For consumers in British Columbia, the issue of professionalism and the conduct of realtors’ in real estate transactions is a concern which has yet to be fully addressed.\(^8\) In March 2003, the government announced its plans to reform the *Real Estate Act* (the “Act”).\(^9\) Among its proposals for reform, the government proposed to delegate further regulatory power to the real estate industry. The industry welcomed greater independence from government and lobbied to be completely self-regulating. In May 2004, the government passed the *Real Estate Services Act* (the “new Act”), as replacement legislation for Part 1 of the existing *Real Estate Act*.\(^10\) Under the new Act, the Council will be a self-regulating body. Undoubtedly, the government believes the new Act will meet its objective of protecting the public and preserving its confidence by providing a “least cost” regime.\(^11\) However, to adequately protect consumers, the government should have considered both the potential monetary and non-monetary costs of delegating further

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7 The BCREA claimed that for the sake of consumers, and to ensure high levels of professionalism, the Real Estate Council of British Columbia had to be self-regulating. See BCREA, “*Real Estate Act on the Fast Track*” *The Bulletin* 26:9 October 2003 at 1 online: http://www.bcrea.bc.ca/publications/publications.htm.


9 *Real Estate Act*, RSBC 1996, c. 397.


powers to the real estate industry.

Real estate plays an important role in British Columbia’s economy. It accounts for approximately five percent of the province’s gross domestic product and over 30,000 jobs. In 2003, residential sales on the multiple listing service set a new record at $24.2 billion, with more than 93,200 properties sold in the province. A recent study indicates that, during the period between January 2000 and November 2002, the average housing transaction in Canada generated an estimated $19,800 of spending for general household purposes, moving, renovations, and transaction costs. In 2003, home-ownership costs in British Columbia were among the highest in Canada.

Although real estate transactions comprise a significant portion of most household budgets, real estate transactions for most consumers occur relatively infrequently and are rather complex. In general, consumers lack the time, knowledge, and resources to make a sale or purchase which is most advantageous to them. They also do not have the skills to negotiate and to articulate formally all relevant terms of a real estate transaction. As a result, many consumers enlist the services of a realtor for information, advice, and representation.

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12 Ibid. at 2.
13 BCREA, Fact Sheet at 1, online: http://www.bcrea.bc.ca/about/Factsheet.pdf
14 BCREA, Real Estate Act Reform Questions and Answers at 1, online: <http://www.bcrea.bc.ca/news_room/media_kits.htm>
15 Katherine Macklem, “Did Someone Say Bubble?” Maclean’s (10 May 2004) 30 at 34.
16 Ministry of Finance, supra note 11 at 1.
17 W. F. Foster, Real Estate Agency Law in Canada (Toronto: Carswell, 1994) at 2.
18 Federal Trade Commission, supra note 6 at 70.
However, when consumers lack the necessary knowledge to evaluate their realtor’s services, they are vulnerable to being exploited in what is often the largest, financial transaction of their lives. According to the Minister of Finance, exploitation of consumers by realtors or other real estate market participants results in an erosion of consumer confidence in the real estate market.

Given the nature of the real estate market, the government believed that the primary objective in reforming the Act was to maintain and enhance consumer confidence in the real estate sector by providing a “least cost” regime, promoting “competition among participants”, and providing a flexible, accountable regulatory framework. The government said that delegating further regulatory authority to the real estate industry would contribute to its objectives for reforming the Act. The BCREA claimed that in order to ensure high levels of professionalism, the real estate industry had to be self-regulating. According to the BCREA, its proposals reflected the will of the public and realtors. However, a recent survey commissioned by the BCREA indicated that 53% of those surveyed expressed concern about the common practice of dual agency. In British Columbia, realtors often act for both a vendor and

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20 Ministry of Finance, supra note 11 at 1.

21 Ibid.

22 Ibid. at 4.


24 BCREA, Real Estate Act Reform, One Profession - One Voice, Presentation to the Legislative Assembly, (April 7, 2003) at Executive Summary, online <http://www.bcrea.bc.ca/news_room/media_kits.htm>

25 Ibid.
a purchaser of the same property. According to the survey report “those with concerns fear that realtors will be in some type of conflict of interest, for example, seeking the largest commission possible or possibly putting their own interests before those of their clients.”26 Despite the results of this recent survey, both the government and the BCREA have been silent on the practice of dual agency.

To genuinely maintain and enhance consumer confidence in the real estate sector, the government must not acquiesce to the status quo and ignore the non-monetary implications of delegating governing authority to the industry.27 In particular, it must not ignore the public’s concerns about dual agency. The government should notice that, in addition to the public’s concerns, it has been widely observed by commentators that the practice of dual agency in residential real estate transactions represents a compromise to consumers and the professionalism claimed by realtors.28 Nonetheless, dual agency is still commonly practised by realtors and is

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26 CGT Research International, British Columbia Real Estate Association Public Consultation (February 27, 2003) online: <http://www.bcrea.bc.ca/news_room/media_kits.htm> at 13.

27 In general, no regulation should be implemented unless its benefits outweigh its costs. This means that the government must identify and weigh the potential effects and consequences of a particular form of regulation prior to deciding to introduce it. No action should be taken unless the regulation will substantially reduce the risk of harm to the public and unless decision-makers are convinced that the effect of implementing the regulatory form will result in greater benefits for the public than costs. These costs must also include potential effects which are beyond administrative savings. See Law Reform Commission of Manitoba, supra note 19 at 18-19.

endorsed by the real estate industry and the Council.\textsuperscript{29} Moreover, despite its position on dual agency, the industry's claimed that its professionalism made it trustworthy and deserving of self-regulatory authority.\textsuperscript{30} Understandably, there were many interests at stake in the government's reform of the Act. However, for the sake of the public interest, the government should have, before it considered delegating any more authority to the real estate industry, questioned whether the industry was representing the public interest and whether it could be trusted with more regulatory powers. To evaluate the government's recent decision to grant self-regulation to the real estate industry, this chapter will review the manner in which the real estate industry has organized itself, its interests, and its ideology. It will also analyse the nature of the relationships formed between realtors and consumers and consider the biases and interests which endanger these relationships. The practice of dual agency and its implications for consumers and the industry will be considered in greater detail in Chapter 3.

I. The Residential Real Estate Industry in British Columbia

A. Historical Underpinnings

In the 1850s, European settlers began to arrive in British Columbia in significant numbers. While many aboriginal groups remained resident on ancestral sites, European settlers gained extensive control over major aboriginal groups by the 1890s.\textsuperscript{31} Although the question of

\textsuperscript{29} Real Estate Council of British Columbia, \textit{Real Estate Salesperson's and Sub-Mortgage Broker's Pre-Licensing Course Manual} (Vancouver: Real Estate Division, Faculty of Commerce, University of British Columbia, 1999) at 12.8.

\textsuperscript{30} BCREA, \textit{supra} note 23 at 1.

aboriginal land claims is still unsettled, the principles of British/Canadian sovereignty assume that the first owner of all lands within the province, with some exceptions, was the government of British Columbia. Early settlers acquired land through preemption or purchase from the provincial government. In the late nineteenth century, real estate practitioners tended to function mostly as speculators. They purchased properties directly on their own account and then sold them to buyers. Eventually, they acted as auctioneers or middlemen, bringing vendors and purchasers together through exchanges modelled after early forms of stock exchanges. At that time, almost anyone could call themselves a real estate practitioner. When acting for a vendor, the job of the early practitioner was to do no more than to find a person willing to buy the vendor’s property. Vendors would consider prospective purchasers and decide for themselves whether or not to sign a contract with them. Typically, early practitioners only made rudimentary enquiries about a purchaser’s solvency or the likelihood that they would complete a deal. In general, early practitioners had no particular aptitude or facility for the task of assisting in real estate transactions. Some were barely able to draft a basic agreement which would entitle

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32 CCH Canadian Limited, *British Columbia Real Estate Law Guide, Vol. 1*, (North York: Ontario, 1997) at 3041. Exceptions include: areas which were owned or were acquired by the federal government as a result of railway grants, the reservation of National Harbours, and the creation of Indian reserve lands title to which is vested in the federal government as a result of a treaty between the federal government and the province of British Columbia.

33 Some mine owners were also land speculators and hotelmen. Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change*, (Vancouver, BC: University of British Columbia Press, 1997) at 207.

34 Harris, supra note 33 at 207; Also, see Davies, *supra* note 3 at 17.

35 The first local real estate board was formed in 1847 in New York. It was called the New York Real Estate Exchange. Until 1885, Davies says that “there was no organization of brokers or unity of real estate interests, outside of an auctioneers’ association in the old exchanges sales-room at No. 811 Broadway.” See Davies, *ibid* at 22-3.
them to a commission.36 Arrangements for commissions were usually oral and loose. Standard forms had not yet been created. There was frequent haggling over commissions, which might be as little as two percent. In the early twentieth century, realtors sought the aid of legislatures to bring a measure of respectability and professionalism to an occupation that had been largely unregulated.37 In 1922, the government of British Columbia passed its first real estate licensing laws.38

B. Industry Organization and Professionalism

For decades, the real estate industry in British Columbia has struggled for recognition as a profession by self-consciously undergoing the traditional process known as "professionalization."39 As discussed in Chapter 1, this includes: (1) establishing an association, (2) renaming the occupational group, (3) creating a university program or an affiliation with a university, (4) creating continuing education programs, (5) developing a code of ethics, and (6) campaigning or lobbying for self-government.

Recently, the BCREA argued that realtors have attained professional status, and that for the sake of consumers, and to ensure high levels of professionalism, they must be

36 Vaver, supra note 5 at 223 citing the commission documents produced by the real estate practitioner in Smith v. Barff (1912), 27 O.L.R. 276, 8 D.L.R. 995 at 998 (Div. Ct.)

37 Vaver, ibid. at 222.

38 Real-estate Agents' Licensing Act, S.B.C. 1920 c. 48 The goal of licensing regulation is to protect the public by homogenizing services offered in a particular area of activity by requiring a minimum acceptable level of competence from practitioners.

self-regulating. Are realtors professionals? What are the primary functions of realtors in residential real estate transactions? Is self-regulation for the real estate industry necessary for protecting consumers? Is it necessary for ensuring high levels of professionalism? To answer some of these questions, it would helpful to review the industry’s progress in organizing itself along the traditional process of professionalization.

1. Occupational Organizations and Associations

The first step in the process of professionalization is to establish a professional association, with definite membership criteria. According to Carr-Saunders and Wilson, “[A] profession can only be said to exist when there are bonds between the practitioners, and these bonds can take but one shape—that of formal association.” For the real estate industry in British Columbia, the most identifiable forms of occupational organization are the local real estate boards, the BCREA, and the CREA.

a. Real Estate Boards

To serve their common interests of effecting purchases and sales in real estate, realtors formed local real estate boards. The first real estate board in Canada appeared in 1888 in

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40 BCREA, supra note 23 at 1

41 Caplow, supra, note 39 at 139.


43 In the United States, the first local real estate board was the New York Real Estate Exchange which was formed in 1847. Until 1885, Davies says that “there was no organization of brokers or unity of real estate interests, outside of an auctioneers’ association in the old exchanges sales-room at No. 811 Broadway.” See Davies, supra note 2 at 22-3.
Vancouver. Today, there are 12 local real estate boards in British Columbia. These are associations of local realtors who work within certain geographical boundaries. The typical objectives of a board include the improvement of business standards, the establishment of cooperative information systems, and the updating of education for its members. Realtors must be members of a local real estate board to gain access to the lucrative Multiple Listing Service (the "MLS"). The MLS is an information exchange whereby members agree to share information about their listings and to split commissions with any cooperating realtor who finds a suitable buyer. Because of the substantial market share of the MLS, it has been recognized as an efficient “one-stop shopping” method of canvassing available opportunities. The MLS also publishes recent sales information. This data is used by realtors for property comparisons and pricing. The local real estate board which operates and controls the MLS is often the best or only source this data in a community. In addition to the MLS, another valuable service controlled by local real estate boards is the “lock box” system, through which keys are made available to realtors who wish to show homes.

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44 The Vancouver Board was active until the First World War, when operations were suspended. It resumed in 1919 and has continued since. See CREA, “History of Real Estate” online at: http://www.crea.ca/public/crea/history.htm.

45 Real Estate Council, supra note 28 at Pref. 10.

46 The earlier form of the MLS was the “photo-cop system.” This was introduced in 1955 by the Canadian Association of Real Estate Boards, the predecessor of the CREA. Today’s MLS was introduced in 1962.

47 Currier, supra note 28 at 661.

48 Federal Trade Commission, supra note 6 at 93.
b. Provincial Association

Today, the formal voice of the real estate industry in British Columbia is the BCREA.\(^49\) It represents the real estate industry on all provincial issues and government relations. Its members are the 12 local real estate boards throughout the province, representing 13,000 realtors. The BCREA’s primary function is to promote the interests of realtors by advocating for the group, seeking public support for realtors, promoting property rights and real estate-related issues, and ensuring ethics and professionalism through continuing education. It also provides its members with a communications network, continuing education courses, and standard forms.\(^50\)

c. National Association

The Canadian Real Estate Association (the “CREA”) is the national counterpart of the BCREA.\(^51\) It owns the Multiple Listing Service (MLS) trademark and has proprietary interest in the Realtor trademark. Both trademarks may only be used by members of the CREA who accept and respect its Code of Ethics. As the national trade association for realtors, its members include 10 provincial associations and one territorial association.

\(^{49}\) The BCREA was incorporated in 1976. In 1949, the BC Association of Real Estate Boards was established. This early organization eventually became: the BCREA, the Real Estate Institute of BC, and the Real Estate Council of BC. See Real Estate Council of British Columbia, supra note 29 at Pref. 9.

\(^{50}\) BCREA, Who We Are, online: <http://www.bcrea.bc.ca/about/who.htm> Also see Real Estate Council, ibid.

