

CANADIAN REGULATORS GROUP

**REPORT
OF THE
AGENCY TASK
FORCE**

JUNE 2004

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Note: The recommendations in this report apply to the provinces and territories that follow the common law. As such, they would not be applicable to the Province of Quebec.

EXECUTIVE SUMMARY

The Agency Task Force was formed by the Canadian Regulators Group to review and make recommendations on a variety of issues related to “agency” that would reduce complaints, link requirements between various agreements, and improve licensee and consumer knowledge. The Task Force completed an extensive review of recent case law, industry practices, and insurance and regulatory experience.

The legal foundation and primary information base for the Task Force recommendations was the analysis provided by Professor William Foster, McGill University. The Task Force concluded that while the courts have already established conduct levels for industry members, the understanding of agency law by those members needs to be improved. A common set of definitions for industry terms, standard forms that identify the obligations of industry members, and related education programs are proposed as methods to increase understanding. Eight model forms are provided as guides for each jurisdiction.

The Task Force concluded that “dual agency,” as an issue that may arise for firms and industry members, deserves particular attention. To address dual agency arising from different agents in the same brokerage representing the seller and the buyer, the Task Force is recommending “designated agency” as the model for the future. To address dual agency arising from the same individual industry member representing both the buyer and the seller, the Task Force is recommending “transaction brokerage” as the model for the future.

The Task Force has combined all of its recommendations into a “model agency provision” which could be used by regulators to draft legislation, regulations, bylaws or best practice guidelines as appropriate.

Finally, the Task Force developed the contents for an information brochure that is intended to inform consumers concerning typical property and contract issues, inspections to be considered when selling or buying property, and other matters.

The specific recommendations of the Task Force are:

RECOMMENDATION 1

That each jurisdiction use the definitions identified in this report in all documentation such as legislation, regulations and best practice guidelines.

RECOMMENDATION 2

That industry associations and educators use the definitions identified in this report in all documentation such as forms, brochures, and educational materials.

RECOMMENDATION 3

That the Canadian Regulators Group review its Terminology Paper to find an alternative way of addressing the licensing class definition of “agent.”

RECOMMENDATION 4

That each jurisdiction use the requirements identified in this report for disclosure by industry members.

RECOMMENDATION 5

That each jurisdiction use the requirements identified in this report for disclosure by clients.

RECOMMENDATION 6

That the client disclosure provisions identified in this report be included in all relevant documentation such as forms, brochures, and educational materials.

RECOMMENDATION 7

That each jurisdiction use the requirements identified in this report on the protection of confidential information.

RECOMMENDATION 8

That the Canadian Regulators Group develop best practice guidelines on establishing and maintaining Information Barriers.

RECOMMENDATION 9

That each jurisdiction adopt the basic obligations for a sole agency relationship identified in this report.

RECOMMENDATION 10

That the basic obligations identified in this report for a sole agency relationship be used in all relevant documentation such as forms, brochures, and educational materials as appropriate.

RECOMMENDATION 11

That the basic remuneration provisions identified in this report be used in all relevant documentation such as forms, brochures, and educational materials.

RECOMMENDATION 12

That designated agency and transaction facilitation be adopted as the standard practice in Canada for the future.

RECOMMENDATION 13

That the model forms presented in this report be used by the real estate industry across Canada.

RECOMMENDATION 14

That a standard course for use across Canada be developed on agency as it applies in the real estate industry using this report as a template.

RECOMMENDATION 15

That the model agency provision provided in this report be used as the basis for standard best practice guidelines across Canada.

RECOMMENDATION 16

That the Buyer/Seller Information Brochure (Appendix J) be distributed as a standard practice in each jurisdiction.

INTRODUCTION

Each province has a mechanism for licensing and regulating the real estate industry. The regulatory body is responsible for regulating business practices, setting standards of conduct and protecting consumers affected by the real estate industry. This is accomplished through legislation, regulations, rules, codes of conduct, and policies. Senior staff members from the jurisdictions across Canada that carry out these responsibilities are known within the industry as the “Canadian Regulators Group” (CRG). The CRG is a valuable vehicle for the exchange of information between provinces, regulatory harmonization, and cooperation on common issues.

The senior staff members from the provinces and territories participate in annual meetings to discuss current issues and exchange information. The senior staff members have established committees and task groups to carry out research projects for the benefit of the CRG. The reports and recommendations of the senior staff are advisory in nature. Ultimately, it is the responsibility of each jurisdiction to consider their work and decide whether to implement any recommendations affecting their regulatory framework.

Agency is a core issue for the industry. How agency is interpreted and applied by industry members directly affects consumers and members of the public. Traditional industry practices, the common law, provincial legislation, the standards of conduct adopted and enforced by regulatory agencies, interpretations and guidelines all have a major influence on how agency is applied by individual industry members.

Agency is also an important issue of interest to all regulators across Canada. The

industry is changing: buyer agency agreements are on the increase; relatively new concepts, such as transaction brokerage, are emerging and challenging the traditional agency role of industry members; active real estate markets are giving rise to multiple offer and multiple agency situations.

Errors and Omissions Insurers report that an increasing number of errors and omissions claims and incidents reported involve agency related issues. These claims and incidents tend to be more expensive to defend, impacting the premiums payable by the real estate industry. There has been pressure in the United States, resulting in insurers declining to provide errors and omissions insurance to brokerages or imposing premium surcharges based on the dual agency transactions in a brokerage.

A good understanding of the practice, legal and insurance aspects of agency and their application to the real estate industry is important for both licensees and consumers. Regulatory approaches and industry practices vary from province to province. As a result, the Agency Task Force (ATF) was established to examine issues related to agency and provide recommendations to the CRG.

The research and information gathered as a result of this project will be shared with regulators. ATF has reviewed the application of agency law in the real estate industry and developed a common or “best practices” approach for regulators across Canada to consider. While the ATF has no authority to impose any practices on the industry or the regulatory authorities, it is providing recommendations for consideration by the regulating body in each province and territory.

AGENCY TASK FORCE PARTICIPANTS

Alberta (Chair) and British Columbia (Vice-Chair) have been the lead jurisdictions on this issue and agreed to oversee the project. The ATF members are:

Real Estate Council of Alberta (Chair)	Bob Myroniuk
Real Estate Council of British Columbia (Vice Chair)	Larry Buttress
Saskatchewan Real Estate Commission	Kirk Bacon
Manitoba Securities Commission	Bill Baluk
Real Estate Council of Ontario	Allan Johnston
Nova Scotia Real Estate Commission	Doug Dixon
Alberta Real Estate Insurance Exchange	Merv Borgeson
Real Estate Errors & Omissions Insurance Corporation (BC)	Rob Stevens
Canadian Real Estate Association	John Fraser Brian Collie
Buyer representation perspective	Adrienne Lake
Real Estate Institute of Canada	Dick Briscoe
Building Owners and Managers Association (Canada)	Diana Osler-Zortea

At the outset, the ATF determined it would need assistance and expert advice to carry out its mandate. The following individuals provided a valuable contribution to the work of the ATF:

- Professor William Foster**, Faculty of Law, McGill University, author of *Real Estate Agency Law in Canada*
- Mike Gorham**, formerly Director, Division of Real Estate, Colorado
- Bill Harrington**, Legal Counsel, Canadian Real Estate Association
- Tom Forgrave**, Secretariat Coordinator

PROJECT TIMELINE

The membership and funding arrangements for the ATF were finalized in October of 2002.

The Task Force held a total of eleven meetings. Seven were held in various locations across Canada and four were held by conference telephone call.

In addition to the ATF meetings, a variety of sub-groups met by conference call and email to work on specific tasks.

PROJECT OUTCOMES

The ATF was mandated to perform a number of specific tasks. However, it was recognized from the outset that the initial list of tasks was preliminary in nature and the actual work of the ATF would depend on the complexity of the issues and the ability of the ATF to address the issues given the time and resources available.

The goal of the ATF was to provide the following outcomes:

- a Report on Current Issues, Agency Law and Real Estate Brokerage in Canada,
- a Report on Current Industry Practices and Regulatory Approaches to Real Estate Agency Issues Across Canada,
- a Recommended Approach to Real Estate Agency Issues for Regulators in Canada,
- recommendations for Real Estate Licensing Education Programs (related to the topic of agency and industry practices),
- an Information Article or Brochure (Guidelines) on Agency for Real Estate Licensees,
- an Information Article or Brochure on Agency for Consumers.

AGENCY TASK FORCE WEBSITE

In addition to these outcomes, ATF developed a website www.canadianregulators.ca.

The website has a general access area where public information is available. It also has a members' area where the regulators and the ATF members may access information specific to the work of the Task Force and, on an ongoing basis, the work of the CRG.

PROJECT RESOURCES

The ATF is a major initiative for the CRG and required additional resources and expertise to achieve its mandate.

Accordingly, the ATF established a Secretariat to provide administrative, research and facilitating services to the group. The Secretariat Coordinator was Tom Forgrave, a former Assistant Deputy Minister with Alberta Municipal Affairs whose responsibilities included the Housing & Consumer Affairs Division. In addition to his experience as a policy advisor within government, and a coordinator and facilitator of major projects, he brought a consumer perspective to the work of the ATF.

One of the priorities of the ATF was to establish a base of information concerning the current state of real estate agency law in Canada. In addition to having a current understanding of the law, the ATF required an expert to provide research, reports, and advice as it carried out its mandate. Professor William Foster, Sir William Macdonald Professor of Law and Associate Dean (Strategic Planning), of the Faculty of Law, McGill University in Montreal was retained as

the ATF legal advisor. Professor Foster is a leading expert in this area of law in Canada and is the author of the text *Real Estate Agency Law in Canada*.

The ATF was fortunate to secure the expertise of Bill Harrington, Legal Counsel with CREA. Bill Harrington has extensive experience working with CREA and the real estate industry on agency related issues.

In addition, Michael Gorham, former Director of the Colorado Real Estate Commission in Denver, agreed to be a resource to the task force. Mike Gorham is a lawyer, has extensive regulatory experience, and has led changes to the real estate laws of Colorado. He was an excellent resource to help the ATF understand how agency in the real estate industry has been addressed in Colorado from the perspective of a leader in real estate policy in the United States.

Each of the six participating jurisdictions provided a senior staff member to the ATF. The travel costs and the time of those members to attend meetings and carry out the mandate of the ATF were covered by their respective jurisdictions.

In addition, the Real Estate Councils of Alberta and British Columbia both secured matching grants from the Real Estate Foundations of Alberta and British Columbia. Additional funds were provided by the Manitoba Securities Commission, Real Estate Council of Ontario, Nova Scotia Real Estate Commission, Province of Newfoundland, and the Saskatchewan Real Estate Commission. These grants assisted the task force to cover the costs of the Secretariat Coordinator, consultants, legal advisor and administrative expenses including the travel expenses of the Chair, and Vice Chair.

The organizations that agreed to provide grants (“project funding partners”) to support the work of the Agency Task Force include the following:

Real Estate Foundation of British Columbia	\$ 49,500
Real Estate Foundation of Alberta	\$ 49,500
Manitoba Securities Commission	\$ 25,000
Real Estate Council of Ontario	\$ 10,000
Real Estate Foundation of Newfoundland	\$ 5,000
Nova Scotia Real Estate Commission	\$ 5,000
Saskatchewan Real Estate Commission	\$ 5,000
Total	\$149,000

The participating organizations, including the Canadian Real Estate Association, the Real Estate Institute of Canada, and the Building Owners and Managers Association, also provided at least \$100,000 by covering the travel expenses of their members.

ADVISORY GROUPS

For practical reasons, direct participation on the ATF was limited. However, the ATF recognized a broad industry perspective on agency issues was important. Also, the ATF wanted feedback on any recommendations it might develop that could result in changes to legislation and changes to current industry practices.

Accordingly, industry associations or stakeholders who were not ATF members were invited to participate in Advisory Groups in each of the ATF jurisdictions. The Advisory Groups reviewed the work of the ATF and provided feedback. This information was brought to the ATF meetings. The Advisory Groups provided an opportunity for a larger cross-section of licensees and others involved in the industry to participate in this project.

LEGAL RESEARCH – THE FOSTER PAPERS

In the course of its work, the ATF collected a great variety of information from Canadian regulators and industry associations and from jurisdictions in the United States. Much of this information is available on the website www.canadianregulators.ca.

The major contribution to identifying and understanding the issues, however, came from Professor Foster who produced three papers for ATF. The following three supplementary papers are an important component of the work of the ATF and form part of the final report:

- 1) [Supplementary Paper No. 1 - Agency Law and Real Estate Brokerage: Current Issues](#)
A Review of the Case Law and Some Industry Practices (January 2003)
- 2) [Supplementary Paper No. 2 - Licensee Duties within the Real Estate Industry Regulatory Frameworks](#) A Review of the Obligations Owed Clients and Customers and Incidental Issues (March 2003)
- 3) [Supplementary Paper No. 3 - Review of Industry Standard Form Representation Agreements](#)
(May 2003)

The supplementary papers are available on the website www.canadianregulators.ca.

ISSUES IDENTIFIED BY THE AGENCY TASK FORCE

A. AGENCY LAW AND REAL ESTATE BROKERAGE

A.1 Terminology

The industry, legislation and the courts use different terminology to describe the various participants in real estate transactions and their relationships. Not all regulatory frameworks provide such definitions and those that do exist are not necessarily uniform between jurisdictions.

A.2 Who Must Be Licensed

In some jurisdictions all who trade in real estate must be licensed (unless exempt); in other jurisdictions all who trade in real estate in a representative capacity must be licensed (again, unless exempt).

A.3 Brokers As Fiduciaries

‘There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. ... Indeed, the term ‘fiduciary’ has been described as ‘one of the most ill-defined, if not altogether misleading terms in our law’” (SCC in Lac Minerals Ltd. v. International Corona Resources Ltd., 1989)

Brokers, when acting as agents, traditionally have been held to owe their clients fiduciary obligations. The critical element is a discretionary power in a person to affect the interests of another who is in a position of vulnerability and who is relying on the former to protect their interests.

The basic duty of a fiduciary is to always act in a client’s best interest. Accordingly, as fiduciaries, brokers have the following obligations:

- utmost loyalty
- avoiding all conflicts of interest and
- acting only in the client’s interests.

In particular, this means that a broker must protect any confidential information obtained from clients, and refrain from

“Thus, the dual agency relationship raises particular problems for brokers. Brokers can avoid liability for a prime facie breach of their fiduciary obligations if they completely disclose the conflict of interest and obtain their client’s consent to engage in otherwise prohibited conduct.”

Professor Bill Foster

A.4 Representative Capacity of Brokers

Brokers normally represent one party to a transaction (either the buyer or the seller). A broker’s representative capacity is primarily a question of fact and not simply one of intention; consequently, brokers may unknowingly enter into agency relationships, especially concurrent representation relationships (for example, dual agency) in particular cases. The move

making any secret profits (including, directly or indirectly, buying or selling any property clients own or are interested in purchasing) at the expense of the clients. So, the dual agency relationship raises particular problems for brokers.

However, it is recognized not all agents need be fiduciaries, as where the critical elements of such relationships are absent. Therefore, looking at the label of “agent” is not enough. The case law says the substance of the relationship is the key.

Not all duties owed by a fiduciary are fiduciary duties. Some duties are owed by all professionals acting in an advisory capacity, e.g. the duty to exercise reasonable care and skill in the performance of services.

toward requiring brokers to disclose in writing their representative capacity is a positive one. However, mere disclosure of representative capacity is not sufficient in itself to overcome potential problems raised by concurrent representation if subsequent conduct is inconsistent with the broker’s declaration.

Included in the situations in which concurrent representation may arise are:

- an individual broker represents both parties to a transaction
- the parties are represented by employees of the same firm
- the parties are represented by employees of different firms under MLS[®] arrangements (*see discussion of this 4.3.3 Agency Law and Real Estate Brokerage: Current Issues*)
- a broker represents competing buyers
- a buyer's broker seeks remuneration from the seller

The case law indicates that the issue of dual agency continues to be a source of concern to the industry.

The common law presumes that

- members of a firm share information and advice, so
- all have knowledge of confidential information concerning the firm's clients.
- the agent's knowledge is imputed to the principal.

A.5 Duty and Standard of Care

Brokers owe clients and customers a duty of care. They must exercise their profession in accordance with set standards that have their basis in industry practice. The standard is an objective one – that of the reasonable broker – and is applicable to all. A higher standard is expected of those who possess or purport to possess special expertise. In a considerable number of cases non-compliance with the relevant standard has been alleged by a client or customer.

