

REAL ESTATE REGULATORY STRUCTURE REVIEW

Prepared by: DAN PERRIN
Perrin, Thorau and Associates Ltd.

Prepared for: B.C. MINISTRY OF FINANCE

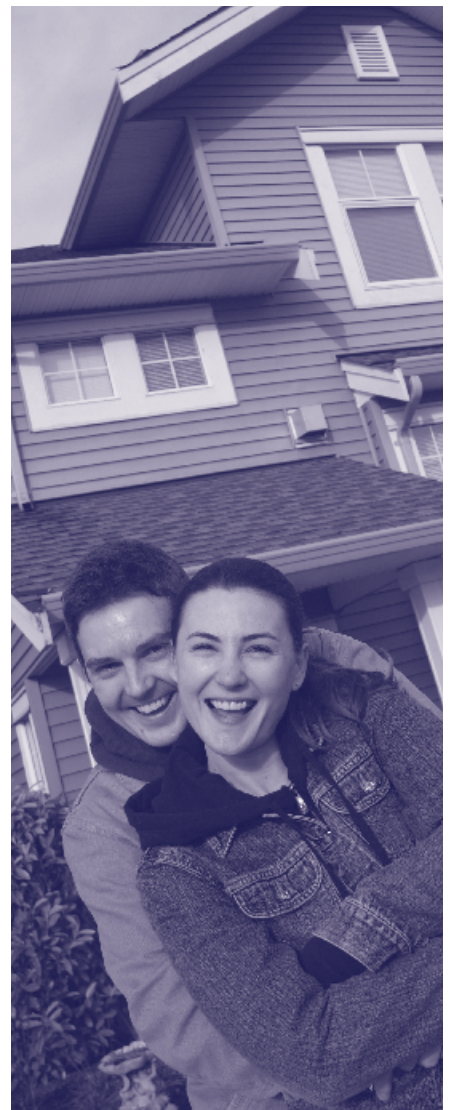


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EXECUTIVE SUMMARY

The purpose of this review, as set out in the Terms of Reference,¹ is to:

“undertake a review of the current state of real estate regulation and develop and present recommendations for the Minister of Finance to consider on how best to ensure the effective regulation of real estate activity in British Columbia. In particular, the purpose of the review is to ensure that real estate regulation appropriately and efficiently protects participants in the real estate market.”

Housing prices have increased rapidly in the Lower Mainland and adjacent markets since at least the 2009 recession, creating a hot market with high volumes of sales at escalating prices. As a result, housing affordability steadily decreased until in April 2018 it reached the worst level ever recorded anywhere in Canada, as measured by RBC.²

In 2016, the practice of assigning sales contracts, known as “shadow flipping” attracted considerable media attention. The role of real estate licensees in what increasingly was used as a type of speculative practice was a particular concern even though such assignments were and continue to be legal. The implication was that these transactions were fueling housing unaffordability.

In response to this and other concerns, the Real Estate Council of BC (RECBC) established the Independent Advisory Group on Conduct and Practices in the Real Estate Industry in B.C. (IAG) in Spring 2016, chaired by the CEO of the Financial Institutions Commission (FICOM). The IAG was focused on real estate licensee conduct related to residential real estate. It reported in June 2016³ with 28 recommendations including some fundamental changes to the way real estate licensees are regulated.

In Summer 2016, just weeks after the release of the IAG report, the government restructured real estate regulators by:

- Changing RECBC from a self-regulatory agency to a government body through amendments to the *Real Estate Services Act* (RESA); and
- Making the Office of the Superintendent of Real Estate (OSRE) a stand-alone body, responsible for rule-making, oversight of RECBC and regulation of unlicensed activity.

The objectives of the changes were to improve the effectiveness of the regulatory structure, to improve conduct and practices in the real estate industry and, implicitly, to improve housing affordability. Instead the two regulators have disagreed about

¹ See Appendix A.

² RBC Economic Research, Housing Trends and Affordability, April 5, 2018 <http://www.rbc.com/newsroom/reports/rbc-housing-affordability.html>

³ The IAG did not make a recommendation about structural change as this was outside its mandate, but it also did not recommend keeping the existing structure.

many things and often worked at cross purposes, reducing both the efficiency and effectiveness of the development of rules and the efficiency of real estate regulation enforcement.

Those who provided comments to this review (including the superintendent, RECBC and the real estate industry) generally agreed that the rule-change process, particularly as it related to eliminating dual-agency,⁴ was problematic.

Not only did the process not go smoothly, the result is not supported by either RECBC or the industry, but for different reasons. RECBC does not feel the changes go far enough to fully implement the IAG recommendation, while industry is concerned that the effective date of the change⁵ was too early for them to be fully prepared and that there is uncertainty related to some of the provisions. OSRE and RECBC have not collaborated effectively on policy development, with inconsistencies arising between the policy intent of OSRE rules and policy interpretation by RECBC, who must enforce the rules. In addition, OSRE and RECBC have ongoing disputes related to OSRE's oversight of RECBC. This is an unsustainable situation that has led to the current review.

There are three conclusions of this report:

1. Policy development is the central issue and it will require both a change to the regulatory structure and to policy development practice to rectify;
2. The regulatory structure is a significant factor contributing to the dysfunction in the policy development and oversight relationship between OSRE and RECBC; and
3. The focus on licensee professional conduct to protect the public is important and necessary but expanding the purpose of real estate regulation to “ensuring a fair, efficient and trusted real estate market” would provide a basis for expanding the scope of regulation to more broadly preventing market level manipulation and abuse.

To address these conclusions, the report is recommending four significant changes.

The first is that the regulatory enforcement responsibilities of both OSRE and RECBC be amalgamated with FICOM. This provides a basis for regulatory enforcement that extends beyond the conduct of licensees to broader capital market type conduct regulation within the context of broader financial sector regulation. While it might have been possible to overcome the differences between OSRE and RECBC through changes in practice, this recommendation also resolves those differences.

Not only will licensed and unlicensed activity be the responsibility of the same regulator, but FICOM also regulates mortgage brokers, who play a significant role in the

⁴ Dual agency refers to a real estate licensee providing services to both the buyer and seller in a real estate transaction, a practice that the IAG recommended should be eliminated because of the inherent conflict of interest.

⁵ The dual agency rule changes took June 15, 2018.

real estate market, and other financial sector participants, putting real estate regulation into a broader context.

The second is that the public policy development function be controlled by the Ministry of Finance. This addresses concerns with the policy development process that are at the root of the issue. The ministry already routinely uses the policy development methodology and processes needed to generate informed government public policy decisions.⁶ It also serves to move public policy decisions from being delegated to a regulator back to being made by government, which is ultimately responsible and accountable for public policy.

Ministry of Finance policy staff would take the lead in managing the policy development process, with appropriate and ongoing participation from regulators and from stakeholders including industry participants. To the extent that policy changes require the force of law, they would be addressed through changes to the Act or regulations. Regulators would remain responsible for the practices and procedures needed to operationalize the regulatory framework, some of which would still require rules, which would be subject to ministerial approval and the *Regulations Act*.⁷

The fact that OSRE has direct oversight over RECBC is a significant part of the problem. That issue would be resolved by the recommendation to make FICOM the single regulator. However, that begs the question of whether there should be some oversight generally for regulators to hold them accountable and to prevent complacency from making regulators vulnerable to changes in circumstances that require a different regulatory focus. The third recommendation is that government consider whether and how there should be general oversight of regulators in B.C.

The fourth recommendation is that real estate regulatory policy be fundamentally reviewed. The concerns with market conduct in the hot Lower Mainland real estate market require a broader mandate than was given to the IAG or addressed by the 2016 legislative changes.

Such a review would require a significant policy development process over at least two years, focussed on the objective of ensuring a fair, efficient and trusted real estate market. It would include consideration of whether and how real estate activity currently exempted from licensing requirements should be regulated, including employees of developers who sell new housing, and related services such as real estate appraisal and home inspection. More fundamentally, the review would consider whether and how real estate market conduct that is disruptive to a fair, efficient and trusted market, or is illegitimate (such as money laundering or similar activities), could be deterred. It would also restructure the current Act, regulations and rules to put the public policy framework in the Act and regulations and administrative policy provisions that

⁶ See Appendix D.

⁷ The report makes a distinction between “public policy,” which is the fundamental framework established by government within which services are provided, including regulatory services, and “administrative policy,” which are the detailed provisions required to effectively deliver services within the public policy framework.

need to be legally enforceable in the rules. The IAG recommendations would also be reviewed as part of the process, but there would not be a presumption that all IAG recommendations would be implemented.

Two additional recommendations are made to address:

- transition until structural change can be implemented, and
- to consider consequentially addressing the board appointment process for the Real Estate Errors and Omissions Insurance Corporation (REEOIC) to once again make it an independent corporation rather than a government body.

In summary, the report recommends that:

1. OSRE and RECBC should be merged into FICOM as the single regulator, with FICOM having full responsibility for public education, education of licensees, complaints and enforcement related to licensee professional conduct, enforcement related to unlicensed activity and market conduct generally, and associated administrative policy, including rule-making.
2. The Ministry of Finance should control real estate public policy development, in collaboration with the regulator.
3. Government consider whether there should be oversight for regulators in B.C. and if so, what form that oversight should take.
4. A policy review of real estate regulatory requirements be undertaken, including:
 - a. A review of existing regulatory requirements in RESA, the regulations and the rules to ensure that the public policy requirements are contained in RESA and the regulations, and that the rules are limited to administrative policy provisions that need the force of law to be effective and are consistent with the public policy framework;
 - b. A review of the best way to move beyond the regulation of those currently required to be licensed to more fully regulate market conduct in the public interest to prevent market manipulation and abuse, including but not limited to considering whether each of the different groups currently exempt from licensure should be regulated and if so, how; and
 - c. A review of outstanding IAG recommendations that would require a public policy response to determine the best way to proceed. That would include a review of changes already that need to be revisited consequentially to any changes made to the regulatory structure and other regulatory requirements under a. or b.

Rules needed to implement administrative policy should be subject to ministerial approval and the *Regulations Act*.

5. Until a single regulator model is implemented, or if the recommendation that there be a single regulator is not accepted, the Ministry of Finance, OSRE and RECBC should work together using the following framework beginning immediately:
 - a. The Ministry of Finance policy staff should immediately assume the role of public policy lead (Recommendation 2) on an informal basis, if necessary confirmed in writing by the minister for RECBC and the deputy minister for OSRE;
 - b. The ministry should develop a recommendation for the minister, with the advice and collaboration of OSRE and RECBC, about which if any outstanding public and administrative policy issues need to be addressed immediately;
 - c. Policy work approved by the minister should proceed based on the methodology and process described in Appendix D, with a committee comprised of representatives of the ministry, OSRE and RECBC meeting regularly to coordinate administrative input into public policy issues and the development of needed administrative policy changes;
 - d. All other policy work should be deferred to the real estate regulatory policy review (Recommendation 4), the timing of which need not be tied to structural changes;
 - e. OSRE and RECBC should also continue to focus on their operational responsibilities, including establishing a committee co-chaired by the Superintendent and Executive Director of RECBC to work together on enforcement of licensee and unlicensed activity and the implementation of operational changes RECBC currently has underway;
 - f. If possible, the ministry should facilitate the appointment of additional council members with hearing and real estate experience to accelerate enforcement activity, on the understanding that appointments may be temporary as a result of structural change.
6. Government consider changing the board appointment mechanism of REEOIC so that REEOIC is no longer a government body.

PURPOSE

In July 2016, a co-regulation model was established in legislation with the Office of the Superintendent of Real Estate (OSRE) as a stand-alone body and a significant change to the structure and responsibilities of the Real Estate Council of BC (RECBC). In a letter dated March 8, 2018 addressed to the Minister of Finance, RECBC indicated that the current regulatory structure of real estate in B.C. is dysfunctional and recommended that RECBC “be recognized in legislation as the sole regulatory agency for real estate industry regulation and that the Office of the Superintendent of Real Estate be abolished.”