\(^{51}\) The first national association of realtors was formed in 1943. At that time, it was called the Canadian Association of Real Estate Boards. It eventually evolved into what is known today as the CREA. See CREA, supra note 44.
2. **New Occupational Designation**

The second step in the process of professionalization is a change of name to reduce identification with the previous occupational status, and to provide a name that could be monopolized. In an effort, to distance themselves from speculators and middlepersons, and to distinguish themselves as a service oriented group with professional attitudes and qualifications, the real estate industry adopted the title *Realtor*. Charles Chadbourn who is credited with coinining the term *Realtor* described his experience that led to the idea as follows:

"I was on my way to a meeting of our board in 1915. A street newsboy was peddling a sensational sheet which bore the headlines 'REAL ESTATE MAN SWINDLES POOR WIDOW.' A casual examination of the article showed that the 'real estate man' in question was not a member of our local real estate board, but was only an obscure speculator with desk room in some back office. Nevertheless, by his dishonour he had besmirched every 'real estate man' in Minneapolis, including all members of the board... Then the thought occurred to me 'Why should not real estate board members adopt some name to call themselves which would distinguish them from such rascals? Why could not we adopt a title which would single out our members, would imply that we are vouched for by our board as qualified and responsible, and would cement the confidence of the public in them?'"\(^5\)

At that time, a typical board bulletin of the Minneapolis Board read:

"Now that Realtor signs are on the doors, it will not be difficult for the buying public to recognize with whom it is doing business. There is now a separation of the sheep from the goats."\(^5\)

In short, the term *Realtor* was created to identify to the public which real estate practitioners have

\(^{52}\) Caplow, *supra* note 39 at 139.

\(^{53}\) Davies, *supra* note 3 at 110.

\(^{54}\) *Ibid.* at 113.
pledged to abide by a national code of business ethics. Only practitioners who are members of a local board having membership in the national association are permitted to identify themselves as a Realtor.55

3. Education and University Affiliation

The third step in the process of professionalization is the creation of a mandatory course of study at a university or in affiliation with a university. In 1950, the British Columbia government required realtors to pass qualifying examinations before it would issue a licence.56 In the late 1950s, the British Columbia Association of Real Estate Boards arranged for pre-licensing education and examinations of realtors to be handled by a division within the Faculty of Commerce and Business Administration at the University of British Columbia.57 Although pre-licensing education for realtors was not a university program of study, this administrative arrangement gave the industry the prestige of a university affiliation, however tenuous. Under the existing Act, anyone who applies for a licence is not required to have completed any other formal education, including secondary or elementary school.58 At present, it is unknown whether, under the Real Estate Services Act, the education requirements for obtaining a license will change.

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55 In April 1944, CREA adopted the use of the term Realtor. In the United States, the term “realtor” was adopted as a membership designation by the National Association of Real Estate Boards in 1917.

56 Real Estate Council, supra note 28 at Pref. 10.

57 Ibid.

58 B.C. Reg. 75/61, s. 4.01.
4. **Continuing Education**

   The fourth step in the professionalization process is the creation of continuing education courses and active encouragement for members to attend.\footnote{Manitoba Law Reform Commission, [*supra* note 19] at 5.}
   In British Columbia, continuing education for realtors is primarily offered by the BCREA. It believes that education continues to be ongoing responsibility for realtors even after they have completed their pre-licensing programmes and examinations.\footnote{Real Estate Council, [*supra* note 29] at Pref. 9.}
   Realtors are encouraged to continually update their knowledge in order to best serve consumers.\footnote{The BCREA expresses its mandate in the following statement:  
   "The BCREA is the voice of licensed REALTORS. The Association shall ensure the highest level of service to the public through appropriate standards of education and professional conduct; represent the interests and enhance the image of all licensees; and promote the enjoyment and ownership of real property." BCREA, [*supra* note 24].}
   To this end, the BCREA provides courses covering a range of topics from sales techniques to investment and financial management to legal updates. At present, continuing education is not mandatory for realtors. However, the BCREA believes that there is strong support for the concept of mandatory education.\footnote{BCREA, "Real Estate Act Reform Update" *The Bulletin* 26:2 (February 2003) at 1.}
   The BCREA argues that the Council must be self-regulating so that it may impose minimum practice standards and required continuing education.\footnote{BCREA, [*supra* note 24] at 1.}

5. **Code of Ethics**

   The fifth step in professionalization is the development and promulgation of a code of ethics which asserts the social utility of the occupation, sets up public welfare rationale, and
develops rules which serve as further criteria to eliminate the unqualified and unscrupulous. As a member of the CREA, the BCREA is obligated to subscribe to the Code of Ethics adopted by the CREA. According to the CREA, the purpose of the Code of Ethics is to bind realtors together in a common continuing quest for professionalism through ethical obligations premised on moral integrity, competent service, and dedication to the public interest. The preamble to the realtor’s Code of Ethics says:

Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization.

This statement underscores the principle that every person, agency, or corporation is responsible for the land. This means the protection of fundamental rights such as security of tenure and an incorruptible system of commercial law to enforce contracts. It also asserts the social utility of the services offered by realtors. Realtors are in the unique position of being directly involved in property brokerage, one of the basic aspects of land use. For realtors, professionalism and ethical behaviour mean cooperation and not competition with one another.

64 Caplow, *supra* note 38 at 139; One practitioner of the time warned that “the curse of the business were brokers who offer property without authority, not knowing whether they can deliver.” See Davies, *supra* note 3 at 114.


66 *Ibid*.


68 The second statement of the Code of Ethics says: “Through the Realtor, the land resource of the nation reaches its highest use and private land ownership its widest distribution. The Realtor is instrumental in moulding the form of his or her community and the living and working conditions of its people.” CREA, *supra* note 65.

69 CREA, *supra* note 65 at Articles 22, 23, 24, and 29.
6. Self-Government

Once a group is well-established, the final step in the traditional process of professionalization is to lobby legislators for self-government. At present, the BCREA has successfully lobbied the government for self-regulation and the industry will be self-regulating under the *Real Estate Services Act*. BCREA claimed that realtors are professionals and that in order to protect consumers and to ensure high levels of professionalism, the industry had to be self-regulating.

**Summary**

In terms of its organizational forms, the real estate industry has completed the traditional process of *professionalization*. It has a formal association, a trademarked title for its members, a university affiliated pre-licensing program, continuing education courses, a written code of ethics, and under the *Real Estate Services Act*, it will be self-regulating. As an occupational group, it does appear that realtors have organized themselves in a manner which emulates the traditional professions of medicine and law. However, although the real estate industry has, for decades, laboured to improve and organize itself for professional status, the reality is that whether any group is a profession is a question of definition and approach. Attempting to define a profession has been an endless pursuit for social scientists and sociologists.

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71 BCREA, *supra* note 24 at 1.

72 Caplow, *supra* note 38 at 139.

definition is not as simple as it might seem. As Eliot Freidson, a sociologist who has studied the medical profession explains:

First, the word is evaluative as well as descriptive. Virtually all self-conscious occupational groups apply it to themselves at one time or another either to flatter themselves or to persuade others of their importance. Occupations to which the word has been applied are thus so varied as to have nothing in common save a hunger for prestige. This state of affairs, has led Becker, for one, to claim that it is hopeless to expect the word to refer to more than a social symbol which people attach to some occupations but not to others. A second reason for the disagreement surrounding the meaning of the word lies in the strategies commonly underlying the process of definition. People frequently draw up definitions first by deciding that certain occupations “are” professions and then by attempting to determine the characteristics these occupations have in common. Since people do not agree on which occupations “are” professions – librarians? social workers? nurses? – their definitions vary with the occupations they include (and exclude) or else are alike on such an abstract level as to be virtually inapplicable to the task of distinguishing real professions.\(^\text{74}\)

Therefore, since professionalism is not easily definable, it may not be useful to think of professions as an observable and definable group of occupations. As mentioned in Chapter 1, Tuohy and Wolfson suggest that professionalism is best defined in relational terms, as characterizing a type of relationship between producers and consumers of services.\(^\text{75}\)

Professional relationships are appropriately established on the individual level between consumers and producers of services where the consumer requires information which is costly to acquire, and costly to do without and where the service provider acts as the agent for the consumer. By transferring decision-making authority to a professional agent in such circumstances, the consumer reduces the likelihood that costly errors will be made, without


having to acquire costly information themselves. To determine whether realtors are professionals from this perspective, one must examine the functions of the realtor in the realtor/consumer relationship, the nature of the realtor/consumer relationship, and the interests and biases which affect this relationship.

II. The Relationship Between Consumers and Realtors at the Individual Level

A. The Primary Functions of Realtors

In residential real estate transactions, realtors perform two primary functions, (1) the provision of information, and (2) representation.

1. Information Function

As providers of information, realtors gather information on available properties and interested purchasers. This information is then used to assist vendors and purchasers. Realtors assist vendors by providing services which maximize exposure for their properties. These services may include placing properties on the MLS, showing properties to their best advantage, holding “open houses”, and providing knowledge of the housing market. In addition to exposure, vendors rely upon realtors to determine the market value of their properties and to set an advantageous asking price.

Purchasers, on the other hand, require information about which properties are for sale and how the market values certain properties or particular characteristics of properties. For efficient

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76 Ibid. at 49.
access to information about suitable properties and market values, purchasers usually seek the assistance of realtors. In addition to providing information, realtors also assist purchasers by screening out properties which may not interest them. This requires realtors to be knowledgeable about the housing market and to be appreciative of the needs of each purchaser, in terms such as size, location, layout, or price. As a conduit of information, realtors perform a market-making function which matches suitable properties and purchasers to produce a sale.77

2. Representation Function

In addition to providing information, realtors also perform a representation function for consumers of their services. Although consumers may seek representation from others such as lawyers, the actual finding of a property for a purchaser or a purchaser for a property, is generally the domain of realtors.78 There are two aspects to the realtors' representation, namely, an advisory function and a negotiation function.

a. Advisory Function

As advisors, realtors process market information to help consumers understand real estate transactions and to make optimal decisions. This is done by educating consumers about the process of a transaction and the status and roles of the various parties in the transaction. To assist consumers in making optimal decisions for their particular circumstances, realtors give advice about the desirability of a purchase or sale, including information regarding the advantages and defects of a prospective property or transaction. Realtors also help consumers

77 Federal Trade Commission, supra note 6 at 70.
78 Ibid. at 26.
understand the costs, risks, and implications of their decisions. When it is necessary and appropriate, the realtor will advise clients when to seek the opinion of other advisors, such as property appraisers, mortgage brokers, land surveyors, property inspectors, or lawyers.

b. Negotiation Function

Helping a consumer negotiate the terms of a real estate transaction is considered an integral part of the realtor’s function.79 Realtors assist their clients in negotiations by determining the motivations of the other party, suggesting strategic terms, and giving recommendations on price. Realtors will also prepare written offers and draft contracts of purchase and sale on behalf of their clients.

B. The Nature of the Relationship

In summary, in residential real estate transactions, most consumers do not have the time, knowledge, or access to sufficient information to make purchase or sale decisions which are advantageous to them. Also, for most consumers, real estate transactions occur infrequently and often represent the largest, financial transactions of their lifetime. Realtors, on the other hand, have training, experience, and access to an information monopoly which make them uniquely positioned to offer assistance to consumers in real estate transactions. As such, consumers who plan to purchase or sell real estate, will often establish a relationship with a realtor to ensure that specialized competence is brought to bear in making decisions and to ensure

79 A Federal Trade Commission Consumer survey found that over 80 percent of both buyers and sellers agreed that the realtors involved in their transactions played a major role in negotiations. Ibid. at 78.
that their interests are fully protected in the makings of these decisions. Real estate transactions, for most consumers, are complex and represent a significant portion of their household budgets. Therefore, consumers rely and depend upon realtors for information, advice, and representation in negotiations and during most stages of the real estate transaction. In other words, a professional relationship is appropriately established between a realtor and consumer because information and representation in real estate transactions are, for most consumers, costly to obtain and costly to do without. Thus, from the view proposed by Tuohy and Wolfson, the realtor/client relationship on the individual level is an appropriately established professional relationship. Next, we will examine the biases and interests which affect the realtor/client relationship.

C. Interests and Biases Which Affect the Idealized Realtor/Client Relationship

According to Tuohy and Wolfson, it is paramount for the proper functioning of a professional relationship that the professional who is entrusted with decision-making authority only promotes the client’s interests. When a person makes decisions, we expect that those decisions will be in their interest. However, once the decision-making function is transferred to another party, the interests of the client will be promoted only insofar as the new decision-maker assumes this responsibility. In the realtor/consumer relationship, there is a properly

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80 Ibid. at 173.
81 Tuohy and Wolfson, supra note 75 at 49.
82 Ibid. at 49.
functioning professional relationship if the realtor only promotes the consumer's interests. However, there are a number of ways in which actual professional decision-making may diverge from the ideal. Tuohy and Wolfson identify these divergences as: information transaction costs, mis-specification of information requirements, and conflicts of interests.

1. Information Transaction Costs

As Tuohy and Wolfson note, information for professionals is not costless. This is true for realtors in the context of real estate transactions. Realtors, in their capacity as “information intermediaries,” invest time, effort, and money in advertising a property, listing it for sale on the MLS, and otherwise providing information to others about the property and its availability for purchase. Consumers and other realtors who receive this information might, in the absence of contractual restraint, contact the vendor and try to persuade the vendor to sell the property directly, cutting the listing realtor out of their commission. To deal with this “free rider” concern, realtors generally require vendors to sign a listing contract which provides that the realtor will be paid a commission should certain specific conditions be met. Today, the most common listing contract is the “exclusive right to sell” agreement. This contract guarantees the realtor a commission in the event that the property is sold by anyone. Most multiple listing services will only accept and disseminate information relating to exclusive right to sell listings.