Dual agency in the real estate industry raises significant and unique problems. The main cause of the problem is that brokers represent parties whose interests can be diametrically opposed. As the courts have indicated, sellers look to their brokers to obtain the highest possible price and terms which accommodate their interests and needs. Buyers look to their brokers to obtain the lowest possible price and terms which accommodate their interests and needs.

Neither sellers nor buyers look to brokers to merely mediate what the brokers personally believe to be “fair” or an “acceptable” deal between them. If brokers act as dual agents, absent compliance with their fiduciary duty of disclosure, they permit a conflict of interest to arise between the interests of sellers and those of buyers.

However, ***“the case law suggests that not all dual agency relationships need attract fiduciary obligations; and developments in other fields suggest that brokerage firms may be able to implement policies and procedures (‘Information Barriers’) to protect confidential information provided by clients.”***

Professor Bill Foster

Brokerage firms are vicariously liable for the misconduct of their employees. However, in recent cases “direct” liability has been imposed on firms for failing to adequately supervise and monitor their employees and to have in place policies and procedures to prevent harm to clients and customers.

“While ‘exclusion clauses’ in contracts may provide brokers and their firms some protection from liability it still remains to be seen whether brokerage firms can avoid vicarious liability through employment of brokers as ‘independent contractors.’”

Professor Bill Foster

A.6 Duty of Disclosure

In the course of their profession, brokers are required to disclose information to clients and customers. **To clients**, brokers are required to disclose all relevant information that they might possess about the property, the transaction and a third party with whom a client is dealing.

A broker’s obligation of disclosure **to customers** is more limited – it is coextensive with the client’s obligation of disclosure. Seller clients and thus, by extension their brokers, must disclose to customers all material latent defects in a property, not necessarily all defects in a property. However, clients and their brokers cannot mislead customers or conceal defects.

Material latent defects are defects that cannot be discerned through a reasonable inspection of the property. Material latent defects include defects that render the property

- dangerous or potentially dangerous to the occupants;
- unfit for habitation;
- unfit for the purpose for which the buyer is acquiring it where the buyer has made this purpose known to the seller or the broker;

and may include

- defects that would involve great expense to remedy;
- local authority and similar notices received by the seller that affect the property; or,
- the lack of appropriate municipal building and other permits.

Given the limited duty of disclosure of seller clients and their brokers to customers, property disclosure statements are problematic since they require sellers to voluntarily disclose more than they are legally obliged to disclose to buyers. Thus, where brokers ask their seller clients to complete such statements serious questions arise as to whether brokers are acting in their seller clients’ best interests.

The regulatory frameworks are not consistent as to the circumstances that call for disclosure, how the obligation should be discharged, and whether client acknowledgement of and consent to the disclosure is required.

B. LICENSEE DUTIES WITHIN THE REAL ESTATE INDUSTRY REGULATORY FRAMEWORKS A REVIEW OF THE OBLIGATIONS OWED CLIENTS AND CUSTOMERS

B.1 Comments on Today’s Legislation

“Few jurisdictions provide definitions of commonly encountered industry representation relationships such as ‘buyer’ and ‘seller agency,’ ‘agency agreement,’ ‘brokerage agreements,’ ‘listing agreements’ and ‘dual agency.’ And, no framework, other than that of Quebec with respect to residential listing agreements, attempts expressly to regulate any of

these common relationships. Moreover, no regulatory framework recognizes, let alone seeks to define, other representation relationships, such as those of ‘presumed buyer agency,’ ‘limited dual agency,’ ‘designated broker’ and ‘transaction broker’ notwithstanding that the first two relationships appear to be recognized by the industry. However, on the positive side, neither the regulatory frameworks, nor the general law of agency, proscribe the foregoing relationships; thus, resort may be had to designated broker and transaction broker relationships if it is so wished.

“Most legislation governing brokers and their industry reflects previous practice where brokers were perceived to be the seller’s agents. Thus, the legislation does not deal effectively with, for example, buyer agency and dual agency.”

Professor Bill Foster

B.2 Disclosure of Representative Capacity

At common law there is no obligation for licensees to disclose the representative capacity in which they are acting. The trend in the regulatory frameworks is to require such disclosure to both clients and customers. There are a number of advantages associated with disclosure, especially reducing the incidence of inadvertent dual agency relationships.

B.3 Duties to Clients

In addition to a number of general obligations, the regulatory frameworks impose obligations relating to licensees’ fiduciary status, the treatment of confidential information, and the conduct of appraisals and evaluations. The regulatory frameworks vary as to nature or number of obligations imposed and, where commonality exists, it is in a number of obligations imposed by the statutes governing the industry.

Only Alberta attempts to group licensee obligations according to the party to whom they are owed, and only in Alberta is explicit reference made to the fiduciary obligations of licensees to their clients.

B.4 Duties to Customers

The regulatory frameworks specifically impose on licensee few duties to customers. Most frameworks impose a number of

obligations that are owed, not particularly to clients or customers, but either to both parties or to “buyers” or “sellers,” such as the standard of conduct expected of licensees, the preparation and delivery of documents, disclosure of transaction costs and the handling of transaction moneys.

Again, not all obligations are found in all frameworks, nor is there uniformity in the treatment of particular obligations in the frameworks that do address them.

B.5 Obligation of Disclosure

The obligation of disclosure is a recurring and important theme in regulatory frameworks. However, there is no agreement as to:

- the circumstances that call for disclosure
- how the obligation should be discharged
- the need for acknowledgement of and informed client consent to the disclosure.

Professor Foster suggested that there is a need for:

- greater uniformity in the treatment of this issue, particularly within individual regulatory frameworks; and,
- guidance to licensees as to what an effective disclosure entails.

B.6 Remuneration and Fees

All frameworks address the manner in which licensee remuneration can be established. Similarly all impose restrictions on the right of licensees to sue for their remuneration in the event of non-payment. However, the only common restriction is that of licensing; and this is the only restriction in some frameworks.

Other frameworks impose additional restrictions, which differ amongst jurisdictions, on licensees' right to sue for remuneration. But, despite the differences in the wording of these constraints, the case law suggests that there is similarity in their effect. A number of frameworks also require licensees to disclose all remuneration and certain fees to their clients.

B.7 Regulatory Powers

The delegation of regulatory power varies considerably between jurisdictions – in part because in a number of jurisdictions there appears to be no industry body to which such powers have been assigned. However, even in those jurisdictions with industry bodies there is no consistent approach.

B.8 Governance Framework

Most legislation governing brokers and their industry reflects previous practice where brokers were perceived to be the seller's agents. Thus, the legislation does not deal effectively with, for example, buyer agency and dual agency. (See Professor Foster's second paper).

The move to self-regulation in the industry is a positive one. While governing bodies have the power to regulate members of the industry, in general, they lack the power to affect the common law and statutory rights and obligations of members, clients and customers.

B.9 Table of Duties

Professor Foster provided a Table of Duties comparing the duties of industry members in the various relationships considered by the ATF. ("R.O.C." means the rest of Canada outside of Quebec.)

GENERAL OBLIGATIONS	QUEBEC	R.O.C. AGENCY PARADIGM			R.O.C. DUAL AGENCY OPTIONS	
	NON-AGENCY	TO CUSTOMER	TO CLIENT	OF DESIG. BROKER	OF TRAN. BROKER	OF DUAL AGENT
1. Perform mandate	Yes	No	Yes	Yes	Yes	Yes
2. Obey instructions	Yes	No	Yes	Yes	*	*
3. Act in person	**	No	Yes	Yes	Yes	Yes
4. Honesty and fairness	Yes	Yes	Yes	Yes	Yes	Yes
5. Act in impartial, objective manner	Yes	No	No	No	Yes	Yes
6. Exercise care and skill	**	Yes	Yes	Yes	Yes	Yes

GENERAL OBLIGATIONS	QUEBEC	R.O.C. AGENCY PARADIGM			R.O.C. DUAL AGENCY OPTIONS	
	NON-AGENCY	TO CUSTOMER	TO CLIENT	OF DESIG. BROKER	OF TRAN. BROKER	OF DUAL AGENT
7. Disclose information concerning:						
7.1 Other party's maximum/minimum price or terms	**	No	Yes	Yes	No	No
7.2 Other party's motivation	**	No	Yes	Yes	No	No
7.3 Material defects in the seller's property	Yes	Yes	Yes	Yes	Yes	Yes
7.4 Buyer's financial ability to complete transaction	Yes	No	Yes	Yes	No	No
7.5 Other confidential information obtained from other party	**	No	Yes	Yes	No	No
8. Provide confidential advice on any or all relevant matters	Yes	No	Yes	Yes	No	No
9. Help negotiate and draft favourable terms	Yes	No	Yes	Yes	No	No
10. Recommend relevant "experts" (appraisers, surveyors, inspectors, etc.)	Yes	No	Yes	Yes	No	No

FIDUCIARY OBLIGATIONS

11. Loyalty	**	No	Yes	Yes	No	No
12. Avoid all conflicts of interest	**					
12.1 Not act for both parties	Yes	No	Yes	Yes	N/A	N/A
12.2 Not make secret profit	Yes	No	Yes	Yes	Yes	Yes
12.3 Not buy client's property	Yes	No	Yes	N/A	N/A	N/A
12.4 Not sell own property to client	Yes	No	Yes	N/A	N/A	N/A
12.5 Not act for parties whose interests conflict	**	No	Yes	Yes	N/A	N/A

FIDUCIARY OBLIGATIONS	QUEBEC	R.O.C. AGENCY PARADIGM			R.O.C. DUAL AGENCY OPTIONS	
	NON-AGENCY	TO CUSTOMER	TO CLIENT	OF DESIG. BROKER	OF TRAN. BROKER	OF DUAL AGENT
13. Not misuse confidential information	Yes	No	Yes	Yes	Yes	Yes
14. Disclose all personal (brokerage's) conflicts of interest	Yes	No	Yes	Yes	Yes	Yes
15. Provide real estate statistics, comparable property information, etc.	Yes	Yes	Yes	Yes	Yes	Yes

FACILITATION SERVICES

16. Provide standard form agreements and other relevant documents	Yes	Yes	Yes	Yes	Yes	Yes
17. Act as a scribe in the preparation of standard form agreements, etc.	Yes	Yes	Yes	Yes	Yes	Yes
18. Provide the names of "experts" (appraisers, surveyors, inspectors, etc.)	Yes	Yes	Yes	Yes	Yes	Yes
19. Present, in a timely manner, all offers, counter-offers, etc.	Yes	Yes	Yes	Yes	Yes	Yes
20. Convey in a timely manner all information that party wishes to have communicated	Yes	Yes	Yes	Yes	Yes	Yes
21. Keep fully informed regarding the progress of the transaction	Yes	Yes	Yes	Yes	Yes	Yes

STATUTORY DUTIES

22. To account	Yes	Yes	Yes	Yes	Yes	Yes
23. Other misc. statutory duties	Yes	Yes	Yes	Yes	Yes	Yes

VICARIOUS LIABILITY

24. Client vicariously liable for misconduct of brokerage	**	No	Yes	Yes	**	**
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* YES if no conflict of interest ** not known at the present time

KEY POINTS ARISING FROM ATF RESEARCH & MEETINGS

AGENCY – OBSERVATIONS, ISSUES, PROBLEMS

1. The business of a real estate brokerage is complex. The reality is that problems do exist.
2. Primary areas of litigation include: brokers as fiduciaries, representative capacity of brokers, duty and standard of care, and duty of disclosure.
3. Terminology is a problem. The courts, consumers, industry members, and regulators all use different terms.
4. Some terms commonly used by the industry have no apparent meaning in the law and, as a result, some misunderstanding may have developed within the industry e.g. the concept of “limited dual agency”. It is the broker’s capacity to act as an agent for each of the competing clients that is limited – it is not the dual agency itself that is limited.
5. Few legal concepts are more frequently invoked but less understood than that of the “fiduciary relationship.”
6. When considering the obligations of brokers, the starting premise is that in most situations real estate agents owe their clients a fiduciary duty.
7. The assumption that brokers are fiduciaries is rebuttal, in other words, one has to look at the substance of the relationship.
8. The key ingredient is whether clients place trust and confidence in brokers and rely on their advice thus making clients dependent on and vulnerable to brokers.
9. Not all duties owed by fiduciaries to their clients are fiduciary duties. Examples of other duties include:
 - Duty to obey instructions
 - Duty to exercise reasonable care and skill in the performance of duties
 - Duty to disclose representative capacity (regulatory requirement)
 - Duty to disclose material latent defects
 - Duty of honesty and fairness
 - Duty not to mislead third parties
10. Dual agency is a prima facie case of conflict of interest.
11. Where a real or potential conflict arises (e.g. concurrent representation), disclosure is not enough; brokers must show that their client understood:
 - the nature of the conflict of interest,
 - what was being proposed by the broker, and,
 - the implications of giving their consent.
12. Compliance with both statutory and fiduciary duties of disclosure (common law) is required.
13. Timing of disclosure is important. It must
 - be timely,
 - occur before the seller or buyer believe that the broker is acting as their agent and before any potential conflicts of interest have arisen, and,
 - be done when it has some meaning.

14. The last decade has seen a shift towards the buyer agency paradigm. Often the paradigm is not fully achieved since buyer's brokers often look to sellers or sellers' brokers for their remuneration.
15. Dual agency is a continuing concern for the industry.
16. Dual agency is not prohibited by law; however, there is an inherent conflict of interest that exists between the interests of the seller and the buyer.
17. Brokers in dual agency relationships are akin to "middlemen" or brokers in the narrowest sense.
18. The dual agency relationship demands neutrality, impartiality and objectivity.
19. Not all dual agency relationships are necessarily fiduciary in nature. However there is a presumption in law that all agency relationships are fiduciary in nature.
20. This presumption has successfully been rebutted in a number of cases by co-operating brokers under MLS[®] arrangements.
21. Selling brokers, when acting as cooperating brokers under MLS[®] arrangements, traditionally were often viewed as dual agents owing fiduciary duties to both sellers and buyers. Recent case law, however, suggests that such cooperating brokers are no longer to be viewed as agents of sellers or, at least, are non-fiduciary agents of sellers. The latter case law clearly suggests that not all agency relationships need be fiduciary relationships.
22. There is case law (in other industries) that suggests the presumption of a fiduciary relationship in an "in-firm" dual agency situation can be rebutted by construction of an Information Barrier or cone of silence.
23. The timing of the creation of the Information Barrier is critical; it has to be done before a dual agency situation arises.

REVIEW OF THE LEGISLATIVE FRAMEWORK

1. Most legislation does not reflect current business practices in the industry.
2. Professor Foster suggests regulators need to consider:
 - specifying minimum requirements for written service agreements, and not just listing agreements
 - a default setting – the need for all service agreements to be in writing (unless lack of writing is not the fault of the broker)
 - requiring in all transactions that brokers disclose in writing to the seller and buyer the representative capacity in which they are acting
 - prescribing (by regulation or rule) standard form service agreements or their minimum requirements
 - prescribing (by regulation or rule) standard form disclosure statements (or their minimum requirements)
 - extending the statutory right of brokers to sue for their commissions under expired listing agreements to embrace all expired agency agreements

3. The objective of these reforms would be to ensure the legislative framework places all agency relationships whether the client is a seller or buyer on the same footing and to require disclosure of critical facts relevant to clients and customers thereby minimizing the risk of misunderstanding and litigation.

CONCLUSIONS & GUIDING PRINCIPLES

1. The general intention was that the ATF should provide recommendations that would reduce complaints, link requirements in various agreements, and improve licensee and consumer knowledge.
2. The ATF discussed the various issues identified and accepted the findings of the courts and analysis of Professor Foster, i.e. this was the legal foundation and base of information the ATF relied upon in its discussions.
3. The ATF agreed that a common set of definitions for common industry terms needed to be developed and harmonized across Canada.
4. The ATF decided to develop recommendations which, if implemented, would ensure the conduct of industry members (and their agency practices) would be at the level already established by the courts and consistent with consumer expectations.
5. The ATF concluded the understanding of agency law and related practice issues across the industry (industry members, consumers and regulators) needs to be improved. Improving the current level of understanding and implementing any changes to current practices will require a major education effort.
6. The ATF concluded the current seller brokerage agreement (standard listing agreement) has been viewed by the courts as reflecting an agency relationship. The ATF asked the question: What could be done to improve seller or buyer agency relationships in the current environment?
7. The ATF concluded that the standard listing (seller agency) and buyer agency agreements currently in use are inadequate and tend to favour the interests of the industry. The model agreements drafted by the ATF reflect a balance between the interests of industry members and consumers.
8. The ATF concluded that the current (standard) form of listing agreement should more clearly spell out the obligations of the seller's agent/broker and the seller.
9. The ATF concluded that buyer agency agreements should clarify the rights and obligations of the buyer's agent and the buyer. In other words, the ATF took the position sellers and buyers should be treated in a similar fashion and brokers' obligations should be clear in the agreements.
10. The ATF discussed dual agency and all the associated issues; however, it decided at this stage in the process it would not consider an express prohibition (regulatory) on dual agency.

