

April 12, 2016

Marylou Leslie, Chair  
Real Estate Council of British Columbia  
900-750 West Pender Street  
Vancouver, BC V6C 2T8

Dear Ms. Leslie,

Last week the Independent Advisory Group (IAG) issued its interim report to the Real Estate Council (the Council). Today I had an opportunity to brief you, your Vice Chair and senior staff in further detail on the IAG's deliberations to date, and subsequently we both had an opportunity to brief the Honourable Minister Michael de Jong on the progress of the IAG and the issues facing the real estate services industry in our province.

We discussed a number of important issues today and I wanted to summarize these discussions as a complement to the report we issued to you last week.

### **The Work of the IAG**

As was noted in the interim report issued last week, the IAG is conducting its work under heightened public scrutiny. Public confidence in the integrity of the real estate services sector and its regulation has been shaken. Each member of the Advisory Group has understood from the moment they accepted their appointment that part of the role of the IAG is to help restore public confidence that those providing real estate services are held to high legal and ethical standards.

From the beginning the IAG has set a very broad scope for its review. We are looking at the immediate issues and examples of licensee misconduct that have been the subject of recent media reports such as improper contract assignments ("shadow flipping") and misuse of limited dual agency ("double ending"). We will also consider whether the obligations for licensees to comply with other regulatory regimes, such as the Financial Transactions and Reports Analysis Centre (FINTRAC) and the Canadian Revenue Agency (CRA), are sufficiently clear and enforceable.

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It is not enough for licensees to comply with the spirit and law of their own industry regulatory regime. The real estate industry is part of the broader financial sector and licensees have an important role in upholding the laws in place to maintain the integrity and stability of that sector. It goes without saying that the public expects that people who handle large sums of other people's money adhere to the strictest legal and ethical standards at all times.

The IAG will also consider whether misleading advertising and predatory sales strategies are being sufficiently deterred and, when identified, being adequately punished. It is particularly disturbing for the public to hear allegations of licensees being trained to engage in sales strategies that are clearly designed to take advantage of consumers. It is also disturbing to hear that consumers, who may be more vulnerable such as seniors or new immigrants, may be targeted by these predatory practices. The IAG is exploring whether the regulatory regime in place is adequately resourced and engaged with the public so that it can identify, investigate and ultimately stop these practices.

Finally we are also looking at broader issues such as whether the structure of the industry and the regulatory regime continue to serve the public interest. The public has rightfully questioned whether the self-regulatory powers granted to the real estate services industry continue to be appropriate and whether the industry is adequately fulfilling its obligations under this regime. The IAG considers this question to be within the scope of its review.

The IAG's published Terms of Reference identify the issues mentioned above, and others, and we are benefiting in our deliberations from over 70 submissions received to date from members of the real estate industry and the public. We hope all stakeholders will continue to engage in this process by sending us their comments and suggestions.

Next, I want to comment further on several topics we have focused on in the first six weeks of our work and provide some additional insight into some of the issues you can expect our final recommendations to address.

### **“Shadow Flipping” and “Double Ending”**

The practices of inappropriate contract assignment (“shadow flipping”) and misuse of limited dual agency (“double ending”) are both explicitly identified in the IAG's Terms of Reference. The IAG views both of these issues as fundamentally about licensee conduct. Abusing otherwise legal practices such as assigning contracts or acting in any way that fails to clearly disclose the interests of a licensee or puts those interests ahead of a client's interests, cannot be tolerated. These practices are contrary to existing laws, regulations and standards of conduct in place to protect the public.

We intend to monitor the upcoming changes to regulations, announced recently by the Premier, that will restrict the assignment of real estate contracts and increase the obligations of licensees to secure informed consent of sellers. The IAG will consider whether there are additional or complementary recommendations that can be made that will support the Council's ability to enforce these new regulations including, as an example, requiring reporting of all contract assignments directly to the Council.

The IAG is also considering whether or not limited dual agency continues to have a place in the real estate service industry. The advice that the real estate services industry itself makes to the public is to "secure the services of a licensed real estate professional that will act in your interest". Real estate licensees are expected to act at *all times*, solely in their client's best interest. It is difficult for most people to understand how this advice and this obligation can co-exist with rules that allow a licensee to represent the interests of a buyer and a seller in the same transaction given the inherent conflicts between those parties' interests. We acknowledge there may be circumstances where this practice does not create a clear conflict of interest, but we consider those to be very rare and potentially outweighed by the risk that advantage may be taken of some consumers. I expect the IAG will make recommendations in this regard.

### **Penalties**

The public perception is that penalties administered by the Council have fallen so far behind the remuneration received by licensees they have become ineffective; essentially treated as "the cost of doing business". This perception seems to be shared by some licensees who have also commented that they consider the penalty regime to be inadequate as a deterrent to misconduct.

The IAG is firmly of the view that penalties for breaches of the Real Estate Services Act and for unethical behavior by licensees must be significantly increased. We did not make specific recommendations on penalty amounts in the interim report because we also believe that simply increasing the size of penalties is not enough. In addition to raising penalty amounts the IAG believes there needs to be greater flexibility in the types of infractions that are subject to penalty. We are also considering options that would empower the Council to disgorge commissions and profits over and above penalties levied. This would ensure that in addition to being penalized for the misconduct a licensee would not be able to profit from that misconduct.