The Ministry of Finance commissioned this review as a result of that letter and other indications that the structure is not delivering effective and efficient regulation of the real estate sector. The Terms of Reference for the review (see Appendix A) indicates:

“The purpose of this review is to advise the Minister of Finance on how best to ensure the effective regulation of real estate activity in British Columbia. In particular, to ensure that it appropriately and efficiently protects participants in the real estate market.”

More specifically, the review is to consider:

“The current roles and responsibilities of RECBC, the Office of the Superintendent of Real Estate (OSRE) and the Ministry of Finance in the regulation of real estate activity in B.C. including an assessment of which elements of those roles and responsibilities are operating efficiently and which are not.”

PROCESS

This review has been undertaken based primarily upon a review of relevant documents and submissions provided by, and discussions with representatives from:

- RECBC,
- OSRE,
- Financial and Corporate Sector Policy Branch, Ministry of Finance (FCSPB),
- BC Real Estate Association (BCREA), and
- Financial Institutions Commission (FICOM).

Several individuals and representatives of other groups also contributed, including several real estate licensees, and submissions were received from some real estate boards as a result of outreach by the BCREA. Appendix B provides a list of participants.

All of those who participated in the process, especially OSRE and RECBC representatives, have been open and frank in both interviews and written submissions. All are clearly motivated to make the system better in the public interest and are acting in accordance with that motivation. I thank all of those who have contributed for their candor and commitment, as well as for their insightful contributions.

CONTEXT

Historical Context

Historically (up to 2004) under the former *Real Estate Act* the structure of real estate regulation was:

- A majority of RECBC board members were elected by the industry. RECBC was responsible for licensing and education of licensees with the ability to establish the details of the licensing scheme through bylaws;
- OSRE was originally a separate office that was amalgamated with other regulators in 1989 when FICOM was formed by appointing the same person as both Superintendent of Financial Institutions and Superintendent of Real Estate. OSRE was responsible for enforcing real estate regulatory requirements related to licensed and unlicensed activity; and
- Regulatory requirements including licensing requirements and exemptions were established by the act and regulations.

Over time, RECBC was given increased authority for regulatory enforcement and moved towards becoming a self-regulatory agency with a larger proportion of board members elected by licensees. RECBC became a fully self-regulating body in 2004 with a re-write and modernization of the legislation in the form of the *Real Estate Services Act* (RESA), which is the current governing legislation for most real estate activity.⁸

Under RESA:

- RECBC was a fully self-regulatory agency independent of government with 13 of 17 board members elected by licensees, the full authority to establish legally enforceable rules applying to licensees and the responsibility for education, licensing and regulatory enforcement related to licensees; and
- The Superintendent of Real Estate role remained within FICOM, responsible for regulation of unlicensed activity and disclosure requirements under REDMA. The superintendent had the ability to appeal RECBC decisions.

The initial RECBC rules were created by combining some provisions that had been in regulations with existing RECBC bylaws, while other provisions remained in the regulations. RECBC was given the authority to create and amend rules without government oversight, a departure from the approach used for other regulatory bodies with rule-making power, such as the Insurance Council of BC, where rules require ministerial approval. It is noted though that the government retained the ability to override rules with regulations.

The motivations for giving RECBC full rule-making power was, at least in part, to reduce the number of regulations to meet regulatory reform targets.

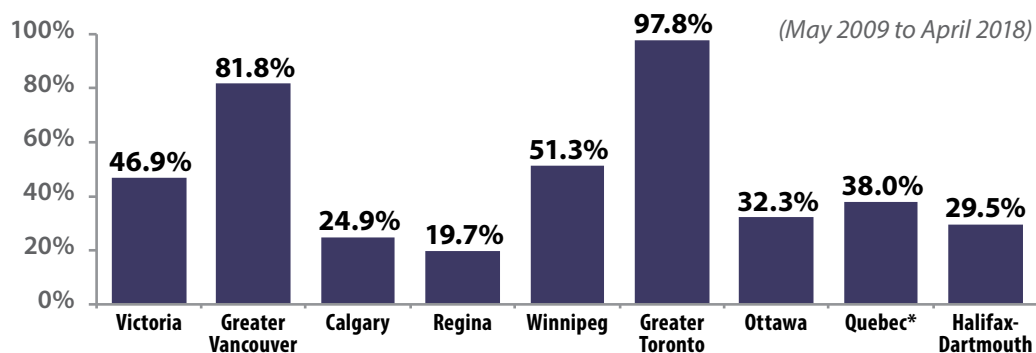
⁸ Disclosure statement requirements for developers that had been included in the *Real Estate Act* were moved to the new *Real Estate Development Marketing Act* (REDMA) at the same time that RESA was enacted.

The IAG Report

Historically and up to recent years, real estate has generally been considered to be low risk compared to other regulated financial sectors and RECBC was regarded as an effective regulator. As a result, RECBC was effectively given full autonomy, with FICOM devoting relatively few resources to the oversight authority that it retained when RESA was created.

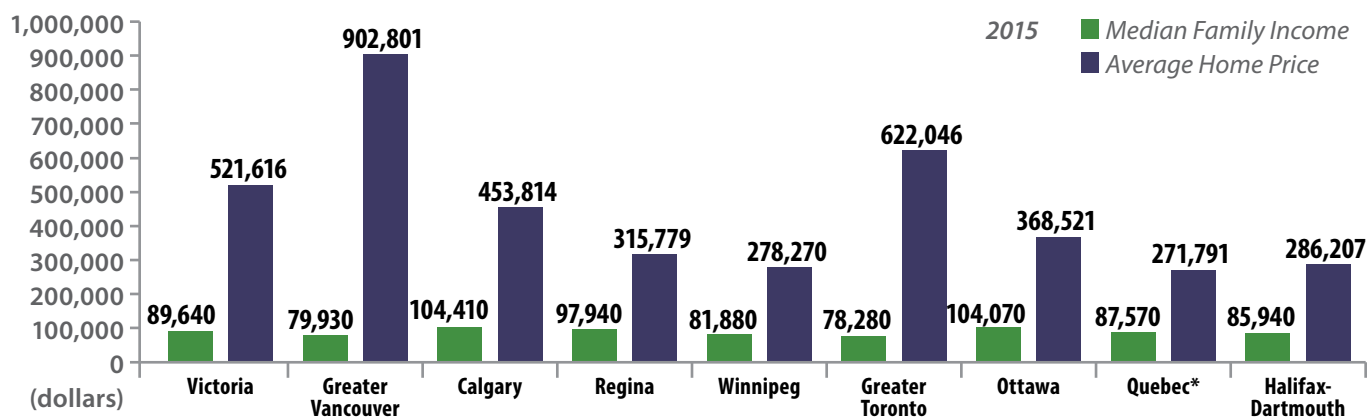
The real estate industry began to be subject to greater public and media scrutiny after the 2009 recession, as the property market in the Lower Mainland became overheated and housing affordability became a growing issue. Chart 1 shows that two Canadian markets have demonstrated exceptional price growth over the past nine years – Toronto and Metro Vancouver, with spillover into the Capital Region market to some extent. Chart 2 shows that in 2015 Greater Vancouver was already the most unaffordable city in Canada. According to RBC, housing affordability in Metro Vancouver has now reached a point never before experienced in Canada.⁹

CHART 1 – CHANGE IN AVERAGE HOME PRICE



Sources: Haver Analytics; Canadian Real Estate Association (* Montreal and Quebec City data not available).

CHART 2 – MEDIAN FAMILY INCOME VERSUS AVERAGE HOME PRICE



Sources: Haver Analytics; Statistics Canada; Canadian Real Estate Association (* Montreal and Quebec City data not available).

⁹ RBC Economic Research, Housing Trends and Affordability, April 5, 2018
<http://www.rbc.com/newsroom/reports/rbc-housing-affordability.html>

Rising prices and high volumes of real estate transactions provide opportunities and incentives for market participants to earn extraordinary profits, including in some cases using strategies not in common use previously. A high-profile example of that was trading in assignments of real estate purchase contracts, known as “shadow flipping.” The practice was brought to the attention of the public by the media beginning early in 2016.

Assignment of purchase agreements has always been legal and continues to be legal. It is a legitimate contractual tool that is used in a variety of circumstances. Concerns arose when the ability to assign purchase agreements began to be extensively used for speculation purposes in the hot property market, to the benefit of intermediaries, some of whom were licensees. In 2016, legislative changes required licensee disclosure of assignments and required the consent of the seller but did not prohibit assignments or make any changes to cases where no licensee is involved.

Media attention to assignments and other forms of speculation led to concerns about industry practices and whether regulatory requirements and their enforcement were sufficient to deal with market conduct in the overheated Lower Mainland market, including questions about whether the industry should continue to be self-regulating.

In response to both media and public concerns RECBC created the Independent Advisory Group on Conduct and Practices in the Real Estate Industry in British Columbia (IAG), chaired by the superintendent, in March 2016. The IAG report was made public in late June 2016.¹⁰

The IAG Terms of Reference indicates:

“The Advisory Group’s mandate is to examine whether the current regulatory regime adequately protects consumers and the wider public interest from real estate licensee conduct that is inconsistent with the duties and standards of conduct required of licensees. It will make recommendations on ways to enhance consumer protection and strengthen public confidence in the regulation and practices of real estate licensees in British Columbia.”

The IAG intentionally did not address the question of whether or not RECBC should continue to be a self-regulatory agency, arguing that was a matter for government to decide, although it did recommend that the number of government appointed council members be increased to 50%.

The IAG report made 28 recommendations for improvements to the regulation of real estate. Appendix C provides a chart setting out the recommendations, lead agencies and current status.

Underlying media and public concerns about real estate market conduct, especially by licensees, was an implicit linkage between that conduct and the growing affordability

¹⁰ https://www.recbc.ca/wp-content/uploads/IAGReport_June2016.pdf

crisis in the Lower Mainland. The IAG report explicitly denies any material impact of inappropriate licensee activities on affordability:

“It is important to understand that the recommendations in this report, if implemented, are unlikely to have a material effect on housing prices and issues of affordability. The price of housing is determined by the factors of high demand and limited supply. The work of the IAG and the recommendations contained in this report are focused on the conduct of real estate licensees. Ensuring people buying and selling homes are fairly treated is critical to public confidence, but it does not affect housing supply and demand.”

Current Regulatory Structure

On June 29, 2016, two weeks after receiving the IAG report, Premier Christy Clark said in a statement:

“After reading the report, our conclusion is that the privilege of self-regulation in the real estate industry must end,”

In July 2016, the provincial government restructured governance of real estate regulation in B.C. The changes included:

- Removing the pre-existing Superintendent of Real Estate function from within FICOM and creating the stand-alone OSRE reporting to the Minister of Finance, with oversight responsibilities for RECBC and rule-making power (Recommendation 21 suggested more superintendent oversight of RECBC but the IAG did not recommend changing rule-making);¹¹
- Changing the governance of RECBC from an industry elected board to a fully government appointed board, making RECBC a government body reporting to the Minister of Finance (based on Recommendation 19, which suggested 50% non-industry members); and
- Implementing several IAG recommendations, including increasing maximum fines and administrative penalties for licensees (Recommendation 16), allowing the proceeds from misconduct to be paid to RECBC (Recommendation 18) and increasing standards for brokerage representatives (Recommendation 23).

As noted, the creation of OSRE, transfer of rule-making to OSRE and making the RECBC board fully government appointed were not specifically recommended by the IAG. However, the report made it clear that elimination of self-regulation was an option government could take.

¹¹ Legislation was not required to move OSRE out of FICOM because it was only in FICOM through cross-appointments of the two superintendents, but the legislation changed the OSRE’s responsibilities.