11. Instead, ATF looked at alternatives to the two basic types of dual agency in the real estate industry (i.e. (a) in firm, and (b) individual industry member) and developed model agreements to address both situations.
12. In the case of dual agency arising from different agents from the same brokerage representing a seller and a buyer, the ATF has proposed “designated agency” as an alternative.
13. In the case of dual agency arising from the same individual (agent) representing a seller and a buyer, the ATF has proposed a form of “transaction brokerage” as an alternative.
14. The ATF concluded the most effective strategy to implement the changes to agency practices and conduct of industry members across Canada in a consistent manner was to mandate the forms as suggested by Professor Foster.
15. The ATF developed a recommended approach (regulation, bylaw or rule) for regulators to adopt with respect to the requirements for disclosure and consent when a change in representative capacity takes place.
16. The ATF developed an Information Brochure for Sellers and Buyers that is intended to inform consumers concerning typical property issues and inspections to be considered when selling or buying property.

DEFINITIONS

CRG has previously adopted a list of definitions which its members had been encouraged to use. In addition to the issues raised by Professor Foster, ATF also concluded that some of these need to be revisited.

RECOMMENDATION 1

That each jurisdiction use the following definitions in all documentation such as legislation, regulations, and best practice guidelines.

RECOMMENDATION 2

That industry associations and educators use the following definitions in all documentation such as forms, brochures, and educational materials.

RECOMMENDATION 3

That the Canadian Regulators Group review its Terminology Paper to find an alternative way of addressing the licensing class definition of “agent.”

DEFINITIONS

- 1) “**Agent**” means an industry member who is expressly or implicitly authorized to act for or represent another person in a trade in real estate.
- 2) “**Broker**” means an individual who is licensed as a broker by the [*name of governing body*], who is employed by or associated with a licensed brokerage in [*name of jurisdiction*], and is registered with and authorized to operate a brokerage and trade in real estate on behalf of that brokerage.
- 3) “**Brokerage**” means a person licensed by the [*name of governing body*] as a brokerage and who is authorized to trade in real estate in [*name of jurisdiction*] as a brokerage or advertise or hold itself out as a real estate brokerage to the public and includes all the industry members licensed with the brokerage.
- 4) “**Buyer**” means a person acquiring or attempting to acquire an interest in real estate by purchase.
- 5) “**Client**” means a person who has engaged or employed the brokerage, either as the person’s agent or as the person’s transaction broker.
- 6) “**Concurrent representation**” means a situation in which a brokerage or an industry member represents two or more parties to a trade whose interests are seen to be in conflict.
- 7) “**Customer**” means a person who has not engaged or employed the brokerage in an agency capacity or as the person’s transaction broker.
- 8) “**Designated agency**” means a relationship in which one or more different industry members, licensed with the same brokerage, are designated in writing by the brokerage to act as sole agents for a buyer or a seller with respect to the same trade.
- 9) “**Designated Agent**” means an individual industry member who is designated in writing by a brokerage to serve as a sole agent for a buyer or a seller in a trade in real estate.
- 10) “**Designated Brokerage Agreement**” means a written service agreement between a brokerage and a buyer or a seller which sets out the terms and conditions under which one or more different individual industry members licensed with the brokerage are designated as the agent of the seller or of the buyer, respectively, in the same trade.
- 11) “**Dual agency**” means a relationship in which a brokerage or an individual industry member represents, as agent, both the buyer and the seller in the same trade.
- 12) “**Exclusive Buyer Brokerage Agreement**” means a written service agreement between a brokerage and a buyer under which the buyer grants the brokerage exclusive authority to act as agent for the buyer and the exclusive right to locate for the buyer an interest in real estate and by which the buyer may agree to compensate the brokerage on any purchase effected by the brokerage, another brokerage or the buyer.
- 13) “**Exclusive Seller Brokerage Agreement**” means a written service agreement between a brokerage and a seller under which the seller grants the brokerage exclusive authority to act as agent for the seller and the exclusive right to offer for sale the seller’s interest in real estate and by which the seller agrees to compensate the brokerage on any sale effected by the brokerage, another brokerage or the seller.

14) “Facilitation services” means services that do not require the exercising of discretion or judgement, or the giving of confidential advice or advocating on behalf of either the buyer or the seller and may include:

- i) providing real estate statistics and information on property including comparable property information available through listing services or other local data bases;
- ii) providing standard form agreements of purchase and sale and other documents and assisting in their preparation in accordance with the instructions of the buyer and the seller;
- iii) providing names of real estate appraisers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and the like but not recommending any particular professional to the buyer or the seller;
- iv) presenting to the buyer and the seller, in a timely manner, all offers and counter-offers to and from either regardless of whether the property is already the subject of a contract;
- v) conveying to the buyer and the seller in a timely manner all information that either wishes to have communicated to the other;
- vi) keeping the buyer and the seller informed regarding the progress of the transaction; and
- vii) complying with the provisions of the [*name of Act*] and its regulations and the rules and bylaws of the [*name of governing body*].”

15) “Industry member” means a person licensed by the jurisdiction to trade in real estate.

16) “Non-Exclusive Buyer Brokerage Agreement” means a service agreement between a brokerage and a buyer under which the buyer grants the brokerage non-

exclusive authority to act as agent for the buyer to locate for the buyer an interest in real estate and by which the buyer may agree to compensate the brokerage only if the brokerage is the effective cause of the purchase.

17) “Non-Exclusive Seller Brokerage Agreement” means a service agreement between a brokerage and a seller under which the seller grants the brokerage non-exclusive authority to act as agent for the seller to offer for sale the seller’s interest in real estate and by which the seller agrees to compensate the brokerage only if the brokerage is the effective cause of the sale.

18) “Person” includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law.

19) “Property management” includes

- i) leasing, negotiating, approving or offering to lease, negotiate or approve a lease or rental of real estate;
- ii) collecting or offering or attempting to collect money payable for the use of real estate;
- iii) holding money received in connection with a lease or rental of real estate;
- iv) advertising, negotiating or any other act, directly or indirectly for the purpose of furthering an activity described in sub clauses (i) to (iii); or
- v) any combination of the things mentioned in sub clauses (i) to (iv).

20) “Purchase” includes an exchange, option, lease or other acquisition of an interest in real estate.

21) “Sale” includes an exchange, option, lease or other disposition of an interest in real estate.

22) “Seller” means a person disposing or attempting to dispose of an interest in real estate by sale.

- 23) “**Service Agreement**” means an agreement that establishes a relationship between a brokerage and a person which identifies the responsibilities of each party and includes the services to be performed by the brokerage and the commission or remuneration payable if any.
- 24) “**Sole agency**” means a relationship in which a brokerage or industry member acts as the agent of only one party in a trade.
- 25) “**Sub-agent**” means a brokerage to whom a buyer's or seller's brokerage or designated agent delegates, in whole or in part, the performance of the buyer's or seller's brokerage's or designated agent's mandate.
- 26) “**Trade**” includes one or more of the following:
- i) a disposition of, an acquisition of or a transaction in real estate by sale or purchase;
 - ii) an offering, advertisement, listing or showing of real estate for sale or purchase;
 - iii) an offer to purchase or offer to sell;
 - iv) property management;
 - v) the solicitation, negotiation or obtaining of a contract, agreement or any other arrangements for any one or more of the things mentioned in this clause, either directly or indirectly;
- vi) holding oneself out as trading in real estate;
- vii) any conduct, act or negotiation, in the furtherance or attempted furtherance of any one or more of the things mentioned in this clause;
- but the provision of information alone does not constitute furthering or attempting to further for the purposes of subsection (vii).
- 27) “**Transaction brokerage**” means a relationship in which a brokerage or industry member provides facilitation services to the buyer and the seller in the same trade.
- 28) “**Transaction Brokerage Agreement**” means a written service agreement between a brokerage and the buyer and the seller in a trade which sets out the terms and conditions under which the brokerage will provide facilitation services to the seller and the buyer in the same trade.
- 29) “**Transaction Facilitator**” means an industry member who has been engaged under a Transaction Brokerage Agreement to provide facilitation services to the buyer and the seller in the same trade.

DISCLOSURE OBLIGATIONS

The ATF concluded that there is a need for

- (a) greater uniformity in the treatment of disclosure obligations, particularly within individual regulatory frameworks, and
- (b) guidance to licensees as to what effective disclosure entails.

The Table of Duties presented by Professor Foster included a comparison of disclosure obligations in different representation relationships (see Table on Page 11 ff).

RECOMMENDATION 4

That each jurisdiction use the following requirements for disclosure by industry members.

- 1) Before eliciting or as soon as practicable upon receiving confidential information from any person concerning that person's real estate needs, motivation, financial qualifications, or in any event before entering into a service agreement, an industry member must disclose (in writing) to that person
 - (a) the nature of the services that the industry member will provide,
 - (b) whether the industry member is acting in the trade or anticipated trade on behalf of any other person, in any capacity,
 - (c) any conflict of interest that may exist, and
 - (d) any other facts that may be likely to influence the person's decision.
- 2) If, subsequent to this disclosure, there is any material change in the facts which have been disclosed, the industry member must immediately disclose the change to that person.
- 3) The best efforts of the industry member shall be used to obtain written acknowledgement of all disclosures made by the person to whom it was made.
- 4) The duty of disclosure is not triggered merely by
 - (a) a bona fide "open house" showing,
 - (b) preliminary conversations or "small talk" concerning price range, location and property styles, or
 - (c) responding to general factual questions from a potential buyer or seller.
- 5) An industry member shall not provide any services to the client or potential client in a trade or anticipated trade in which the industry member has, or will have a conflict of interest without first receiving the written and informed consent of the party.
- 6) "Conflict of interest" means a real or apparent incompatibility between an industry member's interests and the interests of the client or potential client including
 - (a) whether the industry member has any interest in the property which is subject to the trade,
 - (b) whether the industry member is, or will be, receiving remuneration relating to the trade from any other person,
 - (c) the nature of the industry member's relationship with any other person involved in the trade.

These requirements make it clear that the "triggering event" for disclosure is eliciting or receiving confidential information or entering into a service agreement.

They require the industry member to use his/her best efforts to get the client to acknowledge general disclosures and require written and informed consent to continue to act in the case of a "conflict of interest".

These requirements set out principles which will guide the preparation of best practice guidelines. These would include examples of conflict of interest (e.g. an interest in the property, a family or business association with the buyer or seller, etc).

CLIENT DISCLOSURE

Just as the industry member needs to make the disclosure discussed above, the client also needs to disclose matters which could affect the trade.

RECOMMENDATION 5

That each jurisdiction use the following requirements for disclosure by clients.

RECOMMENDATION 6

That the following client disclosure provisions be included in all relevant documentation such as forms, brochures, and educational materials.

SELLER DISCLOSURE

The Seller warrants that:

- (a) the Seller has the authority to sell the property and to enter into the Agreement;
- (b) spousal consent:
 - i) for the sale of the Property has been obtained; or
 - ii) is not necessary for the sale of the Property;
- (d) the Seller has disclosed to the Brokerage all third party claims and interests in the Property known to the Seller;
- (e) the Property is not currently the subject of an exclusive seller brokerage agreement and, during the term of this Agreement, the Seller will not enter into another service agreement with another brokerage related to the sale of the Property;
- (f) the Seller has disclosed to the Brokerage all material latent defects affecting the Property known to the Seller;
- (g) the Seller will provide the Brokerage with all information necessary for the listing and marketing of the Property;
- (h) all information provided to the Brokerage is accurate to the best of the Seller's knowledge;
- (i) the Seller will immediately advise the Brokerage of any material change in the physical condition or status of the Property or in the information provided by the Seller.

BUYER DISCLOSURE

The Buyer warrants that:

- (a) the Buyer is not currently represented by, and will not enter into another exclusive buyer brokerage agreement with another brokerage during the term of this Agreement with respect to the same Market Area;
- (b) the Buyer has disclosed to the Brokerage all of the material requirements that the Buyer is seeking in a property.

PROTECTING CONFIDENTIAL INFORMATION

It is essential that industry members ensure that confidential information is kept confidential. This is not just the type of personal information which is subject to *the Personal Information Protection and Electronic Documents Act* (Canada) or its provincial counterpart legislation. Confidential information includes basically any information concerning the client, the property or the transaction that is not required by law to be disclosed.

This issue is not exclusive to the real estate industry. The term “Chinese Wall” (referred to in this report as an “Information Barrier”) was coined to describe the arrangements implemented by multi-service financial institutions in the United States to prevent the flow of information between departments that represented different clients with competing interests. The Information Barrier comprises policies, procedures and enforcement mechanisms designed to ensure that employees working in different departments do not communicate with, or to, their colleagues in other departments any information which, if disclosed, could be prejudicial to their clients’ interests.

In Canada, the Supreme Court has referred to imposing a “cone of silence.” Each broker would undertake not to disclose any

confidential information concerning the client to the broker representing the other party in the trade. Each brokerage firm would put in place policies, procedures and enforcement mechanisms to ensure that firm members representing clients with conflicting interests do not communicate with or to their colleagues (directly or indirectly, advertently or inadvertently), any information which, if disclosed, could be prejudicial to the interests of the clients.

Situations where inadvertent disclosure of confidential information may occur, include, but are not limited to:

- ✓ sales meetings or marketing sessions,
- ✓ shared fax or copy machines,
- ✓ shared computer networks, printers and file directories,
- ✓ in-office mail boxes,
- ✓ handwritten telephone messages,
- ✓ phone conversations or meetings with clients,
- ✓ relocation, divorce, pending foreclosure and other sensitive documents,
- ✓ conversations with affiliated business providers,
- ✓ social functions.

Some of the factors determining whether an Information Barrier may effectively be established in a firm are:

- the size of the firm (the smaller the brokerage the more difficult it may be to build an effective barrier);
- the extent of its departmentalization (are brokers representing buyers and sellers in distinct departments?);

- the number of branch offices (are the brokers representing the buyer and the seller based in different branches?);
- physical separation of brokers in an office (what are the chances that confidential conversations will be, advertently or inadvertently, overheard by the “other side?”);

- internal procedures for the handling of files, data and confidential information (is access restricted?; if so, how, to whom, to what degree?);
- support personnel (do brokers share the services of the same support personnel?);
- opportunities for personal contact (are the brokers likely to come into contact, socially or professionally, other than in relation to the transaction at issue creating the risk that they may inappropriately “talk shop”?);
- sharing of commissions by the brokers (will the brokers benefit from each other’s activities – an element that raises a particularly difficult issue in light of the fact that it is the seller who tends to pay the entire commission?).

In addition, for an Information Barrier to be acceptable and effective the following conditions must also be met:

- **Timeliness:** Information Barriers have to be established in a timely manner, that is:
 - before the creation of the risk that confidential information may be inadvertently disclosed; and
 - before a concurrent representation situation (for example, dual agency, designated brokerage, or transaction brokerage) situation arises.
- **Education:** Firms must educate their employees concerning the Information Barrier:
 - its elements;
 - the reasons for its presence; and
 - the consequences of its breach.
- **Full Disclosure:** Brokerage firms and brokers would have to disclose fully to clients:
 - the existence of the Barrier;
 - the elements of the Barrier;
 - the reason for its creation (to ensure that each client will still benefit from “arm’s length” representation and the preservation of each broker’s fiduciary obligations of obedience, loyalty and confidentiality);
 - the risks that it entails (that the Barrier is not impermeable to the flow of information and may be breached, intentionally or unintentionally); and
 - the names of the employees with whom the client can safely communicate.
- **Client Consent:** After full and complete disclosure has been made of all facts that might influence a client’s decision as to whether to accept such representation, each client’s consent to the arrangement must be obtained.
- **Independent Advice:** Clients should also be given the opportunity to obtain independent advice as to the implications of agency representation behind an Information Barrier.

RECOMMENDATION 7

That each jurisdiction use the following requirements on the protection of confidential information.

RECOMMENDATION 8

That the Canadian Regulators Group develop best practice guidelines on establishing and maintaining Information Barriers which should include at least the following elements.

- 1) In addition to the requirements of relevant legislation on the protection of personal information, an industry member will not disclose information regarding a client, property or transaction to any other person unless
 - (a) authorized by the client, or
 - (b) required by law.
- 2) A broker who in a supervisory capacity becomes aware of confidential information referred to in Clause 1) will not disclose the information to any other person except
 - (a) as required by law, or
 - (b) with the written consent of the client.
- 3) Each brokerage will establish adequate policies and procedures for the maintenance and protection of confidential information which will address office meetings, office layout, office procedures, support staff, and any other matter relevant to the particular circumstances of the brokerage.
- 4) Each brokerage will ensure that all industry members licensed with the brokerage and all support staff associated with the brokerage are aware of the policies and procedures and routinely carry them out in the course of their work.

