

A submission to the Ministry of Finance,
Financial and Corporate Sector Policy Branch
by the Law Society of British Columbia
May 16, 2003

A Response to the Real Estate Act Review Discussion Paper

The Law Society
of British Columbia



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Background

In March 2003 the BC Ministry of Finance published a discussion paper entitled *Real Estate Act Review*. The discussion paper describes the importance of the real estate industry in the economy of the province, and suggests that the existing regulatory regime has become outdated.

The discussion paper states that “The *Real Estate Act* requires modernization to ensure that it continues to provide a solid basis for real estate activities.” In light of this overarching goal, the discussion paper outlines the regulatory objectives expected to be met by the development of a new *Real Estate Act*. Briefly stated, those objectives are:

- **Least Cost** – Regulatory costs should be minimized wherever possible;
- **Competitive Market** – Regulatory requirements should contribute to a competitive real estate market by promoting competition among participants and by removing unnecessary barriers to entry;
- **Flexible Frameworks** – The legislative framework and the regulatory requirements should be flexible to enable both market participants and regulators to adapt to and to incorporate changes in technology and market practices;
- **Accountability** – Participants in the industry should be responsible for complying with the regulatory requirements, and the regulator should be accountable for applying the spirit and substance of those requirements.

The Ministry discussion paper notes:

The Government places importance on creating an environment where regulation is justified on the basis of good public policy, and whether the legislative framework contributes to enhancing a competitive business climate and enables the efficient delivery of services.

The Law Society notes that the wholesale restructuring of the *Real Estate Act* is a task of significant magnitude, deserving of more than a two-month window for consultation with interested stakeholders, including the general public. It is our view that a significantly expanded timeframe is needed to properly plan changes to the existing regime.

The need for a longer timeline is illustrated by the fact that the Law Society received this week an extensive position paper from the BC Real Estate Association that criticizes the legal profession in its role in the real estate marketplace. From our preliminary review, that paper reflects a number of misconceptions. It is not our desire to engage in a sparring match with real estate lobby groups; however, the Law Society should be given a fair opportunity to respond so that important public policy issues are not decided without proper factual analysis and consultations.

The Law Society can clearly demonstrate to the government the value and expertise that lawyers bring to real estate transactions and why consumers should not be deprived of the choice of retaining a lawyer to conduct a transaction throughout all its stages. We respectfully submit that a proposal to limit the scope of practice for lawyers in conducting real estate sales is not warranted. It cannot be justified on the grounds of public protection and runs counter to the stated objectives of the *Real Estate Act* reforms.

While certain proposed reforms in the Ministry discussion paper appear well-founded, others require more analysis and consultation. The current timeframe allows for a cursory examination of the issues by stakeholders and that is not sufficient for such major public policy reforms.

We respectfully ask that the Ministry of Finance allow a longer timeframe for public review and consultations – including time to review any draft legislation.

Overview of the Discussion Paper

The Ministry's discussion paper contains a number of proposals to change both Part 1 and Part 2 of the *Real Estate Act*.

Part 1 of the *Act* establishes a licensing and regulatory regime for those who deal with buying and selling properties for a fee.

Part 2 regulates the sale and purchase of new developments by developers. While most of the proposed amendments to Part 2 of the *Real Estate Act* are less dramatic than those contemplated for Part 1, some do require comment for the purpose of public protection and will be addressed first.

The Part 2 proposals

The proposals under Part 2 contemplate the elimination of the real estate prospectus, a disclosure document that has not been in widespread use for some years.

The Part 2 proposals also contemplate developers being permitted to use purchasers' deposit monies during the construction phase of development projects. At present, developers are required to hold such deposits in trust. It is critical that there be opportunity to examine whether this specific proposal is, in fact, in the public interest.