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83 Ibid. at 55.
84 Federal Trade Commission, supra note 6 at 78.
85 Ibid. at 17.
2. **Mis-Specification of Information**

Tuohy and Wolfson observe that the kinds of information which a professional relies upon in their decision-making may not represent all relevant aspects of their client's interests. For example, information concerning the client's preferences might not be adequately considered by a professional in their decision-making. Tuohy and Wolfson suggest that this "mis-specification of information" occurs because a professional's definition of information requirements is often biassed by the context or framework in which the professional works. In the residential real estate industry, realtors rely upon the MLS to advertise their listings or to find suitable properties for their clients. In order to list a property on the MLS, realtors must enter into an exclusive right to sell listing agreement with the vendor. As a result of the MSL framework, most vendors are not informed by realtors that the primary object of the exclusive right to sell listing agreement is to protect a realtors' right to a commission. Vendors are also not informed that there are other options other than this form of listing agreement and that commission rates are negotiable. Vendors are also not aware that under the exclusive right to sell listing agreement, they have given consent for their realtors to grant subagencies to any

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86 Tuohy and Wolfson, *supra* note 75 at 55.


88 Seventy years ago the predominant form of contract between vendors and realtors was the open listing agreement. In an open listing, the realtor has less guarantee of eventually recovering any expenditures made in trying to sell a property. The vendor is permitted to use any number of realtors and only pays a commission to the realtor who finds a purchaser on the vendor's terms. The vendor also retains the right to sell the property themself without paying a commission. This relationship benefited vendors because it encouraged competition among realtors and allowed the vendor to make their own efforts to sell their own property. The open listing is the predominant form of contract used in the commercial real estate market. See Michael K. Braswell and Stephen L. Poe, "The Residential Real Estate Brokerage Industry: A Proposal for Reform" (1992) 30 Am. Bus. L.J. 271 at 271-2. Also see, Federal Trade Commission, *ibid.* at 30.

cooperating realtor who finds a suitable purchaser. 90 Likewise, potential purchasers of properties listed on the MLS usually do not know that when their realtor who has assisted them in finding a suitable property, is a cooperating agent under the MLS and shares a commission with a listing agent, that their realtor is under a legal duty to divulge their confidential information to the vendor. 91 Commentators and consumer advocates have observed that the cooperative framework of the MLS and its mandatory use of exclusive right to sell listing agreements, have created much confusion for consumers and realtors, and have made dual agency the most common relationship between realtors and consumers in residential real estate transaction. 92 Moreover, most realtors and consumers are usually not aware of the specific cost/benefit implications of the practice of dual agency. It is likely that the government decision-makers also lack an awareness of the specific problems created by dual agency. The impact of dual agency upon consumers and realtors will be discussed in greater detail in Chapter 3.

3. Conflicts of Interest

Tuohy and Wolfson say that the ideal professional relationship may also be negatively affected by conflicts of interest. In real estate transactions, a conflict of interest exists whenever a realtor is in a situation in which they are tempted not to act the best interests of their client. 93 It has been observed that although the relationship between a realtor and consumer is

90 Braswell and Poe, ibid. at 273.
91 One commentator has said, "As a result, the purchaser, without an attorney, is the least protected and most vulnerable party in a real estate transaction." See Joseph M. Grohman, "A Reassessment of the Selling Broker's Agency Relationship with the Purchaser, (1987) 61 St. John's L. Rev. 560 at 568 cited in Michael K. Braswell and Stephen L. Poe, ibid. at 278.
92 Kroll, supra note 27 at 382.
93 Stahl v. Miller (1918), 56 S.C.R. 312 at 322.
based upon the consumer’s expectations of trust and confidence, there are many opportunities in this relationship for realtor’s to extract illicit gains. In residential real estate transactions, conflicts of interest exist when realtors are engaged in: (a) self-dealing, (b) steering, (c) vest-pocket listings, and (4) double dealing.

a. Self-Dealing

Historically, self-dealing by realtors has been one of the real estate industry’s most prevalent consumer problems. Self-dealing occurs when a realtor purchases the listing of their client without disclosing the realtor’s interest in the purchase. Without proper disclosure, this practice is illegal and unethical because it violates the fiduciary and confidential nature of the relationship between a realtor as listing agent and a vendor. Specifically, this practice violates the realtor’s duty to make full disclosure of all relevant information. Full disclosure is required both where the realtor purchases a property directly from the vendor, and where the purchase takes place through an intermediary. Although the Act and real estate associations have

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94 Roman v. Lobe, supra note 1.

95 Federal Trade Commission, supra note 6 at 73. For example, in Henderson v. Thompson (1909), 41 S.C.R. 445, the appellant posed as a disinterested friend and induced the respondent homeowner to sell her house and lot to an undisclosed principal which the appellant represented as an agent. When the homeowner discovered that the undisclosed principal was in fact the agent’s wife, she refused to carry out the sale. The appellant sued for specific performance and succeeded at the trial level. The homeowner appealed this decision successfully at the Court of Appeal of British Columbia. Based upon the fiduciary nature of the agent’s role to the homeowner, the Supreme Court of Canada refused to grant the appellant specific performance.


97 Re Crackle et al. And Deputy Superintendent of Insurance and Real Estate (1983), 47 B.C.L.R. 256, 150 D.L.R. (3d) 371, 29 R.P.R. 276 (C.A.); leave to appeal to full Court of Appeal denied September 19, 1983, 32 R.P.R. 99). Also, section 28 of the Act provides that any purchasing realtor must advise any vendor of the fact they the realtor holds a license, and what the realtor intends to do with the property. This section applies regardless of whether the property is listed with the realtor’s company, with another realtor, or at all. However, mere compliance with the statute may not be sufficient to enable the realtor to enforce a contract, where the property is listed with the realtor or the realtor’s firm.
attempted to control this practice, the violation of the realtor’s duty to make full disclosure continues to be litigated.\(^{98}\)

**b. Steering**

"Steering" describes the practice of steering potential purchasers away from certain listings which may seem inappropriate for the purchaser in terms such as size, location, layout, or price. Steering may also occur when realtors give preferential showings of their own listings to potential purchasers. As will be discussed, in Chapter 3, this is often done by realtors to promote their own interests. Generally, in the steering process the realtor restricts the flow of information and reduces the consumer’s access to the market, and transactions that might interest the consumer may never come to the consumer’s attention.\(^{99}\)

**c. Vest Pocket Listings**

"Vest-pocket" listings are those which realtors deliberately withhold from advertising on the MLS, usually because the listing is undervalued and will sell quickly and easily.\(^{100}\) By not advising their client that the asking price is too low, and not listing the property on the MLS, realtors promote their own interests of making a quick, effortless sale without splitting a commission with a cooperating realtor. The practice of only placing high priced or difficult to sell listings on the MLS was one of the historic problems of the real estate industry.\(^{101}\) For this

\(^{98}\) CCH Canadian, *supra* note 32 at 497.


\(^{100}\) *Ibid.* at 74.

\(^{101}\) *Ibid.*
reason, many multiple listing services have created rules making it mandatory for members to submit listings of a certain type. However, despite these mandatory rules, the problem of vest pocket listings may still be difficult to detect. Unless consumers are better educated about what to expect from the services they receive from realtors, they may continue to leave matters like advertising and promotion of their property at the discretion of their realtor.102

d. Double Dealing

Double dealing is another term for the practice of dual agency by realtors. In this practice, realtors attempt to act for both parties to a transaction. Without proper disclosure, this practice is illegal. However, as will be discussed in Chapter 3, even if realtors meet statutory disclosure requires, the practice of dual agency in residential real estate transactions compromises consumers, contains inherent conflicts of interests, and may be found illegal at common law.

Summary

To summarize, there are three types of interests and biases which cause divergences from the ideal professional relationship between a realtor and a consumer: information costs, mis-specification of interests, and conflict of interests. In general, the interests and biases which may affect this relationship favour realtors at the expense of consumers. When practised by realtors, these divergences cause a restricted flow of market information from realtors’ to consumers. As a result, consumers receive less than optimal information and professional

102 One commentator has observed that the Consumer Reports phenomenon is evidence of the advantages of an informed consumer. Many people look to this magazine as well as other third party sources of information prior to making major purchases to determine quality and price of the different options. See Patricia A. Wilson, "Non-agent Brokerage: Real Estate Agents Missing in Action" (1999) 52 Okla. L. Rev. 85 at 99.
representation to protect their interests. At their worst, conflicts of interest such as self-dealing, vest-pocket listings, steering, and double-dealing result in realtors serving their own interests by abusing the confidence and trust of their clients. Therefore, the relationship between a realtor and a consumer on an individual level is an appropriately established professional relationship only insofar as the realtor behaves and practices in manner which promotes the best interests of a client. Next, we will turn to the real estate industry’s claims that self-regulation is necessary for the consumer interest and for the industry to ensure high levels of professionalism. Are these claims true?

III. The Relationship Between Realtors as an Occupational Group and the Government

As Tuohy and Wolfson have suggested, agency relationships between occupational groups and the government parallel those at the individual level. If the government determines that some form of regulation is needed to protect consumers who are vulnerable and unable to properly evaluate the costs and benefits of certain professional services, the government has the choice of exercising regulatory powers directly, or it may delegate its regulatory power to an institution representing the providers of the services themselves. Under what conditions will it be appropriate for the government to delegate regulatory powers to an occupational group?

According to Tuohy and Wolfson, self-regulation for an occupational group is appropriate under conditions analogous to those which influence an individual consumer in

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103 Tuohy and Wolfson, supra note 75 at 60.
deciding to establish an agency relationship with an individual practitioner. Therefore, as with an individual consumer, it is appropriate for the government to establish an agency relationship with realtors as a group if information is costly to obtain and costly to do without. In British Columbia, there has been an established licensing regime governing the area of real estate marketing. The administration of this regime was already partially self-governed by the industry. Under the Real Estate Services Act, the government has granted self-regulation to the industry believing that this would result in a more cost effective and efficient regulatory scheme. The government, like the individual consumer, desired an option which maximized benefits subject to cost constraints. However, the government as the embodiment of the public interest, should not have assumed that only administrative costs were at stake when regulatory powers are delegated an occupational group. For as mentioned earlier, the delegation of self-governing powers to an occupational group is only appropriate when practitioners have a demonstrated willingness to act in the public interest. It is only appropriate under conditions analogous to those which would influence a consumer to enter into a professional relationship with an individual practitioner. If consumers were informed of how the common practice of dual agency by realtors actually threatened their interests, it is likely that consumers would be reluctant and less inclined to rely upon a realtor for professional representation or advice. Likewise, if a government which embodies the public interest understood how the ideology and the organization of the residential real estate industry are designed to favour realtors at the expense of consumers, it should not entrust such a self-serving industry with more regulatory

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powers. Moreover, if government appreciated dual agency and its impacts, it would realize how it would be completely inappropriate to grant any further regulatory powers to an industry which endorses such a practice. Furthermore, it would abolish such consumer unfriendly practices. Chapter 3 addresses the issue of dual agency.
Chapter 3

“Double, double toil and trouble;
Fire burn and caldron bubble.”
(Macbeth, Act IV, Scene 1)

“Double, double agency trouble;
Brokers learn or lawsuits bubble.”

Dual Agency in Residential Real Estate Transactions

Introduction

In its brief to the government, the Law Society of British Columbia highlighted the recent survey conducted by the British Columbia Real Estate Association (the “BCREA”) which indicated significant public concern about the practice of dual agency by realtors. Concerns focussed on the conflicts of interest that might cause realtors’ placing their interests ahead of consumers. Despite these concerns, the government has been silent on the issue of dual agency and the industry endorses its continued practice. The government, for the sake of maintaining and enhancing consumer confidence in the real estate sector, should address the public’s concern over the practice of dual agency. To initiate further discussion on the issue of dual agency, this chapter will ask the following questions:

1. What is dual agency?
2. What are the duties owed by a realtor?
3. To whom are these duties owed?
4. How does dual agency arise in real estate transactions?


3 CGT Research International, British Columbia Real Estate Association Public Consultation (February 27, 2003) at 13 online: <http://www.bcrea.bc.ca/news_room/media_kits.htm>.
5. What is the current practice for resolving the problems of dual agency?
6. What are the costs and benefits of dual agency for consumers and realtors?

1. **What is Dual Agency?**

In British Columbia, the accepted legal definition of agency is the one proffered by Fridman:

> Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by making of contracts or the disposition of property.\(^\text{4}\)

An agency relationship may be created by an express or implied agreement. In general, an agent owes their principal the duties of carrying out their instructions, exercising care and skill, being honest, and avoiding conflicting interests.\(^\text{5}\) A dual agency exists when parties with adverse interests are represented in a transaction by the same agent.\(^\text{6}\) Because of the prospect of fraud, dual agency is generally considered improper and against public policy. Although the courts have criticized and questioned the legitimacy of dual agency, the practice of dual agency is not prohibited when proper disclosures are made.\(^\text{7}\) Thus, while undisclosed dual agencies are illegal, disclosed dual agencies are not.


The use of the term "dual agency" in real estate transactions assumes that a realtor is always in an agency relationship with a client. Technically, a realtor’s relationship with a client rarely includes all the elements of an agency relationship at law. Fridman explains that the essence of the agency relationship is the power to contract on behalf of a principal. Therefore, unless a vendor or a purchaser specifically empowers a realtor to enter into contracts on their behalf, a realtor, unlike an agent, does not have the power to enter into contracts on behalf of its principal. The use of the term “agent” does not create an agency relationship at law. Likewise, the listing of property with a realtor does not grant any authority to enter into contracts. Although a realtor’s relationship with a client rarely meets all the technical elements of an agency at law, it is currently assumed by the government and the industry that

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8 This assumption is held by the government of British Columbia. Section 4.01(e) of BC Reg. 75/61 says an applicant shall..."(e) have an understanding of the obligations between principal and agent, of the principles of real estate practice and canons pertaining thereto...” It is also held by the Real Estate Council of British Columbia. See Real Estate Council of British Columbia, Real Estate Salesperson’s and Sub-Mortgage Broker’s Pre-Licensing Course Manual (Vancouver: Real Estate Division, Faculty of Commerce, University of British Columbia, 1999) at 12.1. This assumption also exists among lawyers in British Columbia. See Susan Munroe, British Columbia Real Estate Practice Manual (Vancouver: Continuing Legal Education, 1995) at 1A.16. This assumption is also held by academics. See W. F. Foster, Real Estate Agency Law in Canada (Toronto: Carswell, 1994) at 3. Fridman, supra note 4 at 13. Chitty, supra note 5 at 31-002.