SOLE AGENCY

It is important to realize three things:

- the agency issues identified by the ATF are not new - they arise from the experience of regulators and the decisions of courts;
- most consumers have very little experience in real estate transactions; and
- the great majority of real estate transactions are completed to the satisfaction of everyone involved.

The challenge, therefore, is to develop best practice guidelines which will address the issues, protect consumers, and help industry members to avoid inadvertent conflicts with the agency principles, without unnecessarily complicating transactions. The guidelines also need to be relevant not only to the activities of individual industry members but also to their employing brokerages.

The ATF is also aware that the traditional or full service type of listing is now being supplemented by a variety of levels of service offering various levels of agency, if any. The ATF decided to focus its attention first on the full service type of relationship.

The ATF concluded, based on the case law and industry practice, that there is a set of basic obligations which an industry member has to a client with whom the member is in a sole agency relationship.

RECOMMENDATION 9

That each jurisdiction adopt the following basic obligations for a sole agency relationship.

RECOMMENDATION 10

That the following basic obligations for a sole agency relationship be used in all relevant documentation such as forms, brochures, and educational materials as appropriate.

SELLER BROKERAGE

Basic Obligations

A Brokerage which is in a sole agency relationship with a Seller will discharge the following obligations:

- (a) to use best efforts to market the property and to promote the interests of the Seller;
- (b) at the earliest reasonable opportunity, to advise any buyer interested in the Property that the Brokerage is the Seller's agent;
- (c) subject to the provisions of the agreement related to a change in representative capacity, to act as only the Seller's agent;
- (d) to obey all lawful instructions of the Seller;
- (e) to fulfill its fiduciary obligations of loyalty, confidentiality and of full disclosure of all conflicts of interest that may arise between the Seller's interests and those of the Brokerage or buyers;
- (f) not to appoint another Brokerage to act on behalf of the Seller as sub-agent without the Seller's prior written consent;
- (g) to exercise reasonable care and skill in the performance of the agreement;
- (h) to assist the Seller in negotiating favourable terms and conditions with a buyer and in preparing and complying with a legally binding agreement of purchase and sale for the Property;
- (i) to disclose to buyers all material latent defects affecting the Property known to the Brokerage;
- (j) to present, in a timely manner, all offers and counter-offers to and from the Seller even when the Property is already the subject of an agreement of purchase and sale;
- (k) to disclose, in a timely manner, to the Seller, all relevant facts affecting the transaction known to the Brokerage;
- (l) to keep the Seller fully informed regarding the progress of the transaction;
- (m) to advise the Seller to obtain expert advice on matters of importance to the Seller;
- (n) to comply with all provisions of the [name of Act] and its regulations, and the rules and by-laws of the [name of governing body].

Additional Services

With the written consent of the Seller, the Brokerage may provide additional services at the Seller's expense, where applicable, such as:

- (a) to list the Property with the listing service(s) of the *[name of Association]*;
- (b) to cooperate with brokerages working with buyers and to offer such brokerages a portion of the Remuneration to which the Brokerage may be entitled under this agreement in the amount of *[amount]* Dollars (\$number) or *[amount]* percent (*number%*) of that Remuneration;
- (c) to obtain verification of mortgage, property and school taxes, improvement charges, tenancy information and other similar information with respect to the Property;
- (d) to advertise the Property;
- (e) to place a "for sale" sign on the Property;
- (f) to install a lock-box on the Property to provide access to authorized persons
- (g) to show the Property at times acceptable to the Seller and, if any, tenants;
- (h) to arrange "open-house" showings of the Property;
- (i) other services agreed between the Brokerage and the Seller and contained in the agreement.

BUYER BROKERAGE

Basic Obligations

A Brokerage which is in a sole agency relationship with a Buyer will discharge the following obligations:

- (a) to use best efforts in locating a property in the specified Market Area(s) that meets the material requirements identified by the Buyer and to promote the interests of the Buyer;
- (b) at the earliest reasonable opportunity, to advise any seller in whose property the Buyer is interested that the Brokerage is the agent of the Buyer;
- (c) subject to the provisions of the agreement related to a change in representative capacity, to act as only the Buyer's agent;
- (d) to obey all lawful instructions of the Buyer;
- (e) to fulfill its fiduciary obligations of loyalty, confidentiality and of full disclosure of all conflicts of interest that may arise between the Buyer's interests and those of the Brokerage, sellers or competing buyers;
- (f) not to appoint another brokerage to act on behalf of the Buyer as sub-agent without the prior written consent of the Buyer;
- (g) to exercise reasonable care and skill in the performance of the Agreement;
- (h) to seek out and advise the Buyer in a timely manner of available properties in the Market Area which may meet the Buyer's requirements, including those listed with other brokerages, those "for sale by owner" and other available properties known to the Brokerage;
- (i) to use best efforts to discover relevant facts pertaining to any property for which the Buyer is considering making an offer;
- (j) to disclose, in a timely manner, to the Buyer all relevant facts known to the Brokerage affecting a property or transaction;

continued...

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| <ul style="list-style-type: none"> (k) to advise the Buyer to obtain expert advice on matters of importance to the Buyer; (l) to present, in a timely manner, all offers and counter-offers to and from the Buyer even when a property is already the subject of an agreement of purchase and sale; (m) to keep the Buyer fully informed regarding the progress of the transaction; (n) to disclose to the Buyer the existence and terms of any competing offers known to the Brokerage for a property in | <ul style="list-style-type: none"> which the Buyer is interested known to the Brokerage; (o) to assist the Buyer in negotiating favourable terms and conditions and in preparing a legally binding agreement of purchase and sale; (p) to comply with all relevant provisions of the [<i>name of Act</i>] and its regulations, and the rules and by-laws of the [<i>name of governing body</i>]. |
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Additional Services

With the written consent of the Buyer, the Brokerage may provide additional services at the Buyer's expense, where applicable, such as:

- (a) to advertise for suitable properties;
- (b) to assist the Buyer to arrange financing;
- (c) to assist the Buyer to arrange for inspections of a property;
- (d) to assist the Buyer to arrange for appraisals of a property;
- (e) to seek from a seller or seller's brokerage a Seller's Property Disclosure Statement;
- (f) to assist the Buyer in arranging for a search of title to a property;
- (g) other services as agreed between the Brokerage and the Buyer

REMUNERATION

ATF has concluded that the agreements now in use should be expanded to clearly indicate that a range of remuneration options is available if the consumer and the industry member agree (and the arrangement is otherwise consistent with the relevant legislative framework).

RECOMMENDATION 11

That the following basic remuneration provisions be used in all relevant documentation such as forms, brochures, and educational materials.

SELLER

Remuneration

1) The Seller will pay the Brokerage as Remuneration:

(a) *[amount]* percent (*[number]* %) of the purchase price; (*initials*)

OR

(b) a flat fee of *[amount]* Dollars (\$ *[number]*); (*initials*)

OR

(c) a fee for services as specified in writing, signed by the Seller, in the Annex attached to this Agreement. (*initials*)

(PLUS applicable Goods and Services Tax and any other taxes payable in respect of the Remuneration):

i) if, during the term of this agreement, a legally enforceable agreement of purchase and sale, from whatever source obtained, is entered into between the Seller and a buyer (other than a buyer who has been specifically excluded in writing from the Agreement) AND the sale is completed OR the Seller, without legal justification, fails to complete the sale; OR

ii) if within *[number]* days (*[number]* days) (the Hold-Over Period) of the expiration of this Agreement, a legally enforceable agreement of purchase and sale is entered between the Seller and a buyer (other than a buyer who has been specifically excluded in writing from the Agreement) who was introduced to the Property or the Seller during the term of this Agreement, by whatever means or person and whether or not the Brokerage is the effective cause of such agreement of purchase and sale AND the sale is completed OR the Seller, without legal justification, fails to complete the sale; OR

iii) if during the term of the Agreement, an unconditional offer to purchase the Property upon the terms specified in the Agreement is presented to the Seller which the Seller refuses to accept;

PROVIDED that under clause 1)(ii) if, on the expiration of the Agreement, the Seller enters into an exclusive seller brokerage agreement with another brokerage for the payment of remuneration the Seller's liability to the Brokerage will be reduced by the amount paid by the Seller under the subsequent exclusive seller brokerage agreement.

Alternative Compensation

2) The Seller will pay the Brokerage Alternative Compensation, in the amounts specified below:

i) if, during the term of the Agreement or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered into between the Seller and a buyer and the buyer, without legal justification, fails to complete the sale, the Seller will pay the Brokerage, from monies, if any, forfeited by the buyer or recovered by the Seller from the buyer, *[percentage]* of such amount or the Remuneration specified in clause 1, whichever is the less;

ii) If, during the term of the Agreement, the Seller should withdraw the Property from the market the Seller will reimburse the Brokerage for all reasonable expenses incurred in the

continued...

iii) performance of the Agreement prior to the date on which the Seller notifies the Brokerage in writing of the Seller's decision, provided that such reimbursement will not prejudice any other claim to remuneration to which the Brokerage may become entitled under this clause of the Agreement.

BUYER

Retainer

- 1) The Buyer will pay the Brokerage on the signing of the Agreement a retainer fee of Dollars (\$.....) which:
- (a) will be credited (*initials*)
 - (b) will not be credited (*initials*)
- towards any Remuneration or Alternative Compensation payable by the Buyer to the Brokerage under clauses 2) and 4) respectively of the Agreement.

Remuneration

- 2) The Buyer will pay the Brokerage as Remuneration:
- (a) [*amount*] percent ([*number*] %) of the purchase price (*initials*);
OR
 - (b) a flat fee of [*amount*] Dollars (\$ [*number*]) (*initials*);
OR
 - (c) a fee for services provided as specified in writing, signed by the Buyer, in the Annex attached to the Agreement (*initials*);
(PLUS applicable Goods and Services Tax and any other taxes payable in respect of the Remuneration):
 - (i) if, during the term of the Agreement, a legally enforceable agreement of purchase and sale, from whatever source obtained, is entered into between the Buyer and a seller (other than a seller or a property that has been specifically excluded in writing from the Agreement) AND the purchase is completed OR the Buyer, without legal justification, fails to complete the sale; OR
 - (ii) if, within [*number*] days ([*number*] days) (the Hold-Over Period) of the expiration of this Agreement, a legally enforceable agreement of purchase and sale is entered between the Buyer and a seller (other than a seller or a property that has been specifically excluded in writing from the Agreement) whose property was introduced to the Buyer during the term of the Agreement, by whatever means or person and whether or not the Brokerage is the effective cause of such agreement of purchase and sale AND the purchase is completed OR the Buyer, without legal justification, fails to complete the sale; OR
 - (iii) if, during the term of the Agreement, an unconditional offer to purchase a property upon the terms specified in the Agreement is presented to the Buyer which the Buyer refuses to accept;

PROVIDED that under clause 2)(b)(ii) if, on the expiration of the Agreement, the Buyer enters into an exclusive buyer brokerage agreement with another brokerage for the payment of a remuneration or fee, the Buyer's liability to the Brokerage will be reduced by the amount paid by the Buyer under the subsequent exclusive buyer brokerage agreement.

continued...

Source of Remuneration

- 3) (a) The Buyer authorizes the Brokerage to request payment of the Remuneration specified in clause 2), or part thereof, from (*Buyer to initial*):
- (i) the brokerage representing the seller; YES NO
 - (ii) the seller, where the seller has not listed the property with a brokerage. YES NO
- (b) Where the amount so received by the Brokerage is:
- (i) less than the Remuneration specified in clause 2), the Buyer will pay to the Brokerage the outstanding balance;
 - (ii) more than the Remuneration specified in clause 2), the Brokerage will pay to the Buyer the excess balance.

Alternative Compensation

- 4) The Buyer will pay the Brokerage Alternative Compensation, in the circumstances and amounts specified below:
- (a) If, during the term of this Agreement, or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered into between the Buyer and a seller and the seller, without legal justification, fails to complete the sale, the Buyer will pay the Brokerage the Remuneration specified in clause 2) should the Buyer obtain an order for specific performance of the contract with the seller;
 - (b) If, during the term of this Agreement or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered between the Buyer and a seller and the seller, without legal justification, fails to complete the sale, the Buyer will pay the Brokerage from monies, if any, recovered by the Buyer from the seller in settlement of the Buyer's claim against the seller, [*percentage*] of such amount recovered or [*percentage*] of the Remuneration specified in clause 2), whichever is the less;
 - (c) if during the term of this agreement the Buyer should withdraw from the market, the Buyer will reimburse the Brokerage for all reasonable expenses incurred in the performance of the Agreement prior to the date on which the Buyer notifies the Brokerage in writing of the Buyer's decision, provided that such reimbursement will not prejudice any other claim to remuneration to which the Brokerage may become entitled under clause 2) or clause 4) of this Agreement.

A MODEL FOR THE FUTURE

RECOMMENDATION 12

That designated agency and transaction brokerage be adopted as the standard practice in Canada for the future.

The ATF spent more than a year coming to an understanding of the issues surrounding dual agency and potential solutions. In addition to Professor Foster, Mike Gorham

was a key resource in providing information on experience in the United States.

Both a brokerage and an individual industry member may find themselves in a dual

agency relationship. When two individual industry members in the same firm separately represent the seller and the buyer in a trade the brokerage is placed in the position of representing both parties and the supervising broker may become aware of confidential information regarding both parties. The same situation applies when an individual brokerage member represents both the seller and the buyer.

The ATF recognizes that many industry members perform a valuable service in assisting willing sellers and willing buyers to reach a mutually acceptable agreement. However, unless certain precautions are taken, the industry member and the brokerage are in jeopardy should the trade sour.

As it evolved, the ATF focused in on two concepts: designated agency and transaction brokerage.

Under designated agency, the brokerage would designate an individual industry member (or a team of members) as the agent for the seller. If the brokerage locates a buyer who wishes to make an offer on the seller's property, the brokerage would

designate another individual industry member as the agent for the buyer. The designated agent(s) would treat the other agents in the brokerage as if they were agents from another brokerage altogether.

The brokerage itself would be in a neutral position, not advocating for either the seller or the buyer, essentially facilitating the transaction while maintaining the confidentiality of all information.

The ATF concluded that it would be useful for consumers, the industry and the regulators if all jurisdictions established designated agency as the default position, i.e. that the brokerage would automatically designate an individual industry member licensed with the brokerage as the seller's agent. The major challenge for the brokerage will be attempting to ensure that the information barriers are adequate.

The ATF realizes that it will take some time for jurisdictions to implement this model. While the model could be immediately implemented in its entirety, some jurisdictions may wish to take a phase-in approach.

The listing agreement would include a provision (similar provisions would be included in a designated buyer's agent agreement) such as:

- 1) The Brokerage will designate [*name of agent(s)*] (the Designated Agent) to serve as sole agent for the Seller and will designate other members of the Brokerage to serve as sole agents of any buyers also represented by the Brokerage interested in the Property.
- 2) If, for any reason, the Designated Agent ceases to be licensed with the Brokerage, the Brokerage will designate another member of the Brokerage to serve as sole agent for the Seller.

The role of the brokerage would be set out in the agreement as follows:

The Seller agrees that an agency relationship will exist only with the Designated Agent and not with the Brokerage.

- 1) The Seller agrees that the Brokerage's responsibilities will be limited to:
 - a) treating the interests of both the Seller and potential buyers of the Property in an even-handed, objective and impartial manner;
 - b) ensuring compliance by the Designated Agent with the Brokerage's policies and procedures governing designated agents;
 - c) supervising the Designated Agent and support staff to ensure the Designated Agent fulfills its mandate under this Agreement;
 - d) holding all monies received by the Brokerage in trust in accordance with the provisions of the [*name of Act*].

Maintaining the confidentiality of information respecting the client would be described as:

The Brokerage and the Designated Agent undertake that they have not, and will not, disclose, any confidential information concerning the Seller to any other member of the Brokerage or other person unless

- a) authorized by the Seller or
 - b) required by law.
- 1) The Designated Agent's knowledge will not be attributed to the Brokerage or to designated agents representing buyers.