The Ministry's discussion paper suggests that purchasers' deposits will be more secure in the new regulatory regime through deposit insurance, which developers would be required to carry in order to access those deposits. It is, in fact, unlikely that insurance over a deposit would provide higher security than having the deposit held in trust by either a licensee under the *Real Estate Act* or by a member of the Law Society. While insurance offers some protection, a member of the public may be faced with making an insurance claim and facing the risk that an insurer proves reluctant to pay insured risks promptly, or at all, in some circumstances.

It is similarly not clear how the public interest would be served by expanding access by out-of-province developers to consumers in British Columbia. The elaborate disclosure requirements for out-of-province projects have grown out of a perceived need to protect consumers in British Columbia from the sometimes unscrupulous practices of off-shore developers. There does not appear to be a particularly compelling public interest to be served by relaxing the requirements on out-of-province developers to sell their products in BC.

The Part 1 proposals

The discussion paper contains a number of proposals to Part 1 of the *Act* that the Law Society would support, subject to a review of the legislation once it is made available for comment:

- The proposed *Act* would clarify that parties who provide information and assistance to property owners who sell their own properties are not subject to licensing under the *Real Estate Act*.
- The proposed *Act* would acknowledge business brokering as an exempt activity, one not requiring the involvement of a real estate licensee. This recommendation tracks the current market reality, which is that these transactions are most often conducted by lawyers and accountants working in teams to accomplish client objectives.
- The proposed *Act* would exempt residential caretakers from licensing in order to show suites and collect rental money, provided they do not negotiate leases or manage deposit funds. This appears a pragmatic response to a niche need in the real estate market.
- The proposed *Act* would see an intensified regulatory regime for those persons who provide strata management services to the public and would ensure financial safeguards for the public.

The Ministry's discussion paper also proposes that the Real Estate Council, as a regulatory body, have broader jurisdiction and greater independence from government. This component of the deregulation model would see delegation of rule-making and disciplinary powers to the Real Estate Council. In addition, the new *Act* would require real estate licensees to establish and maintain a special compensation fund to protect members of the public from insolvency for fraudulent activity by or on the part of a licensee.

The Law Society expects to support a special compensation fund initiative within the real estate industry, as this is a model with which we have both experience and comfort. The Law Society would defer its comments on specific delegation of authority to the Real Estate Council until legislation in that regard has been prepared and circulated for comment. We are generally supportive of self-regulating professions, provided that protection of the public interest is maintained as a paramount concern. At this stage, we also defer comments on the proposed exemption for accountants, other than to state that the Law Society would have serious concerns if the proposal is

to introduce anything other than a very narrow exemption. Accountants are not trained to give legal advice or draft agreements in business transactions including the sale of businesses.

There are other proposals of concern in the Ministry's discussion paper, in particular the proposed limitation on the exemption for lawyers to engage in real estate sales transactions. As set out in the next section of this submission, the Law Society opposes this change on the basis that there is no public policy rationale for introducing such a restriction and that public would not be well served by such a restriction.

Lawyers in the sale of real estate by their clients

The Ministry's discussion paper proposes changing the current *Real Estate Act* provisions, which exempt members of the Law Society from licensing requirements under the Act:

The new Act will clarify that the lawyers' exemption only applies to real estate trades which arise in the ordinary course of law practice. For example, a lawyer could sell property, without obtaining a real estate licence, where the sale is ancillary to settling an estate, administering a will, or effecting a marriage settlement, but would not be allowed to solicit new listings, or show property outside of these kinds of circumstances.

This proposal would effectively restrict BC lawyers from offering their services in the real estate marketplace, except in isolated and controlled circumstances. The restriction would unfairly impair the ability of lawyers to offer their services and the right of clients to receive legal advice in the early stages of a purchase and sale of real property.

The use of the real estate industry phrase "solicit new listings" has no applicability to the solicitor-client relationship involving the provision of legal advice to clients in this area. Lawyers do not "solicit new listings" but instead are lawfully entitled to advertise for and seek new clients who are in need of the professional services offered by lawyers. The suggestion that there is something improper about this conduct is ill-conceived.

It is important to recognize that there are significant differences in the way in which property sales are carried out by realtors and the way in which they are carried out by lawyers – and equally significant reasons why the realtor model should not be the only option for consumers.