### **Industry & Regulatory Structure**

The real estate industry is well organized and its participants are served by a number of large, well-resourced and powerful trade organizations. These organizations exist to serve the

interests of their member realtors. In the real estate sector in particular the trade associations have significant power by virtue of their control over the Multiple Listing Service (MLS).

In our interim report the IAG observed that these trade organizations have taken on quasi regulatory functions. We believe that some of these functions, particularly those that relate to investigating consumer complaints, are properly the role of the Council. The IAG's concern is that these blurred lines appear to dilute responsibilities and accountabilities of the Council and make it unnecessarily difficult for consumers to navigate the complaint process. We are also concerned that the trade associations have assumed the role of triaging consumer complaints and are doing so with no requirement for public transparency or reporting to the Council. We believe this must be cleared up and intend to make recommendations in this area.

The role and responsibilities of the managing broker is also part of our review. A managing broker plays a key oversight role and can set the culture of a firm. Their role in protecting the integrity of the industry is therefore critical. The IAG is considering whether those responsibilities are clear enough in existing legislation and regulation and whether the Council has strong enough powers to hold managing brokers accountable. Further, the IAG is looking at evolutions in business models, including unregulated ownership structures, that may weaken the ability of Managing Brokers to ensure compliance. If the rules or enforcement powers are lacking in any way we will consider recommendations to strengthen them.

The IAG also expects to make recommendations on the structure of the Council itself, including the proportion of industry members and public members that participate in the governing board. As well, the IAG will be examining the composition and mandate of the Council's various committees, particularly the discipline and hearing committees. These recommendations will align to contemporary best practices for governance.

### **Public and Licensee Education**

An important role of every regulator is to educate their stakeholders. This includes educating licensees on their obligations and educating the public on the level of service and professionalism that they are entitled to receive.

The IAG was encouraged to see the Council recently remind licensees of their obligation to report misconduct to the Council. We have noted with great concern licensees reporting to the media that they have been aware of misconduct by fellow licensees but have opted not to report for fear of repercussions by their board or broker. The IAG intends to probe further to determine whether rules or other deterrents exist that would prevent licensees from fulfilling their obligation to report misconduct. If such deterrents exist you can expect recommendations in this regard.

We believe a greater level of public engagement and consumer education is necessary, particularly in the type of environment that currently exists in the British Columbia real estate industry. The IAG is considering whether the Council and the Superintendent's office have the necessary services and resources to make the complaint process and regulatory services sufficiently accessible to the public and available in multiple languages.

### **Summary**

The IAG's intention in sending this follow-up communication is to highlight some of the areas that the Council and government can expect to see recommendations when we deliver our final report. Some recommendations, such as those related to penalty amounts and additional reporting, may be more straightforward to implement. Others, such as changing the role of the industry trade associations and the structure and operation of the Council's governance will be more significant. Our intention in providing you and government this added information is so that you can begin to consider the effort required to make these changes.

Thank you for your time and your attention today. As mentioned in our interim report and in our subsequent meetings, the IAG is looking forward to finishing its task in early June and making a number of substantial recommendations that will serve the public interest and strengthen the real estate sector in British Columbia.

A handwritten signature in black ink, reading "Carolyn Rogers" with a period at the end. The signature is fluid and cursive.

Carolyn Rogers,  
Chair, Independent Advisory Group  
Superintendent of Real Estate

April 8, 2016

Marylou Leslie, Chair  
Real Estate Council of British Columbia  
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### **Interim Progress Report of the Independent Advisory Group**

The purpose of this letter is to provide the Real Estate Council of British Columbia (RECBC) an update on the Independent Advisory Group's (IAG) progress and some early indication of those areas the IAG expects to make recommendations.

#### **Background**

The IAG was formed at the initiation of RECBC and the Superintendent of Real Estate was asked to Chair the group. On February 9, 2016 the RECBC and the Financial Institutions Commission (FICOM) issued a joint press release announcing the formation of the IAG to examine issues of concern relating to real estate licensee conduct and practices that had come to the attention of the RECBC and to the general public. On February 22, 2016 the members of the IAG were announced to the public and a website was established that included an avenue for members of the public to make submissions to the IAG.

On March 9, 2016 the IAG held its first formal meeting and shortly after that meeting, on March 15, 2016, released its terms of reference to the public. The IAG has met twice since then, most recently on April 1, 2016.

The February 9<sup>th</sup> joint press release identified an interim date of April 8, 2016 for the initial recommendations of the IAG. At its April 1<sup>st</sup> meeting the IAG discussed the group's progress and deliberations to date and determined that it was not yet in a position to form any initial recommendations. The IAG is still gathering information and assessing the structure and effectiveness of the current regulatory regime in place to protect consumers of real estate services in British Columbia.