The agreement would also need to anticipate the possibility that the designated agent could have a buyer client who might become interested in the seller's property. **This would be covered by the following provision:**

If the Designated Agent is also the agent of a buyer who becomes interested in the Property, the Designated Agent will:

- a) immediately advise the Seller and the buyer of all relevant facts and of the implications of concurrent representation;
 - b) give the Seller and the buyer an opportunity to seek independent advice; and
 - c) then seek their written informed consent to the Brokerage and the Designated Agent continuing to provide services to the Seller and the buyer as **Transaction Brokerage** on the terms and conditions specified in the Transaction Brokerage Agreement and in the [*brochure*] published by [*name of Association*].
- 1) Should the Seller refuse to consent, the Designated Agent will continue to represent the party, be it the Seller or the buyer, with whom it first entered into an agency relationship and the Brokerage will offer:
 - a) to designate another member of the Brokerage to represent the other party as sole agent;
 - b) to treat the other party as a customer; or
 - c) to refer the other party to another brokerage.

If the parties agree that the brokerage and the designated agent should continue to provide services to both the buyer and the seller, all of them would enter into a Transaction Brokerage Agreement. This agreement would essentially set out the ideal practices associated with what is currently called dual agency, but the use of another title would assist consumers and industry members in recognizing that the industry member will not be serving as an advocate for either party. ATF believes that transaction brokerage offers risk reduction for the individual industry member, the principals would not be vicariously liable for the wrongful acts of their agent, and projects a better public image.

The basic provisions of such a Transaction Brokerage agreement would be:

THIS AGREEMENT IS ENTERED INTO BY THE BUYER, THE SELLER, THE BROKERAGE AND THE DESIGNATED AGENT WITH RESPECT TO THE PROPERTY KNOWN AS:

.....
.....

(the Property) ON THE BASIS OF THE FOLLOWING FACTS:

- The Buyer is interested in purchasing, and the Seller is interested in selling, the Property;
- The Designated Agent concurrently represents both the Buyer and the Seller;
- Such concurrent representation by the Designated Agent of both the Buyer and the Seller prevents the Designated Agent from discharging the fiduciary obligations owed to the Buyer and the Seller respectively and, in particular, the obligations:
 - of utmost loyalty to the Buyer and to the Seller;
 - to act solely in the best interests of the Buyer and of the Seller;
 - to avoid all conflicts of interest including conflicts that may arise between the interests of the Buyer and of the Seller;
 - of full disclosure of all facts that may influence the decisions of the Buyer or of the Seller; and
 - to maintain the confidentiality of information obtained from the Buyer or from the Seller;
- Such concurrent representation by the Designated Agent is only permitted by law with the fully informed and voluntary consent of both the Buyer and the Seller;
- The Buyer and the Seller have read the [brochure name] published by [name of Association] and this Agreement, and have been given the opportunity to seek further information and independent advice concerning **Transaction Brokerage** representation and other relationships discussed therein;

THEREFORE, THE BUYER AND THE SELLER CONSENT AND AGREE TO their continued representation by the Designated Agent, now acting in the capacity of **Transaction Facilitator**, on the following terms:

- 1. Impartiality:** The Transaction Facilitator will treat the interests of both the Buyer and the Seller in an even-handed, objective and impartial manner.
- 2. Reasonable Care and Skill:** The Transaction Facilitator will exercise reasonable care and skill in the performance of its mandate under this Agreement.
- 3. Accuracy of Information:** The Transaction Facilitator will not negligently or knowingly give false or misleading information to the Buyer or the Seller.

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- 4. Instructions:** The Transaction Facilitator will obey the instructions of the Buyer or the Seller to the extent that they are consistent with the other terms of the Agreement.
- 5. Non-Disclosure of Certain Information:** The Transaction Facilitator will not disclose without the informed written consent of the Buyer or the Seller, as the case may be:
- a) that the Buyer may be prepared to offer a higher price or terms other than those contained in the offer to purchase;
 - b) that the Seller may be prepared to accept a lower price or terms other than those contained in the Seller's Exclusive Seller Designated Brokerage Agreement;
 - c) the motivation of the Buyer or the Seller for wishing to respectively purchase or sell the property; and
 - d) subject to clause 6 of the Agreement, personal information relating to the Buyer or the Seller and other information disclosed at any time in confidence by either to the Transaction Facilitator.
- 6. Disclosure of Certain Information:** The Transaction Facilitator will disclose:
- a) to the Buyer, all material latent defects affecting the Property known to the Transaction Facilitator; and
 - b) to the Seller, all material facts relevant to the Buyer's ability to purchase the Property known to the Transaction Facilitator.
- 7. Inspections and Inquiries:** The Transaction Facilitator will not conduct or arrange:
- a) an independent inspection of the Property for the Buyer and will not verify the accuracy or completeness of any information supplied or statements made by the Seller concerning the Property; or
 - b) an independent inquiry into the financial status of the Buyer for the Seller and will not verify the accuracy or completeness of any financial information supplied by the Buyer.
- 8. No Attribution of Knowledge:** The Transaction Facilitator's knowledge concerning the Buyer or the Seller will not be attributed to the other or to the Brokerage.
- 9. Vicarious Liability:** Neither the Buyer nor the Seller will be vicariously liable to the other for any acts of the Transaction Facilitator.
- 10. Facilitation Services:**
- a) The Brokerage will:
 - i) present to the Buyer and the Seller, in a timely manner, all offers and counter-offers to and from either regardless of whether the Property is already the subject of a contract;
 - ii) convey to the Buyer and the Seller, in a timely manner, all information that either wishes to have communicated to the other;
 - iii) keep the Buyer and the Seller informed regarding the progress of the transaction;
 - iv) hold all monies received in respect of the transaction in accordance with the provisions of the [name of Act]
 - v) comply with the provisions of the [name of Act] and its regulations, and the rules and by-laws of the [name of governing body].
 - b) The Brokerage will also perform for the Buyer and the Seller all necessary facilitation services, (that is, those services needed to assist the Buyer and the Seller to complete a transaction that do not require the exercise of discretion or judgment, or the giving of confidential advice or advocating on behalf of either the Buyer or the Seller) and will, when requested by the Buyer or the Seller:

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- i) provide real estate statistics and information on property including all comparable property information available through the listing service or other local data bases;
- ii) provide standard form agreements of purchase and sale and other documents and act as scribe in their preparation in accordance with the instructions of the Buyer or the Seller;
- iii) provide the names of real estate appraisers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and the like, but the Brokerage will not recommend any particular professional to the Buyer or the Seller.

11. Brokerage's Responsibility:

- a) The Brokerage will ensure that the Transaction Facilitator:
 - i) complies with the Brokerage's policies and procedures governing Transaction Brokerage; and
 - ii) treats the interests of both the Buyer and the Seller in an even-handed, objective and impartial manner.
- b) The Brokerage will supervise the Transaction Facilitator and support staff to ensure that they properly fulfill this Agreement.

MODEL FORMS

RECOMMENDATION 13

That the model forms presented in this report be used by the real estate industry across Canada.

With the assistance of Professor Foster, the ATF has developed a series of model forms. The ATF suggests that these forms are appropriate for use across the country. Those familiar with the existing forms will note many substantial changes, primarily arising from the case law. However, the forms use consistent language in treating most situations the industry member is likely to face when entering into a representation agreement.

These forms are provided in a format to facilitate review by readers of this report. Appendix I provides a sample of what a formatted Exclusive Seller Designated Brokerage Agreement might look like.

Recommended Forms

- Exclusive Seller Designated Brokerage Agreement (Appendix A)
- Exclusive Buyer Designated Brokerage Agreement (Appendix B)
- Transaction Brokerage Agreement – Designated Brokerage (Appendix C)
- Customer Status Acknowledgement – Seller (Appendix D)
- Customer Status Acknowledgement – Buyer (Appendix E)

Supplementary Forms

- Exclusive Seller Brokerage Agreement (Appendix F)
- Exclusive Buyer Brokerage Agreement (Appendix G)
- Transaction Brokerage Agreement – Exclusive Brokerage (Appendix H)

EDUCATION PROGRAMS

The ATF has not had the opportunity to review all of the educational programs related to agency and industry practices. In addition, such an activity would not be particularly productive until the approach selected by the CRG is known.

RECOMMENDATION 14

That a standard course for use across Canada be developed on agency as it applies in the real estate industry using this report as a template.

Before implementing any of the changes, the course should be offered to as many industry members as possible, and preferably all, in each jurisdiction. The course should be standard across the country and should be a prerequisite for licensing or renewal of licensing.

The papers presented by Professor Foster provide an extensive review of agency issues arising from case law. The contents of these papers should be the basic component of the educational programs.

The courses will need to explain the defined terms, and in particular such terms such as “material latent defects” and “exercise reasonable care and skill”, the difference between “assisting” and “arranging”, a review of the “basic services”, the disclosure provisions, what can be delegated and what must be done in person by the industry member.

It will also be key for industry members to understand the relationship of the proposed new forms to the existing forms, and the relationships they describe.

The courses will also need to address the concepts and practices of both designated agency and transaction brokerage. Industry members will need to understand

- the basic obligations of the brokerage,
- how the brokerage can ensure that all parties understand the brokerage’s role,
- how to implement an information barrier,
- how to handle a change in representative capacity,
- how to handle multiple offers.

MODEL AGENCY PROVISION

RECOMMENDATION 15

That the model agency provision provided in this report as the template for standard best practice guidelines across Canada.

Pulling together all of the work of the ATF, it is possible to set out a Model Agency Provision which could be adopted by all regulators in Canada.

Depending on the practice in the jurisdiction, a Regulator may wish to use the Model Agency Provision as the basis for amendment of an act or a regulation or for a section of the Regulator's best practice

guidelines. It is understood that Legislative Counsel may wish to use a different drafting style for an act or regulation and that the Regulator may wish to style it differently for

the best practice guidelines. The substance of this model agency provision should be maintained, regardless of the drafting style.

INTERPRETATION

1. In this provision

- a) "**Agent**" means an industry member who is expressly or implicitly authorized to act for or represent another person in a trade in real estate.
- b) "**Broker**" means an individual who is licensed as a broker by the [*name of governing body*], who is employed by or associated with a licensed brokerage in [*name of jurisdiction*], and is registered with and authorized to operate a brokerage and trade in real estate on behalf of that brokerage.
- c) "**Brokerage**" means a person licensed by the [*name of governing body*] as a brokerage who is authorized to trade in real estate in [*name of jurisdiction*] as a brokerage or advertise or hold itself out as a real estate brokerage to the public and includes all the industry members licensed with the brokerage.
- d) "**Buyer**" means a person acquiring or attempting to acquire an interest in real estate by purchase.
- e) "**Client**" means a person who has engaged or employed the brokerage, either as the person's agent or as the person's transaction broker.
- f) "**Concurrent representation**" means a situation in which a brokerage or an industry member represents two or more parties to a trade whose interests are seen to be in conflict.
- g) "**Customer**" means a person who has not engaged or employed the brokerage in an agency capacity or as the person's transaction broker.
- h) "**Designated agency**" means a relationship in which one or more different industry members, licensed with the same brokerage, are designated in writing by the brokerage to act as sole agents for a buyer or a seller with respect to the same trade.
- i) "**Designated Agent**" means an individual industry member who is designated in writing by a brokerage to serve as a sole agent for a buyer or a seller in a trade in real estate.
- j) "**Designated Brokerage Agreement**" means a written service agreement between a brokerage and a buyer or a seller which sets out the terms and conditions under which one or more different individual industry members licensed with the brokerage are designated as the agent of the buyer or of the seller, respectively, in the same trade.
- k) "**Dual agency**" means a relationship in which a brokerage or an individual industry member represents, as agent, both the buyer and the seller in the same trade.
- l) "**Exclusive Buyer Brokerage Agreement**" means a written service agreement between a brokerage and a buyer under which the buyer grants the brokerage exclusive authority to act as agent for the buyer and the exclusive right to locate for the buyer an interest in real estate and by which the buyer may agree to compensate the brokerage on any purchase effected by the brokerage, another brokerage or the buyer.
- m) "**Exclusive Seller Brokerage Agreement**" means a written service agreement between a brokerage and a seller under which the seller grants the brokerage exclusive authority to act as

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agent for the seller and the exclusive right to offer for sale the seller's interest in real estate and by which the seller agrees to compensate the brokerage on any sale effected by the brokerage, another brokerage or the seller.

- n) **"Facilitation services"** means services that do not require the exercising of discretion or judgement, or the giving of confidential advice or advocating on behalf of either the buyer or the seller and may include:
- i) providing real estate statistics and information on property including comparable property information available through listing services or other local data bases;
 - ii) providing standard form agreements of purchase and sale and other documents and assisting in their preparation in accordance with the instructions of the buyer and the seller;
 - iii) providing names of real estate appraisers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and the like but not recommending any particular professional to the buyer or the seller;
 - iv) presenting to the buyer and the seller, in a timely manner, all offers and counter-offers to and from either regardless of whether the property is already the subject of a contract;
 - v) conveying to the buyer and the seller in a timely manner all information that either wishes to have communicated to the other;
 - vi) keeping the buyer and the seller informed regarding the progress of the transaction; and
 - vii) complying with the provisions of the [*name of Act*] and its regulations and the rules and bylaws of the [*name of governing body*]."
- o) **"Industry member"** means a person licensed by the jurisdiction to trade in real estate.
- p) **"Non-Exclusive Buyer Brokerage Agreement"** means a service agreement between a brokerage and a buyer under which the buyer grants the brokerage non-exclusive authority to act as agent for the buyer to locate for the buyer an interest in real estate and by which the buyer may agree to compensate the brokerage only if the brokerage is the effective cause of the purchase.
- q) **"Non-Exclusive Seller Brokerage Agreement"** means a service agreement between a brokerage and a seller under which the seller grants the brokerage non-exclusive authority to act as agent for the seller to offer for sale the seller's interest in real estate and by which the seller agrees to compensate the brokerage only if the brokerage is the effective cause of the sale.
- r) **"Person"** includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law.
- s) **"Property management"** includes
- i) leasing, negotiating, approving or offering to lease, negotiate or approve a lease or rental of real estate;
 - ii) collecting or offering or attempting to collect money payable for the use of real estate;
 - iii) holding money received in connection with a lease or rental of real estate;
 - iv) advertising, negotiating or any other act, directly or indirectly for the purpose of furthering an activity described in sub clauses (i) to (iii); or
 - v) any combination of the things mentioned in sub clauses (i) to (iv).
- t) **"Purchase"** includes an exchange, option, lease or other acquisition of an interest in real estate.
- u) **"Sale"** includes an exchange, option, lease or other disposition of an interest in real estate.

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- v) **“Seller”** means a person disposing or attempting to dispose of an interest in real estate by sale.
 - w) **"Service Agreement"** means an agreement that establishes a relationship between a brokerage and a person which identifies the responsibilities of each party and includes the services to be performed by the brokerage and the commission or remuneration payable if any.
 - x) **"Sole agency"** means a relationship in which a brokerage or industry member acts as the agent of only one party in a trade.
 - y) **“Sub-agent”** means a brokerage to whom a buyer's or seller's brokerage or designated agent delegates, in whole or in part, the performance of the buyer's or seller's brokerage's or designated agent's mandate.
 - z) **"Trade"** includes one or more of the following:
 - i) a disposition of, an acquisition of or a transaction in real estate by sale or purchase;
 - ii) an offering, advertisement, listing or showing of real estate for sale or purchase;
 - iii) an offer to purchase or offer to sell;
 - iv) property management;
 - v) the solicitation, negotiation or obtaining of a contract, agreement or any other arrangements for any one or more of the things mentioned in this clause, either directly or indirectly;
 - vi) holding oneself out as trading in real estate;
 - vii) any conduct, act or negotiation, in the furtherance or attempted furtherance of any one or more of the things mentioned in this clause;
 - viii) but the provision of information alone does not constitute furthering or attempting to further for the purposes of subsection (vii).
 - aa) **"Transaction brokerage"** means a relationship in which a brokerage or industry member provides facilitation services to the buyer and the seller in the same trade.
 - bb) **“Transaction Brokerage Agreement”** means a written service agreement between a brokerage and the buyer and the seller in a trade which sets out the terms and conditions under which the brokerage will provide facilitation services to the buyer and the seller in the same trade.
 - cc) **“Transaction Facilitator”** means an industry member who has been engaged under a Transaction Brokerage Agreement to provide facilitation services to the buyer and the seller in the same trade.
2. An agency relationship is established when a buyer or a seller expressly or implicitly consents that an industry member should act on his or her behalf, and the industry member consents so to act or so acts in a trade of real estate.
 3. A buyer or seller who is in an agency relationship is a client of the industry member.
 4. A buyer or seller who is not in an agency relationship with the industry member is a customer.

AGENCY RELATIONSHIP

5. An agency relationship may be established implicitly when
 - (a) an industry member provides advice on which the client relies, or
 - (b) an industry member receives confidential advice from a client such as the lowest price a seller will consider or the highest price that a buyer is willing to pay.