Two other recommendations that would require legislation have yet to be implemented:

- IAG Recommendation 6, that the changes made prior to the IAG report regarding assignment of purchase agreements that currently apply only to licensees be extended to all contracts, whether or not the contract is prepared by a licensee; and
- IAG Recommendation 20, that enforcement of regulations related to both licensed and unlicensed activity be undertaken by a single regulator.

Public Policy vs. Administrative Policy

In addition to the IAG report recommendations that require legislation, there are several recommendations that are fundamental changes to the policy framework for the regulation of real estate, such as Recommendations 1 and 2, while some relate primarily to how the regulatory framework is administered. As context to the remainder of the report, this section draws a distinction between public policy and administrative policy.

Governments can be broadly viewed as having two main responsibilities:

- Establishing the “public policy” framework within which government operates; and
- Operating the machinery of government, through a wide variety of agencies and entities controlled by government, which administer laws, regulatory regimes and service delivery programs.

These two responsibilities are closely interrelated. Administrative operations provide valuable intelligence crucial to identifying and informing issues that give rise to public policy development. Likewise, ensuring that the public policy framework can be efficiently administered should always be an important consideration in public policy design. High-level public policy decisions set the framework within which government expects an issue to be dealt with but the detailed interpretation of that public policy at the operational level inevitably plays a major part in determining practical outcomes.

For the purpose of the report:

- **“Public policy”** means government decisions that set the direction for how government intends to address a specific area of responsibility, achieve a specific objective or solve a specific problem. Public policy is effectively the relatively high-level expression of government’s agenda; and
- **“Administrative policy”** means the policies, procedures and practices that interpret and implement public policy direction.

Where is the line between public policy and administrative policy more generally in the regulation of real estate? Traditionally that line was relatively distinct – public policy was originally articulated primarily through legislation and the regulations under that legislation. Administrative policy had originally been set out primarily in RECBC bylaws and professional standards manual. As noted above, that changed in 2004 when a significant proportion of the regulations under the former *Real Estate Act* was combined with RECBC bylaws to create the initial RECBC Rules. Those rules were then, and still are, a combination of provisions, some of which are fundamental regulatory provisions (public policy) and others are administrative details (administrative policy).

First RECBC and subsequently the superintendent effectively had full delegated authority to set real estate regulation public policy, subject to the ability of government to override rules with regulations. Between 2004 and 2016 RECBC made few if any rule changes that would fall into the public policy category. However, implementation of the IAG report and the government decision not to deal with dual agency through a regulation indicated that the superintendent was expected to make needed public policy changes through the rules.

Public Policy Development

There are well-established principles and processes for public policy development that are routinely applied in the BC government and in jurisdictions around the world. For example, The Organisation for Economic Development and Co-operation (OECD) has developed extensive guidance about how to develop public policy in a regulatory context, as has the UK Professional Standards Authority.¹² In B.C., the Ministry of Finance applies these principles and processes routinely in dealing with tax policy issues and with the regulation of the financial and corporate sector.

Appendix D describes a best-practice methodology and process for public policy development in a regulatory context. In summary, the highlights are:

- Government, which is accountable for public policy development, should make public policy decisions, with regulators dealing with administrative policy.
- In practice that means a close working relationship between government policy advisory staff and regulatory administrators, not least to ensure that public policy is administratively feasible, and that administrative policy is aligned with the objectives and content of the public policy framework.
- Public policy development should:
 - Clearly and in detail identify the objective of a change or the issue to be resolved;
 - Establish relevant principles that should also be taken into account;
 - Develop alternatives for consideration;
 - Evaluate alternatives based on the principles and the unintended consequences of each;
 - Make a recommendation; and
 - Develop an implementation plan including the administrative policy measures needed to implement the change.
- The process should include active participation by both policy advisory staff and regulators, with needed legislation (including statutory provisions, regulations and/or administrative rules) drafted by Legislative Counsel, the drafting experts in

¹² See for example the Organisation for Economic Co-operation and Development (OECD) (<http://www.oecd.org/gov/regulatory-policy/#d.en.194409>) and the UK Professional Standards Authority (<https://www.professionalstandards.org.uk/publications/detail/right-touch-regulation-2015>)

the Ministry of Attorney General, with appropriate approvals consistent with the nature of the policy measure being proposed.

- An industry or stakeholder advisory group should be considered to get early input into the process, prior to wider consultation as the proposal is developed.
- Consultation should be based on a discussion paper that puts the proposal into the context of the matters considered, especially unintended consequences and how they can be mitigated.

INPUT RECEIVED

This review was prompted by a letter from RECBC to the Minister of Finance. Two passages of the letter summarize RECBC's concerns effectively:

"Since coming into force in October 2016, the co-regulation model has resulted in significant delays in implementing the very changes recommended by the IAG, disagreements over their scope and application and, perhaps most symptomatic of dysfunctionality, litigation over jurisdiction. In our view, many of the changes recommended by the IAG and held out to the public as an immediate priority would have been enacted and in force within months of the appointment of the new Council members in October 2016 had rule-making been left with Council. . . . Our recommendation is that the Real Estate Council of BC be recognized in legislation as the sole regulatory agency for real estate industry regulation and that the Office of the Superintendent of Real Estate be abolished."

There were some common themes among the feedback received, regardless of its source:

- There is general agreement that there is a lack of clarity and alignment under the current structure that has impacted the effectiveness and efficiency of real estate regulation;
- The policy development process for Superintendent's Rule changes related to dual agency was not effective or efficient;
- Enforcement has become less efficient, largely because of the lack of council members with the skills and experience to chair or participate in complaints and hearing committees. Members must form the majority of all committees, including hearing committees.

Despite these common themes, there is little consensus about the appropriate solutions, but virtually all parties suggested that change of some kind is needed. It should be noted that OSRE has committed to making changes to the rule-making approach to generate greater collaboration between RECBC and OSRE and specifically to avoid the issue of inconsistency between the intent of proposed rules issued by OSRE and the interpretation of those rules issued by RECBC after the proposed rules have been made public.

Much of the input received, especially from real estate licensees and organizations representing them, related to perceived problems with the recent dual agency rule changes. Concerns include that the rule is causing uncertainty among licensees who feel they have not had time or guidance to prepare for what is, in some cases, a significant change in real estate practice, and that some of the provisions may be difficult to use in practice. While comments about dual agency rules have been helpful in understanding the process that led to these rules, this report does not make any comment about the rules themselves or their timing.

Some participants raised issues about the scope of current real estate regulation in B.C. There were two aspects to the comments.

The first related to exemptions from the licensing requirements under the *Real Estate Services Act* for participants in some real estate trades, primarily employees of developers selling interests in new buildings, real estate appraisers and those providing home inspection services. While the latter are regulated under consumer protection legislation, the other two are fully exempt from provincial regulation. The suggestion made was that all of these should be regulated to improve consumer protection and to give the regulator a broader view of real estate market conduct.

The second related to the broader question of market conduct in the real estate sector, whether involving licensees or not. The IAG mandate was focused on licensees. There is increasing concern about money laundering in the real estate market and concerns that there may be other market conduct practices that disrupt or manipulate the market.

One final, more technical issue, was raised by the Real Estate Errors and Omissions Insurance Corporation (REEOIC), which is a statutory corporation created in the *Real Estate Services Act* providing errors and omissions insurance to licensees. The fact that licensees have errors and omissions insurance indirectly protects the public by making sure there are the resources to compensate consumers in the case of negligence by licensees. The changes to the Act in 2016 had the apparently unintended consequence of making the corporation a government body. REEOIC has asked that its governance be reviewed and adjusted to return it to its previous status as a non-government corporation, to better serve its clients, the licensees.

The Real Estate Compensation Fund Corporation similarly suggested to government that it should not be a government body, while RECBC recommended that its function be rolled into RECBC.

THE ISSUES

OSRE has three primary functions under RESA: rule-making; oversight of RECBC; and enforcement related to unlicensed activity.¹³ Disputes have arisen between OSRE and RECBC in respect of two of the three functions, rule-making and oversight, giving rise to two issues to be addressed. The third issue relates to the scope of regulation.

Rule-Making

While OSRE has made several rule changes, the one that has been the most contentious between the two agencies and with the real estate industry has been changes related to dual agency.

“Dual agency” refers to the practice of real estate licensees offering services to both the buyer and seller in a transaction. In B.C., and every jurisdiction in Canada, dual agency has traditionally been allowed, subject to disclosure, consent by the parties and some restrictions, despite the fact that dual agency represents a clear conflict of interest. It is usually referred to as “limited dual agency” since a limited form of agency is offered to the buyer. This practice may have initially arisen because few buyers traditionally had independent representation and limited dual agency improved consumer protection compared to the norm of buyers being unrepresented and having no access to advice.

The IAG report pointed out that the legal concept of agency requires the agent to act exclusively in the best interests of the client, maintain confidentiality and avoid conflicts of interest. Dual agency clearly violates these principles, which is the basis for IAG Recommendation 2 that it no longer be permitted. The IAG went further, recommending within its discussion of Recommendation 2 that risks to unrepresented parties be mitigated by requiring licensees to inform unrepresented parties of the licensees’ inability to provide services to the unrepresented party and the benefits of obtaining independent representation. The IAG also recommended that “guidance” be provided by RECBC to help licensees determine when a pre-existing conflict of interest means that they should not be acting for either party.

Government fully accepted the IAG report and its recommendations, which was also publicly endorsed by industry associations. IAG Recommendation 2 was not addressed until after OSRE was established in October 2016. This issue was one of the initial priorities of the newly established OSRE.

OSRE and RECBC worked together over several months to draft rule changes needed to no longer permit limited dual agency and require the disclosure recommended by the IAG report. OSRE undertook consultation with industry and the public based on draft rule changes before making an order to bring the changes into effect.

Following the rule changes being ordered, RECBC released its interpretation of the rule changes in the form of “Frequently Asked Question” (FAQ) scenarios that indicated

¹³ OSRE is also responsible for administering REDMA.

what RECBC would expect of licensees in various scenarios. The FAQs required that if there was a conflict between two existing clients, such as a client listing a property and a client seeking to buy that is interested in the same property or two clients seeking to buy looking at the same property, the licensee must not represent either in the transaction. This is known as “double recusal.”

OSRE did not agree with RECBC’s interpretation. OSRE’s intention, which they thought RECBC understood and agreed with, was that as long as the licensee disclosed the situation and both parties agreed, the licensee could refer one party to an independent licensee for representation and continue to represent one rather than not representing either party. RECBC argued that their interpretation was an accurate representation of the meaning of the OSRE provision and that OSRE knew that before they put the rule in place. The real estate industry was vociferously opposed to double recusal.

In response to RECBC’s interpretation, OSRE developed and consulted on additional rule changes that clarified their original intent. Despite the OSRE clarifications, the real estate industry continues to be concerned because they feel the lead time to prepare for the change was too short and that an exemption provided to licensees in remote locations is unworkable.

What went wrong?

1. OSRE and RECBC did not work effectively and collaboratively with each other. The interpretation of the proposed rule change should have been discussed between the two agencies and agreed, prior to the proposed rule change even being released for consultation, much less being made a rule. While the dispute was about the interpretation of specific rule changes, the underlying issue seems to have been a dispute about what the best solution should have been.
2. Policy development best practices, as discussed in Appendix D, were not used. There should have been a more fulsome discussion paper that discussed in detail what the problem is, alternative solutions and their unintended consequences. Rather, there was an initial two-page discussion paper that did not provide the basis for meaningful input and a second consultation based on proposed rule changes. RECBC’s interpretation resulted in OSRE making changes that were intended to mitigate some unintended consequences that should have been foreseen and discussed publicly. But, even for the second set of rule changes, the intent and reasoning behind the changes was not clearly explained. In part, rigorous policy analysis was not done because government had accepted the IAG dual agency recommendation and it was assumed there was no scope for further policy work to be done.