The current legal authority for lawyers to represent clients in real estate sales

The present *Real Estate Act* contains the following exemption for lawyers from compliance with Part 1 of the *Real Estate Act*:

This part does not apply:

... to a barrister or a solicitor whose name is inscribed on the rolls of barristers or solicitors in British Columbia, or to a person employed by him or her, in respect of transactions in the course of his or her practice.

This exemption has existed in substantially its present form for over 80 years. In 1920 BC was the first province in Canada to regulate the real estate sales industry. The statute introduced at that time was not intended to change the practice of lawyers, which is why all similar statutes across the country contained exemptions for the legal profession. In order to meet the regulatory objective of protecting the public from unscrupulous real estate salespersons, the BC statute (and others across the country) set out broad definitions of "trade" and "real estate." It was therefore also necessary to provide broad exemptions for lawyers since the normal work of lawyers includes thousands of real estate and business matters every day that would be otherwise considered a "trade in real estate."

Although the current proposals would modify this historically broad exemption, the reason for the change is unclear. There has never been, to the knowledge of the Law Society, any court decisions or consumer complaints that would indicate the exemption is in any way problematic or that any lawyer has been found to have acted improperly under the exemption. There does not appear to be any public pressure for a change in this exemption. To the contrary, in certain communities in British Columbia, the engagement of lawyers in the more active aspects of buying and selling real property has met with considerable public favour. BC consumers wish to be assured of proper protections through regulation, and lawyers are professionally regulated.

Through correspondence with representatives of the Financial Institutions Commission in 2001, however, the Law Society became aware of antipathy within that body to what it considered an expansion in the role of lawyers in the purchase and sale of real property in BC. The Commission took the position that the current *Real Estate Act* exemption did not permit members of the legal profession to advertise properties for sale on behalf of their clients in stand-alone transactions, that is, any transactions that are not an adjunct of an estate administration or a family law file.

As a result of these discussions, the Law Society retained Geoffrey Cowper, QC of the national law firm Faskens Martineau to provide, on behalf of the Law Society, an opinion to government on the scope of the lawyer exemption in the *Real Estate Act*. His letter to the Attorney General, dated January 3, 2002, is attached as Appendix A to this brief. Mr. Cowper's letter states that activities undertaken by a lawyer on behalf of clients to advertise the availability for sale of client properties and to assist those clients with concluding an agreement for sale are clearly and substantially within the present exemption.

As reflected in that letter, the Law Society accepts that lawyers, acting on behalf of their clients, are not permitted to open free-standing real estate sales offices staffed by lawyers.

It is clear, however, that lawyers are permitted under the present exemption to conduct all aspects of a transaction involving the sale of real estate in British Columbia, including the advertising of

property for sale and the conduct of negotiations to settle a contract for the sale of the property. All aspects of such a transaction fall within the scope of a lawyer's services to a client.

The differences between realtors and lawyers in property sales: why the public should have a choice

The "realtor model" of property selling is most predominant in BC and therefore familiar to most people. Typically, a vendor enters into a listing agreement with a real estate agent. The vendor agrees to pay the agent's commission from the proceeds of the sale of the property to compensate the agent for his or her services in marketing, negotiating and concluding sale of the property. The vendor's agent may share the sales commission with another agent who has assisted the purchaser in finding the property and negotiating the sale.

The contract of purchase and sale is negotiated and concluded by the parties through real estate agents. In most cases vendors and purchasers do not receive legal advice on a transaction until after negotiations are completed and the contract is signed.

Although familiar to the public in BC, the realtor model is *not* the only model available in the marketplace. Nor should it be. While the model has positive features – in that realtors and real estate agents are subject to training and regulation and various practice standards and ethical requirements– it also has serious limitations. These limitations must be recognized and addressed so as to ensure continued consumer choice, public protection and marketplace competition.

Independent representation

If parties choose to be represented by lawyers throughout a real estate transaction, they can be assured of independent representation and undivided loyalty.

