FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

"The Voice of the Practising Lawyer in Ontario"

March 15, 2019

VIA Email: REBBA@ontario.ca

REBBA Review
Consumer Policy and Liaison Branch
Policy, Planning and Oversight Division
Ministry of Government and Consumer Services
56 Wellesley Street West, 6th Floor
Toronto, ON M7A 1C1

Re: Consultation on the review of the Real Estate and Business Brokers Act, 2002

The Federation of Ontario Law Associations ("FOLA") is pleased to have the opportunity to provide comments on the government's review of the *Real Estate and Business Brokers Act, 2002.*

FOLA is an organization representing the associations and members of forty-six local law associations across Ontario. Together with the Toronto Lawyer's Association, our members represent approximately 12,000 lawyers across the province. The vast majority of these lawyers provide front-line services to the Ontario public. Many of our members regularly act for buyers and sellers of real estate in the province.

Our response to the first five questions in the consultation paper are attached as Schedule "A" to this letter. We have not responded to the last five questions as we do not feel that we have enough information on these matters to adequately respond.

Please do not hesitate to contact us should have any questions or require any further information.

Yours truly,

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Schedule "A"

Consultation questions

A. CONSUMER PROTECTION

1. Transparency in the offer process

What do you think?
1.1. Would you support changes to allow registrants to disclose the details of competing bids in multi-offer situations? If so: a) Should this disclosure require the consent of all parties? or b) Should the disclosure be the norm, with parties having the ability to opt out? Please explain. *We see no reason to change the current disclosure requirement, which permits a broker/salesperson to disclose the number of offers only.* *The type of disclosure proposed could be seen to potentially benefit certain buyers in multiple offer situations, as they would be able to alter their original offer to "sweeten the deal", after learning the details of competing offers, but would be to the detriment of other buyers who might have otherwise had the "best offer" under the current system.* *In addition, it may also induce buyers to increase the purchase price or remove important conditions from the agreement. It could be easy for buyers to get caught up in the competition of an open bidding system.* *Under the current system, in a hot market, buyers are submitting their best offer in the hopes that it is more appealing to the sellers than the competing offers. We see no significant issue with this system.* *The consultation paper notes that sellers would benefit in knowing that buyers are not deterred from making an offer in a blind bidding process. However, we wonder how often buyers are reluctant to make an offer because of the current the blind bidding process. It seems that the goal of revealing the details of competing offers is to ultimately increase the sale price or reduce conditions in a multiple offer situation where parties are openly competing to bring the best price/terms and we wonder if this is in the best interest of Ontarians.*

Requiring disclosure of the details of competing offers would make the system closer to an open auction system, where parties are present to hear competing offers. It is our understanding that sellers are not currently prohibited from selling property by way of an open auction if they so choose.

If disclosure is permitted, then requiring the consent of all parties or allowing parties to opt out defeats the goal of transparency. If all parties do not consent, then disclosure is not provided, and buyers and sellers are in the same position they are under the current system. If a party opts out, then disclosure is not permitted, and buyers and sellers are in the same position they are under the current system.

1.2. If the legislation is changed to permit registrants to disclose the details of competing offers, should the disclosure be limited to those making offers or should it be available to anyone who inquires?

If disclosure of the details of competing offers is permitted, it should only be available to parties making offers. The legitimate need for other parties to have this information is questionable. This information could be used to the detriment of a buyer whose offer was not accepted. Suppose the unsuccessful buyer submits an offer on another property but includes a lower purchase price. If this second seller knows the details of the first offer, they will know that the buyer has the ability to pay a higher price and may use this as leverage to extract a higher price.

1.3. If the legislation is not changed to permit registrants to disclose the details of competing offers, should they be prohibited from submitting offers that automatically increase if higher offers are submitted by another party (i.e., escalation clauses)?