9 Fridman, ibid. at 22.

10 Richards, J. in Chadburn v. Moore, 61 L.J. Ch. 674 at 216-217 said: “Prima facie, the duty of a real estate broker, acting for an intending vendor, goes no further than to procure a purchaser. It is not his ordinary duty to make the contract when he has found the purchaser. An authority to do so, being unusual, must be specifically given”.

11 As said by Lord Herschell, “No word is more commonly and constantly abused than the word ‘agent’. A person may be spoken of as an ‘agent’, and no doubt in the popular sense of the word may properly be said to be an ‘agent’, although when it is attempted to suggest that he is an ‘agent’ under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading.” Kennedy v. De Trafford [1897] A.C. 180, 188.

agency law governs the relationship between realtors and their clients.\textsuperscript{13} Leading academics have also acquiesced to this assumption.\textsuperscript{14} As such, realtors are presently considered to be agents at law and capable of entering into dual agency relationships.

2. What are the Duties owed by a Realtor

As an agent, a realtor’s duties arise from various sources.\textsuperscript{15} Duties may arise from an express contract, an implied agency relationship, or the law of negligence. A realtor may also owe duties arising from the fiduciary nature of the agency relationship.\textsuperscript{16} As observed by Foster, the most onerous of the many obligations to which a realtor is subjected, and those most pertinent to the issue of dual agency, are a realtor’s fiduciary obligations.\textsuperscript{17}

Certain classes of relationships, including that of principal and agent, are assumed to give

\begin{itemize}
\item \textsuperscript{13} See note 7.
\item \textsuperscript{14} G.H.L. Fridman, “The Abuse and Inconsistent Use of Agency” (1982), 20 U.W.O.L. Rev. 23 at 40. Fridman says that to refuse to both to categorize realtors as agents and to apply agency principles in regulating their dealings with those who employ their services and third parties “seems to be inconsistent with the normal meaning and use of agency in commercial life.” This view has been adopted by Foster. See Foster, \textit{supra} note 8 at 5. Chitty regards the realtor as an example of incomplete agency. See Chitty, \textit{supra} note 5 at 31-002. Fridman suggests that the most satisfactory approach to adopt is to say that the agency of realtors is an anomalous type of agency, that has some practical utility, but does not conform to the normal commercial agency. See Fridman, \textit{supra} note 4 at 13.
\item \textsuperscript{15} For a detailed treatment of a realtors’ duties and liabilities to their principals see Foster, \textit{supra} note 8 at 211-268. Basically, an agent owes a principal the duty to obey instruction, to exercise care and skill, to avoid conflicts of interests, to not make a secret profit, and to fully disclose material facts which affect the value of the property. Where there is no express agency relationship, the realtor owes a duty to exercise care in giving advice to those reasonably relying on that advice. This is the principle arising from \textit{Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.} [1963] 2 All E.R. 575 (H.L.) and has been applied to realtors in \textit{Bango v. Holt}, [1971] 5 W.W.R. 522 (B.C.S.C.). In \textit{Bango v. Holt}, Ruttan, J. at 528 said, “It is well established in this province that a quasi-fiduciary relationship between potential purchaser and real estate company does arise under the doctrine of \textit{Hedley Byrne & Co. v. Heller & Partners}.”
\item \textsuperscript{16} \textit{Henderson v. Thompson} (1909) 41 S.C.R. 445.
\item \textsuperscript{17} Foster, “Dual Agency: Its Implications” \textit{supra} note 6 at 75.
\end{itemize}
rise to fiduciary obligations. In such relationships, there is a strong, but not irrebuttable, presumption that fiduciary obligations are present.\(^{18}\) Whether a realtor owes fiduciary duties to a party will depend upon the nature of the realtor’s relationship with that party.\(^{19}\) If the realtor is in an agency relationship with that party, the realtor will be presumed to be a fiduciary of that party unless it is proved otherwise. If the relationship between a realtor and a party is not one of agency, the realtor is not presumed to be a fiduciary of that party. Nonetheless in the absence of an agency relationship, a party to a transaction who places trust and confidence in a realtor, may establish that in the circumstances of that particular case, a fiduciary relationship did exist.

Generally speaking, a fiduciary relationship betokens loyalty, good faith and avoidance of a conflict of duty and self-interest.\(^{20}\) Therefore, a realtor with fiduciary duties must not act for both parties to a transaction, receive a commission or other remuneration from any person other than their principal, and use information acquired in the course of the agency “for any purpose likely to cause the principal harm or to interfere with their business.”\(^{21}\)

Although a realtor’s fiduciary duties appears to prohibit dual agency, there is an exception. A realtor may enter into a transaction which might conflict with their fiduciary duties to their principal, such as a dual agency, if the realtor makes full and proper disclosure of the material


\(^{21}\) Foster, “Dual Agency: Its Implications” *supra* note 6 at 75.
circumstances to their principal and their principal consents.\textsuperscript{22} In particular, a realtor must prove that the transaction was entered into “after full and fair disclosure of all material circumstances and of everything known to him respecting the subject matter of the contract.”\textsuperscript{23} In addition to full disclosure, an agent must also establish through “clear and affirmative proof,” that “the parties were at arm’s length” and, that after receiving the information, the principals “agreed to adopt what was done,” or what is proposed to be done by the realtor.\textsuperscript{24} The realtor’s duty to disclose is not confined to “those instances where the [realtor] has gained an advantage in the transaction or where the information might affect the value of the property, or where the information might affect the value of the property, or where a conflict of interest exists.”\textsuperscript{25} The realtor’s obligation to make full disclosure includes “everything known to [the realtor] respecting the subject-matter of the contract which would be likely to influence the conduct of their principal.”\textsuperscript{26} The duty of full disclosure has also been described as the duty to disclose “all material facts which might affect the value of the property.”\textsuperscript{27} The duty to disclose arises upon the creation of the agency relationship and continues until the transaction closes or the listing agreement terminates.\textsuperscript{28}

A realtor who breaches their fiduciary obligations will lose entitlement to their

\textsuperscript{22} William Bowstead, \textit{Bowstead on Agency} (London: Sweet Maxwell, 1985) at 164.

\textsuperscript{23} \textit{Charles Baker Ltd. v. Baker}, supra note 7 at 423.

\textsuperscript{24} \textit{Ibid.} at 423.


\textsuperscript{26} \textit{Canada Permanent Trust Co. v. Christie} (1976), 16 B.C.L.R. 183 (S.C.).


commission and be liable to their principal for any losses caused by the breach of the duty.\textsuperscript{29}

Ignorance on the part of a realtor of their dual agency or of the nature or scope of their obligations is no excuse. The fairness of a transaction is also not a defense.\textsuperscript{30} Where a realtor as an agent breaches the duty of loyalty:

The fairness of the transaction is immaterial; and the agent might be acting with the best of good faith; but it does not make any difference, because an agent will never be allowed to place himself in a situation in which, in ordinary circumstances, he would be tempted to do that which is not the best for his principal.\textsuperscript{31}

The reason for the law's strictness towards fiduciaries has been explained as:

It is in the interest of equity that persons upon whom members of the public rely for advice, knowledge and trust must act with the best good faith and if any dispute arises must be able to demonstrate unequivocally that they did so act. Any doubt must be resolved in favour of the person who relied upon them.\textsuperscript{32}

3. To Whom do Realtors' Owe Duties?

Because a realtor's fiduciary duties are owed to their principal, it is critical for a realtor to identify their principal or principals. Unfortunately, the answer to this critical question is not always readily apparent to a realtor.\textsuperscript{33} This is because the common law accepts that an agency relationship may exist by express agreement or by implication from the dealings of the parties.\textsuperscript{34}

\begin{flushright}
\textsuperscript{31}Ibid. at 322-23.
\textsuperscript{33}It has been observed that even experienced realtors are not fully aware of the agency relationships in real estate transactions nor can they be certain of the extent of their duties and liabilities. See Guy P. Wolf & Marianne M. Ennings, “Seller/Broker Liability in Multiple Listing Service Real Estate Sales: A Case for Uniform Disclosure” (1991) 20 Real Est. L.J. 22 at 31.
\textsuperscript{34}Garnac Grain Co. Inc. v. H.M.F. Faure & Fairclough Ltd., [1967] 2 All E.R. 353 at 358.
\end{flushright}
An agency relationship may be implied from the words and conduct of the parties even if its existence is denied.\textsuperscript{35} Therefore, realtors may not assume that because they have not entered into a written agreement with a particular party, that such party cannot be their principal. Similarly, realtors who have entered into an express agreement with one party to a transaction, may not simply conclude that they cannot be an agent of another party.\textsuperscript{36} Therefore, to correctly identify a realtor’s principal and those to whom fiduciary duties are owed, the facts and circumstances of each case must be examined in light of relevant case law.\textsuperscript{37} This is a difficult task for any person with a limited or superficial knowledge of agency law.\textsuperscript{38}

As mentioned earlier, a realtor may owe fiduciary duties in a non-agency relationship if a party alleges such and certain characteristics exist:

\begin{enumerate}
\item The fiduciary has the scope for the exercise of some discretion or power.
\item The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.
\item The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.\textsuperscript{39}
\end{enumerate}

The mere presence or absence of one or more of these characteristics will not necessarily be determinative of the issue.\textsuperscript{40} Given the law on implied agency relationships and fiduciary obligations, realtors have had difficulty in identifying their principals and have suffered the

\textsuperscript{35} Ibid.

\textsuperscript{36} Foster, “Dual Agency: Its Implications” supra note 6 at 81.


\textsuperscript{38} G.H.L. Fridman, “Establishing Agency” (1968) 84 Law Q. Rev. 224 at 225.


\textsuperscript{40} Lac Minerals Ltd. v. International Corona Resources Ltd., supra note 18.
consequences of breaching a fiduciary duty to a principal that they failed to identify.  

4. How Do Dual Agencies Arise in Real Estate Transactions?

In real estate transactions, dual agencies have arisen in multiple listing transactions, sub-agency scenarios, in-house transactions, listing agent only transactions, and transactions where the commission is entirely paid by the vendor.

a. Multiple Listing Service Transactions

The agency relationship between a realtor and a vendor is usually created in the form of a listing agreement. The multiple listing agreement is the most popular form of listing because it gives a property the broadest exposure to the market. In a multiple listing, the property is listed with a local real estate board which operates the multiple listing system (the "MLS"). The public only has access through realtors who are members of the MLS. In MLS transactions, the vendor authorizes their realtor (the "listing agent") to use the services of cooperating firms to market the vendor's property. The listing agent will then cooperate with other realtors who are members of the MLS. The realtor who finds the actual purchaser, is called the "selling agent." The commission is usually paid by the vendor and split between the listing agent and the selling agent. Under most MLS transactions, all cooperating firms and their selling agents are sub-agents of the


42 The multiple listing is a form of an exclusive listing. Exclusive listings must meet the writing requirements of section 57 of the Act: An agreement purporting to be or being an exclusive listing of real estate for sale, exchange, lease or rental is not valid unless
(a) it is in writing and a true copy is delivered to each party to it immediately after its execution, and
(b) it contains a provision that it will expire on a specified date.
See Appendix A for a copy of a standard form "Multiple Listing Contract".
listing agent and are, therefore, sub-agents of the vendor.\textsuperscript{43}

This legal reality has not always conformed with the expectations of purchasers or selling agents.\textsuperscript{44} In practice, a selling agent spends most of their time with a purchaser and rarely deals directly with a vendor. Purchasers typically consult with prospective selling agents during the purchaser's property search period. During this search period, the selling agent will, in order to find properties that suit the purchaser’s needs, elicit and become privy to a considerable amount of private information about the purchaser’s financial position and personal tastes. In light of the selling agent’s dealings with the purchaser, many purchasers believe that the selling agent is their representative.\textsuperscript{45} Unbeknownst to many purchasers and, frequently, selling agents as well, selling agents whom purchasers often regard as trusted advisors, owe a duty of disclosure to vendors.\textsuperscript{46} In particular, the selling agent must disclose to the vendor pertinent information concerning the purchaser.\textsuperscript{47} If the purchaser is prepared to offer a price higher than that accepted by the vendor,

\textsuperscript{43} Barrett v. Reynolds, supra note 28.

\textsuperscript{44} Commentators have for some time agreed that the traditional listing/selling realtor model created by the multiple listing service creates agency relationships that are counterintuitive to the parties and that, all too often, neither consumer nor realtor seems to know exactly what is expected or required within the context of the legal relationship. Ann Morales Olazabal, “Redefining Realtor Relationships and Responsibilities: the Failure of State Regulatory Responses” (2003) 40 Harv. J. On Legis. 65 at 66. According to J. Clark Pendergrass, confusion among purchasers and vendors as to the realtor’s role in residential real estate transactions is problem common to the state of Alabama and the rest of the United States. See J. Clark Pendergrass, “The Real Estate Consumer’s Agency and Disclosure Act: The Case Against Dual Agency” (1996) 48 Ala. L. Rev. 277 at 277; Also see Currier, supra note 41 at 662.

\textsuperscript{45} A survey conducted in three major Canadian cities, found that 40% of purchasers felt that the agent with whom they dealt represented them. B.J. Reiter, R. Prichard & Lauwers, Housing Transaction Costs in Canada (Ottawa: Department of Consumer and Corporate Affairs, 1982) cited in B.J. Reitter, Risk & B.N.McLellan, Real Estate Law (Toronto: Emond Montgomery, 1986) at 106.

\textsuperscript{46} The traditional subagency relationship has been described as “counterintuitive in light of actual experience.” See Matthew M. Collette, “Subagency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality” (1988) 61 S. Cal. L. Rev. 399 at 403.