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## **Review of the Current Statutory and Regulatory Regime**

At the IAG's March 17<sup>th</sup> meeting RECBC staff presented an overview of the current governance structure and operation of the statutory and regulatory regime pursuant to the *Real Estate Service Act* (RESA) and Regulations and the RECBC Rules and Bylaws.

On April 1<sup>st</sup> at the IAG's request, RECBC staff made a second presentation identifying specific provisions, gaps and recommendations relating to those areas identified in the IAG's terms of reference, namely licensee conduct and practices relating to:

- Contract Assignment;
- Client's best interest (including limited dual agency);
- Honesty, reasonable care and skill;
- Conflicts of interest (including disclosures);
- Compliance with other legal obligations (e.g. CRA, FINTRAC);
- Misleading advertising; and
- Predatory marketing/sales

Both presentations were useful and we appreciate the considerable time spent by staff to prepare and deliver them. The recommendations made by staff to improve the effectiveness of the regulatory regime will receive the IAG's full consideration.

## **Monetary Penalties**

One topic that has received considerable discussion is the current restrictions on the size and applicability of monetary penalties currently permissible under the RESA and the IAG is aware that RECBC has made a submission to Government to increase the maximum penalties. The IAG shares the Council's view that maximum fines and penalties need to be increased to allow a greater and more meaningful range of monetary consequences. However, it is also our view that increasing the magnitude of fines and penalties alone is not sufficient.

I expect the IAG will make a number of recommendations pertaining to penalties in its final report. We are gathering information and best practices from a number of sources, on a range of regulatory sanctions, to inform a series of recommendations that will ensure a robust system that not only punishes those who are caught, but functions as a deterrence to those who are considering actions or activities that contravene the Act and Rules.

## **Industry Trade Associations – Canadian Real Estate Association (CREA), British Columbia Real Estate Association (BCREA) and Real Estate Boards**

As the IAG builds its knowledge of the current regulatory regime it has become aware of the unique role that the real estate trade associations play in that regime. The province's eleven real estate boards, the BCREA and CREA appear to have adopted an influential role in developing and enforcing conduct requirements for their members, via their REALTOR® Code of Ethics (the Code) and the Standards of Business Practice (the Standards). The Code and Standards are established by CREA and enforced through the real estate boards as a mandatory condition of membership and, in British Columbia, access to MLS®. In British Columbia 95 per cent of trading services licensees are members of a real estate board.

The IAG intends to explore this unique structure further. Its initial concern is that the Code and Standards do not have the authority of a legal or regulatory instrument and their administration is conducted without transparency and without accountability to, and protection of, the public interest. There is also the potential for functional overlap and consumer confusion as to consistency of treatment of misconduct, the most appropriate avenue for consumers to address their complaints, and what they can expect when a complaint is filed.

To assist in building our understanding further, the IAG has requested the cooperation of the BCREA and the real estate boards. On March 30, 2016, letters were sent to all 11 real estate boards in the province requesting responses to questions concerning the boards' administration of the Code and Standards specifically with respect to the seven issues identified in the IAG's terms of reference. An invitation has also been extended to the Executive Officer of BCREA to speak with the IAG at its next meeting.

## **Industry Structure – Managing Brokers and Personal Real Estate Corporations**

The IAG has also come to understand the complex ways in which the industry has evolved to serve business objectives such as efficiency, economies of scale and legal liability. It would appear that these changes have had significant and potentially unintended impacts on the application and effectiveness of the regulatory regime. Further exploration will be undertaken in this area as well.

## **Public Engagement**

The IAG is conducting its work under heightened public scrutiny. In the period leading up to the establishment of the Group and commencement of its review, media reports and public commentary brought to light conduct and practices of real estate licensees that pose significant



risks to the public interest and confidence in the province's real estate industry and its regulatory regime. The IAG has therefore chosen to conduct its work with a degree of transparency and public engagement in order to contribute to restoring public trust in the sector. A website and dedicated email address were established and the IAG invited members of the public and industry stakeholders to provide written comment or submission to the Group on the issues that are within the scope of the review. To date, we have received 78 communications pertaining to the conduct, practices and related activity that are the subject of the review.

These communications fall into the following broad categories:

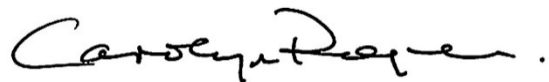
- Substantive suggestions;
- Comments and observations;
- Requests to present to the IAG;
- Other (e.g. questions).

Overall the Group is impressed with the quality of submissions received so far and plans to continue to encourage public engagement in our work.

### **Next Steps**

The IAG will be continuing its examination and deliberations on the issues before it over the course of the next two months. The issues are complex and we are highly reliant on cooperation from RECBC, BCREA and the provincial boards in gathering and organizing some of the necessary data and information to inform our deliberations. We remain optimistic about meeting a delivery date of early June for a final report, but will keep you informed of any challenges to meeting that date.

On behalf of the Independent Advisory Group, we look forward to completing this important task.



Carolyn Rogers,  
Chair, Independent Advisory Group  
Superintendent of Real Estate

cc: Robert Fawcett  
Executive Officer, RECBC