Yes, if the legislation is not changed to permit registrants to disclose the details of competing offer, offers that automatically increase if higher offers are submitted should be prohibited. Allowing escalation clauses in offers makes it virtually impossible for another buyer to be able to successfully bid on the property. It also leaves room for dishonest conduct – if a party knows that there is an offer with an escalation clause, it can 'safely' have a third party submit an offer that has no other purpose but to increase the purchase price.

In addition, sellers want reasonable assurance that buyers will be able to complete an accepted offer. If the buyer isn't aware of the price that is ultimately being offered, there is a potential that they may not be able to complete the transaction.

1.4.	If the legislation is not changed to permit registrants to disclose the details of competing offers, should they be prohibited from submitting offers before the advertised offer period begins? *Yes, if a seller wants only to accept offers after a certain period, then registrants should not be entitled to submit offers prior to this date. In this way, all buyers are treated equally.*
1.5.	Other comments?

2. Relationships with consumers: clients and customers

What do you think?
2.1. What is the best way to ensure that consumers understand the agreements they enter into with brokerages and the kinds of services and duties that are owed to them? For example: What kind of information should brokers and salespersons be required to provide to clients? To customers? *Brokers/salespeople should be required to explain the differences between the types of services/relationships available (ie. client representation vs. customer service) in plain language and the agreements or confirmation of the relationship should also be in plain language.* At what stage should this information be provided and how should it be documented? *The type of relationship and obligations of the brokers/salespersons should be clearly documented in plain language as early as possible in the relationship. As soon as the broker/salesperson is retained by the client/customer, the nature of the relationship should be documented.* What is the best approach for dealing with and documenting changes in relationships and/or changes in services to be provided? *Changes in the relationship should be document as soon as possible in plain language.*

2.2. What are the implications of requiring a consumer to enter a formal agreement with a brokerage before any services are provided?

Consumers should be permitted to terminate an agreement if they are not satisfied with the services being provide by the broker/salesperson. As the standard agreements are currently drafted, consumers are locked in, usually for a minimum of 90 days, and may suffer financial consequences for terminating the agreement early.

2.3. Other comments?

The phrases "client" and "customer" essentially mean the same thing in many other contexts, so it is very confusing for the public when they mean such drastically different things in this context. Perhaps changing the terminology to "client" and "non-client" or "unrepresented customer", or something that more clearly denotes that the broker/salesperson will not be representing the interests of the customer.

3. Relationships with consumers: multiple representation

What do you think?

3.1. Are there circumstances in which multiple representation should be prohibited outright? If so, please describe.

It is our understanding that multiple representation arises in three situations:

a) when one salesperson represents both the buyer and the seller in the same transaction;

b) when two different salespeople in the same office are involved in the same transaction, with one representing the buyer and the other the seller; and

c) when two different salespeople in the same brokerage (but in different offices) are involved in the same transaction, with one representing the buyer and the other the seller.

Multiple representation by the following should be prohibited as a general rule, and only be allowed in exceptional circumstances:

i) by a single salesperson, as set out in a) above;

ii) by salespeople within the same office who are part of a "team", ie. where there is a joint sharing of commissions, joint marketing, and/or or an association/employment situation; and

iii) by different salespeople within the same brokerage or office if the number of salespeople with that brokerage or office is less then 5.

Section 4 of the Code of Ethics (OReg 580/05) states that a "registrant shall promote and protect the best interest of the registrant's clients". A salesperson cannot protect the best interest of a buyer or seller if s/he is also acting for the other party in the transaction. Similarly, salespeople who are part of a team or a small office will be effectively acting in concert with one another.

Buyers are seeking to pay the least amount possible, to put down the smallest deposit possible and to extract the most representations and warranties possible from the sellers. Sellers, on the other hand, are looking for the highest purchase price, the largest deposit and the least amount of representations and warranties. It is not possible to represent the best interest of both parties in such circumstances.

The Rules of Professional Conduct for Lawyers was changed in 2008 to generally prohibit a lawyer from acting for both the buyer and seller in the same transaction. This was a recognition of the conflict of interest between buyers and sellers in real estate transaction and the need for separate and independent representation.