\textsuperscript{47} Cuttell v. Bentz, supra note 29.
this too must be disclosed by the selling agent.\textsuperscript{48} Because an agency relationship may be implied from the conduct of the parties, selling agents have knowingly, and, in some cases, unknowingly created implied agency relationships with purchasers.\textsuperscript{49} As a sub-agent of the vendor, the selling agent who creates an implied agency relationship with a purchaser, also creates a dual agency relationship between the vendor and the purchaser.

b. Sub-Agent Scenarios

In non-multiple listing transactions, a vendor or a purchaser may also expressly or implicitly authorize a realtor to seek the assistance of other realtors. Just as in the multiple listing scenario, all cooperating realtors become the sub-agents of that particular vendor or purchaser. If a sub-agent also represents the other party to the transaction, a dual agency is created.

c. In-House Transactions

A dual agency occurs when both the purchaser and vendor are represented by realtors who are employed by the same real estate firm.\textsuperscript{50} When a consumer enters into an express or implied agency agreement with a realtor, the agreement is with the realtor’s employer, the real estate firm. This makes the entire sales staff of that real estate firm the agent of that consumer. Thus,

\textsuperscript{48} Canada Permanent Trust Co. \textit{v.} Hutchings (1977), 3 R.P.R. 211 (Ont. Co. Ct.)

\textsuperscript{49} Foster, \textit{Real Estate Agency Law in Canada}, supra note 8 at 48. One commentator has coined the term “accidental agency” to describe the situation when un-intending selling agents are deemed by the purchaser or the court to be the purchaser’s agent. See Roy T. Black, “Proposed Alternatives to Traditional Real Property Agency: Restructuring the Brokerage Relationship” (1994) 22 Real Est. L.J. 201 at 205.

\textsuperscript{50} This practice has also been referred to as a “designated agency”. This practice allows realtors to represent both vendors and purchasers at the same time without resolving the problems of dual agency. See Sandra Nelson, “The Illinois Real Estate ‘Designated Agency Amendment’: A Minefield for Brokers” (1994) 27 J. Marshall L. Rev. 953 at 987.
whether a purchaser and a vendor are represented by the same realtor, or different realtors working out of the same branch of the firm, or different realtors working out of different branches of the firm, the real estate firm is the agent of both the purchaser and the vendor, and a dual agency exists.\textsuperscript{51}

d. Listing Agent Only Transactions

When dealing with prospective purchasers, listing agents are susceptible to creating dual agency relationships. During their property search period, purchasers often contact listing agents directly to inquire about particular properties. When listing agents meet prospective purchasers who appear unrepresented, listing agents may be tempted to court the prospective purchaser into becoming the listing agent's own client. Since listing agents are already agents of the vendor, a listing agent's behavior towards a prospective purchaser may give rise to a dual agency. For as said earlier, the law may imply an agency relationship from the dealings between the parties. There is a financial incentive for listing agents to represent purchasers without involving selling agents. When listing agents represent both the vendor and the purchaser to a transaction, they earn both the listing and selling agents' shares of the commission. In the real estate industry, this is referred to as a "double-ender."\textsuperscript{52}

Selling agents who assist prospective purchasers in a property search, are also open to the same temptation. This arises when selling agents begin showing their listings to prospective purchasers. In this situation, selling agents are the same listing agents. Regardless of how contact

\textsuperscript{51} Foster, "Dual Agency: Its Implications" \textit{supra} note 6 at 86.

\textsuperscript{52} Real Estate Council, \textit{supra} note 8 at 12.8.
with a purchaser is initiated, there is a financial incentive for all realtors to represent both parties to a transaction without involving another realtor.

e. **Transactions Where the Commission is Entirely Paid by the Vendor**

There is authority to support the proposition that the person who pays a realtor’s remuneration is entitled to consider themself a principal of the realtor. Therefore, when a purchaser’s realtor is paid a commission by the vendor, with or without the purchaser’s consent, that realtor is deemed to be the vendor’s agent as well. This creates a dual agency relationship. Given that vendors customarily pay the commission in residential real estate transactions, it would be safe to say that dual agency is the most common form of agency relationship in the real estate industry.

5. **What is the Current Practice for Resolving the Problems of Dual Agency?**

As an attempt to address consumer confusion over the role of realtors in real estate transactions and to prevent undisclosed dual agencies, the government, in 1995, amended the *Real Estate Act*, introducing the requirement for realtors to disclose their agency status upon contact with a consumer. Section 36 of the Act says:

(1) Before assisting or representing any person in a real estate transaction, a licensee must disclose to that person
(a) the nature of the assistance or representation that the licensee will provide to the person,

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54 *Real Estate Act*, RSBC 1996, c. 397. The Act does not require written disclosure but the CREA makes written disclosure mandatory.
(b) whether the licensee is, or will be, acting in the real estate transaction on behalf of any other person, in any capacity,
(c) whether the licensee is, or will be, receiving remuneration relating to the real estate transaction from any other person,
(d) the nature of the licensee’s relationship with any other person from whom the licensee is, or will be, receiving remuneration relating to the real estate transaction, and
(e) any other particulars that may be prescribed by the Lieutenant Governor in Council.

(2) If, during the course of the real estate transaction in which a licensee is assisting any person, there is a material change in the facts that the licensee has disclosed under subsection (1) to that person, the licensee must disclose the change to that person immediately.

The Real Estate Services Act does not have a disclosure requirement. But, since the industry intends to continue the practice of dual agency, the Council, with its new powers to make rules concerning the conduct and business standards of realtors, may enact some disclosure rules. Also, the government may decide to enact a disclosure requirement in the regulations to the new Act.

To help realtors comply with the existing disclosure requirements, real estate boards in British Columbia have employed a three stage disclosure system. At the first stage, realtors present to consumers a brochure entitled “Working with a Real Estate Agent.”

This brochure explains basic agency concepts for both vendors and purchasers. At the second stage, realtors obtain written confirmation of their agency relationship. With a vendor, this is the listing contract or a written acknowledgment of sub-agency. Although purchasers rarely enter into written agreements with a realtor, realtors are encouraged to obtain written terms of their agency relationship with a purchaser. To assist realtors, local real estate boards have prepared standard

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55 See Appendix II for a copy of the brochure entitled “Working with a Real Estate Agent.”

56 See Appendix III for a copy of a standard form “Acknowledgment of Sub-Agency.”
form buyer’s agency agreements for realtors to use.\textsuperscript{57} In the absence of an written buyer’s agency agreement, realtors may ask the listing agent and the vendor to sign a form entitled “Acknowledgment of Buyer’s Agency.”\textsuperscript{58} In this form, both the vendor and the listing agent acknowledge and agree that the selling agent represents the purchaser and not the vendor in that particular transaction.

For in-house or listing agent only transactions, realtors ask the vendor and the purchaser to sign a standard form agreement entitled “Limited Dual Agency.”\textsuperscript{59} Under the Limited Dual Agency agreement, the realtor claims that they will deal impartially with both clients. However, the realtor’s fiduciary duty of full disclosure is modified so that the realtor is not required to disclose information in three areas:

- the price a client is willing to accept or pay;
- the motivation of either client; and,
- either client’s personal information.\textsuperscript{60}

In the final stage of disclosure, realtors are to verify the agency relationships on the Contract of Purchase and Sale. Special “agency disclosure” clauses are included in the standard form Contract of Purchase and Sale to allow realtors to specify for whom they act in the transaction.\textsuperscript{61}

In summary, the existing disclosure requirements and the practices of real estate boards have been intended to prevent the creation of undisclosed dual agencies. This is done by

\textsuperscript{57} See Appendix IV for a copy of a standard form “Exclusive Buyer’s Agent Contract.”

\textsuperscript{58} See Appendix V for a copy of the standard form “Acknowledgment of Buyer’s Agency.”

\textsuperscript{59} See Appendix VI for a copy of the standard form “Limited Dual Agency.”

\textsuperscript{60} Real Estate Council, \textit{supra} note 8 at 12.9.

\textsuperscript{61} \textit{Ibid.}
mandating disclosure and obtaining consent. In short, the practice of dual agency is permitted if disclosure requirements are met. In British Columbia, the current practice of dual agency is referred to as “disclosed dual agency.”

Since the purpose of real estate legislation is to protect consumers, an important question to ask is whether disclosure requirements, even if they are complied with by realtors, provide adequate protection to purchasers and vendors in disclosed dual agencies. As mentioned earlier, the public has recently expressed its concerns about the practice of a realtor acting for both parties to a transaction. If the public interest is to be served and consumer confidence in the real estate sector is to be preserved, the government should weigh the costs and benefits of permitting disclosed dual agencies in real estate transactions. The BCREA should also consider how the practice of disclosed dual agency affects the interests and reputation of realtors.

6. The Costs and Benefits of Disclosed Dual Agency for Realtors and Consumers

a. The Benefits for Realtors

In Canada, the real estate industry is dominated by a few large multi-branch real estate firms. If dual agency becomes prohibited, only one realtor from a particular real estate firm would be permitted to represent either the vendor or the purchaser. The practice of dual agency, on the other hand, increases the opportunities for other members of the same multi-branch firm to earn a

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63 Foster, “Dual Agency: Its Implications” supra note 6 at 80. Real Estate Council, supra note 8 at 9.13: The Standards of Business Practice of CREA permit a professional broker to act for two (or more) clients if the fact has first been fully disclosed in writing and the consent of everyone involved is obtained. It is easy to foresee situations in which even compliance with these disclosure requirements will not meet the high ethical standards expected of a professional.
commission from a particular transaction. Dual agency also permits realtors on the individual
level to earn a “double-ender”, that is, both the listing and selling agents’ shares of the
commission.

Second, dual agency allows realtors to provide less service for higher pay. Under the
standard terms of a limited dual agency agreement, a realtor is prevented from giving advice on
matters such as price, the motives of either party, or the personal circumstances of either party.
Yet, unless agreed otherwise, a realtor who acts as a limited dual agent is entitled to both the
listing and selling shares’ of commission. This means that the realtor is required to do less for
each party in exchange for a double-ender commission.

Third, the practice of dual agency offers realtors the advantage of alleviating the
adversarial air that potentially exists in a single agency arrangement.\textsuperscript{64} Transactional
relationships need not always be intense and contentious. Unlike litigation, transactional matters
present an opportunity for non-combative interaction with the common goal of reaching a
mutually acceptable deal.\textsuperscript{65} In order to quickly consummate a deal, it is in the realtors’ favour to
minimize differences between the parties. Proper advice and representation, on the other hand,
often involve emphasizing potential differences which may interfere with the quick
consummation of a deal.\textsuperscript{66}

\textsuperscript{64} Patricia A. Wilson, “Non-agent Brokerage: Real Estate Agents Missing in Action” (1999), 52 Okla. L.
Rev. 85 at 92.

\textsuperscript{65} \textit{Ibid.} at 92.

\textsuperscript{66} Los Angeles Regional Office, Federal Trade Commission, \textit{Residential Real Estate Brokerage Industry},
b. The Costs for Realtors

One of the terms of the standard form limited dual agency agreement is that the realtor will deal with both the purchaser and the vendor impartially. In practice, this is nearly impossible. Realtors represent parties whose interests are diametrically opposed during the negotiation process. For example, vendors seek the highest possible price, while purchasers want to buy at the lowest. Also, in real estate transactions, there are few, if any, terms and conditions (from price to date of vacant possession) that are pre-determined and unalterable. As Gregory, J. says:

How, in these circumstances, can one be the agent of both simultaneously and at the same time act faithfully toward each? To me it seems a difficult task, for what the agent does in the interests of one will almost certainly be against the interests of the other.

Further, it is naive and unrealistic to expect that realtors, as dual agents, will act impartially towards a purchaser and a vendor. That is, realtors will invariably disclose information, tender an opinion, or give advice to one party that is potentially prejudicial to the other. As case law indicates, realtors are just human and they possess their share of human weaknesses.

Second, the practice of dual agency undermines the professionalism which realtors seek.

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67 One commentator has asked if the realtor is to act in any dual capacity for a vendor and a purchaser, can the realtor be expected to segregate and properly serve such conflicting interests. "In short, is [the realtor] capable of conscious and controlled schizophrenia, or must his actions inevitably involve some conflict of interests?" See Arthur Stambler and Jacob A. Stein, "The Real Estate Broker—Schizophrenia or Conflict of Interests" (1961) 28 J.B.A.D.C. 16 at 18.

68 Wyne v. Martin, supra note 7 at 743.

69 Foster, "Dual Agency: Its Implications" supra note 6 at 78.

70 Wyne v. Martin, supra note 7 at 743.

71 Foster, "Dual Agency: Its Implications" supra note 6 at 91.
Among the elements of professionalism which realtors try to emulate are a “tradition of service” and adherence to a code of conduct. In their pre-licensing manual, a tradition of service is described as “an outlook which is essentially objective and disinterested, where the motive of making money is subordinated to serving the client in a manner not inconsistent with the public good.”

Their pre-licensing manual also says that “a real estate professional’s role is to provide impartial expert advice. If a real estate professional is placed in a position of conflict between the interests of two clients, he or she should resolve the matter by declining to act for one, or in extreme cases both, of the clients.” The Code of Ethics of the Canadian Real Estate Association (the “CREA”) says that realtors are to further their “continuing quest for professionalism through ethical obligations premised on moral integrity and competent service to clients and customers, and dedication to the interests and welfare of the public.”

If realtors genuinely wish to provide consumers with the level of professional service which they claim to provide, and seriously desire to further their quest for professionalism, realtors, as an occupational group, must seriously consider whether they should continue the practice of disclosed dual agency. This is especially true if realtors expect public support and confidence in the industry’s self-governing status. For as it has been observed that “[t]he public has become more dubious about the claim that professionals are solely concerned about the interests of their clients and patients and not in their own financial advantage.”


Another problem with the practice of disclosed dual agency is that it reinforces the erroneous belief among realtors that they are mere middlepersons or brokers to a transaction. A middleperson is a person who brings parties together in order that they may make their own contract without any further intervention or assistance. The law defines a broker as a middleperson. In their recommendations to the government, the industry indicated their preference to change the reference of realtors under existing the Act as “agents” to that of “brokers.” Their desired change has been reflected in the Real Estate Services Act. However, if realtors wish to regard themselves as brokers, they should reconsider their aspiration for professional status. As brokers, they are not professing to act as agents or to exercise their skill, knowledge or influence over the parties.