3. OSRE did not get needed technical support in policy development or legislative drafting¹⁴ and was placed in the difficult position of facing an important and controversial policy issue as its first significant policy test while dealing with the disruption of establishing a new stand-alone organization.

OSRE has indicated that the process can be improved. Based on lessons learned, OSRE is making changes that would, for example, ensure that they fully understand how proposed changes will be interpreted prior to consultation and again, prior to implementation. RECBC has also committed to changes in the process.

It is unlikely that would be enough. The co-regulator structure itself creates a natural tension between the co-regulators that is a long-term barrier to efficient and effective policy development. Perhaps more importantly, the delegation of public policy to a regulator, dating back to 2004, also contributed significantly the issues related to dual agency and would likely continue to present problems related to public policy development into the future.

The fact that significant issues raised by the IAG have yet to be resolved suggests that it is important that the policy making environment be adjusted so that public and administrative policy development become more efficient, effective and integrated.

Oversight

The oversight responsibilities given to OSRE include the ability to review and report on RECBC's performance as a regulator and the ability to intervene in certain regulatory decisions. The latter includes the ability to direct RECBC to hold a hearing on a matter and the ability to appeal a decision by a hearing committee to the Financial Services Tribunal (FST).

OSRE has yet to exercise its oversight through a review of performance. It has made one order that a hearing be held and has appealed one decision to the FST.

RECBC has questioned OSRE's ability to order RECBC to hold a hearing when RECBC has already made a decision not to proceed to a hearing. OSRE is seeking clarification from the Supreme Court of BC that it has the authority to order RECBC to hold the hearing. RECBC is disputing its legal ability to hold a hearing in a case where it has already made a decision not to proceed to a hearing.

While it would be inappropriate to make any comment on the matters currently subject to litigation, it is clear that having one regulator oversee just one other regulator is a source of irritation between the two agencies. To date this structure has not made a material contribution to the regulation of real estate in B.C. and has reduced the efficiency of the system by distracting both parties from the task at hand, which is licensing and enforcement in the case of RECBC and rule-making in the case of OSRE.

¹⁴ While the dual agency rules were drafted by Legislative Counsel, it was in an unofficial capacity without same rigor as would be applied if the rules were subject to the *Regulations Act*. Legislative Counsel support was withdrawn fully in February 2018.

Regulatory Scope

There are several aspects to the issue of regulatory scope, including what market participants should be regulated, whether licensed and unlicensed activity should be regulated by the same agency and whether there are aspects of market conduct beyond the provision of trading services. One way of looking at this is through the lens of why real estate is regulated in the first place.

The common answer to the question “What is the purpose of real estate regulation?” is “To protect the public.”

The purchase and sale of real estate assets, especially owner-occupied residences, are high-value, complex transactions that most people only engage in a few times in their life. These are important and often difficult decisions because where you live has a big impact on your life. Real estate transactions take place in a complex marketplace within a complex legal framework where most individuals buying and selling their homes do not directly have access to full information, making them vulnerable to being taken advantage of. It is vital that buyers and sellers are able to obtain advice and assistance from knowledgeable and competent professionals who are able to help them make informed decisions, so they can have confidence they are paying or receiving a fair price for the property in question.

The regulatory regime protects the public by regulating real estate professionals. It imposes standards for knowledge and competence on those involved in trading real estate for compensation by requiring them to be licensed after passing an education and applied practice program and being vetted for personal suitability. Regulatory requirements also impose standards of behaviour on licensees aimed at ensuring licensees represent their clients’ best interests in transactions. Property and strata managers are similarly regulated to ensure that property owners are protected when they entrust others to look after their property.

The public protection objective for regulating real estate has created a regulatory system that works well in preventing abuse at the level of individual transactions. Does it go far enough to deal with the operation of the market as a whole?

Real estate is an extremely important sector of the economy and it is also the way in which the basic human need for shelter is fulfilled through both rental and owned accommodation. Housing affordability is a serious concern, especially in major urban areas. There are concerns that the extended hot real estate market in parts of the Province has given rise to increased opportunities for market manipulation with market participants finding new ways to profit from questionable real estate activity. For example, the impact of money laundering and illegitimate foreign funds on the real estate market has been a growing concern.

The current regulatory approach based on a public protection objective is an important factor in ensuring an efficient real estate market through better informed buyers and sellers who are able to trust the market. But there may be market level distortions that also need to be addressed as a result of real estate shifting increasingly from housing

for shelter to housing as a speculative investment that requires the type of regulation applied to capital markets.

This analysis suggests that, without reducing the focus on public protection, the purpose and scope of real estate regulation should be broadened to more generally focus on ensuring a fair, trusted and efficient real estate market.

The IAG noted that the changes that it was recommending would be not have a material impact on housing affordability. That is because housing affordability is determined not at the level of individual transactions but rather by overall market conditions. From an economic perspective, prices are determined by supply and demand, and there are many factors affecting supply and demand that have nothing to do with inappropriate market conduct. While a broadening of the scope of market conduct regulation may improve the functioning of the real estate market, care must be taken not to expect that to solve housing affordability.

Licensing and Enforcement

RECBC has sole responsibility, subject to oversight, for administering the regulatory system as it applies to licensees. Several IAG recommendations related to RECBC's licensing and enforcement operations and RECBC has either made changes or is in the process of addressing those recommendations.

The theme of IAGs comments about RECBC, as a self-regulatory organization, were that it did not represent an industry culture of holding itself to a high standard and that it relied too heavily on public complaints and a narrow focus on compliance with specific requirements rather than generally high ethical standards.

The changes in 2016, which brought in a fully government appointed board of directors was effective in enhancing RECBC's focus on increasing public protection. RECBC has made or plans to make a significant number of operational changes designed to enhance regulatory effectiveness, as indicated in Appendix E, which is an excerpt from a briefing document prepared for this review by RECBC.

Input received indicates that RECBC has become more effective in terms of licensing and enforcement. Comments from RECBC and industry both indicated that an ongoing issue is the lack of industry expertise among council members, with RECBC also noting that additional legal expertise would also be useful. More council members with such expertise would make it easier to schedule and hold committee meetings and hearings needed for the enforcement process, as well as enhancing policy input and administrative policy development.

This suggests that the issues at hand relate primarily to the policy and oversight functions of the co-regulator model.

Conclusion

There are three conclusions of this report:

1. Policy development is the central issue and it will require both a change to the regulatory structure and to policy development practice to rectify;
2. The regulatory structure is a significant factor contributing to the dysfunction in the policy development and oversight relationship between OSRE and RECBC; and
3. The focus on licensee professional conduct to protect the public is important and necessary but expanding the purpose of real estate regulation to “ensuring a fair, efficient and trusted real estate market” would provide a basis for expanding the scope of regulation to more broadly preventing market level manipulation and abuse.

REGULATORY POLICY DEVELOPMENT AND STRUCTURE OF REGULATORS

The first conclusion above suggests two inter-related changes: a change to the way policy is made and a change to the regulatory structure.

The discussions in the Context section and in Appendix D describe best practices for policy development in B.C. and elsewhere. The discussion in the Issues section above indicates that these best practices have not been followed. Given the situation and government decisions related to the structure of regulators and the implementation of IAG report, it is understandable why some of these practices were not followed but the outcome would have been better if they had been. The most important element in the best practices is that government should make the public policy decisions for which they are accountable, with the support of ministry policy staff.

For that reason, regardless of whether and how the regulators are restructured, the public policy element of policy making would be shifted to the government, as represented by the minister, from being delegated to a regulator with rule-making power. Organizationally, the public policy process would be led by the Policy and Legislation Division, which is responsible for advising the minister on policy issues related to taxation and the financial and corporate sector. As they already do as a matter of standard practice, ministry policy staff would work closely with the regulator(s) to ensure that public policy proposals would be administratively feasible and effective in achieving their objective, and to ensure that regulator's administrative policy is consistent with government public policy direction.

As noted, the lack of industry representation on the current RECBC board reduces RECBC's ability to provide expert industry input regarding policy development and implementation.¹⁵ A solid, industry appointed policy advisory group would provide significant beneficial advice to the policy development process and should be considered as part of the changes.

The conclusions make it clear that in addition to addressing how policy development is managed, a change to the co-regulator model is required to resolve the current situation. The following describes five possible alternatives.

¹⁵ The other reason that more industry expertise on the RECBC board was suggested was to increase RECBC's capacity to staff complaints, hearing and other committees that require a majority of RECBC board members.

1. Status Quo

The status quo option would retain both OSRE and RECBC with their current set of responsibilities. Changes would be made to the policy development process to have the process led by Ministry of Finance policy staff, increase collaboration between the co-regulators and require ministerial approval of rule changes.

2. RECBC as Single Regulator

This option would essentially be to adopt the structure recommended by RECBC. OSRE would be abolished and there would no longer be any superintendent; rule-making would be the responsibility of RECBC but policy development of changes that are recognized as “public policy” would be led by Ministry of Finance policy staff and approved by the minister and preferably implemented by regulation rather than rules. There would be no oversight of RECBC by another regulator, but RECBC would continue to be a public body and subject to the accountability regime that applies to government bodies. RECBC would be responsible for:

- Enforcement related to both licensed and unlicensed activity;
- As RECBC recommended, mortgage brokers; and
- Marketing activities of developers under REDMA.

3. RECBC as Single Self-Regulatory Regulator

This option would be similar to Option 2 but also basically reverse the 2016 structural changes, making RECBC the single regulator, governed by a board with a majority of members elected by licensees. That would remove the organization from the broad public sector and make it an independent body, as it was before 2016. Government could also take control of public policy development under this option, consistent with the other options.

4. OSRE as Single Regulator

This option would see RECBC merged with OSRE. As with Option 2, public policy would be led by Ministry of Finance policy staff, approved by the minister and preferably implemented with regulations rather than rules. OSRE would be responsible for regulatory enforcement related to both licensed and unlicensed activity and for administering REDMA, but not the regulation of mortgage brokers. Hearings would be held by staff or contractors hired for specific skills and competencies related to adjudication and real estate practice. OSRE would not be subject to oversight by another regulator but would remain part of the ministry and be subject to the accountability framework that applies to the public service.

5. Merge RECBC and OSRE with FICOM

This option would essentially be the same as Option 4 except that both the current OSRE and RECBC would be merged into FICOM. The Superintendent of Real Estate would be one of several statutory decision-makers reporting to the CEO of the Financial Institutions Commission. As with the other options, policy

development would be led by Ministry of Finance policy staff, approved by the minister and preferably implemented with regulations rather than rules. The result would be that all financial sector regulatory administration would be within one organization, including mortgage brokers, licensed and unlicensed real estate activity, and administration of REDMA.

To be clear, this option would mean that the existing staff of OSRE and RECBC would become FICOM staff, recognizing that there are human resources issues to be dealt with in making that happen. It would be important though to retain the experience and expertise of staff in both organizations when merging them with FICOM. It might also make sense for some OSRE policy staff to be moved to FCSPB to maintain policy development expertise and continuity. Under FICOM, hearings would be held by hearing officers with hearing and real estate industry experience, skills and competencies, rather than by those with governance responsibilities.

Option 1 would have the distinct advantage of minimizing disruption. There is a significant cost associated with major structural change in government organizations in terms of reduced efficiency and effectiveness while the changes are implemented. In fact, the disruption caused by the 2016 change is still felt in both OSRE and RECBC and has contributed to the current situation. Moving policy development responsibility to ministry policy staff might reduce tensions between the two regulators but would not address the basic sense that there is really no reason why there needs to be two regulators, which underlies the difficulty the two regulators have in working effectively together.