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6. An agency relationship is established expressly when the client and the industry member agree that the industry member will be the agent of the client.

CONFIDENTIAL INFORMATION

7. In addition to the requirements of relevant legislation on the protection of personal information, an industry member will not disclose information regarding a client, property or transaction to any other person unless
 - (a) authorized by the client, or
 - (b) required by law.
8. A broker who in a supervisory capacity becomes aware of confidential information referred to in Clause 7) will not disclose the information to any other person unless
 - (a) authorized by the client, or
 - (b) required by law.
9. Each brokerage will establish adequate policies and procedures for the maintenance and protection of confidential information which will address office meetings, office layout, office procedures, support staff, and any other matter relevant to the particular circumstances of the brokerage.
10. Each brokerage will ensure that all industry members licensed with the brokerage and all support staff associated with the brokerage are aware of the policies and procedures and routinely carry them out in the course of their work.

DISCLOSURE

11. Before eliciting or as soon as practicable upon receiving confidential information from any person concerning that person's real estate needs, motivation, financial qualifications or in any event before entering into a service agreement, an industry member must disclose (in writing) to that person
 - (a) the nature of the services that the industry member will provide,
 - (b) whether the industry member is acting in the trade or anticipated trade on behalf of any other person, in any capacity,
 - (c) any conflict of interest that may exist, and
 - (d) any other facts that may be likely to influence the person's decision.
12. If, subsequent to this disclosure, there is any material change in the facts which have been disclosed, the industry member must immediately disclose the change to that person.
13. The best efforts of the industry member shall be used to obtain written acknowledgement of all disclosures made by the person to whom it was made.
14. The duty of disclosure is not triggered merely by
 - (a) a bona fide "open house" showing,
 - (b) preliminary conversations or "small talk" concerning price range, location and property styles, or
 - (c) responding to general factual questions from a potential buyer or seller.
15. An industry member shall not provide any services to the client or potential client in a trade or anticipated trade in which the industry member has, or will have, a conflict of interest without receiving the written and informed consent of the party.

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16. "Conflict of interest" means a real or apparent incompatibility between an industry member's interests and the interests of the client or potential client including
- (a) whether the industry member has any interest in the property which is subject to the trade or anticipated trade,
 - (b) whether the industry member is, or will be, receiving remuneration relating to the trade or anticipated trade from any other person,
 - (c) the nature of the industry member's relationship with any other person involved in the trade or anticipated trade.

CLIENT DISCLOSURE

Seller Disclosure

17. The Seller should warrant that:

- (a) the Seller has the authority to sell the property and to enter into the Agreement;
- (b) that spousal consent:
 - i) for the sale of the Property has been obtained; OR
 - ii) is not necessary for the sale of the Property;
- (c) the Seller has disclosed to the Brokerage all third party claims and interests in the Property if known to the Seller;
- (d) the Property is not currently the subject of an exclusive seller brokerage agreement and, during the term of the Agreement, the Seller will not enter into another service agreement with another brokerage related to the sale of the Property;
- (e) the Seller has disclosed to the Brokerage all material latent defects affecting the Property known to the Seller;
- (f) the Seller will provide the Brokerage with all information necessary for the listing and marketing of the Property;
- (g) all information provided to the Brokerage is accurate to the best of the Seller's knowledge;
- (h) the Seller will immediately advise the Brokerage of any material change in the physical condition or status of the Property or in the information provided by the Seller.

Buyer Disclosure

18. The Buyer should warrant that:

- (a) the Buyer is not currently represented by, and will not enter into another exclusive buyer brokerage agreement with, another brokerage during the term of the Agreement with respect to the same Market Area;
- (b) the Buyer has disclosed to the Brokerage all of the material requirements that the Buyer is seeking in a property.

AGREEMENTS

19. The relationship will be set out in writing using one of the standard or supplementary agreements.

20. Every written service agreement shall

- (a) be signed by the relevant parties
- (b) clearly show all terms and conditions of the agreement and shall include:

continued...

- (i) the names of the parties to the agreement;
- (ii) the address of the property affected by the agreement,
- (iii) if applicable; the date on which the agreement will become effective;
- (iv) a single expiry date (that is less than 12 months from the date on which the agreement will become effective);
- (v) the amount of the remuneration or alternate compensation to be paid and the circumstances on which it will be payable; the services to be provided by the brokerage;
- (vi) the services to be provided by the brokerage
- (vii) the responsibilities of each party to the agreement; and
- (viii) the use and distribution of personal information.

and shall provide that

- (c) any amendment of or addition to the terms of the agreement shall be in writing and signed by the relevant parties.
- (d) a true copy of the agreement, and of any amendment or addition, shall be delivered to the parties immediately upon its signature.

21. The standard agreements are

- (a) Exclusive Seller Designated Brokerage Agreement
- (b) Exclusive Buyer Designated Brokerage Agreement
- (c) Transaction Brokerage Agreement – Designated Agency
- (d) Customer Status Acknowledgement – Buyer
- (e) Customer Status Acknowledgement - Seller

22. The supplementary agreements are:

- (a) Exclusive Seller Brokerage Agreement
- (b) Exclusive Buyer Brokerage Agreement
- (c) Transaction Brokerage Agreement – Exclusive Brokerage

BASIC OBLIGATIONS

To a Seller

23. The basic obligations of an industry member who is in a sole agency relationship with a Seller are

- a) to use best efforts to market the property and to promote the interests of the Seller;
- b) at the earliest reasonable opportunity, to advise any buyer interested in the property that the industry member is the Seller's agent;
- c) subject to Sections 33 to 41, to act as only the Seller's agent;
- d) to obey all lawful instructions of the Seller;
- e) to fulfill its fiduciary obligations of loyalty, confidentiality and of full disclosure of all conflicts of interest that may arise between the Seller's interests and those of the industry member or buyers;
- f) not to appoint another brokerage to act on behalf of the Seller as sub-agent without the Seller's prior written consent;
- g) to exercise reasonable care and skill in the performance of the agreement;
- h) to assist the Seller in negotiating favourable terms and conditions with a buyer and in preparing and complying with a legally binding agreement of purchase and sale for the Property;

continued...

- i) to disclose to buyers all material latent defects affecting the Property known to the industry member;
- j) to present, in a timely manner, all offers and counter-offers to and from the Seller even when the Property is already the subject of an agreement of purchase and sale;
- k) to disclose, in a timely manner, to the Seller all relevant facts affecting the transaction known to the industry member;
- l) to keep the Seller fully informed regarding the progress of the transaction;
- m) to advise the Seller to obtain expert advice on matters of importance to the Seller;
- n) to comply with the provisions of the [name of Act] and its regulations, and the rules and by-laws of the [name of governing body].

Additional Services

24. With the written consent of the Seller, the Brokerage may provide additional services at the Seller's expense, where applicable, such as:
- (a) to list the Property with the listing service(s) of the [name of Association];
 - (b) to cooperate with brokerages working with buyers and to offer such brokerages a portion of the Remuneration to which the Brokerage may be entitled under this agreement in the amount of [amount] Dollars (\$number) or [amount] percent (number%) of that Remuneration;
 - (c) to obtain verification of mortgage, property and school taxes, improvement charges, tenancy information and other similar information with respect to the Property;
 - (d) to advertise the Property;
 - (e) to place a "for sale" sign on the Property;
 - (f) to install a lock-box on the Property to provide access to authorized persons
 - (g) to show the Property at times acceptable to the Seller and, if any, tenants;
 - (h) to arrange "open-house" showings of the Property;
 - (i) other services as agreed between the Brokerage and the Seller.

To a Buyer

25. The basic obligations of an industry member who is in a sole agency relationship with a Buyer are
- a) to use best efforts in locating a property in the specified Market Area(s) that meets the material requirements identified by the Buyer and, generally, to promote the interests of the Buyer;
 - b) at the earliest reasonable opportunity, to advise any seller in whose property the Buyer is interested that the industry member is the agent of the Buyer;
 - c) subject to sections 33 to 41, to act as only the Buyer's agent;
 - d) to obey all lawful instructions of the Buyer;
 - e) to fulfill its fiduciary obligations of loyalty, confidentiality and of full disclosure of all conflicts of interest that may arise between the Buyer's interests and those of the industry member, sellers or competing buyers;
 - f) not to appoint as sub-agent another brokerage without the Buyer's prior written consent;
 - g) to exercise reasonable care and skill in the performance of this Agreement;
 - h) to seek out and advise the Buyer in a timely manner of available properties in the Market Area which may meet the Buyer's requirements, including those listed with other brokerages, those "for sale by owner" and other available properties known to the industry member;

continued...

- i) to discover relevant facts pertaining to any property for which the Buyer is considering making an offer;
- j) to disclose, in a timely manner, to the Buyer all relevant facts known to the industry member affecting a property or transaction;
- k) to advise the Buyer to obtain expert advice as to matters of importance to the Buyer;
- l) to present, in a timely manner, all offers and counter-offers to and from the Buyer even when a property is already the subject of an agreement of purchase and sale;
- m) to keep the Buyer fully informed regarding the progress of the transaction;
- n) to disclose to the Buyer the existence and terms of any competing offers known to the industry member for a property in which the Buyer is interested;
- o) to assist the Buyer in negotiating favourable terms and conditions and in preparing a legally binding agreement of purchase and sale;
- p) to comply with all relevant provisions of the [name of Act] and its regulations, and the rules and by-laws of the [name of governing body].

Additional Services

26. With the written consent of the Buyer, the Brokerage may provide additional services at the Buyer's expense, where applicable, such as:
- (a) to advertise for suitable properties;
 - (b) to assist the Buyer to arrange financing;
 - (c) to assist the Buyer to arrange for inspections of a property;
 - (d) to assist the Buyer to arrange for appraisals of a property;
 - (e) to seek from a seller or seller's brokerage a Seller's Property Disclosure Statement;
 - (f) to assist the Buyer in arranging for a search of title to a property;
 - (g) other services as agreed between the Brokerage and the Buyer

DESIGNATED AGENCY

27. In the normal course of business the brokerage will designate one or more industry members licensed with the brokerage to serve as sole agent for the seller of property listed through the brokerage and will designate other industry members of the brokerage to serve as sole agents of any buyers represented by the brokerage interested in the property.
28. If the approach to the brokerage has been initiated by a buyer, in the normal course of business the brokerage will designate one or more industry members licensed with the brokerage to serve as sole agent for the buyer and will designate other industry members of the brokerage to serve as sole agents of any sellers of property listed with the brokerage in which the buyer is interested.
29. If, for any reason, a designated agent ceases to be licensed with the brokerage, the brokerage will designate another industry member licensed with the brokerage to serve as sole agent for the seller or buyer.
30. Before an industry member is designated pursuant to Section 27 or 28, the seller or buyer must agree that an agency relationship will exist only with the designated agent and not with the brokerage.
31. The agreement under Section 30 shall provide that the brokerage's responsibilities will be limited to:
- (a) treating the interests of both sellers and buyers in an even-handed, objective and impartial manner;

continued...

- (b) ensuring compliance by the designated agent with the brokerage's policies and procedures governing designated agents;
- (c) supervising the designated agent and support staff to ensure the designated agent fulfills its mandate under the agreement;
- (d) holding all monies received by the brokerage in trust in accordance with the provisions of the [name of Act].

32. The agreement under Section 30 shall provide that the brokerage and the designated agent undertake that they have not, and will not, disclose, any confidential information concerning the seller or the buyer to any other member of the brokerage or other person unless

- (a) authorized by the seller or buyer as the case may be, or
- (b) required by law

and shall provide that knowledge of information known to the designated agent will not be attributed to the brokerage or to designated agents representing the other party.

TRANSACTION BROKERAGE

33. If the situation arises where the brokerage represents both the buyer and the seller because the same industry member licensed with the brokerage represents both the buyer and the seller, in order to facilitate the purchase and sale of the property, the buyer and the seller and the brokerage may enter into a Transaction Brokerage agreement.

34. If the parties do not agree to enter into a Transaction Brokerage agreement the Designated Agent will continue to represent the party, be it the seller or the buyer, with whom it first entered into an agency relationship and the Brokerage will offer:

- a) to designate another member of the Brokerage to represent the other party as sole agent;
- b) to treat the other party as a customer; or
- c) to refer the other party to another brokerage.

35. A Transaction Brokerage Agreement will provide that

- (a) the brokerage will treat the interests of both the buyer and the seller in an even-handed, objective and impartial manner.
- (b) the brokerage will exercise reasonable care and skill in the performance of its mandate under the Agreement.
- (c) the brokerage will not negligently or knowingly give false or misleading information to the buyer or the seller.
- (d) the brokerage will obey the instructions of the buyer or the seller only in so far as they are consistent with the other terms of this Agreement.
- (e) the brokerage will not disclose without the informed written consent of the buyer or the seller, as the case may be:
 - i) that the buyer may be prepared to offer a higher price or terms other than those contained in the offer to purchase or the Exclusive Buyer Designated Brokerage Agreement;
 - ii) that the seller may be prepared to accept a lower price or terms other than those contained in the Exclusive Seller Designated Brokerage Agreement;
 - iii) the motivation of the buyer or seller for wishing to respectively purchase or sell the property; and

continued...

- iv) subject to clause (i) personal information relating to the buyer or the seller and other information disclosed at any time in confidence by either to the brokerage.
- (f) Knowledge of information known to the brokerage concerning the buyer or the seller will not be attributed to the other.
- (g) Neither the buyer nor the seller will be vicariously liable to the other for any acts of the brokerage.
- (h) The brokerage will perform for the buyer and the seller all necessary facilitation services (that is, services that do not require the exercise of discretion or judgment, or the giving of confidential advice or advocating on behalf of either the buyer or the seller) and, in particular, when requested by the buyer or the seller, the brokerage will:
 - i) provide real estate statistics and information on property including all comparable property information available through the listing service or other local data bases;
 - ii) provide standard form agreements of purchase and sale, lease, or other relevant documents and acting as scribe in their preparation in accordance with the instructions of the buyer or the seller;
 - iv) provide the names of real estate appraisers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and the like, but the brokerage will not recommend any particular professional to the buyer or the seller;
 - v) present, in a timely manner, all offers and counter-offers to and from the buyer and the seller regardless of whether the property is already the subject of a contract;
 - vi) convey to the buyer and the seller in a timely manner all information that either wishes to have communicated to the other;
 - vii) keep the buyer and the seller fully informed regarding the progress of the transaction.
- (i) The brokerage will disclose:
 - i) to the buyer, all material latent defects affecting the property known to the designated agent; and
 - ii) to the seller, all material facts relevant to the buyer's ability to purchase the property known to the designated agent.
- (j) The brokerage will not conduct or arrange:
 - i) an independent inspection of the property for the buyer and will not verify the accuracy or completeness of any information supplied or statements made by the seller concerning the property;
 - ii) an independent inquiry into the financial status of the buyer for the seller and will not verify the accuracy or completeness of any financial information supplied by the buyer.
- (k) The brokerage will ensure that the industry member licensed with the brokerage providing services to the buyer and the seller under the agreement:
 - i) complies with the brokerage's policies and procedures governing Transaction Brokerage; and
 - ii) treats the interests of both the buyer and the seller in an even-handed, objective and impartial manner.
- (l) The brokerage will supervise the member of the brokerage and support staff providing services to the buyer and the seller to ensure that they properly fulfill the agreement.
- (m) The brokerage will hold all monies received in accordance with the provisions of the [name of Act].

continued...

(n) The buyer and the seller will remunerate the brokerage in accordance with the terms of the Buyer's Exclusive Buyer Designated Brokerage Agreement and Seller's Exclusive Seller Designated Brokerage Agreement with the brokerage respectively.

36. Both the buyer and the seller shall receive and read the Agreement and the [name of relevant brochure], and be given the opportunity to request further information concerning the Transaction Brokerage Agreement and the representation relationship described in it before signing the agreement.

CUSTOMER STATUS

37. If a brokerage or a designated agent

(a) acts as the agent of a seller and is requested to assist a buyer in purchasing the seller's property

(b) acts as the agent of a buyer and introduces the buyer to a seller's property

the buyer or seller for whom the brokerage is not an agent and the brokerage may enter into a Customer Status Acknowledgement.

38. Each Customer Status Acknowledgement will provide that the customer has received and read both the Acknowledgement and the [name of brochure], published by [name of association] and has been given the opportunity to request further information and independent advice concerning the Acknowledgement and the representation relationships described in the [name of brochure] and that the customer:

(a) has chosen to forgo any agency representation, together with its advantages, protection and services;

(b) understands that the brokerage does not owe the customer any agency obligations and, in particular, any fiduciary obligations; and

(c) understands that the brokerage will not provide the customer with any services that require the exercise of discretion or judgment, or the giving of confidential advice or the brokerage advocating on behalf of the customer.