75 Canada Permanent Trust Co. v. Hutchings (1977), 3 R.P.R. 211 at 216 (Ont. Co. Ct.)

76 Foster, Real Estate Agency Law in Canada, supra note 8 at 5.

77 Story, in his work on Agency, 9th ed., at 31 describes a broker as:

...an agent, employed to make bargains and contracts between other persons, in matters of trade, commerce or navigation, for a compensation, commonly called brokerage.

...It has been already suggested that, a broker is for some purposes treated as the agent of both parties. But primarily he is deemed merely the agent of the party by whom he is originally employed; and he becomes the agent of the other party only when the bargain or contract is definitively settled, as to its terms, between the principals; for, as a middle-man, he is not intrusted to fix the terms, but merely to interpret (as it is sometimes phrased) between the principals.

Story’s definition was applied in Royal Securities Corp. v. Montreal Trust Co. (1967) 59 DLR (2d) 666; affd (1967) 63 DLR (2d) 15.

78 BCREA, Real Estate Act Reform, One Profession - One Voice, Presentation to the Legislative Assembly, (April 7, 2003) at 1 online <http://www.bcrea.bc.ca/news_room/media_kits.htm>

79 In Harry M. Fine Realty Co. V. L.J. Stiers, 326 S.W. 2d 392, 398 (Mo. Ct. App. 1959), one of the leading Missouri cases concerning dual agency, the realtor contended that he was a mere middleman and, therefore, was not subject to the rule that an agent cannot act for both parties. The court noted the general rule that if an agent is employed merely as a broker or a middleman for the purpose of bringing the parties together, has nothing to do with setting the price or the terms of the bargain, and has no adverse interests, he may act for both principles and bargain for compensation from both of them. If, however, the principal is entitled to rely on such a broker for their
themselves while they stand by indifferently. This is not the actual role or function of realtors in real estate transactions. As evidenced in the CREA’s Code of Ethics, realtors’ profess to have specialized skills and knowledge, and also profess to exercise their expertise and knowledge on behalf, and in the interests of consumers. Consumers who seek the assistance of realtors expect that realtors will exercise their expertise to the consumer’s advantage. When practising limited dual agency, realtors are effectively reducing themselves to brokers. Characterizing a realtor as a broker emphasizes the realtor’s objective to earn a commission in the transaction. Such a priority is not in keeping with their professed professionalism.

Third, the practice of dual agency exposes realtors to litigation. It is uncertain whether meeting statutory disclosure requirements, provides the realtor with protection from litigation. Statutory disclosure requirements were enacted in the United States earlier than in Canada. The American dual agency case *Dismuke Realty v. Edina Realty Inc.* has exposed the inadequacy of merely meeting statutory disclosure requirements. In that case, a realtor acted as a disclosed dual agent in an in-house transaction. The realtor complied with a Minnesota statute which mandated written disclosure of agency representation. Nonetheless, numerous vendors sought a

skill and judgment, he is not considered a mere middleman.

80 Foster, *Real Estate Agency Law in Canada*, supra note 8 at 5.

81 Canadian Real Estate Association, *Interpretations of the Code of Ethics and Standards of Business Practice* (rev. ed., 1991) at Article 2 says: "In entering into an agency agreement with the vendor of a property or a purchaser for a property the Member pledges to protect and promote the interests of his or her client..."

At Article 4, a realtor is told that: "The entering into an agency agreement imposes upon the Member the obligation of rendering a skilled and conscientious service..."


83 Currier, supra note 41 at 679.

84 *Dismuke Realty v. Edina Realty Inc.*, No. 92-8716 Minnesota District Court, Fourth Judicial District, June 17, 1993.
return of commission paid to the realtor's brokerage firm on the ground that the firm acted as an undisclosed dual agent. While the brokerage firm met the statutory requirements for disclosing dual agency, the Minnesota court held that meeting statutory disclosure requirements did not constitute informed consent. Since the Minnesota statute did not abrogate common law disclosure requirements, the common law requirements still had to be met and, in that case, they were not.

In British Columbia, common law disclosure requirements have not been abrogated by the existing Act or by the *Real Estate Services Act*. In comparison to common law requirements, the existing statutory disclosure requirements are more limited and less comprehensive.\(^{85}\) Thus, merely meeting statutory disclosure requirements may give realtors a false sense of security. Unless realtors regularly meet common law as well as statutory disclosure requirements before engaging in the practice of disclosed dual agency, realtors will be exposed to the risk of being sued for not obtaining informed consent from a consumer.

One of the possible consequences of realtors giving full and proper disclosure about dual agency is widespread, consumer rejection of dual agency. For, "after all, who with full knowledge of its advantages and disadvantages, as compared to individual representation, would want to be represented in the negotiation of a transaction, nearly all of the terms of which are open to negotiation, by an agent who represents the other party?"\(^{86}\)

Finally, if, in order to secure a disclosed dual agency relationship, realtors attempt to meet common law disclosure requirements, realtors risk engaging in the illegal practice of law. As one

\(^{85}\) *Real Estate Act, supra* note 54 at section 36(1).

\(^{86}\) Foster, "Dual Agency: Its Implications" *supra* note 6 at 90.
commentator argues:

Few attorneys themselves are experts in agency law. Even attorneys well versed in agency law who are now advising real estate brokers, often disagree on the meaning of current law and on what form of agency representation brokers should implement. As a result...brokers are clearly not qualified to explain to their clients the ramifications and effects of dual agency.\(^\text{87}\)

Although realtors often encourage consumers to seek legal advice as needed, they may be reluctant to do so when a potentially, lucrative dual agency arrangement is at stake. With detailed professional advice about the disadvantages of dual representation, consumers are very likely to reject a dual agency arrangement.

c. The Benefits for Consumers

Other than freedom of choice, the practice of disclosed dual agency has no actual benefits for consumers. Potential purchasers might think that the practice of sub-agency and disclosed dual agency benefits the purchaser because under those practises, it is the vendor who usually pays the commission for the transaction. If a purchaser arranges individual representation with a realtor, a listing agent or a vendor might refuse to give the purchaser's agent the selling share of the commission. If a commission split is not agreed upon, a purchaser would be responsible for paying a commission to the purchaser's realtor. Therefore, a money conscious purchaser might think that some or less representation from a sub-agent or a dual agent is worth the monetary savings. However, this would be a mistaken assumption. Most vendors add the cost of the

commission to the asking price of the property. As such, there are no real commission savings for a purchaser under a sub-agency or dual agency. Unless a vendor is being offered an exceptionally attractive purchase price on exceptionally attractive terms, the practice of disclosed dual agency also has no benefits for a vendor. Since a vendor usually pays the entire commission, why would a vendor, in an ordinary transaction, agree to less disclosure from a listing agent without any commission savings in return?

d. The Cost for Consumers

For consumers, the cost of engaging a realtor in a disclosed dual agency is not receiving advice or assistance on critical terms for a costly and significant transaction. Most consumers turn to realtors because they themselves lack knowledge or experience in real estate transactions. The sale or the purchase of a residential property is usually, for most consumers, the largest single personal transaction in a lifetime. Thus, consumers do not turn to realtors to mediate what realtors personally believe to be a fair or acceptable deal between the parties. In almost all cases, vendors look to their realtors to obtain the highest possible price and the terms which best accommodate their interests; whereas purchasers look to realtors to negotiate the lowest possible price and the terms which best accommodate their interest. The restrictions inherent in seeking to serve opposing parties in an even-handed and impartial manner would have the effect of emasculating a realtor. The realtor would be unable to utilize all their expertise and

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88 Wyne v. Martin, supra note 7 at 741.
89 Ibid. at 743.
90 Foster, "Dual Agency: Its Implications" supra, note 6 at 91.
knowledge for the benefit of either principal, let alone both.\textsuperscript{91} As mentioned earlier, “anything [the realtor] does in the interests of one will almost certainly be against the interests of the other.”\textsuperscript{92} Therefore, a realtor who engages in disclosed dual agency will not be able to ensure that the conflicting interests of purchasers and vendors receive the unbiased protection and representation they deserve and for which the consumer has paid.

Summary

The practice of dual agency favours realtors at the expense of consumers. This practice causes consumers to receive inadequate representation and advice in what is usually the largest, financial transaction of a lifetime. Although the practice of dual agency allows realtors to complete a transaction with less effort and for higher pay, it can also be argued that realtors pay for the price of this risky convenience at the expense of their public image, aspirations for professional status, and credibility for self-regulation. Unless the real estate industry concedes that dual agency is not in the interests of consumers, the government should reconsider its grant of self-regulatory powers to the Council. To assist the government in taking the path which is fair and just for consumers, the final chapter will offer some recommendations for reform.

\textsuperscript{91} \textit{Ibid.}

\textsuperscript{92} \textit{Wyne v. Martin, supra} note 7 at 743.
Conclusion and Recommendations

Indeed, it may be said that there is a logical inconsistency in ever giving self-governing powers to an occupational group which enjoys a state-created monopoly. One important rationale for creating regulatory structures in the first place is precisely because of a perceived need to remedy failures in the efficient or just functioning of a market economy. There is no more suspect situation than one in which economic monopoly combines with imperfect consumer information—as is commonly the case with professions. In such situations an additional grant of self-regulatory powers becomes all too reminiscent of the proverbial selection of a fox as a keeper of the chickens.

(Wes W. Pue)

CONCLUSION

Although the practice of disclosed dual agency compromises the interests of consumers and the professionalism of realtors, the government and the real estate industry have remained silent on the issue. For the sake of consumers, the government must weigh the costs and benefits of allowing disclosed dual agencies to be practiced in real estate transactions. In analyzing costs and benefits, the government must ensure that despite the competing interests of the real estate industry and other stakeholders, that the public interest is consistently the government’s paramount, overriding concern. Central questions that should be addressed are: Is there a manifest need on the part of the public for protection from the problems of dual agency in real estate transactions? If so, will prohibiting this practice provide an adequate level of protection for the public? Will it do so at a cost which is less than the benefits of protection? Most importantly, and most urgently, while the real estate industry endorsed the practice of dual agency, was it appropriate for the government to grant self-regulatory powers to the real estate


industry?

If consumers had the necessary knowledge and ability to assess the quality of a realtor’s services, they would be able to protect themselves from incompetent and unethical practices. In this scenario, the government would not need to regulate the activities of realtors because consumers and realtors would be able to achieve a fair bargain based on sufficient information. However, when consumers lack the necessary information to make an informed decision, they are vulnerable to practitioners who may overcharge for the quality of work being performed or who may perform their services improperly or unethically. In these circumstances, the government may choose to implement a licensing regime to solve the problem of a lack of consumer information. Although licensing regimes restrict market competition for an occupational service and usually result in higher prices for consumers, the benefit for consumers is an assurance of minimal levels of competence and standards of practice.³

Since most consumers cannot protect themselves in real estate transactions or evaluate a realtor’s services, the purpose of the Real Estate Act is to protect consumers from “unscrupulous or incompetent real estate practitioners.”⁴ Although realtors enjoy a monopoly under the licensing regime created by the Act and the administration of this regime has been partially self-governed by the industry, the Act was not created to confer professional recognition upon realtors. Its core purpose is consumer protection. Likewise, the government’s recent decision to grant full self-regulatory status to the industry under the Real Estate Services Act, is only


appropriate if consumers benefit. Regardless of its impact upon realtors, the only legitimate purpose of the new Act is consumer protection.

One of the flaws of the traditional approach to occupational regulation is the belief that it is appropriate and in the public interest to grant self-regulation to any occupational group which has attained certain “professional” attributes such as an association, educational programs, and written codes of ethics. This approach assumes that the only costs of regulation are administrative in nature. However, as discussed in Chapter 1, there are other serious costs to granting self-government to an occupational group. For example, one of the high non-administrative costs of self-government is its inherent conflict of interest. Practitioners usually have a financial interest in various aspects of occupational regulation. Ultimately, self-government should only be delegated to an occupational group if it extends a net benefit to the public.\(^5\) It should not be used to give status or benefits to practitioners.

As suggested by Tuohy and Wolfson, professionalism is best defined in relational terms. Professionalism is an agency relationship which exists at two levels: between the individual professional and client, and between the professional group and the state. On the individual level, the professional acts as the agent of the client and is expected to make decisions in the best interests of the client.\(^6\) Professional relationships are appropriately established where the client

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\(^5\) Manitoba Law Reform Commission, \textit{supra} note 6 at 23.

requires information which is costly to acquire and to do without. On the group and state level, the professional group acts as the agent of the state in regulating its own members. The state delegates decision-making authority to the professional group, on condition that this authority be exercised in the public interest. Self-regulation is appropriate under conditions analogous to those which influence an individual consumer to establish an agency relationship with an individual professional.

The relationship between a realtor and a consumer is an appropriately established professional relationship insofar as the realtor behaves and practices in a manner which promotes the best interests of a client. If consumers were informed of how the common practice of dual agency by realtors actually threatened their interests, it is likely that consumers would be reluctant and less inclined to rely upon a realtor for professional representation or advice. Similarly, if the government as the representative of the public interest, understood how the organization of the real estate industry and the practice of dual agency are designed to favour realtors at the expense of consumers, it would reconsider its grant of self-regulatory powers to the industry and prohibit the practice of dual agency in any form. This decision would be consistent with the government's professed regulatory objectives for reforming the Act and the purpose of the Act itself. It is further hoped that the BCREA and other stakeholders will also weigh the

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8 Professionalism, therefore, is a way of controlling the application of specialized knowledge. It is not the only mechanism. The government could choose to rely upon the market to protect the public or consider other modes of intervention. Tuohy and Wolfson, "Self-Regulation: Who Qualifies?" supra note 10 at 115.
costs and benefits of dual agency and, ultimately, support proposals which favor the public interest and professional integrity over self-interest and profit.

PROPOSALS FOR REFORM

1. Prohibit Dual Agency

To protect consumers from the problems of dual agency, the government should prohibit realtors from practicing any form of dual agency. This would mean that purchasers and vendors would receive individual representation from realtors. It would also put an end to in-house real estate transactions. This may pose significant challenges to the real industry that is centralized in a few, large multi-branch firms.9 Prohibiting dual agency would reduce the opportunities for members of the same large multi-branch firm to earn commissions from the same transaction. However, despite the implications to the real estate industry, this proposal protects consumers from being exploited by realtors.