The exception to this prohibition for lawyers includes when the buyers and sellers are "related persons" as defined in section 251 of the Income Tax Act (Canada), or when the lawyer practices law in a remote location where there are no other lawyers that the parties could retain without undue inconvenience. (Law Society of Ontario, Rules of Professional Conduct, section 3.4-16.9)

In those limited circumstances where dual representation may be permitted for salespeople, informed consent is an absolute requirement.

3.2. What conditions would need to be met before a brokerage should be permitted to represent more than one party in a trade through designated representation (e.g., informed consent)?

The multiple representation scenarios set out in b) and c) above involve separate salespeople representing the buyer and seller, although they may be within the same office or brokerage. For the purpose of the

multiple representation regulations or rules, salespeople acting as a "team" or within a "small" office or brokerage should not be considered as separate salespeople.

When separate salespeople from the same brokerage or office are acting for the buyer and seller, the clients should be advised of the relationship between the salespeople at the time an offer is made, and informed consent should be obtained prior to the offer being submitted/accepted. Information from clients relating to negotiation points should remain confidential – as it would if the salespeople were in different offices or brokerages.

What compliance and oversight measures should be required to ensure consumer protection (e.g., confidentiality of client information)?

In the exceptional circumstances where a single salesperson (or "team" or two salespeople from the same "small" brokerage or office) is permitted to act for both parties in a transaction, in addition to obtaining informed consent, the salesperson should be required to confirm that s/he cannot keep information received from one party confidential from the other.

The Rules of Professional Conduct for lawyers prevent lawyers from keeping information confidential as between the parties when a lawyer acts for multiple people in the same transaction. Specifically, Rule 3.4-5 states:

Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

The same conflict principles should apply to salespeople who are representing multiple parties in a transaction.

With respect to transactions where each party is represented by a separate salesperson with the same brokerage (either within the same office or not, all information received from the client should remain confidential, subject to the Code of Ethics requirements for the disclosure of all material information regarding the property.

	Brokerages should be required to implement and maintain a conflict screen, whereby salespeople representing the buyer and seller in the same transaction are prevented from accessing the files and records relating to the party who they are not representing.
3.3.	What conditions would need to be met before a broker or salesperson could provide facilitation services to more than one party in a single trade (e.g., informed consent)? *See the exceptions set out in response to question 3.1 above. It would have to be clear to all parties that the broker/salesperson is providing services to all parties and that there will be no representation for any of the parties.* What measures should be required to ensure that consumers understand the implications of the change in the role of the broker or salesperson from representation to facilitation? *This should be communicated in clear language as soon as possible.*
3.4.	At what stage should a broker or salesperson be required to raise the issue of multiple representation with a consumer and explain what the options would be in the event the situation arises? *This should be raised as soon as the possibility arises. It should be communicated in clear and plain language*.
3.5.	Other comments?

4. Real Estate and Business Brokers Act scope and exemptions

What do you think?	
4.1.	Does the current situation leave a gap in consumer protection for those who buy new homes? If so, please describe. *The current system does not appear to leave a gap in consumer protection:* *a) The Condominium Act, 1998 provides buyers of new condominium units with a mandatory disclosure statement and a 10 day "cooling off" period, during which time new home buyers can review the documents with legal counsel. Currently, lawyers negotiate*

amendments to the standard terms of builders' agreements with the builder's lawyer within that 10 day period.

b) *Buyers of new homes in Ontario have the benefit of the Ontario New Home Warranties Plan Act (ONHWPA), which buyers of re-sale homes do not. The ONHWPA is a consumer protection legislation, and pursuant to which Tarion warranties are administered.*

c) *Buyers of new homes work can with brokers/salespeople, who then deal with the builder's salesperson.*

d) *Builder's prepare their own form of agreement of purchase and sale and do not use the OREA standard form. The builder's salesperson is intimately aware of the details of the agreement, the Tarion (ONHWPA) terms and, in the case of a condominium unit, the relevant portions/requirements of the Condominium Act.*

We do note that not all builders will agree to pay any commission to salespeople and lawyers are not in a position to advise new home buyers on price or marketability. Further, in-house sales staff will be acting in the best interest of the builder and not the buyer. However, builders may not be any more likely to negotiate the terms of an agreement with a salesperson than with the new homebuyer and/or their lawyer, builders rely heavily on their reputation, and are regulated by Tarion (ONHWPA).