The fundamental structural issue is that there are two regulators with overlapping responsibilities, particularly in the policy development area. Options 2 to 5 are different ways to merge the regulators into a single regulator, needed to resolve the current situation. Essentially the differences among the four single regulator options are:

- Where the regulator would be organizationally located:
 - In the direct public service (Option 4 – OSRE as Single Regulator);
 - In a government body (Option 2 – RECBC as Single Regulator, and Option 5 – Merge RECBC and OSRE with FICOM¹⁶); or
 - In a body outside the broad public sector (Option 3 – RECBC as Single Self-Regulatory Regulator); and
- The scope of regulatory enforcement responsibility.

The organizational dimension raises a fundamental question – should the structure revert to its pre-2016 self-regulatory approach? The IAG report specifically left the decision about whether RECBC should continue to be a self-regulatory body to government but provided considerable support for removing self-regulation. The implicit argument was that under self-regulation there was not sufficient motivation to look beyond the regulation of licensee professional conduct or at evolving market conduct issues. Government accepted that implicit argument and decided to make

¹⁶ Assuming that FICOM becomes a government body as currently planned.

RECBC a government body. While RECBC has struggled with having only a small minority of board members with the industry and legal experience needed for complaint and hearing committees, that issue can be resolved without reinstating self-regulation. Given the conclusion that an even broader regulatory scope is required, a return to self-regulation is not recommended.

In summary:

- There should be a single regulator;
- Government should control public policy development, in collaboration with the regulator, which would be responsible for the administrative policy needed to implement and administer government public policy decisions; and
- There is not a strong case for returning to a self-regulatory model.

That leaves Options 2, 4 and 5 as potential options, all single regulators that are government bodies in the public service or broader public sector. The fundamental difference among them is the regulatory scope.

Option 5 would provide regulators with the broadest possible regulatory context within which to regulate the real estate sector, including not only licensees but also provide the ability to apply capital market regulation to the real estate market in the context of related financial activity throughout the financial sector.

Given the conclusion that regulation of real estate market conduct should move beyond the regulation of licensee professional behavior, merging RECBC and OSRE with FICOM is the preferred option. It is recognized that FICOM is itself undergoing considerable change, which creates both an opportunity to make this change and a risk associated with further disruption, but it is expected that the benefits of such a change would significantly outweigh the costs of change.

While the two regulators might, in the absence of other concerns about the policy function and broadening the regulatory context, have been able to resolve their differences and find ways to work effectively together, amalgamating the co-regulators with FICOM also has the side-effect of eliminating that issue.

It is recommended that:

- 1** OSRE and RECBC should be merged into FICOM as the single regulator, with FICOM having full responsibility for public education, education of licensees, complaints and enforcement related to licensee professional conduct, enforcement related to unlicensed activity and market conduct generally, and associated administrative policy, including rule-making;
- 2** The Ministry of Finance should control real estate public policy development, in collaboration with the regulator.

OVERSIGHT

Having OSRE oversee RECBC has not been a successful model and it is hard to imagine a situation where a new regulator set up to oversee an established regulator as its only oversight function would be successful. None of the restructuring options considered above would include an oversight function related to the resulting single regulator. In fact, there are few examples in B.C. of a regulator, whether a self-regulatory body or a government body, being subject to oversight. One exception is the Insurance Council of B.C., which is overseen by FICOM in the sense that FICOM has the ability to appeal Insurance Council enforcement decisions to the FST. Oversight of regulators is also rare generally in Canada.

That raises the question – is there a need for regulatory oversight more generally?

There are three types of oversight functions:

- The ability of those affected by a decision to appeal regulatory decisions to a tribunal;
- The ability of an oversight agency to appeal decisions to a tribunal in the public interest; and
- Performance review/performance audit type of oversight.

The availability of appeals from administrative decisions, whether by those affected by the decision or public interest appeals, are an important part of the system and provide an important level of oversight. Administrative tribunals are generally faster and less expensive than the courts for addressing disputes about regulatory decisions. They hold decision-makers accountable for ensuring the decision-making process and the decisions themselves are consistent with the facts, the law and natural justice. In B.C. there is an extensive administrative tribunal infrastructure, with the *Administrative Tribunals Act* creating a generally applicable framework that is applied by various statutes to tribunals designed to provide for appeals from a broad range of administrative decisions throughout the public sector. The Financial Services Tribunal, established under the *Financial Institutions Act*, provides for appeals under RESA and other statutes.

Public interest appeals provide a third party with the right to appeal a regulatory decision because there is a concern that the regulatory adjudicator may have made an error that harms the public interest. Sometimes that right is vested in the regulator itself, allowing it to appeal decisions by adjudicators working on behalf of the regulatory body. Sometimes the right is granted to an outside body or person. For example, the superintendent has the right to appeal RECBC decisions and FICOM has the right to appeal Insurance Council of B.C. decisions. On the other hand, sometimes, such as under the *Financial Institutions Act*, there is no provision allowing public interest appeals and only those directly affected by decisions have the right to appeal. Should there be some kind of independent ability for some independent body to file public interest appeals of regulators generally?

Performance reviews or audits are important for the same reason that financial audits are important. They help organizations to improve and provide accountability. Regulators within the public sector are all accountable through the same accountability mechanisms that apply to all government bodies, including requirements for service plans and annual reports. Self-regulatory bodies are also generally accountable to ministers and may have reporting requirements. Performance reviews by an independent body would provide a higher level of accountability.

There is another important reason to have a level of oversight for regulatory bodies. There are numerous examples in British Columbia and elsewhere of regulators that are set up to deal with an industry and to achieve a defined public interest objective suddenly finding themselves in crisis after years of successful operation due to a change in the industry or in government's objective.

The real estate industry and RECBC is one example. Because real estate was for years effectively regulated by regulating licensees' professional conduct in a certain way and there were few or no high-profile issues, RECBC was regarded as a well performing body not in need of oversight. The minister and superintendent both had powers that could be used to oversee RECBC but there was no need to use them. Suddenly, the Lower Mainland property market and media attention to a certain type of alleged misconduct resulted in a spotlight being shined on the council, revealing the need for some changes to council operations and to the legislation, such as increased fine amounts. It should be noted that RECBC had asked for increased fines repeatedly but as there was no overarching issue, it was not a government priority. If there had been regular performance reviews, that might have prevented the disruptive change that took place in 2016 and might have provided the context for addressing legislative housekeeping such as increasing fines earlier.

FICOM is another example. In the 1980's financial institution regulation that had been unchanged for decades was shown to be ineffective by several high-profile credit union and trust company failures. That crisis led to the creation of the current regulatory regime, which has been reviewed from a policy perspective several times since to keep it up to date, as a result of a statutory review requirement.

There are other current examples of B.C. regulators that are being reviewed because of specific cases that have arisen, including related to health professions. Sometimes a specific case does suggest that a regulator is ineffective and sometimes the case, regardless of how tragic, would have been beyond the ability of even the most effective regulator to prevent. Nevertheless, high profile crises often generate significant change, whether needed or not.

Subjecting all regulators to some form of oversight can be an effective way of preventing complacency due to a regulator being effective for long periods of time but being unable to adapt to changing circumstances. It can also provide an effective body of experience that can help deal with the inevitable specific cases that call the effectiveness of a regulator into question, whether fairly or not.

One model for an oversight agency that covers a number of regulatory bodies is the UK Professional Standards Authority¹⁷, which is an independent body reporting to Parliament that oversees the regulators of health and care service professionals. There are numerous other approaches that could be taken to provide a level of oversight to regulatory agencies.

It is beyond the scope of this review to propose general regulatory oversight for B.C. However, removal of the existing oversight function for real estate regulation because of the flawed structural model raises the question of whether general regulatory oversight should be considered.

It is recommended that:

3 Government consider whether there should be oversight for regulators in B.C. and if so, what form that oversight should take.

¹⁷ <https://www.professionalstandards.org.uk>

EXPANDED REGULATORY SCOPE

The third conclusion is that real estate regulation should extend beyond the regulation of those currently required to be licensed to market conduct more broadly, in the interest of ensuring a fair, efficient and trusted real estate market. That implies that a significant policy development exercise will be required to consider the best way to expand the scope of real estate regulatory requirements.

Similarly, the discussion above about ensuring that ministry policy staff take the lead for public policy issues implies a need to distinguish between public policy and administrative policy, which is not a trivial task.

At present, RESA contains some relatively detailed requirements related to trust accounts, the regulations contain some but not all significant regulatory provisions and the rules are a combination of detailed administrative policy requirements and significant public policy measures, such as the dual agency provisions. As suggested in the section about policy and regulatory structure, public policy provisions should be implemented using regulations. That would leave the rules for administrative policy measures that require the force of law to be enforceable but are not public policy measures. In that context, it would be useful to reorganize the existing act, regulations and rules to distinguish between public policy and administrative policy.

There are also significant outstanding IAG recommendations that need to be analyzed and decisions made about whether and how to proceed. That includes Recommendation 1, that a code of ethics for licensees should be developed, and Recommendation 22, that the requirement for managing brokers to oversee licensees be strengthened. In the context of a broad review of real estate regulatory requirements, it may also be necessary to consequentially review the implementation of other IAG recommendations. The code of ethics recommendation in particular provides an opportunity to build an overarching public policy framework based on ethics principles that provides a useful context for real estate regulation and administrative policy.

It is recommended that:

- 4** A policy review of real estate regulatory requirements be undertaken, including:
 - a.** A review of existing regulatory requirements in RESA, the regulations and the rules to ensure that the public policy requirements are contained in RESA and the regulations, and that the rules are limited to administrative policy provisions that need the force of law to be effective and are consistent with the public policy framework;
 - b.** A review of the best way to move beyond the regulation of those currently required to be licensed to more fully regulate market conduct in the public interest to prevent market manipulation and abuse, including but not limited

to considering whether each of the different groups currently exempt from licensure should be regulated and if so, how; and

- c. A review of outstanding IAG recommendations that would require a public policy response to determine the best way to proceed. That would include a review of changes that already need to be revisited consequentially to any changes made to the regulatory structure and other regulatory requirements under a. or b.

Rules needed to implement administrative policy should be subject to ministerial approval and the *Regulations Act*.

It is noted that such a review would be a considerable undertaking and should be expected to take at least two years to complete. The first step in such a review should be to establish an industry advisory committee in consultation with organizations representing existing licensees and real estate market participants who are currently exempt from licensure. The review should follow the methodology and process discussed in Appendix D.

It is also noted that the IAG review, which arose out of the specific situation in the Lower Mainland, focused on urban owner-occupied residential real estate. The recommended review should ensure that it includes due consideration to the needs of, and unintended consequences for, the real estate industry and real estate markets in rural and remote areas of the province, and of whether different standards are required related to different market segments, such as commercial, industrial and rental housing real estate markets.

TIMING AND TRANSITION

Of the four recommendations set out above, one relates to the move from co-regulation by two regulators to a single regulator and three relate to policy development (that the Ministry of Finance control public policy development related to real estate regulation, that consideration be given to whether there should be regulatory oversight in B.C. generally and that a broad real estate policy review be conducted).

Restructuring the two real estate regulators and integrating that into a change process already underway for FICOM will require considerable planning to minimize disruption, which it is recognized will be considerable even in the best case. Legislation will be required. If the recommendation to restructure is accepted, it will take some time to implement. If not, it will be even more important that the co-regulators find a way to work more closely together. Specifically, it will be important to prevent disputes from arising and resolving those that do.