2. Commissions paid by vendors and purchasers separately

Statutory disclosure requirements only address the problem of creating undisclosed dual agencies. What is forgotten is that in multiple listing transactions or other situations where vendors authorize the use of sub-agents, purchasers are usually unrepresented. Although purchasers may seek individual representation through a buyer’s agency arrangement, a dual

agency may still arise if the purchaser’s agent is remunerated by a commission split with a listing agent. The person paying the commission is entitled to consider themself a principal of the agent receiving the payment.\textsuperscript{10} Therefore, in order to ensure that purchasers receive meaningful representation and to avoid the unintended dual agencies in sub-agency or buyer agency arrangements, the customary practice of the vendor paying the commission should be reconsidered. This practice has made dual agency the most common form of relationship between realtors and consumers in residential real estate transactions.\textsuperscript{11}

If vendors were no longer expected to always pay the entire commission, vendors and purchasers would be required to pay their respective realtors separately. By paying their realtors separately, purchasers and vendors may become motivated to be more informed about the services offered by realtors. Consumers who are armed with information feel empowered to act on their own behalf or to work with other professionals.\textsuperscript{12} As a result, consumers may also discover the advantages of individual representation over dual representation. This proposal for reform should not pose great difficulty provided a reasonable attitude is adopted and careful thought given by the members of the real estate industry to available options.\textsuperscript{13} This idea was suggested over three decades ago by the British Columbia supreme court in \textit{Wyne v. Martin}:

\begin{itemize}
\item \textsuperscript{11} In commercial and industrial real estate transactions, vendors and purchasers are often more legally sophisticated and usually retain independent representation.
\item \textsuperscript{12} Patricia Wilson, “Non-Agent Brokerage: Real Estate Agents Missing in Action” (1999) 52 Okla. L. Rev. 85 at 101.
\item \textsuperscript{13} Foster, “Dual Agency: Its Implications” supra note 13 at 94.
\end{itemize}
The dollar result is the same in each case, but the agent knows who his principal or principals are and can be faithful in the performance of his duty to him or them.\textsuperscript{14}

A recent economics study observed that when purchasers received independent representation from a realtor, there was a reduction in the information available to vendors during the bargaining process. As a result, the bargaining power of purchasers increased. A shift to buyer's agency led to a significant decline in real estate prices for relatively expensive houses, while real estate prices did not significantly change in the market for relatively inexpensive homes. In both markets, the average time needed to sell a house fell after the change in agency regimes. The conclusion of this study was that a shift to purchaser's receiving independent representation improved the efficiency of the search process.\textsuperscript{15}

3. \textbf{Remove the Realtors' Financial Interest}

At present, realtors are usually compensated with a commission that is calculated as a percentage of the sale price. Even if vendors and purchasers receive separate representation from their own realtors, there still exists an inherent conflict of interest when commissions are based upon a percentage of the sale price. Both realtors involved in the transaction have a financial and vested interest in closing a transaction quickly, effortlessly, and at the highest possible price.\textsuperscript{16} Such an arrangement favors vendors and realtors at the expense of

\begin{itemize}
\item \textsuperscript{14} \textit{Wyne v. Martin}, supra note 14 at 745.
\item \textsuperscript{15} Christopher Curran and Joel Schrag, "Does It Matter Whom an Agent Serves? Evidence from Recent Changes in Real Estate Agency Law" (2000) 43 J. Law & Econ. 265.
\item \textsuperscript{16} Robert E. Kroll, "Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict" (1982) 12 Golden Gate U. L. Rev. 379. Also see, Douglas C. Kaplan, "Time to End 'Let's Pretend'" (1997) 71 Fla. L.J. 97 at 98; Wilson, \textit{supra} note 16 at 104-5.
\end{itemize}
unsuspecting purchasers. As such, it has been suggested that the most obvious alternative to a price-based commission is a flat fee commission.\textsuperscript{17} However, to avoid the creation of an unintended dual agency, a realtor’s compensation should be paid by vendors and purchasers separately, not by the vendor out of the sale proceeds.\textsuperscript{18}

4. Avoid New Labels that Permit Conflict of Interest

The appropriateness of applying agency law to the realtor/client relationship has been questioned.\textsuperscript{19} To deal with the incongruence between agency law and the behavior of realtors, American jurisdictions have considered re-labeling the status of the realtor. It has been suggested that the realtor’s role in a real estate transaction should be statutorily redefined to be an “independent contractor”.\textsuperscript{20} As an independent contractor, the realtor would be a self-employed, professional broker who earns a commission upon bringing together a willing vendor and willing purchaser.\textsuperscript{21} State legislatures have considered the idea of making a distinction between a dual agent and a broker by statutorily providing for a non-agency relationship such as a “transaction

\textsuperscript{17} Wilson, \textit{ibid.} at 105.

\textsuperscript{18} Wilson recommends that the flat fee commission be payable by the seller. However, to avoid the creation of a dual agency, this writer suggests that the flat fee commission idea be applied with both vendors and purchasers paying their realtors separately. \textit{Ibid.}


\textsuperscript{21} \textit{Ibid.}
broker.” A “transaction broker” assists the parties to a transaction without taking on an agency or fiduciary relationship. The transaction broker is neutral and serves neither as an advocate nor an advisor in the absence of a specific, written agency agreement. This is provided that the realtor immediately notifies the purchaser and the vendor of its status as a transaction broker. Although statutory schemes such as these expressly attempt to supersede the common law, the extent to which the courts will recognize a statutory preemption is questionable. For example, it cannot be assumed that a realtor who professes to be a “transaction broker” may not also become an agent or a fiduciary under the common law. In other words, a transaction broker seems to be a realtor acting as a dual agent in “transaction-broker clothing.” For a consumer, the problem of conflicts of interests is not removed by merely re-labeling the status of a realtor.

So long as realtors claim to be skilled and knowledgeable professionals who deserve consumer trust, they must avoid any relationship regardless of its name or benefits that gives rise to a conflict of interest. However, if realtors, in truth, only view themselves as brokers who desire to earn commissions by closing a deal, they should not profess to be professional advisors. Unless realtors agree to adopt a status and a manner of practice that are consistent with the public

22 Valerie M. Sieverling, “The Changing Face of the Real Estate Professional: Keeping Pace” 63 Mo. L. Rev. 581 at 585 Non-agency type relationships such as “transaction broker”, “contract broker”, “facilitator”, “independent contractor”, or “statutory broker” have statutory provisions in Alabama, Colorado, Florida, Minnesota, Montana, Tennessee, Vermont, and Virginia.

23 Ibid.


25 According to the BCREA, “[r]ealtors 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.” See BCREA, Real Estate Act Reform, One Profession - One Voice, Presentation to the Legislative Assembly, (April 7, 2003) online <http://www.bcrea.bc.ca/news_room/media_kits.htm> at “Who We Are”.
interest, the government should reconsider the monopoly favoring realtors under the existing Act and the Real Estate Services Act.

5. **Enact Conflict of Interest Rules for Realtors**

The government must enact strict conflict of interest rules which prevent a realtor from entering into a disclosed dual agency or any type of relationship that would give rise to a conflict of interest.\(^{26}\) Admittedly, the term “dual agency” is a misnomer for the problems in real estate transactions. Actually, there are three competing interests in the normal real estate transaction: the vendor’s interest in the highest price and best terms, the purchaser’s interest in the lowest price and best terms, and the realtor’s interest in closing the deal.\(^{27}\) In this pivotal position, there are no mandatory conflict of interest rules governing realtors who are themselves interested parties.

6. **Increase Consumer Representation on the Council**

Based on its “least-cost principle,” the government reduced the size of the Real Estate Council of British Columbia (the “Council”) from the existing 19. Under the Real Estate Services Act, the Council will be composed of 16 members; 13 elected by the industry; 1 property manager; and 2 non-industry members appointed by the government as public representatives. According to the government, this new model “combines the industry expertise of elected

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\(^{26}\) For examples of conflict of interest rules, the government may wish to refer to the various examples governing the legal profession in Canada and the United States.

\(^{27}\) Kroll, *supra* note 20 at 396; Wilson, *supra* note 16 at 104-5.
members with the broad consumer sensitivity of public appointees." However, if the government genuinely wants meaningful consumer representation on the Council, it is recommended that the government increase the number of public representatives on the Council to at least one third of the Council’s size. Such an action would speak volumes for the government’s regulatory objective of maintaining and enhancing consumer confidence in the real estate sector. Also, in its selection of public representatives, the government could further demonstrate its accountability to the public interest if it only considered candidates with proven track records and reputations for protecting consumer interests.

7. **Reconsider the Council’s Self-Regulatory Powers**

On the advice of the real estate industry, the government granted the Council full self-regulation under the *Real Estate Services Act*. The government has assumed that giving the industry more regulatory authority will result in greater compliance within the industry and better protection for consumers. Although increased responsibility for the Council might “generate a greater sense of ownership and enhanced compliance within the real estate industry,” it is doubtful whether the net benefit of this change will be consumer protection. Under the Act, realtors enjoyed a monopoly in assisting consumers in residential real estate transactions. Yet,

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30 Ministry of Finance, *supra* note 32 at 5.

even under the existing, partially self-regulating model, the industry endorsed the practice of dual agency despite the disadvantages posed to consumers. Because of the financial benefits of practicing dual agency, there is a built-in incentive for realtors to promote and to pursue dual agency arrangements whenever possible. If the real estate industry was endorsing a self-serving, unfair practice under the existing regulatory model, why would the government believe the industry would improve its behavior after receiving more regulatory authority? Under these circumstances, the government’s grant of self-regulatory powers to the industry is reminiscent of the proverbial selection of “a fox as keeper of the chickens.”32 The government must re-examine its reasoning or risk being perceived as less than committed to consumer interests. It is recommended that unless the industry acknowledges the unfairness of dual agency and rejects the practice altogether, the government should reconsider its grant of self-regulatory authority to the industry. Moreover, since the industry endorsed dual agency under partial self-regulation, it is recommended that the government reconsider the role of the Council and consider the advantages of direct regulatory administration by the government. Government decision-makers must constantly remind themselves that the paramount purpose of occupational regulation is to protect consumers not to reward practitioners or the industry. The power of self-government is a privilege based on public trust. Unless a self-governing group assiduously upholds its mandate of protecting the public, the government must intervene and perform this function.

32 Pue, supra note 1 at 294.
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MULTIPLE LISTING CONTRACT

BETWEEN:

NAME OF OWNER(S) / SELLER(S)

REAL ESTATE BOARD

MULTIPLE LISTING SERVICE*

APPENDIX I

LISTING AUTHORITY AND TERM.

A. The Seller hereby lists exclusively with the Listing Agent the property described in Paragraph 2 ("Property") until 11:59 p.m. on __________, unless renewed in writing.

B. The Seller hereby:
   i. authorizes the Listing Agent to obtain any and all information concerning the Property from any person, corporation or governmental authority, including the Columbia Towing Assessment Authority;
   ii. agrees to give the Listing Agent full opportunity to advertise the Property and to show it to buyers during reasonable hours, and
   iii. agrees to allow the Listing Agent to place "For Sale" and "Sold" signs upon the Property and to allow Co-operating Agents (as hereinafter defined) to show the Property to prospective buyers.

PROPERTY.

A. Property:

   UNIT NO. ____________________________________________
   ADDRESS OF PROPERTY ____________________________________________
   CITY/TOWN/MUNICIPALITY ____________________________________________
   POSTAL CODE ____________________________________________
   P.O. BOX __________

LEGAL DESCRIPTION

3. TERMS OF SALE.

   LISTING PRICE ____________________________________________
   POSSESSION ____________________________________________
   TERMS ____________________________________________

OTHER TERMS

4. LISTING SERVICE AND CO-OPERATING AGENTS. The Seller authorizes the Listing Agent:

   A. To list the Property with the Multiple Listing Service* of the Board or any other Real Estate Board or Association in British Columbia that the Listing Agent selects and has access to and to cooperate with other agents acting for a prospective buyer or, with the written consent of the Seller, as a sub-agent of the Listing Agent ("Co-operating Agents");

   B. To publish in the Multiple Listing Service* of the Board or of any other Board or Association that the Listing Agent selects and has access to, the information contained in this Contract, the Data Input Form (when signed by the Seller and the Seller's Property Condition Disclosure Statement (when attached and signed by the Seller), and the sale price of the Property once an unconditional offer has been received.

   C. To allow a salesperson authorized by the Listing Agent to make agency disclosures required of the Listing Agent.

5. LISTING AGENT'S REMUNERATION. The Seller agrees:

   A. To pay to the Listing Agent a gross commission of
      i. the sale price of the Property, plus applicable Goods and Service Tax and any other applicable tax in respect of the commission (commission + tax = gross commission) if:
         i. a legally enforceable contract of sale is entered into, or
         ii. a legally enforceable contract of sale is entered into and the Seller is entered into at all time in respect of which refusal was made by the Listing Agent in an effective cause or
         iii. a person is introduced to the Property during the period of this Contract who is ready, willing and able to purchase at the terms of the Contract or
         iv. terms, other than terms which are set by the Seller, whether or not such person or as introduced by the Listing Agent or by any other person or by the Seller.

   B. The remuneration earned by the Listing Agent shall be payable on the earlier of the date the sale is completed, or the completion date or where no contract of sale has been entered into 4 days after written demand by the Listing Agent.

   C. That all expenses incurred by the Listing Agent in obtaining the Buyer for the Property the listing Agent will offer to each Co-operating Agent a portion of the Listing Agent's commission in the amount of

   D. The sale price of the Property, plus applicable Goods and Services Tax and any other applicable tax in respect of that portion of the commission.