Under the realtor model, real estate agents for the purchaser and for the vendor are typically all paid from the vendor's commission. In some cases an agent seeks permission to act for both parties to a transaction in a form of dual agency. The role of real estate agents – and whose interests they represent – are of concern to consumers.

A recent public opinion survey conducted for the BC Real Estate Association found that 53% of those surveyed expressed concern about a realtor acting for both a buyer and a seller of the same property. According to the survey report "those with concerns fear that realtors will be in some type of conflict of interest, for example, seeking the largest commission possible or possibly putting their own interests before those of their clients."

The real estate industry offers no explanation as to why it was necessary to allow dual agency, but agents who engage in dual agency must make specified disclosures. The industry has produced pamphlets that are routinely distributed and referenced in the standard contract, such that the parties acknowledge that they have been provided with and have read the brochure *Working with your*

realtor in a dual agency relationship. This material describes the various services that a realtor will not be able to perform for a client when that realtor is acting in a dual agency relationship.

While no discernable public interest is served through dual agency, it does afford an opportunity for the real estate agent to benefit from what is known in the industry as a “double-ender,” being a transaction where a single agent or agency receives both the listing and the selling commissions.

An argument raised by the real estate industry against lawyers’ involvement in real estate sales is that lawyers do not have ethical rules that exactly parallel those of real estate agents, in particular disclosure requirements as to whom a real estate agent represents. Lawyers do have comprehensive conflicts rules and rules on dealing with unrepresented parties. However, they do not face the same problems as real estate agents in making disclosure because they do not engage in dual agency. A lawyer representing a vendor in negotiating the contract of purchase and sale is prohibited from representing the purchaser in that same transaction, except in the most limited situations. There is therefore no potential for divided loyalties, or a confusion of roles in the minds of the parties.

Legal advice and expertise

Parties to a property transaction should be entitled to receive legal advice early in the process. In the sale of businesses, the importance of legal advice up front is usually clearly understood by the parties. For most individuals, the purchase or sale of a home is one of the most significant contracts of their lifetime, yet often they receive no legal advice until the last stages of the transaction when they meet with a lawyer for the conveyance.

Under the realtor model followed in most residential real estate transactions in BC, real estate agents negotiate the sale and write up the terms within the standard form Contract of Purchase and Sale. As real estate agents are not legally trained or qualified to give advice on the contract, their clients must generally forgo advice even if such advice would be useful in structuring the transaction.

Many clients might prefer the services of a lawyer in a sale of property to negotiate the terms, provide legal advice and draft the contract. It is common knowledge in the legal profession that the real estate industry does not do an adequate job of preparing real estate contracts. This problem appears to be acknowledged by the industry itself. The introduction to the 1999 *Licencee Practice Manual*, published by the Real Estate Council of British Columbia, reads as follows:

Poorly drawn contracts of purchase and sale are a significant problem in real estate practice. As with any contract, the intent of each item included must be clear and so specific that there is no misunderstanding possible with regard to who will do what and by what date.

Drawing upon the experience of many licencees, the Council has collected some samples of clauses intended to meet various situations in normal real estate practice in the hope that licencees will find them of use. When in doubt on any question, licencees are advised to seek the advice of their agent or sales manager and, if necessary, a lawyer. A slight delay or extra

expense at an early stage may help to prepare an enforceable contract. This care will prevent the loss of a sale (and of commission) and reduce the chance of misunderstanding and litigation.

It is significant that this introduction highlights the inadequacy of the present contract drafting regime. Regrettably, the risk of a poorly prepared contract is characterized as “loss of a sale (and of commission)”, without mention of the risks faced by consumers from the collapse of a transaction or other costly consequences.

While the realtor model is common for property sales in BC, other legal transactions are often approached quite differently as consumers usually seek out legal advice at an early stage.

Outside our borders, alternative models of property sales thrive. In Scotland, for example, members of the public choose to retain solicitors in approximately 90% of all real estate sales transactions, without the engagement of real estate agents.