It is recommended that:

5 Until a single regulator model is implemented, or if the recommendation that there be a single regulator is not accepted, the ministry, OSRE and RECBC should work together using the following framework beginning immediately:

- a.** The Ministry of Finance policy staff should immediately assume the role of public policy lead (Recommendation 2) on an informal basis, if necessary confirmed in writing by the minister for RECBC and the deputy minister for OSRE;
- b.** The ministry should develop a recommendation for the minister, with the advice and collaboration of OSRE and RECBC, about which, if any, outstanding public and administrative policy issues need to be addressed immediately;
- c.** Policy work approved by the minister should proceed based on the methodology and process described in Appendix D, with a committee comprised of representatives of the ministry, OSRE and RECBC meeting regularly to coordinate administrative input into public policy issues and the development of needed administrative policy changes;
- d.** All other policy work should be deferred to the real estate regulatory policy review (Recommendation 4), the timing of which need not be tied to structural changes;
- e.** OSRE and RECBC should also continue to focus on their operational responsibilities, including establishing a committee co-chaired by the Superintendent and Executive Director of RECBC to work together on enforcement of licensee and unlicensed activity and the implementation of operational changes RECBC currently has underway;
- f.** If possible, the ministry should facilitate the appointment of additional council members with hearing and real estate experience to accelerate enforcement activity, on the understanding that appointments may be temporary as a result of structural change.

REAL ESTATE ERRORS AND OMISSIONS INSURANCE CORPORATION

In its submission, REEOIC provided the following background:

E&O was originally formed in 1988 under the Real Estate Act and was subsequently continued pursuant to s.99 of the Real Estate Services Act, SBC 2004, chapter 42 ("RESA"). E&O is a not-for-profit special act corporation formed solely to provide errors and omissions insurance to real estate licensees in BC. E&O pools the assessments paid by real estate licensees in a Fund (authorized by section 103 of RESA) which is used to pay the costs of defending and indemnifying licensees against professional liability claims. Essentially the Fund covers professional negligence losses. In the case where a licensee has acted fraudulently, typically that licensee's brokerage is not implicated in the fraud, and it is entitled to be covered under "innocent insured" provisions of the Indemnity Plan (insurance policy) for its vicarious liability for the conduct of the licensee.

The Fund covers liabilities of licensees up to \$1 million per claim. Many brokerages buy excess professional liability insurance from the private insurance market to cover liabilities in excess of that figure. Despite the increase in real estate prices over the years, the insurance program has remained financially stable. Premiums of \$350 per year have not increased since 2011.

Claims for misappropriation of funds held in trust by licensees are covered under an entirely separate insurance program created under RESA - the Real Estate Compensation Fund Corporation. (See ss. 109 and following of RESA).

The E&O program has a two-fold purpose. It was designed to protect licensees from financial loss arising from errors, omissions or negligent acts that occur during the performance of their duties under RESA. It also ensures that consumers who incur a loss because of the negligence of a licensee will be compensated.

A Board of Directors is responsible for administering E&O and consists of seven Directors; four are appointed by the Real Estate Council of BC ("REC") and three are appointed by the BC Real Estate Association ("BCREA"). The Board appointment process is set out in s. 100 (1) of RESA. E&O's mandate is "to provide adequate cost-effective professional liability insurance for the protection of real estate licensees and thereby the public".

As a result of the 2016 amendments to RESA, since RECBC appoints a majority of REEOIC board members, when RECBC become a government body, so did REEOIC.

REEOIC's direct role is to protect licensees against negligence claims, defending them in legal proceedings and insuring their losses. REEOIC was created to ensure that all licensees have errors and omissions coverage, because it is in the public interest that those suffering losses because of licensee negligence receive compensation. However, REEOIC owes a primary duty to its insureds (licensees), not the public, as is appropriate for an insurer. The public is protected by the provisions of RESA, which ensure that REEOIC can cover losses through premiums, and because REEOIC is regulated by FICOM as an insurer.

The fact that REEOIC inadvertently became a government body in 2016 has had the effect of highlighting the inappropriateness of RECBC controlling REEOIC through board appointments, even though that control has reportedly never been used to influence REEOIC decisions or operations. Also, the board appointment mechanism of REEOIC will need to be changed consequential to Recommendation 1 if it is implemented.

It is recommended that:

6 Government consider changing the board appointment mechanism of REEOIC so that REEOIC is no longer a government body.

It is also noted that there is another government body,¹⁸ the Real Estate Compensation Fund Corporation, created by RESA to manage a compensation fund for losses by market participants due to the misappropriation of funds from trust accounts. RECBC makes decisions about compensation of such losses from the fund. The corporation manages the fund, including investing available money and levying assessment of licensees. Like REEOIC the corporation became a government body when RECBC became a government body. RECBC recommended that the corporation be abolished, and the functions of the corporation become RECBC responsibilities.

If structural change is made, consequential changes to the Real Estate Compensation Fund Corporation will be required. Unlike REEOIC however, since the compensation fund directly provides public protection, there is no similar argument for it being moved outside the public sector and it should remain a government body.

¹⁸ There is third statutory body, the Real Estate Foundation, created by RESA. As a result of its governance structure, the foundation is not now and never has been a government body. There is no basis for reconsidering its status.

SUMMARY – TERMS OF REFERENCE QUESTIONS

Recommendations Summary

The Terms of Reference pose several specific questions to be answered. The recommendations made in this report provide a general answer to the questions. In summary, the report recommends that:

- 1** OSRE and RECBC should be merged into FICOM as the single regulator, with FICOM having full responsibility for public education, education of licensees, complaints and enforcement related to licensee professional conduct, enforcement related to unlicensed activity and market conduct generally, and associated administrative policy, including rule-making.
- 2** The Ministry of Finance should control real estate public policy development, in collaboration with the regulator.
- 3** Government consider whether there should be oversight for regulators in B.C. and if so, what form that oversight should take.
- 4** A policy review of real estate regulatory requirements be undertaken, including:
 - a.** A review of existing regulatory requirements in RESA, the regulations and the rules to ensure that the public policy requirements are contained in RESA and the regulations, and that the rules are limited to administrative policy provisions that need the force of law to be effective and are consistent with the public policy framework;
 - b.** A review of the best way to move beyond the regulation of those currently required to be licensed to more fully regulate market conduct in the public interest to prevent market manipulation and abuse, including but not limited to considering whether each of the different groups currently exempt from licensure should be regulated and if so, how; and
 - c.** A review of outstanding IAG recommendations that would require a public policy response to determine the best way to proceed. That would include a review of changes already that need to be revisited consequentially to any changes made to the regulatory structure and other regulatory requirements under a. or b.

Rules needed to implement administrative policy should be subject to ministerial approval and the *Regulations Act*.

5 Until a single regulator model is implemented, or if the recommendation that there be a single regulator is not accepted, the ministry, OSRE and RECBC should work together using the following framework beginning immediately:

- d.** The Ministry of Finance policy staff should immediately assume the role of public policy lead (Recommendation 2) on an informal basis, if necessary confirmed in writing by the minister for RECBC and the deputy minister for OSRE;
- e.** The ministry should develop a recommendation for the minister, with the advice and collaboration of OSRE and RECBC, about which if any outstanding public and administrative policy issues need to be addressed immediately;
- f.** Policy work approved by the minister should proceed based on the methodology and process described in Appendix D, with a committee comprised of representatives of the ministry, OSRE and RECBC meeting regularly to coordinate administrative input into public policy issues and the development of needed administrative policy changes;
- g.** All other policy work should be deferred to the real estate regulatory policy review (Recommendation 4), the timing of which need not be tied to structural changes;
- h.** OSRE and RECBC should also continue to focus on their operational responsibilities, including establishing a committee co-chaired by the Superintendent and Executive Director of RECBC to work together on enforcement of licensee and unlicensed activity and the implementation of operational changes RECBC currently has underway;
- i.** If possible, the ministry should facilitate the appointment of additional council members with hearing and real estate experience to accelerate enforcement activity, on the understanding that appointments may be temporary as a result of structural change.

6 Government consider changing the board appointment mechanism of REEOIC so that REEOIC is no longer a government body.

Responses to Questions

The following are more specific answers to the questions posed.

In undertaking this review, the following matters will be considered:

1. The current roles and responsibilities of RECBC, the Office of the Superintendent of Real Estate (OSRE) and the Ministry of Finance in the regulation of real estate activity in B.C. including an assessment of which elements of those roles and responsibilities are operating efficiently and which are not.
 - The regulation of real estate is currently not operating effectively because of dysfunction largely created by the structure. In particular, neither the rule-making process or the regulatory oversight roles of OSRE have been effective. As a result, this report has recommended a significant change to the policy-making process and that OSRE and RECBC be merged with FICOM.
2. Recommendations on:
 - a. What matters are appropriately the sole or shared responsibilities of RECBC, OSRE and the ministry, including but not limited to education, disciplinary matters, rule-making, and the regulation of unlicensed activity;
 - The report's recommendations are that there should be a single regulator responsible for education (both public education and education of licensees), disciplinary matters, and the regulation of unlicensed activity.
 - In terms of rule-making, the report recommends that the ministry have lead responsibility for the development of public policy, in collaboration with the single regulator and the regulator should lead development of administrative policy in collaboration with the ministry. In general, public policy decisions should be implemented through regulations or legislation, if needed, with rules reserved for administrative policy matters that require legally binding provisions. Rules would require approval of the minister and be subject to the *Regulations Act*.
 - b. What oversight powers the various agencies should have with respect to one another;
 - The recommendation that the single regulator be merged into FICOM implies that there would be no direct regulatory oversight of the kind OSRE currently has responsibility for in respect of RECBC. FICOM decisions can be appealed by those affected by the decisions under the *Financial Institutions Act* and FICOM is subject to generally applicable public sector accountability requirements but is not subject to direct oversight.
 - The structure of one regulator directly responsible for overseeing just one other regulator should not be replicated, but the report recommends that government consider generally the question of whether there should be some form of oversight for regulators across government.

- c. The role that OSRE should play within the wider financial regulatory framework of British Columbia;
 - The reason why FICOM was chosen among the available options as the agency that should be the single regulator for real estate was to put real estate regulation into the context of broader financial sector regulation in order to effectively regulate market conduct beyond the professional conduct of licensees.
 - The report also recommends that a policy review be undertaken looking at currently exempted market participants, other policy changes needed to effectively regulate market conduct, reorganizing the legislation, regulations and rules to delineate public policy from administrative policy and outstanding IAG recommendations.
- d. How the agencies should communicate with one another about any shared responsibilities;
 - Under the recommendations, there would no longer be shared responsibilities. Nevertheless, effective policy development requires close collaboration between ministry policy staff with the public policy lead and administrators responsible for implementing and interpreting public policy direction set by government. Ministry of Finance policy staff (FCSPB) and the single regulator (FICOM) already routinely collaborate on an ongoing basis.
- e. What the appropriate number, composition and role of RECBC should be;
 - It is recommended that RECBC should be merged with FICOM.
 - If that recommendation is not implemented, it is suggested that the RECBC board be changed from having both oversight of the organization and supplying the majority of those making enforcement decisions. Rather, there should be a smaller, purely executive board. Complaint and hearing committees should be staffed by individuals hired based on skill and competency requirements related to real estate industry practice and regulatory enforcement adjudication.
- f. Mechanisms to avoid disputes between agencies; and
- g. Mechanisms for resolving disputes when they arise;
 - In general terms, the proposed structural change and the change to the policy development process should eliminate the type of disputes that have occurred between OSRE and RECBC. Recommendation 5 sets out some measures that can be taken immediately to prevent disputes (essentially by having the ministry take the public policy lead and only proceeding on policy work that is immediately needed) and resolve disputes (by implementing ministerial approval). These measures will help in the transition period before structural change can be implemented and can stay in effect if structural change is not made.

- h.** Given the recommendations about the roles of RECBC and OSRE, the appropriate organizational structure, staffing complements and areas of staff expertise for OSRE, what systemic changes, if any, are needed to ensure effective regulation in the public interest.
- The recommendations would create a single regulator by merging OSRE and RECOM with FICOM and change the policy development process so that ministry staff (FCSPB) lead public policy development in collaboration with the single regulator.
 - RECBC has implemented and is continuing to implement systemic changes to improve regulatory enforcement. It is important that work continue and that disruption of ongoing operations at RECBC be minimized and that existing staff and organizational structures be maintained through transition to enable these crucial regulatory operations to continue.