39. Each Customer Status Acknowledgement shall provide that the brokerage's obligations to the customer are limited to:

(a) the exercise of reasonable care and skill in the provision of such facilitation services as may be provided the Customer by the Brokerage under Section 40 or 41;

(b) not negligently or knowingly providing the Customer with false or misleading information;

(c) holding all monies received from the Customer in accordance with the provisions of the [name of Act];

(d) complying with the provisions of the [name of Act] and its regulations, and the rules and by-laws of the [name of governing body].

40. If the customer is a buyer, the brokerage may offer the customer the following facilitation services:

(a) provide real estate statistics and information on property including all comparable property information available through the listing service or other local data bases;

(b) provide standard form agreements of purchase and sale and leases and other documents and acting as scribe in their preparation in accordance with the instructions of the customer;

(c) provide the names of relevant real estate service providers, but the brokerage will not recommend any particular service providers to the customer;

(d) present, in a timely manner, all offers and counter-offers to and from the customer regardless of whether a property is already the subject of a contract;

continued...

(e) convey to the seller in a timely manner all information that the customer wishes to have communicated to the seller;

(f) keep the customer informed regarding the progress of the transaction.

41. If the customer is a seller, the brokerage may offer the customer the following facilitation services:

(a) provide real estate statistics and information on property including all comparable property information available through the listing service or other local data bases;

(b) provide standard form agreements of purchase and sale and leases and other documents and act as scribe in their preparation in accordance with the instructions of the customer;

(c) provide the names of relevant real estate service providers, but the brokerage will not recommend any particular service providers to the customer;

(d) present, in a timely manner, all offers and counter-offers to and from the customer regardless of whether a property is already the subject of a contract;

(e) convey to the buyer in a timely manner all information that the customer wishes to have communicated to the buyer;

(f) keep the customer informed regarding the progress of the transaction.

BUYER/SELLER INFORMATION BROCHURE

During the course of its discussions, the ATF concluded that consumers would be assisted by an information brochure which would highlight a variety of topics they should consider when entering into a real estate transaction. The ATF has developed the text for such a brochure which is provided in APPENDIX J. This brochure would be particularly useful where a brokerage or individual industry member is in a concurrent representation situation (e.g. transaction brokerage, or representing two buyers).

RECOMMENDATION 16

That the Buyer/Seller Information Brochure (Appendix J) be distributed as a standard practice in each jurisdiction.

EXCLUSIVE SELLER DESIGNATED BROKERAGE AGREEMENT

This Exclusive Seller Designated Brokerage Agreement (this Agreement) is Between:

The Seller:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

And the Seller’s Brokerage (the Brokerage):

[name – address – phone - fax – e-mail]

THIS AGREEMENT IS ENTERED INTO BY THE SELLER AND THE BROKERAGE ON THE BASIS OF THE FOLLOWING FACTS:

- The Brokerage represents the Seller and may represent buyers interested in the Seller’s property;
- Concurrent representation by the Brokerage of both the Seller and buyers interested in the Seller’s property prevents the Brokerage from discharging the fiduciary obligations it owes to each of the Seller and the buyers;
- Concurrent representation is permitted by law only with the fully informed and voluntary consent of the Seller;
- The Seller has read the [*brochure name*] published by [*name of Association*] and this Agreement and has been given the opportunity to seek further information and independent advice concerning representation by a **Designated Brokerage** and the other relationships discussed therein;
- The Seller wishes both to retain the services of the Brokerage, and to benefit from agency representation together with its advantages, protection and services;
- The Brokerage is prepared to designate separate agents to act as sole agent for and in the interests of the Seller, on the one hand, and of any buyer interested in the property who is also represented by the Brokerage, on the other hand;
- The Brokerage has in place, and has communicated to the Seller its policies and procedures to ensure that a designated agent does not communicate any information prejudicial to the interests of the Seller to other members of the Brokerage, including other designated agents;

THEREFORE THE SELLER AND THE BROKERAGE AGREE that the Brokerage, acting as a Designated Brokerage, will list the Seller’s property known as:

.....
.....

(the Property) and the Seller gives the Brokerage the exclusive right to offer for sale the Property for the price of _____ Dollars (\$) plus applicable Goods and Services and other relevant taxes (and upon the terms, if any, set out in the Schedule hereto or at such other price and terms acceptable to the Seller) on the following terms:

1. **Term of Agreement:** This Agreement will commence at 11:59 p.m. on the [??] day of [*month*], [*year*] and will expire at 11:59 p.m. on the [??] day of [*month*], [*year*].

2. Designated Agent:

- (i) The Brokerage will designate
 [name of agent(s)]
 (the Designated Agent) to serve as sole agent for the Seller and will designate other members of the Brokerage to serve as sole agents of any buyers also represented by the Brokerage who are interested in the Property.
- (ii) If, for any reason, the Designated Agent ceases to be licensed with the Brokerage, the Brokerage will designate another member of the Brokerage to serve as sole agent for the Seller.
- (iii) The Brokerage will not appoint another brokerage to act on behalf of the Seller as a sub-agent without the Seller's prior written consent.

3. Agency Relationship and Brokerage's Responsibility:

- (i) The Seller agrees that an agency relationship will exist only with the Designated Agent and not with the Brokerage.
- (ii) The Seller agrees that the Brokerage's responsibilities will be limited to:
 - (a) treating the interests of both the Seller and potential buyers of the Property in an even-handed, objective and impartial manner;
 - (b) ensuring compliance by the Designated Agent with the Brokerage's policies and procedures governing designated agents;
 - (c) supervising the Designated Agent and support staff to ensure the Designated Agent fulfills its mandate under this Agreement;
 - (d) holding all monies received by the Brokerage in trust in accordance with the provisions of the [name of Act].

4. Brokerage's and Designated Agent's Undertaking: The Brokerage and the Designated Agent undertake that they have not, and will not, disclose, any confidential information concerning the Seller to any other member of the Brokerage or other person unless:

- (i) authorized by the Seller; or
- (ii) required by law.

5. No Attribution of Knowledge: The Designated Agent's knowledge will not be attributed to the Brokerage or to its designated agents representing buyers.

6. Designated Agent's Mandate:

6.A Obligations: The Designated Agent will discharge the following obligations:

- (i) to use best efforts to market the Property and to promote the interests of the Seller;
- (ii) at the earliest reasonable opportunity, to advise any buyer interested in the Property that the Designated Agent is the Seller's agent;
- (iii) subject to clause 16, to act as only the Seller's agent;
- (iv) to obey all lawful instructions of the Seller;
- (v) to fulfill its fiduciary obligations of loyalty, confidentiality and of full disclosure of all conflicts of interest that may arise between the Seller's interests and those of the Brokerage, the Designated Agent or buyers;
- (vi) to exercise reasonable care and skill in the performance of this Agreement;
- (vii) to assist the Seller in negotiating favourable terms and conditions with a buyer and in preparing and complying with a legally binding agreement of purchase and sale for the Property;
- (viii) to disclose to buyers all material latent defects affecting the Property known to the Designated Agent;
- (ix) to present, in a timely manner, all offers and counter-offers to and from the Seller even when the Property is already the subject of an agreement of purchase and sale;

- (x) to disclose, in a timely manner, to the Seller all relevant facts affecting the transaction known to the Designated Agent;
- (xi) to keep the Seller fully informed regarding the progress of the transaction;
- (xii) to advise the Seller to obtain expert advice on matters of importance to the Seller;
- (xiii) to comply with the provisions of the [*name of Act*] and its regulations, and the rules and by-laws of the [*name of governing body*].

6.B Additional Services: The Seller requests, and the Designated Agent agrees to provide, the following additional services [*Seller to initial*]:

- (i) to list the Property with the listing service(s) of the [*name of Association*]; YES NO
- (ii) to cooperate with brokerages working with buyers and to offer such brokerages a portion of the Remuneration to which the Brokerage may be entitled under clause 8.A in the amount of [*amount*] Dollars (*\$number*) or [*amount*] percent (*number%*) of that Remuneration; YES NO
- (iii) to obtain verification of mortgage, property and school taxes, improvement charges, tenancy information and other similar information with respect to the Property; YES NO
- (iv) to advertise the Property; YES NO
- (v) to place a “for sale” sign on the Property; YES NO
- (vi) to install a lock-box on the Property to provide access to authorized persons; YES NO
- (vii) to show the Property at times acceptable to the Seller and, if any, tenants; YES NO
- (viii) to arrange “open-house” showings of the Property; YES NO
- (ix) the services listed below:

.....

7. Use and Distribution of Information:

- (i) The Seller consents to the collection, use and disclosure of personal information by the Brokerage and Designated Agent for the purpose of this Agreement and such other use as is consistent with listing and marketing of the Property including, but not limited to:
 - (a) retaining and disclosing any listing and sales information, including price, which may be used by the Brokerage for any purpose relating to its business including conducting comparative analyses and disclosing such information to other persons such as appraisers and brokerages;
 - (b) providing to present and past customers and clients marketing materials, newsletters and other information that the Brokerage believes may be of interest to them.
- (ii) Subject to clause 6.B(i), the Seller consents to placement of the listing and sales information by the Brokerage into the database of the appropriate listing service and acknowledges that the database of the listing service is the property of the listing service.
- (iii) The Seller further acknowledges that the Brokerage and the listing service may:
 - (a) distribute the information to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others;
 - (b) compile, retain and publish any statistics including historical listing service data which may be used by the Brokerage and licensed listing service members to conduct comparative market analyses; and

- (c) make such other use of the information as the listing service deems appropriate in connection with the listing, marketing and selling of real estate.

8. Brokerage's Remuneration:

8.A Remuneration: The Seller will pay the Brokerage as Remuneration:

- (a) *[amount]* percent (*[number]* %) of the purchase price (*initials*); OR
- (b) a flat fee of *[amount]* Dollars (\$) *[number]*) (*initials*); OR
- (c) a fee for services as specified in writing, signed by the Seller, in the Annex attached to this Agreement (*initials*);

(PLUS applicable Goods and Services Tax and any other taxes payable in respect of the Remuneration):

- (i) if, during the term of this Agreement, a legally enforceable agreement of purchase and sale, from whatever source obtained, is entered into between the Seller and a buyer (other than a buyer who has been specifically excluded in writing from this Agreement) AND the sale is completed OR the Seller, without legal justification, fails to complete the sale; OR
- (ii) if, within *[number]* days (*[number]* days) (the Hold-Over Period) of the expiration of this Agreement, a legally enforceable agreement of purchase and sale is entered into between the Seller and a buyer (other than a buyer who has been specifically excluded in writing from this Agreement) who was introduced to the Property or the Seller during the term of this Agreement, by whatever means or person and whether or not the Brokerage is the effective cause of such agreement of purchase and sale AND the sale is completed OR the Seller, without legal justification, fails to complete the sale; OR
- (iii) if, during the term of this Agreement, an unconditional offer to purchase the Property upon the terms specified in this Agreement is presented to the Seller which the Seller refuses to accept; PROVIDED that under clause 8.A(ii) if, on the expiration of this Agreement, the Seller enters an exclusive seller brokerage agreement with another brokerage for the payment of remuneration the Seller's liability to the Brokerage will be reduced by the amount paid by the Seller under the subsequent exclusive seller brokerage agreement.

8.B Alternative Compensation: The Seller will pay the Brokerage Alternative Compensation, in the amounts specified below:

- (i) if, during the term of this Agreement or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered into between the Seller and a buyer and the buyer, without legal justification, fails to complete the sale, the Seller will pay the Brokerage, from monies, if any, forfeited by the buyer or recovered by the Seller from the buyer, *[percentage]* of such amount or the Remuneration specified in clause 8.A, whichever is the less;
- (ii) if, during the term of this Agreement, the Seller should withdraw the Property from the market the Seller will reimburse the Brokerage for all reasonable expenses incurred in the performance of this Agreement prior to the date on which the Seller notifies the Brokerage in writing of the Seller's decision, provided that such reimbursement will not prejudice any other claim to remuneration to which the Brokerage may become entitled under clause 8 of this Agreement.

8.C Payment of Remuneration: The Seller will pay the Remuneration or Alternative Compensation owing to the Brokerage:

- (i) in the case of the Remuneration, on the date established for completion of the sale of the Property; or
- (ii) in the case of the Alternative Compensation, within *[number]* of days of receipt of a written demand of payment from the Brokerage.

8.D Deduction of Remuneration from Deposit and Proceeds of Sale:

- (i) The Seller authorizes the Brokerage, upon the date established for the completion of the sale, to deduct the Remuneration owed to the Brokerage from the deposit, if any, held by the Brokerage and will pay any balance of Remuneration owed in accordance with clause 8.C.
- (ii) The Seller irrevocably and unconditionally instructs any lawyer acting on behalf of the Seller to deduct from the deposit and proceeds of sale, or moneys forfeited by or recovered from the buyer any Remuneration or Alternative Compensation that remains owing to the Brokerage after it has exercised its right, if any, under clause 8.D(i) and to pay such Remuneration or Alternative Compensation to the Brokerage.

8.E Limitation on Other Remuneration: The Brokerage and Designated Agent agree not to accept any other remuneration, whatever its form (including finder's fees, referral fees and gifts) and from whatever source (including the buyer, a mortgage lender, another brokerage or contractor), directly or indirectly related to its agency under this Agreement, unless, before accepting such remuneration, the Brokerage and Designated Agent have:

- (i) fully disclosed in writing to the Seller all relevant facts relating to the offer of remuneration including the maximum amount to be received; and
- (ii) obtained the Seller's written consent to the Brokerage or the Designated Agent receiving such remuneration.

9. Referral of Inquiries: The Seller will immediately advise the Designated Agent:

- (i) during the term of this Agreement, of all inquiries by, and to deliver to it all offers to purchase from, interested buyers or their representatives received by the Seller; and
- (ii) during the Hold-Over Period, of any offers presented to the Seller by, or made by the Seller to, a buyer introduced to the Seller during the term of this Agreement which offer is accepted by the Seller or a buyer as the case may be.

10. Seller's Warranty: The Seller warrants that:

- (i) the Seller has the authority to sell the property and to enter into this Agreement;
- (ii) spousal consent:
 - (a) for the sale of the Property has been obtained [initials]; OR
 - (b) is not necessary for the sale of the Property [initials];
- (iii) the Seller has disclosed to the Designated Agent all third party claims and interests in the Property known to the Seller;
- (iv) the Property is not currently the subject of any other exclusive seller brokerage agreement;
- (v) the Seller has disclosed to the Designated Agent all material latent defects affecting the Property known to the Seller;
- (vi) the Seller will provide the Designated Agent with all information necessary for the listing and marketing of the Property;
- (vii) all information provided to the Designated Agent is accurate to the best of the Seller's knowledge;
- (viii) the Seller will immediately advise the Designated Agent of any material change in the physical condition or status of the Property or in the information provided by the Seller.

11. Indemnification: The Seller will hold harmless and indemnify the Brokerage and the Designated Agent for any claims that may arise from their reasonable and good faith reliance on representations made and information provided by the Seller.

12. Miscellaneous Provisions: The Seller agrees that:

- (i) the Brokerage and the Designated Agent may represent other sellers and, subject to clause 16, buyers;
- (ii) the Brokerage and the Designated Agent cannot disclose to the Seller confidential information obtained through any other agency relationship;
- (iii) the Brokerage and the Designated Agent will not be obligated to seek additional offers to purchase while the Property is subject to an unconditional agreement of purchase and sale;
- (iv) if the Property is owned by a limited company, a sale of shares representing a controlling interest in the limited company will constitute a sale for the purposes of this Agreement;
- (v) this Agreement will be governed by the laws of the Province of [name] and the Seller, the Brokerage and the Designated Agent will submit to the jurisdiction of the Courts of the Province of [name] for the resolution of any disputes that may arise out of this Agreement.

13. Termination of this Agreement: Without prejudice to the acquired rights of the Seller or the Brokerage, this Agreement will terminate:

- (i) on the expiration of the term of this Agreement as specified in clause 1;
- (ii) on an earlier date than that specified in clause 1 if mutually agreed to by the Seller and the Brokerage in writing;
- (iii) on a completed sale of the Property prior to the expiration of the term of this Agreement;
- (iv) on the suspension or cancellation of the Brokerage's license to trade in real estate;
- (v) on the bankruptcy or insolvency of the Brokerage or if it is in receivership;
- (vi) at the option of the non-defaulting party, exercised in writing, on a material breach of any of the terms of this Agreement by either the Seller or the Brokerage or the Designated Agent.