Competitive pricing

The legal fees charged by BC lawyers in real estate conveyancing compare favourably with those of any jurisdiction, as well as with those of notaries in BC. The public has easy access to compare legal fee packages when choosing a lawyer to carry out a conveyance; the same choice does not exist for real estate commissions.

It is clear that commissions are a matter of concern from a competition perspective as noted by a recent Federal Court of Canada order for the cessation of anti-competitive practices by a major national real estate agency. Earlier this year the Competition Bureau announced that it had settled a case involving Canadian and International divisions of Re/Max. Under the settlement order, issued in the Federal Court of Canada, Re/Max may no longer prohibit its franchisees or sales associates from setting independent commission rates or advertising such rates, and may not pressure independent publishers to refuse advertising from Re/Max franchisees or sales associates because of the commission rates advertised.

Looking at other property selling models, the average rate of commission paid by sellers of real property to solicitors in Scotland is less than 2% of the selling price. That commission structure is dramatically lower than similar prices of realtors in British Columbia and reflects the fact that competition, one of the goals of the Ministry of Finance as set out in the discussion paper, can produce a beneficial result to the public.

More detail on the role of lawyers in the Scottish real estate market is set out in the 300-page report of the English Government's Monopolies and Mergers Commission Report (1997) entitled *Solicitors' estate agency services in Scotland*. This report generally concludes that the public interest has been enhanced by the legal profession's participation in, and indeed dominance of, the Scottish real estate marketplace.

Training and regulation

In retaining a lawyer to carry out a legal transaction, the public can have confidence in the high regulatory standards of the Law Society with respect to the lawyer's legal education, practice, ethics and financial responsibility as well as financial protections offered by the profession through errors and omissions insurance and through the Special Compensation Fund.

The Ministry's discussion paper opposes two regulators being involved in the same marketplace and flags the potential that parallel regulation of lawyers and realtors, where the two jurisdictions overlap, will lead to confusion and, in the end, may erode the quality of services.

There are, however, already specific examples in BC where two regulators of similar activity co-exist. Consider that real estate conveyancing services are provided by lawyers and by notaries public, each profession independently regulated by two different societies. Parallel regulation accordingly need not produce negative consequences.

The Law Society has a well-established regulatory regime that fully applies to lawyers in the area of real estate practice. If there are specific complaints about the practice of an individual lawyer or a lawyer's staff, the Law Society will receive and investigate those complaints. If there are broader concerns within the real estate industry, government or the public about practices in the legal profession, we will fulfil our responsibility to consider whether regulatory changes are necessary.

It is important to flag that *parallel* regulation of an activity, where two separate governing bodies regulate the same activities performed by different professionals, should be contrasted with *dual* regulation, where two separate regulatory bodies are responsible for the regulation of the same professionals doing similar work. The dual regulation of lawyers in real estate sales (by both the Law Society and the Real Estate Council) has been advocated by the real estate industry. Such a proposal would increase costs and complexity, unfairly place lawyers at a competitive disadvantage and offer no better public protection.

The above-noted Monopolies and Mergers Commission Report found that what is important to the public is to have clear distinctions among regulators so that members of the public are not confused about the regulation and rules governing the professional with whom they are dealing.

Conclusion

While the Ministry discussion paper describes a number of potential *Real Estate Act* reforms, most of these require more in-depth review and consultations.

It is particularly difficult to reconcile the stated goals of *Real Estate Act* reforms – to enhance competition and promote ease of access to the marketplace – with new restrictions on lawyers in that marketplace.

Most importantly, the government's discussion paper fails to accord high priority to protection of the public interest in this agenda for reform. It is the position of the Law Society that the public interest is very much served, protected and maintained by the continued and enhanced involvement of lawyers in the purchase and sale of real property in the province.