APPENDIX A – TERMS OF REFERENCE

Terms of Reference

B.C. Real Estate Regulatory Review

Background

B.C. has historically regulated the activities of real estate agents and property managers with several agencies, primarily the Superintendent of Real Estate (the superintendent) and the Real Estate Council of British Columbia (RECBC). In 2016, under pressure from the public and the media, RECBC asked the superintendent to undertake a review of real estate regulation in B.C. The superintendent appointed and chaired a group known as the Independent Advisory Group (IAG), which issued a report in June 2016.

In July 2016, the Legislature passed amendments to the *Real Estate Services Act* that enhanced the role of the superintendent and made RECBC government-appointed, among other changes. The amendments also removed rule-making powers from RECBC and gave them to the superintendent.

The Task

The purpose of this review is to advise the Minister of Finance on how best to ensure the effective regulation of real estate activity in British Columbia. In particular, to ensure that it appropriately and efficiently protects participants in the real estate market.

In undertaking this review, the following matters will be considered:

1. The current roles and responsibilities of RECBC, the Office of the Superintendent of Real Estate (OSRE) and the Ministry of Finance in the regulation of real estate activity in B.C. including an assessment of which elements of those roles and responsibilities are operating efficiently and which are not.
2. Recommendations on:
 - a. What matters are appropriately the sole or shared responsibilities of RECBC, OSRE and the ministry, including but not limited to education, disciplinary matters, rule-making, and the regulation of unlicensed activity;
 - b. What oversight powers the various agencies should have with respect to one another;
 - c. The role that OSRE should play within the wider financial regulatory framework of British Columbia;

- d.** How the agencies should communicate with one another about any shared responsibilities;
- e.** What the appropriate number, composition and role of RECBC should be;
- f.** Mechanisms to avoid disputes between agencies;
- g.** Mechanisms for resolving disputes when they arise;
- h.** Given the recommendations about the roles of RECBC and OSRE, the appropriate organizational structure, staffing complements and areas of staff expertise for OSRE. What systemic changes, if any, are needed to ensure effective regulation in the public interest.

Terms of the Assignment

The review will be conducted by Dan Perrin of Perrin, Thorau and Associates Ltd. (bio attached) reporting to Shauna Brouwer, Assistant Deputy Minister of Policy and Legislation Division, Ministry of Finance. The Financial and Corporate Sector Policy Branch will provide information and assistance to the review.

Both OSRE and RECBC will be consulted in undertaking the review.

The review will begin April 18, 2018. The reviewer will provide weekly progress reports, a draft report by May 10, 2018 and a final report by June 15, 2018.

APPENDIX B – LIST OF PARTICIPANTS

- BC Northern Real Estate Board
- British Columbia Real Estate Association
- Consumer Protection BC
- Financial and Corporate Sector Policy Branch, Ministry of Finance
- Financial Institutions Commission
- Fraser Valley Real Estate Board
- Office of the Superintendent of Real Estate
- Real Estate Alliance of BC
- Real Estate Council of BC
- Real Estate Errors and Omissions Insurance Corporation
- RH Pope, Pope Estates Inc.
- Victoria Real Estate Board

APPENDIX C – IAG RECOMMENDATIONS

| Recommendation | Status |
|--|---------------------------------|
| Transparency and Ethics | |
| 1. The Real Estate Council create a comprehensive Code of Ethics and Professional Conduct and require licensees to affirm, in writing, their compliance with the Code as part of regular relicensing requirements. | OSRE Considering |
| 2. The Real Estate Council amend its Rules to no longer permit licensees engaged in trading services to offer dual agency. | OSRE Action Taken |
| 3. The Real Estate Council require licensees to fully disclose and explain their financial and non-financial incentive structures, prior to and on entering into a client relationship. | OSRE Action Taken |
| 4. The Real Estate Council require licensees to provide information to consumers that clearly explains the duties owed to consumers by licensees, and how consumers can protect their own interests, before, during and after they enter a relationship with a licensee. | OSRE Action Taken |
| 5. The Real Estate Council focus more attention on the forms and contracts used by licensees, to ensure they reflect an appropriate emphasis on consumer protection and the public interest. | RECBC Action Taken |
| 6. Government implement the changes it made to contracts used by licensees, requiring seller consent to contract assignments by the buyer, to all forms of contract for trades in real estate whether or not the contracts are prepared by licensees. | Ministry of Finance to Consider |
| 7. The Real Estate Council require all licensee disclosures of interests in trade be reviewed and approved by a licensee's managing broker and subsequently filed at regular intervals with the Real Estate Council. | OSRE Considering |
| 8. The Real Estate Council amend its Rules to prohibit a licensee from acquiring a direct or indirect interest in their own listing. | OSRE to Consider |
| 9. The Real Estate Council require that all offers received by a seller's agent in relation to a trade in real estate, be promptly filed with that agent's managing broker and be retained at the brokerage for review by the Real Estate Council on demand. | OSRE Considering |
| Compliance and Consequences | |
| 10. The Real Estate Council apply more stringent suitability assessment criteria to prospective licensees. | RECBC Action Taken |
| 11. The Real Estate Council impose an explicit duty on managing brokers to report licensee misconduct to the Council, and explicit duty on licensees to report misconduct to their managing broker, when that misconduct places the public at risk. | OSRE Considering |
| 12. The Real Estate Council implement confidential reporting channels (for example, reporting hotlines or whistle-blower programs) for industry and the public to facilitate reporting of licensee misconduct. | RECBC Action Taken |
| 13. The Real Estate Council use existing regulatory powers to encourage licensee compliance with all rules that govern their conduct, including those of other legal and regulatory regimes. | RECBC Implementing |

| Recommendation | Status |
|--|--|
| 14. The Real Estate Council increase its proactive detection and deterrence efforts for licensees who engage in, aid or abet aggressive marketing and sales practices that target vulnerable members of the public. | RECBC Implementing |
| 15. The Real Estate Council increase the focus on licensee conduct examinations in its brokerage auditing program. | RECBC Action Taken |
| 16. Government increase maximum disciplinary penalties available to the Real Estate Council to \$250,000 for individual licensee misconduct and \$500,000 for brokerage misconduct and increase administrative penalties to a maximum of \$50,000. | Legislation in Force |
| 17. Government amend the Act to enable the Real Estate Council to disgorge the proceeds of misconduct from licensees and brokerages. | Legislation in Force |
| 18. The Real Estate Council improve the transparency of its complaints and disciplinary process, and the resulting outcomes. | RECBC Action Taken |
| Governance and Structure | |
| 19. Government amend the Act to require that 50% of Council members be non-industry members. | Superseded by Legislative Change |
| 20. Government amend the Act to make the regulation of both licensed and unlicensed real estate services the responsibility of a single regulator, the Real Estate Council. | Ministry of Finance to Consider |
| 21. Government increase the Superintendent of Real Estate's oversight of the Real Estate Council including periodic independent assessments of Council's performance against its mandate. | Legislation in Force |
| 22. The Real Estate Council strengthen the requirements for managing brokers to have active and direct oversight over licensees. | OSRE Considering |
| 23. Government implement a "fit and proper" standard for brokerage ownership. | Legislation in Force |
| 24. The Real Estate Council require record keeping and reporting that would assist it to identify industry practices that may be placing consumers at risk. | RECBC and OSRE Considering |
| 25. The Real Estate Council undertake a comprehensive review of licensing education and testing requirements to raise entry standards. | OSRE Rule for English Language Proficiency in Place RECBC Considering Additional Measures |
| 26. The Real Estate Council implement mandatory continuing education with content and testing that reinforces a licensee's ethical obligations, conduct requirements and duties to consumers. | OSRE and RECBC Developing |
| 27. The Real Estate Council make its complaints process more publicly accessible and easier to navigate. | RECBC Action Taken |
| 28. The Real Estate Council significantly increase and improve its public education and awareness efforts. | RECBC Implementing |

APPENDIX D – POLICY DEVELOPMENT BEST PRACTICE

There are two aspects of policy development, methodology and process. The methodology refers to how policy is developed and the considerations that need to be taken into account when developing policy. The process refers to the roles of the various players and how they work together in developing policy.

Public Policy Methodology

The following are matters that should be considered in developing public policy.

It should be noted that these are not steps to be linearly applied, but rather the matters that should be addressed in coming up with an effective and justifiable way to achieve a public interest objective or resolve an issue in the public interest.

1. Establish the Objective – Identify the Problem

It is important that before a decision is made, there is a clear public interest objective established.

Often public policy failures are due to the lack of a clear and comprehensive understanding of why a change is needed. Sometimes ideas for change sound good and are attractive, but if they don't solve the real problem, the result can be the opposite of what was intended.

It is not enough to have a vague overarching objective, like “public protection.” There should be a concrete, identifiable problem, backed up to the extent possible by quantitative evidence of the problem. In other words, using the public protection example, the objective should make it clear what harm the public needs to be protected from and why, including an understanding of how widespread that harm is.

2. Establish Relevant Principles

Every government policy, especially in the area of regulatory policy, has costs and implications as well as benefits associated with achieving the intended objective. These are often referred to as unintended consequences. Principles provide a framework for identifying the unintended consequences or implications associated with policy measures. They also provide a framework for comparing and evaluating options, to choose the best way of achieving a given objective.

Common principles that governments consider when making public policy include:

- **Fairness** – while there can be different dimensions to fairness and different people can have different perceptions about the fairness of a given policy, it is

always important that fairness be considered when developing public policy. Fairness is a lens through which many social implications can be considered;

- **Cost** – all government policies impose financial and economic costs, including financial costs such as government costs of administration, compliance costs imposed on those being regulated, and economic costs like opportunity costs or reduced economic efficiency. It is important to consider what costs are imposed and who bears the cost;
- **Simplicity and understandability** – complex issues usually require a level of complexity associated with the solution, but it is important that unnecessary complexity be avoided, and that the policy be able to be explained clearly;
- **Transparency** – it is important that people be able to see what is happening and to understand why, to enable accountability;
- **Proportionality** – is the policy response proportionate to the problem being addressed? and
- **Competitiveness** – regulation can affect B.C. competitiveness in terms of economic activity and the ability to do business.

There may be other principles that apply in specific circumstances. For example, in the case of tax policy, the stability of a revenue stream is a principle that is commonly considered.

3. Develop Alternative Approaches

There are always alternative ways to achieve a given objective. There may be different legal approaches that can be captured in legislation, whether that comes in the form of statute law, regulations or legally enforceable rules. There also may be other approaches that could be effective and that don't include changes to the law, such as education and training programs or other types of service delivery programs instead of establishing a legal requirement.

Doing nothing should always be considered as an option. Even if it is self-evident that there is a real issue that must be addressed somehow, comparing the implications and unintended consequences of the status quo option with other alternatives is often useful in helping to justify the policy decision that is ultimately taken. Sometimes status quo is the best available option.

4. Evaluate the Alternatives

For each alternative consider first how effective the alternative would be in achieving the objective. That may be a purely qualitative analysis but should where possible include quantitative analysis. The analysis should also specifically ask the question about how administratively and legally feasible the alternative is.

In addition, use the principles as a framework to identify the implications and unintended consequences of each alternative and provide a basis upon which to compare them. In doing so, implications may be identified that can be mitigated and if so that may feed back into the design of the one or more of the alternatives.

5. Recommend a Solution

Based upon the analysis determine what the best public policy alternative is, or at least describe the trade-offs, such as the level of costs that would have to be incurred to achieve a certain level of benefit.

6. Prepare an Implementation Plan

Determine the practical steps that need to be taken to implement the proposed policy, assuming a policy measure is proposed. That could include preparing drafting instructions if legislation is required, establishing administrative policies and procedure manuals, forms and other administrative materials needed to implement the policy, for example and developing a detailed budget for public sector costs. It could also include determining needed transitional provisions to enable those affected to make the adjustments that they need to make without unnecessarily disrupting lives and businesses.