It is difficult to imagine what further protection would be afforded to the public by having builder's staff regulated under REBBA.

4.2. What would the implications be of regulating the employees of builders and vendors of new homes under the Real Estate and Business Brokers Act, 2002, while the builders and vendors that employ them are subject to a different regulatory framework?

It is very conceivable that the price of new homes will increase if builders' in-house sales staff are required to be licenced. The additional costs incurred by builders as a result of a requirement for some of its employees to be licenced under REBBA would be recovered by increased purchase prices. There will be costs to obtain and maintain the licences. In-house sales staff would likely command higher salaries with this additional credentialing. Since builders are regulated under a different framework, the cost of understanding the new regulations for the sales-staff will also likely be passed along to the purchasing public.

The public will not greatly benefit from such a change to the regulations but increasing the red tape for in-house builder sales staff will cost buyers of new homes in Ontario more money.

	There is significant concern in some parts of Ontario regarding the high cost of housing, and artificially inflating new home prices will further increase the existing market concerns.
4.3.	Should any of the other current exemptions in the Real Estate and Business Brokers Act, 2002 be reconsidered? If so, please explain. *The current exceptions are appropriate.* *In particular, we will comment on exception 5(1) (g) relating to lawyers who are providing legal services if the trade in real estate is itself a legal service or is incidental to and directly arising out the legal service.* *Lawyers in Ontario are strictly regulated by the Law Society of Ontario and are governed by their own set of Rules of Professional Conduct. Requiring lawyers trading in real estate in these circumstances to be regulated by an additional statutory regime and subject to an addition Code of Ethics will not provide any further value to the public. The Law Society's bylaws, regulations and rules are stringent and, in our opinion, are sufficient for the regulation of lawyers.*
4.4.	Are there any additional exemptions that should be considered? If so, please explain. *No, the current exceptions are appropriate.*
4.5.	Other comments?

B. ENHANCED PROFESSIONALISM

5. Code of Ethics

What do you think?	
5.1.	Is there a need to update the Code of Ethics to reflect contemporary business practices and expectations for the conduct of real estate brokerages, brokers and salespersons? For example: Would you be in favour of adding a general conflict of interest provision to the Code of Ethics?

Yes – as discussed above, there should be greater regulation relating to conflicts of interest and acting for multiple parties in a transaction.

Would you be in favour of adding a general provision on professional misconduct/conduct unbecoming the profession to the Code of Ethics?

Yes – brokers/salespeople are very much in the public eye and misconduct/conduct unbecoming can bring significant damage to the profession as a whole.

Does the Code include outdated, burdensome and/or unnecessary provisions that should be updated?

Please explain.

5.2. Other comments?

Technology has changed how transactions are completed. Clients are now able to receive, sign, submit, and accept offers electronically. The Code of Ethics should be updated to ensure that the terms of the documents are fully explained to clients prior to being electronically initialled and signed.

Consideration should also be given to revising the Code of Ethics to include an obligation on the part of the salesperson, in recommending a particular tradesperson (including lawyers), to determine and advise on the knowledge or expertise and level of service of the recommended party, as well as the nature of the fees to be charged.

Clients should be aware of the basis for the recommendation (which, for lawyers, can be simply the lowest legal fee available or because of a relationship with a lawyer who will "get the deal done" for the salesperson without "complicating" matters). The client's interest and not the salesperson's commission should be paramount, even after the agreement has been accepted and conditions have been waived. Clients are often influenced by recommendations from their realtor and due to this level of influence, clients should be advised if the recommendation is based on price alone or other relevant factors.