It is the position of the Law Society that it will be impossible to restrict the involvement of lawyers in transacting real estate contracts without interfering with the public's entitlement to appropriate legal advice at each stage of the real estate sale process, including on such critical matters as best valuation information, exposing the property to the marketplace, examination and qualification of prospective purchasers, exploring the nature of the contract and participating in the closing of the transaction by registration at the Land Title Office.

In conclusion, there is no sound basis for changing the present exemption for lawyers to participate on behalf of their clients as advisor in all aspects of the purchase and sale of real property. The public interest is best served by ensuring the public has access to lawyers from the beginning of a real estate sales transaction to the end – to benefit from independent representation and uncompromised, undivided loyalty, legal advice and expertise in negotiation and preparation of contracts, competitive pricing and full regulatory protection.

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Appendix A

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January 3, 2002
File No.: LAW00082

VIA FAX

Attorney General of British Columbia
Legal Services Branch
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Attention: Mr. H. Wayne Nymark

Dear Sirs/Mesdames:

Re: Real Estate Act Exemption

We write to provide you with the Law Society's position on the scope of the exemption from regulation extended to members of the Law Society under section 2(1) (f) of the *Real Estate Act* R.S.B.C. 1996, Chapter 397 (the "*Act*").

As you know, the exemption provides:

“This Part does not apply:

to a barrister or solicitor whose name is inscribed on the rolls of barristers or solicitors in British Columbia, or to a person employed by him or her, in respect of transactions in the course of his or her practice.”

It is clear that the essence of the dispute concerns the proper interpretation of the phrase “transactions in the course of his or her practice”.

In our discussions it appears to be accepted that lawyers could in the course of their practice introduce buyers and sellers to one another and charge legal fees for the work associated with that process. Lawyers can and often do perform the role of connecting buyers and sellers in large complex transactions involving take-overs and similar commercial dealings and this is an accepted aspect of solicitors' practice that is incidental to the practice of law.

The Law Society accepts that a free standing real estate sales enterprise staffed by a lawyer who does not perform legal services would be in violation of the *Act*.



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The issue raised by the recent developments involves two features:

1. advertising for potential clients for whom you are not already acting; and
2. soliciting buyers on behalf of clients through advertising and other marketing efforts.

The Law Society's Position

1. The phrase contained within the *Act* is intended to require that members of the Law Society engage in matters otherwise covered by the *Act* only while acting as lawyers and in no other capacity.
2. How clients are obtained, i.e. by advertising or otherwise, is irrelevant to whether the transactions are in the course of practice.
3. The section would be offended if the lawyer performed no legal services for the client.
4. Legal services in connection with a real estate transaction include: negotiating the purchase or sale, including evaluating factors going to the negotiation such as appraisals, development or redevelopment possibilities, financing and the like.
5. The qualification to the exemption is intended to extend the qualification to employees of a member of the Law Society as well to make it clear that a member is not entitled to act as a real estate agent independently of his or her legal practice.
6. The lawyer need not have been previously retained by the client on other matters, nor must the lawyer be generally responsible for all aspects of the transaction, or the transaction be a limited part of the member's legal practice.
7. There is no support in the statute's wording for a limitation arising out of the exemption that is related to either the means by which the client is obtained or the context of the transaction for the member's overall practice.
8. Whether the lawyers' practise is exclusively related to real estate transactions or not is irrelevant to the question of whether they are in the course of a lawyer's practice.

Application of Existing Case Law

The New Zealand Court of Appeal in the *Lewis v. Real Estate Institute of New Zealand Inc.* (1995) 3 NZLR 385 dealt with very similar statutory language and concluded that a free-standing property centre operated in co-ordination with a solicitor's practice was not permitted.

The dividing line accepted by the Court was between a transaction that was incidental to an existing solicitor-client relationship and one which involved active marketing of property where it could be said the primary service was selling property rather than negotiating and conveying property.

There were several facts that appeared to influence the application of their Lordships' definition of "in the course of" to the case of property centres, including the following:

1. The clients were not required to use the solicitors for the actual conveyancing.
2. The staff who operated the marketing side of the business were not lawyers.
3. The services offered by the property centre included apparently offering appraisals, providing general opinions as to value, showing the property, etc.