6. ASSIGNMENT OF REMUNERATION. The Seller hereby irrevocably:

   A. Assigns to the Listing Agent from the proceeds of sale of the Property, the amount of remuneration due to the Listing Agent and authorizes the Listing Agent to retain from the deposit monies the amount of the Listing Agent's remuneration;

   B. Agrees to sign, either in the Contract of Purchase and Sale or in a separate document, an irrevocable authority directing the buyer and the lawyer or notary public acting for the buyer or Seller to pay to the Listing Agent the remuneration due to the Listing Agent or net amount remaining after the deposit monies held in trust have been credited against the remuneration due to the Listing Agent.

7. THE LISTING AGENT AGREES AS FOLLOWS:

   A. To act only as the agent for the Seller with respect to the Property except where the Seller consents to limited dual agency (see 10 below);

   B. To give the Seller all necessary information about the Property to Co-operating Agents;

   C. Not to accept payment from the buyer without the knowledge and consent of the Seller.

8. THE SELLER AGREES AS FOLLOWS:

   A. To promptly advise the Listing Agent of all enquiries from the Property of the Listing Agent, and to deliver to the Listing Agent all offers to purchase which may be received during the period of this exclusive Contract or arising from it.

   B. To accept an offer made during the term of this Contract by a person ready, willing and able to purchase on the terms set out in this Contract and to complete the transaction by executing an Agreement for Sale or good and sufficient Transfer.

9. THE SELLER ACKNOWLEDGES AND AGREES THAT:

   A. It is not a breach of the Listing Agent's duty to the Seller if the publication of authorized information relating to the Property by the Multiple Listing Service results in the information becoming known to members of the public, including a prospective buyer and agents of a buyer.

   B. It is not a breach of duty to the Seller for the Listing Agent to fail or show property of or to have agency relationships with, other sellers;

   C. It is not a breach of duty to the Seller for the Listing Agent to have agency relationships with buyers;

   D. The Listing Agent will not be required to disclose to the Seller confidential information obtained through any agency relationship;

   E. An agent acting only for a foreigner or for a foreigner or for the buyer of the Property is a non-resident of the listing Agent must comply with the Income Tax Act of Canada before the sale of the property's property can be completed.

10. LIMITED DUAL AGENCY

   A. If the Listing Agent is also the agent of a buyer who becomes interested in the Property, the Listing Agent will seek the written consent of the Seller and the Buyer to continue to act as their limited dual agent to facilitate the sale of the Property.

   B. Where the Seller and the Buyer have consented to the Listing Agent acting as their limited dual agent the Listing Agent's duties will be modified by the limitations described in the Brochure published by the British Columbia Real Estate Association entitled "Working with a Real Estate Agent".

11. MISCELLANEOUS PROVISIONS

   A. "Sale" includes an exchange and "sale price" includes the value of property exchanged.

   B. "Possession" of any property or possession of any part of the property or possession of any term of the contract includes the period or date of expiration of any written extension.

   C. Interpretation of this contract and all matters concerning its enforcement by the parties shall be governed by the laws of the Province of British Columbia.

   D. The parties acknowledge that this contract fully sets out the terms of the agreement between them.

   E. This contract shall be binding upon and benefit not only the parties but their respective heirs, executors, administrators, successors and assigns.

   F. This contract shall automatically end if the Listing Agent ceases to be licensed under the Real Estate Act, R.S.C. 1979 chapter 356.

   G. Property may include a leasehold interest, the sale of shares in an incorporated Company or a manufactured house, plus any other property designed by the seller in the data input form or attachment attached.

   H. In consideration of the Board disseminating the above information as aforesaid, the undersigned sellers and listing agent do hereby assign to each Board to whom all their right and interest herein and to the information relating to the Property contained in this Listing Contract, including all copyrights, rights to copyright, and all other proprietary rights thereto.

12. ENTIRE AGREEMENT - THIS LISTING CONTRACT MEANS AND INCLUDES THIS AGREEMENT, THE DATA INPUT FORM (WHEN SIGNED BY THE SELLER) AND SELLER'S PROPERTY CONDITION DISCLOSURE STATEMENT (WHEN ATTACHED AND SIGNED BY THE SELLER). The Seller acknowledges having read and understood this Contract and agrees that it actually describes the agreement with the Listing Agent and that a copy of it has been received by the Seller the date.

SIGNED, SEALED AND DELIVERED THIS ____________ OF ____________, 19__

LISTING AGENT ____________________________
Per: ____________________________
SALES PERSON ____________________________
Per: ____________________________

SELLER'S SIGNATURE ____________________________
Witness to Seller's Signature ____________________________

POSTAL CODE ____________________________
AGENCY ACKNOWLEDGEMENT

The Seller has an agency relationship with                                  (Agent) and
                                                                                       (Salesperson).

The Buyer has an agency relationship with                                  (Agent) and
                                                                                       (Salesperson).

The Buyer and Seller have consented to a limited agency relationship with              (Agent),
                                                                                       (Salesperson)
and                                                                                       (Salesperson) having signed a Limited Dual Agency Agreement dated _________________________, 19

YOUR RESPONSIBILITIES
AS A BUYER OR SELLER

As a buyer or a seller, you should:

• Carefully read all documents and understand what you are signing.

• If you need special or expert advice, seek other professionals such as lawyers, notaries, accountants, home inspectors, contractors, engineers and surveyors.

DEFINITIONS

The Agent is the real estate company under which the individual salesperson who is representing you is licensed.

REaltor, is often used interchangeably with Licensee, Real Estate Agent or Salesperson and in B.C., is licensed under the Real Estate Act. A REALTOR can use the term REALTOR if he/she belongs to a local board or association that enforces a strict code of ethics.

The Buyer is often referred to as the Purchaser.

The Seller is often referred to as the Vendor.

The Principal is someone who has engaged an Agent to act for and on his or her behalf either to buy or sell a home.

This pamphlet has been designed to explain various types of agency relationships and to help you understand what it all means. If you are still unclear about these concepts, feel free to seek legal counsel.
YOUR RELATIONSHIP WITH A REALTOR

Buying or selling a home is probably the most important and potentially rewarding financial transaction you'll make in your life. So it's a good idea to take a moment and consider the kind of relationship you might be entering into with a REALTOR. The more you know, the more satisfied you'll be with the results.

I acknowledge having received and read the brochure "Working With A Real Estate Agent." I understand the various types of relationships that may occur between myself and a REALTOR. I further understand that I will be signing additional documentation acknowledging the type of agency that I receive.

SALESPERSON

AGENT

SIGNATURE: [Please also print name]

SIGNATURE: [Please also print name]

DATED

THE AGENCY RELATIONSHIP

REALTORS work within a legal relationship called agency. The agency relationship exists between you, the principal, and your agent, the company under which the individual salesperson who is representing you, is licensed. The essence of the agency relationship is that the agent has the authority to represent the principal in dealings with others.

Agents and their salespeople are legally obligated to protect and promote the interests of their principals as they would their own.

Specifically, the agent has the following duties:

1. Undivided loyalty: The agent must protect the principal's negotiating position at all times, and disclose all known facts which may affect or influence the principal's decision.
2. To obey all lawful instructions of the principal.
3. An obligation to keep the confidences of the principal.
4. The exercise of reasonable care and skill in performing all assigned duties.
5. The duty to account for all money and property placed in an agent's hands while acting for the principal.

You can expect competent service from your agent, knowing that the company is bound by ethics and the law to be honest and thorough in representing a property listed for sale. Both buyer and seller can be represented by their own agents in a single transaction.

DUAL AGENCY

Dual agency occurs when a real estate agent is representing both buyer and seller in the same transaction. Since the agent has promised a duty of confidentiality, loyalty and full disclosure to both parties simultaneously, it is necessary to limit these duties in this situation, if both parties consent.

If you find yourself involved in a dual agency relationship, before making or receiving an offer both you and the other party will be asked to consent in writing to this new limited agency relationship.

This relationship involves the following limitations:

a) The Agent will deal with the Buyer and the Seller impartially;
b) The Agent will have a duty of disclosure to both the Buyer and the Seller except that:
   i) the Agent will not disclose that the Buyer is willing to pay a price or agree to terms other than those contained in the Offer, or that the Seller is willing to accept a price or terms other than those contained in the Listing;
   ii) the Agent will not disclose the motivation of the Buyer or the Seller to sell unless authorized by the Buyer or the Seller;
   iii) the Agent will not disclose personal information about either the Buyer or the Seller unless authorized in writing;
c) The Agent will disclose to the Buyer defects about the physical condition of the Property known to the Agent.

WHEN THERE IS NO AGENCY RELATIONSHIP

You may also choose to use the services of a REALTOR without having any kind of agency relationship. This might occur, for example, when you are being shown a property by the seller's agent.

The REALTOR you choose to work with in this manner has a legal and ethical duty to provide you with accurate, honest answers to your questions and can provide all these services:

- Explain real estate terms and practices
- Provide and explain forms used
- Assist you in screening and viewing properties
- Inform you of lenders and their policies
- Identify and estimate costs involved in a transaction
- Assist you in establishing your range of affordability
- Prepare offers or counter-offers at your direction
- Present all offers promptly

A REALTOR who is not your agent cannot:

- Recommend or suggest a price
- Negotiate on your behalf
- Inform you of his/her principal's top/bottom line
- Disclose any confidential information about his/her principal unless otherwise authorized

You should not provide a REALTOR who is not your agent with any information that you would not provide directly to his or her principal.
Pursuant to a Listing Contract between the Seller and the Listing Agent dated 19
authorizes and consents to the Listing Agent appointing the following to act as a Sub-agent of the Listing Agent.

Name of Sub-agent

Address

Name of Salesperson

for the purpose of transacting a sale of the Property to:

Name of Buyer

DATED AT day of 19

WITNESS: SELLER

WITNESS: SELLER

The Buyer acknowledges that the Sub-agent is not an agent for the Buyer and does not have an agency relationship with the Buyer.

Acknowledged this day of 19

BUYER
EXCLUSIVE BUYER'S AGENT CONTRACT

BETWEEN:

[Name of Buyer]

AND:

[Name of Buyer's Agent]

DATED: ______, ______

1. TERM OF CONTRACT
   The Period of this Contract shall begin at 11:00 A.M. on ______ ______, ______.

2. THE BUYER AGREES
   A. The Buyer agrees to be the exclusive agent of the Buyer's Agent and to pay the Buyer's Agent the sum of $______ per week, giving the following terms and conditions:

3. THE BUYER'S AGENT AGREES
   A. The Buyer agrees to

4. BUYER'S AGENT'S REMUNERATION
   B. The Buyer agrees to pay the Buyer's Agent the sum of $______ per week.

5. THE BUYER ACKNOWLEDGES AND AGREES THAT:
   A. The Buyer agrees to pay the Buyer's Agent the sum of $______ per week.

6. MISCELLANEOUS PROVISIONS
   A. The Buyer agrees to pay the Buyer's Agent the sum of $______ per week.

7. AGREEMENT
   B. The Buyer agrees to pay the Buyer's Agent the sum of $______ per week.

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Acknowledgement of Buyers Agency

REAL ESTATE BOARD OF GREATER VANCOUVER

ACKNOWLEDGEMENT OF BUYERS AGENCY

RE:

("PROPERTY")

("BUYERS AGENCY")

("OWNER")

("LISTING AGENT")

The Owner and the Listing Agent hereby acknowledge and agree that the Buyer's Agent represents the buyer with respect to the purchase of the Property and does not represent the Owner.

To assist in obtaining a Buyer for the Property, the Listing Agent offers to the Buyers Agent a portion of the Listing Agent's commission in the amount of

$ __________________________

or

% of the sale price of the Property plus applicable Goods and Services Tax and any other applicable tax in respect of that portion of the commission.

Acknowledged and understood this _______________ day of _______________ , 19 ___.

OWNER

LISTING AGENT/SALESPERSON

LISTING AGENT

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LIMITED DUAL AGENCY AGREEMENT
(CONSENT TO AGENT ACTING FOR BOTH BUYER
AND SELLER AND TO LIMITING THE SCOPE OF THE
AGENCY RELATIONSHIP)

BETWEEN:

("AGENT")
AND:

("BUYER")
AND:

("SELLER")
RE:

("PROPERTY")

Now therefore in order to facilitate the purchase and sale of the Property the Buyer, the Seller, and the Agent hereby acknowledge and agree each with the other as follows:

1. The Buyer and the Seller acknowledge and agree that it is not a breach of duty to either of them for the Agent to act as agent for both the Buyer and the Seller and they hereby authorize and consent to the Agent acting for both the Buyer and the Seller as a limited dual agent with respect to the purchase and sale of the Property.

2. Any previous agreements entered into between the Agent and either the Buyer or the Seller and the agency duties created by such agreements are hereby modified by this Agreement and shall continue in full force and effect except as modified herein. In the event of conflict the provisions of this Agreement will apply.

3. The Buyer and the Seller acknowledge and agree that with respect to the purchase and sale of the Property the Agent and its salespersons will be the agent for both the Buyer and the Seller and will represent both parties as a limited dual agent with the following changes and limitations to its duties as agent:
   a) the Agent will deal with the Buyer and the Seller impartially;
   b) the Agent will have a duty of disclosure to both the Buyer and the Seller except that:
      i) the Agent will not disclose that the Buyer is willing to pay a price or agree to terms other than those contained in the Offer, or that the Seller is willing to accept a price or terms other than those contained in the Listing;
      ii) the Agent will not disclose the motivation of the Buyer to buy or the Seller to sell unless authorized by the Buyer or the Seller;
      iii) the Agent will not disclose personal information about either the Buyer or the Seller unless authorized in writing;
   c) without limiting 3(b) the Agent will disclose to the Buyer defects about the physical condition of the Property known to the Agent.

4. The Buyer and Seller have both received and read the British Columbia Real Estate Association Brochure "Working With a Real Estate Agent".

SIGNED, SEALED AND DELIVERED THIS _________________________ DAY OF _________________________ YR

AGENT PER SALESPERSON

AGENT PER SALESPERSON

BUYERS SIGNATURE

WITNESS TO BUYER(S) SIGNATURE(S)

BUYERS SIGNATURE

SELLERS SIGNATURE

WITNESS TO SELLER(S) SIGNATURE(S)

SELLERS SIGNATURE

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