These are the activities that should be undertaken in developing public policy. Some elements of this methodology can and should be applied to making administrative policy decisions too, depending on the issue at hand. For example, often the objective for administrative policy is clear because it is consequential to a public policy decision and there is really no choice about the nature of the administrative policy. Even when the objective is obvious though, it is almost always worthwhile to give some thought to unintended consequences and ways to mitigate them.

Public Policy Process

There are three crucial roles in an effective public policy process:

- Policy analysis;
- Administrative advice; and
- Legislative drafting (if legislation is required).

Public policy decisions are a fundamental government responsibility in a parliamentary democracy, for which governments are ultimately held responsible by voters. Even if public policy decisions are delegated to a regulatory agency, as was the case with the 2004 changes which gave RECBC rule-making power and the 2016 changes to transfer the rule-making power to OSRE, government is ultimately accountable. That suggests control of public policy decisions should be held by government.

One of the issues raised during this review is the issue of the independence of regulators. It is important that regulators be free from political interference in their application of the regulatory regime, for example in terms of decisions to grant a license, to investigate a complaint, to prosecute alleged non-compliance or to impose a regulatory penalty. However, there seems to be a view held by some that setting regulatory policy should also be independent from elected officials. In fact, it is the elected government that is accountable to voters for public policy. Going forward, the policy process should be built around that principle.

The following roles would realign the policy development process so that it is ultimately consistent with government public policy decision-making:

- The policy process should be led by FCSPB in the Ministry of Finance, which ultimately reports through the deputy minister to the minister;
- The regulator(s) should participate in consultations and also provide advice about industry impacts and the administrative implications and feasibility of policy proposals and develop associated administrative policy materials; and
- Legislative Counsel should be responsible for drafting needed legislation based on drafting instructions provided by FCSPB.

In terms of actual process, the stages would be:

- I. Policy analysts and regulators would work together to develop a policy paper based on the methodology outlined above that identifies the issue and analyses alternatives in the context of effectiveness in solving the issue and taking implications into account. To avoid future disputes, the policy analysts and regulators must agree at this stage about how the recommended policy would be interpreted in practice;
- II. The Minister of Finance would approve the proposed policy prior to consultation;
- III. That paper would then be used as the basis for consultations with those affected;
- IV. Based on consultations, any needed changes to the policy proposal would be made by FCSPB in consultation with the two regulators, ministerial or other required government approval would be sought, and drafting instructions prepared, if needed;
- V. The regulator(s) would prepare needed administrative materials based on the policy proposal and drafting instructions, in collaboration with the policy analysts to ensure that administrative policy remains consistent with the public policy direction; and
- VI. Legislative Counsel would draft legislation based on drafting instructions in consultation with FCSPB and regulators as required.

The approval process depends on whether legislation is required and on the type of legislation (an Act, regulation or rule), but regardless, at least ministerial approval should be required.

One additional role should also be considered – an industry advisory group. The purpose of the advisory group would be to ensure that people with experience in industry practice are consulted early in the policy analysis process as the problem is being defined, options developed, and implications assessed. It is suggested that industry associations and groups representing the various professions involved with real estate, including those who must be licensed and those who are exempt from licensure be given the opportunity to at least nominate or preferably to appoint members to the advisory committee. There is a limit to size of an effective advisory group but it would be valuable to have access to a broad range of industry expertise throughout the policy development process.

APPENDIX E – RECBC OPERATIONAL CHANGES

The following are excerpts from a briefing document provided by RECBC outlining operational changes made since 2016 and changes planned or in process:

| Function | Implemented by Council since June 2016 | Future Projects |
|-------------------------|---|--|
| Licensing and Education | <ul style="list-style-type: none"> • Introduced and expanded online licence renewal applications. • Increased the required passing grade for all licensing exams and the applied practice course from 65% to 70%. • Commissioned an independent review of educational requirements with recommendations on the competencies required for competent and effective professional practice at time of entry and for continued practice. • Hired a Director of Education and Licensing (Registrar) to provide senior leadership to these departments and review the entire education program to seek improvements and efficiencies. • Required new licensing applicants to meet a higher and broader standard of English language proficiency, resulting in a new rule from the superintendent. • Repealed the “pre-screening” process whereby people with potential suitability issues obtained a free investigation and hearing on that issue before having to complete any of the other licensing requirements. • Developed with UBC new mandatory continuing education course on the new rules and forms, as well as new content for licensing courses. | <ul style="list-style-type: none"> • 100% online licence applications and renewals. • Eliminating paper licensing records. • Gathering more data as part of the licence renewal process about volume and nature of licensees’ practices to identify potential areas of risk and concern, particularly with regards to currency and competency (e.g. volume of transactions each licensee is doing). • Implementing recommendations from the licensing education review to raise entry standards for the profession and enhance content and delivery of education through the career continuum. • Expanding the number of Professional Standards Advisors from two to three. • Exploring the creation of an ethics course and the feasibility of an ethics requirement as continuing professional development. • Introducing a more comprehensive licensing process for brokerages to ensure they have the necessary financial and other resources, knowledge, experience and support. |

| Function | Implemented by Council since June 2016 | Future Projects |
|-----------------------|---|--|
| Investigations | <ul style="list-style-type: none"> • Introduced an anonymous reporting tipline which allows individuals to anonymously report suspicious activity or unethical conduct by real estate professionals. • Conducted two pilot projects where two lawyers from the Legal department were seconded to the Compliance department to act as investigators to examine the complaint intake and screening and investigation processes and provide recommendations. • Hired a new Manager of Compliance with a lengthy background in policing and financial investigations in addition to a dedicated lawyer for the Compliance department (a role introduced in January 2016) to lead the ongoing process review and identify opportunities for improvements to the investigation process. • Launched complainant surveys to measure the satisfaction of complainants with the intake and investigation process and processing time and establish baselines for future measurement. • Finalizing an Information Sharing Agreement with FINTRAC. | <ul style="list-style-type: none"> • Focusing on the training and recruitment of compliance officers, including growing the current number of compliance officers of eight to twelve by early fall 2018. • Creating a dedicated “intake team” to provide early contact with complainants and to “triage” files, working toward early resolution, where appropriate, and forwarding on the more serious matters for further investigation. • Continuing a comprehensive process review of the investigations process with a particular focus on creating a training manual and process for compliance officers. • Purchasing and customizing case management software dedicated for investigations and discipline to improve document management, evidence preservation, and data collection and reporting. |
| Discipline | <ul style="list-style-type: none"> • Introduced pre-hearing conferences, which can make orders to assist in the conduct of hearings, narrow the issues for discipline hearings or include discussions of potential resolution of all or part of the case. • Introduced settlement conferences, which are appropriate where the Council and the licensee have agreed on facts and liability. The licensee (and their counsel, if applicable) and prosecuting counsel for the Council appear in front of a discipline committee to attempt to reach an agreement on penalty, which is then incorporated into a Consent Order. • Expanded the use of remedial measures in discipline, such as: adoption of an ethics course for disciplinary purposes; requiring a written statement from the licensee outlining what they learned; and requiring licensees to meet with their managing broker to review their professional obligations. • Created and published Sanctions Guideline to inform licensees and the public and guide discipline committees regarding the considerations involved in determining appropriate penalties for misconduct. • Attempted to expand the use of administrative penalties (unsuccessful due to OSRE’s interpretation of RESA regarding penalty amounts). • Created a process for disciplinary hearings on penalty only to reduce the cost and time of hearings where liability is not in dispute. • Publishing notices of discipline hearing on Council website. | <ul style="list-style-type: none"> • Creating a “conduct review” process which would require a licensee to discuss their conduct in a private setting with a subcommittee of the Discipline Committee, focusing on the education and remediation of real estate professionals that appear to require corrective action but do not warrant a hearing (research underway). • Anonymous publication of conduct reviews on the Council website for the education of licensees and the public. • Creating a conduct assessment and disposition guideline to assist in determining appropriate resolution path for complaints. |

| Function | Implemented by Council since June 2016 | Future Projects |
|------------------------|---|--|
| Brokerage Audit | <ul style="list-style-type: none"> • Broadened the focus of audits beyond the brokerage's financial records and protection of trust funds, including: <ul style="list-style-type: none"> • Examining documents to ensure proper written disclosures have been made and retained, as required; • Investigating further when issues of brokerage solvency arise; and • Ensuring licensee teams are complying with the rules made under RESA. • Added all brokerages with a newly licensed managing broker (including a managing broker who upgraded from associate broker status) to the priority list for audits (this is in addition to auditing all new brokerages within six months). • Initiating an internal Consumer Protection Issues Identification Team to review and track regulatory risks. • Developing new audit procedures to confirm compliance with the new rules. | <ul style="list-style-type: none"> • Hiring dedicated Manager of Audit to oversee the Council's audit program. • Continuing to develop the risk scale for audit priority by examining the characteristics of brokerages with having compliance issues. • Moving audit filings (e.g. Accountant's Reports, financial statements, brokerage activity report) online to provide a more streamlined process. |
| Communications | <ul style="list-style-type: none"> • Updated publication policies to include plain language versions of discipline decisions. • Launched a "knowledge base" website for licensees to act as a central source for all of the information and resources licensees need to comply with the changes to the agency rules and disclosure requirements under RESA. • Issuing consumer alerts to inform consumers about emerging risks. • Hiring new communications specialists with specific expertise in design and media relations. • Creating monthly webinars and podcasts for managing brokers to ensure managing brokers have the necessary tools and support to comply with their obligations. • Working closely with Legal and Compliance staff to create resource materials (including plain language explanatory documents and FAQ's) to assist licensees and consumers to understand new rules or regulations. • Developed a new app for online completion of forms required by the new rules. | <ul style="list-style-type: none"> • Launching a multi-year consumer awareness campaign (co-funded with the Real Estate Foundation) that will focus on building broader awareness of key issues affecting real estate consumers in BC. This will involve • Partnering with other industry organizations and creating a dedicated website for consumers as a onestop resource for all real estate-related issues. • Redeveloping the Council website to make it more consumer friendly and easily navigable. • Establishing a stronger social media presence to increase public awareness of the Council and to have a platform to more widely disseminate the Council's materials and resources. |

| Function | Implemented by Council since June 2016 | Future Projects |
|--|---|---|
| Governance and Policy Development | <ul style="list-style-type: none"> • Organized a joint Council-OSRE staff training workshop on policy making and a Council presentation on governing in the public interest by Harry Cayton of the Professional Standards Authority in the UK. • Reviewed and updated internal management and Council member conduct policies and created a delegation matrix. • Publishing Council meeting agenda packages and minutes on the RECBC website, welcoming observers for public portions of meetings and creating policy for closed meetings. • Published the terms of reference for all Council committees and advisory groups on the Council's website. • Hired two new legal counsel/policy analyst positions and identifying policy needs in various areas. • Approved amendments to the Council's publication policy to include suitability and compensation hearing decisions. • Conducting a comprehensive review of Council's governance policies and comparison with other regulators and Crown agencies to identify best practices/gap analysis (underway). • Developed a three-year strategic plan (as well as a service plan) and a "World Café" event to elicit stakeholder input on strategic priorities. • Conducted a comprehensive compensation review with benchmarking against similar regulatory organizations. • Provided extensive reviews of and input on draft proposed new rules through many rounds of drafting. • Developed and approved five new forms required by the new rules. | <ul style="list-style-type: none"> • Creating a "risk register". • Creating governance policies to improve effectiveness and align with public sector reporting requirements. • Conducting a comprehensive review of Council's nongovernance policies and comparison with other regulators and Crown agencies to identify best practices/ gap analysis. • Prioritizing non-governance related policy work and develop policies based on priorities. |