In our view, the reasoning in *Lewis* is distinguishable from the present dispute on the following grounds:

1. Each of the members allegedly in breach of the *Act* did perform the legal services associated with a conveyance of the property.
2. The property service offered by the members is bundled together with other services and it could fairly be said that the marketing of the property is part and parcel of the solicitor's general services to the client and is not operated independently of other parts of the practice.
3. The impugned arrangements are not primarily a property marketing operation.

It is also significant that the Court of Appeal in *Lewis* disagreed with the trial judge respecting the role of advertising; in their view the question of advertising did not affect the characterization of the practice and was not relevant to whether the practice was permitted under the statute.

The same reasoning applies in the present dispute: whether lawyers advertise or not does not alter the nature of the activity they carry out. In other words, if negotiating a

purchase or sale of real estate is a legitimate part of a solicitor's practice, then advertising for buyers will not alter the character of that professional engagement.

Therefore, any distinction between marketing for potential purchasers and negotiating with an ascertained purchaser would be artificial and stilted.

Public Interest

As the Law Society has made clear in its meeting with representatives of the Superintendent, what is clear from the history of the statute is that there was, for many decades, a blanket exemption for lawyers acting as real estate agents. The present qualification was not added so as to require that lawyers be supervised by the Deputy Superintendent, but rather to make it clear that lawyers could not take up the practice of real estate agencies separate and apart from legal practice without being regulated by the *Real Estate Act*.

We cannot emphasize too much that the Benchers believe that the public interest is well served in all its legitimate dimensions by the Benchers supervising the professional qualities and ethics of lawyers serving real estate clients.

In particular, the Superintendent's concerns expressed in meetings that lawyers may not be adequately trained in respect of appraisals, financing and the like is of course a regulatory concern that applies to real estate agents and real estate lawyers. We are confident that real estate solicitors are more than capable of advising clients as to all the dimensions of a real estate purchase including obtaining professionally qualified valuations where appropriate, negotiating contracts of purchase and sale, and overseeing the process of advertising an asset for sale.

The Benchers are very concerned that Provincial regulation of these disciplines meet the genuine needs of the public, and not solely the interests of the professionals in earning a living. It is clear that lawyers have been involved in real estate transactions in varying capacities for hundreds of years, and their involvement has varied with the times and the culture of their particular jurisdiction. The Benchers are confident that they can competently and effectively discharge the public interest and the supervision of lawyers involved in real estate practices, and that there is no need or compelling interest in having such lawyers also supervised by the Superintendent's office.

Conclusion

In our view:

1. Members of the Law Society will not be in breach of the *Act* where they perform legal services for the client.
2. Legal services bundled together with other services are part and parcel of the solicitor's general services to the client and are not operated independently of other parts of the practice.
3. Whether lawyers advertise or not does not alter the nature of the activity they carry out, nor is advertising relevant to whether the practice is permitted under the statute.

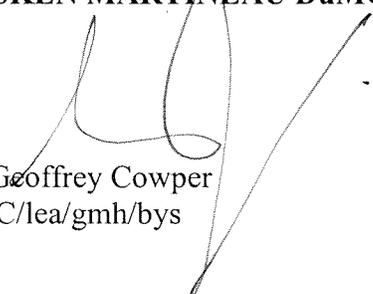
While the Law Society intends on doing everything possible to avoid litigation, the Law Society is prepared to defend its position in the courts.

In our view, no basis for prosecution exists, *i.e.* the probability of success on a prosecution is low. Therefore, the litigation expense incurred in proceeding with an action is not justified.

We hope this puts to rest the Superintendent's concerns over the actions of the members of the Law Society in developing their real estate practices. We understand that no formal opinion has been delivered to the Superintendent by the Attorney General's office with respect to the scope and interpretation of the statute. We would be most interested in receiving a copy of any such opinion, and would be pleased to discuss the terms of this position at any time.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP


D. Geoffrey Cowper
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