14. Brokerage's and Designated Agent's Duties on Termination of the Agreement: Immediately on the termination of this agreement, the Brokerage and the Designated Agent will:

- (i) remove the Property as an active listing on any listing service;
- (ii) cease all marketing activities on behalf of the Seller;
- (iii) remove all signs from the Property;
- (iv) return all documents and other materials provided by the Seller.

15. Continuing Duties: The termination of this Agreement does not relieve the Brokerage and the Designated Agent from their duty:

- (i) to account for all monies received by the Brokerage;
- (ii) of confidentiality to the Seller.

16. Change in Representative Capacity of Designated Agent:

- (i) If the Designated Agent is also the agent of a buyer who becomes interested in the Property, the Designated Agent will:
 - (a) immediately advise the Seller and the buyer of all relevant facts and of the implications of concurrent representation;
 - (b) give the Seller and the buyer an opportunity to seek independent advice; and
 - (c) then seek their written informed consent to the Brokerage and the Designated Agent continuing to provide services to the Seller and the buyer as **Transaction Brokerage** on the terms and conditions specified in the Transaction Brokerage Agreement and in the [brochure] published by [name of Association].
- (ii) Should the Seller refuse to consent, the Designated Agent will continue to represent the party, be it the Seller or the buyer, with whom it first entered into an agency relationship and the Brokerage will offer:
 - (a) to designate another member of the Brokerage to represent the other party as sole agent;
 - (b) to treat the other party as a customer; or
 - (c) to refer the other party to another brokerage.

17. Additional Provisions:

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18. Definitions: For the purposes of this Agreement:

“**buyer**” means a person acquiring or attempting to acquire an interest in real estate by purchase;

“**purchase**” includes an exchange, option, lease or other acquisition of an interest in real estate;

“**sale**” includes an exchange, option, lease or other disposition of an interest in real estate;

“**seller**” means a person disposing or attempting to dispose of an interest in real estate by sale.

19. This Agreement:

(i) This Agreement includes, if signed by the Seller and attached to this Agreement, the following documents:

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(ii) No amendment to the terms of this Agreement shall be effective unless it is in writing and signed by the Buyer and the Brokerage.

(iii) If there is conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision will supersede the standard pre-set provision to the extent of such conflict or discrepancy.

(iv) This Agreement will constitute the entire agreement between the Seller and Brokerage and the Designated Agent, and there are no representations, warranties, collateral agreements or conditions which affect this Agreement other than as expressed herein.

(v) This Agreement will be read with all changes of number required by the context.

20. Seller’s Acknowledgement: The Seller, having received and read both this Agreement and the [*name of brochure*], and having been given the opportunity to request further information concerning this agreement and the representation relationships described in the [*name of brochure*], agrees that:

(i) this Agreement accurately sets out the terms agreed to by the Seller, the Brokerage and the Designated Agent; and

(ii) the Seller has received a true copy of this Agreement.

SIGNED AND DELIVERED this [*day*] of [*month*], [*year*].

[Signature blocks for Seller, Seller’s Brokerage, Designated Agent and Witnesses]

EXCLUSIVE BUYER DESIGNATED BROKERAGE AGREEMENT

This Exclusive Buyer Designated Brokerage Agreement (this Agreement) is Between:

The Buyer:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

And the Buyer’s Brokerage (the Brokerage):

[name – address – phone - fax – e-mail]

THIS AGREEMENT IS ENTERED INTO BY THE BUYER AND THE BROKERAGE ON THE BASIS OF THE FOLLOWING FACTS:

- The Brokerage represents the Buyer and may concurrently represent sellers in whose property the Buyer may be interested;
- Concurrent representation by the Brokerage of both the Buyer and such sellers prevents the Brokerage from discharging the fiduciary obligations it owes to each of the Buyer and such sellers;
- Concurrent representation is permitted by law only with the fully informed and voluntary consent of the Buyer;
- The Buyer has read the [brochure name] published by [name of Association] and this Agreement and has been given the opportunity to seek further information and independent advice concerning representation by a **Designated Brokerage** and the other relationships discussed therein;
- The Buyer wishes both to retain the services of the Brokerage, and to benefit from agency representation together with its advantages, protection and services;
- The Brokerage is prepared to designate separate agents to act as sole agent for and in the interests of the Buyer, on the one hand, and of any sellers also represented by the Brokerage in whose properties the Buyer may be interested, on the other hand;
- The Brokerage has in place, and has communicated to the Buyer its policies and procedures to ensure that a designated agent does not communicate any information prejudicial to the interests of the Buyer to other members of the Brokerage, including other designated agents;

THEREFORE THE BUYER AND THE BROKERAGE AGREE that the Brokerage, acting as the Buyer’s Designated Brokerage, will assist the Buyer to purchase a [insert type of property]..... in the Market Area(s) described as:

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and that the Brokerage will have the exclusive right to act on behalf of the Buyer on the following terms:

1. **Term of Agreement:** This Agreement will commence at 11:59 p.m. on the [??] day of [month], [year] and will expire at 11:59 p.m. on the [??] day of [month], [year].

2. Designated Agent:

- (i) The Brokerage will designate
 [name of agent(s)]
 (the Designated Agent) to serve as sole agent for the Buyer and, subject to clause 14, will designate other members of the Brokerage to serve as sole agents of any sellers represented by the Brokerage in whose properties the Buyer is interested.
- (ii) If, for any reason, the Designated Agent ceases to be licensed with the Brokerage, the Brokerage will designate another member of the Brokerage to serve as sole agent for the Buyer.
- (iii) The Brokerage will not appoint another brokerage to act on behalf of the Buyer as a sub-agent without the Buyer's prior written consent.

3. Agency Relationship and Brokerage's Responsibility:

- (i) The Buyer agrees that an agency relationship will exist only with the Designated Agent and not with the Brokerage.
- (ii) The Buyer agrees that the Brokerage's responsibilities will be limited to:
 - (a) treating the interests of both the Buyer and the sellers represented by the Brokerage in an even-handed, objective and impartial manner;
 - (b) ensuring compliance by the Designated Agent with the Brokerage's policies and procedures governing designated agents;
 - (c) supervising the Designated Agent and support staff to ensure the Designated Agent fulfills its mandate under this Agreement;
 - (d) holding all monies received by the Brokerage in trust in accordance with the provisions of the [name of Act].

4. Brokerage's and the Designated Agents' Undertaking: The Brokerage and the Designated Agent undertake that they have not, and will not, disclose, any confidential information concerning the Buyer to any other member of the Brokerage or other person unless:

- (i) authorized by the Buyer; or
- (ii) required by law.

5. No Attribution of Knowledge: The Designated Agent's knowledge will not be attributed to the Brokerage or to its designated agents representing sellers.

6. Designated Agent's Mandate:

6.A Obligations: The Designated Agent will discharge the following obligations:

- (i) to use best efforts in locating a property in the specified Market Area(s) that meets the material requirements identified by the Buyer and to promote the interests of the Buyer;
- (ii) at the earliest reasonable opportunity, to advise any seller in whose property the Buyer is interested that the Designated Agent is the agent of the Buyer;
- (iii) subject to clause 14, to act only as the Buyer's agent;
- (iv) to obey all lawful instructions of the Buyer;
- (v) to fulfill its fiduciary obligations of loyalty, confidentiality and of full disclosure of all conflicts of interest that may arise between the Buyer's interests and those of the Brokerage, the Designated Agent, sellers or competing buyers;
- (vi) to exercise reasonable care and skill in the performance of this Agreement;
- (vii) to seek out and advise the Buyer in a timely manner of available properties in the Market Area which may meet the Buyer's requirements, including those listed with other brokerages, those "for sale by owner" and other available properties known to the Brokerage or the Designated Agent;

- (viii) to use best efforts to discover relevant facts pertaining to any property for which the Buyer is considering making an offer;
- (ix) to disclose, in a timely manner, to the Buyer all relevant facts known to the Designated Agent affecting a property or a transaction;
- (x) to advise the Buyer to obtain expert advice on matters of importance to the Buyer;
- (xi) to present, in a timely manner, all offers and counter-offers to and from the Buyer even when a property is already the subject of an agreement of purchase and sale;
- (xii) to keep the Buyer fully informed regarding the progress of the transaction;
- (xiii) to disclose to the Buyer the existence and terms of any competing offers for a property in which the Buyer is interested known to the Designated Agent;
- (xiv) to assist the Buyer in negotiating favourable terms and conditions and in preparing a legally binding agreement of purchase and sale;
- (xv) to comply with all relevant provisions of the [*name of Act*] and its regulations, and the rules and by-laws of the [*name of governing body*].

6.B Additional Services: The Buyer requests, and the Designated Agent agrees to provide at the Buyer's expense, where applicable, the following additional services [*Buyer to initial*]:

- (i) to advertise for suitable properties; YES NO
- (ii) to assist the Buyer to arrange financing; YES NO
- (iii) to assist the Buyer to arrange for inspections of a property; YES NO
- (iv) to assist the Buyer to arrange for appraisals of a property; YES NO
- (v) to assist the Buyer in arranging for a search of title to a property; YES NO
- (vi) the other services listed below:

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7. Use and Distribution of Information:

- (i) The Buyer consents to the collection, use and disclosure of personal information by the Brokerage and the Designated Agent for purposes that relate to the services provided the Buyer by the Brokerage and the Designated Agent and such other uses as are consistent with the purchase or prospective purchase of a property.
- (ii) The Buyer agrees that information regarding any property purchased by the Buyer through the Brokerage and the Designated Agent may be retained and disclosed by the Brokerage and any listing service for reporting, appraisal and statistical purposes.

8. Brokerage's Remuneration:

8.A Retainer: The Buyer will pay the Brokerage on the signing of the Agreement a retainer fee of Dollars (\$.....) which:

- (a) will be credited (*initials*)
- (b) will not be credited (*initials*)

towards any Remuneration or Alternative Compensation payable by the Buyer to the Brokerage under clauses 8.B and 8.D respectively of the Agreement.

8.B Remuneration: The Buyer will pay the Brokerage as Remuneration:

- (a) [*amount*] percent ([*number*] %) of the purchase price (*initials*); OR
- (b) a flat fee of [*amount*] Dollars (\$ [*number*]) (*initials*); OR
- (c) a fee for services as specified in writing, signed by the Buyer, in the Annex attached to this Agreement (*initials*);

(PLUS applicable Goods and Services Tax and any other taxes payable in respect of the Remuneration):

- (i) if, during the term of this Agreement, a legally enforceable agreement of purchase and sale, from whatever source obtained, is entered into between the Buyer and a seller (other than a seller or a property that has been specifically excluded in writing from this Agreement) AND the purchase is completed OR the Buyer, without legal justification, fails to complete the sale; OR
- (ii) if, within [number] days ([number] days) (the Hold-Over Period) of the expiration of this Agreement, a legally enforceable agreement of purchase and sale is entered into between the Buyer and a seller (other than a seller or a property that has been specifically excluded in writing from this Agreement) whose property was introduced to the Buyer during the term of this Agreement, by whatever means or person and whether or not the Brokerage is the effective cause of such agreement of purchase and sale AND the purchase is completed OR the Buyer, without legal justification, fails to complete the sale; OR
- (iii) if, during the term of this Agreement, an unconditional offer to purchase a property upon the terms specified in this Agreement is presented to the Buyer which the Buyer refuses to accept; PROVIDED that under clause 8.B(ii) if, on the expiration of this Agreement, the Buyer enters into an exclusive buyer brokerage agreement with another brokerage for the payment of a remuneration or fee the Buyer's liability to the Brokerage will be reduced by the amount paid by the Buyer under the subsequent exclusive buyer brokerage agreement.

8.C Source of Remuneration:

- (i) The Buyer authorizes the Brokerage to request payment of the Remuneration specified in clause 8.B, or part thereof, from (*Buyer to initial*):
 - (a) the brokerage representing the seller; YES NO
 - (b) the seller, where the seller has not listed the property with a brokerage. YES NO
- (ii) Where the amount so received by the Brokerage is:
 - (a) less than the Remuneration specified in clause 8.B, the Buyer will pay to the Brokerage the outstanding balance;
 - (b) more than the Remuneration specified in clause 8.B, the Brokerage will pay to the Buyer the excess balance.

8.D Alternative Compensation: The Buyer will pay the Brokerage Alternative Compensation, in the circumstances and amounts specified below:

- (i) if, during the term of this Agreement or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered into between the Buyer and a seller and the seller, without legal justification, fails to complete the sale, the Buyer will pay the Brokerage the Remuneration specified in clause 8.B should the Buyer obtain an order for specific performance of the contract with the seller;
- (ii) if, during the term of this Agreement or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered between the Buyer and a seller and the seller, without legal justification, fails to complete the sale, the Buyer will pay the Brokerage from monies, if any, recovered by the Buyer from the seller in settlement of the Buyer's claim against the seller, [percentage] of such amount recovered or [percentage] of the Remuneration specified in clause 8.B, whichever is the less;
- (iii) if during the term of this agreement the Buyer should withdraw from the market, the Buyer will reimburse the Brokerage for all reasonable expenses incurred in the performance of this Agreement prior to the date on which the Buyer notifies the Brokerage in writing of the Buyer's decision, provided that such reimbursement will not prejudice any other claim to remuneration to which the Brokerage may become entitled under clause 8.B or clause 8.D of this Agreement.

8.E Payment of Remuneration: The Buyer will pay the Remuneration or Alternative Compensation owing to the Brokerage:

- (i) in the case of the Remuneration, on the date established for completion of the purchase; or
- (ii) in the case of the Alternative Compensation, within [number] of days of receipt of a written demand of payment from the Brokerage.

8.F Limitation on Other Remuneration: Subject to clause 8.C, the Brokerage and Designated Agent agree not to accept any other remuneration, whatever its form (including a finder's fee, referral fee or gift) and from whatever source (including the seller, a mortgage lender, another brokerage or a contractor), directly or indirectly related to their agency under this Agreement unless, before accepting such remuneration, the Brokerage and Designated Agent have:

- (i) fully disclosed in writing to the Buyer all relevant facts relating to the offer of remuneration including the maximum amount to be received; and
- (ii) obtained the Buyer's written consent to the Brokerage or Designated Agent receiving such remuneration.

9. Referral of Inquiries: The Buyer will immediately advise the Designated Agent:

- (i) during the term of this Agreement :
 - (a) of all properties within the Market Area(s) in which the Buyer is interested; and
 - (b) of all inquiries by, and all offers to sell from, interested sellers or their representatives received by the Buyer;
- (ii) during the Hold-Over Period, of any offers presented to the Buyer by, or made by the Buyer to, a seller introduced to the Buyer during the term of this Agreement which offer is accepted by the Buyer or a seller as the case may be.

10. Buyer's Warranty: The Buyer warrants that the Buyer:

- (i) is not currently represented by, and will not enter into any other exclusive buyer brokerage agreement with, another brokerage during the term of this Agreement with respect to the same Market Area;
- (ii) has disclosed to the Designated Agent all of the material requirements that the Buyer is seeking in a property.

11. Miscellaneous Provisions: The Buyer agrees that:

- (i) subject to clauses 14 and 15, the Brokerage and the Designated Agent may represent other sellers and buyers;
- (ii) the Brokerage and the Designated Agent cannot disclose to the Buyer confidential information obtained through any other agency relationship to which the Brokerage or the Designated Agent is a party;
- (iii) the Brokerage will not be obligated to seek additional properties of interest to the Buyer once the Buyer is a party to an unconditional agreement of purchase and sale for a property;
- (iv) if a property purchased is owned by a limited company, a purchase of shares representing a controlling interest in the limited company will constitute a purchase for the purposes of this Agreement;
- (v) this Agreement will be governed by the laws of the Province of [name] and the Buyer, the Brokerage and the Designated Agent will submit to the jurisdiction of the Courts of the Province of [name] for the resolution of any disputes that may arise out of this Agreement.

12. Termination of this Agreement: Without prejudice to the acquired rights of the Buyer or the Brokerage and the Designated Agent, this Agreement will terminate:

- (i) on the expiration of the term of this Agreement as specified in clause 1;
- (ii) on an earlier date than that specified in clause 1 if mutually agreed to by the Buyer and the Brokerage in writing;
- (iii) on a completed purchase of a property prior to the expiration of the term of this Agreement;
- (iv) on the suspension or cancellation of the Brokerage’s license to trade in real estate;
- (v) on the bankruptcy or insolvency of the Brokerage or if it is in receivership;
- (vi) at the option of the non-defaulting party exercised in writing, on a material breach of any of the terms of this Agreement by either the Buyer, the Brokerage or the Designated Agent.

13. Continuing Duties: The termination of this Agreement, for whatever reason, does not relieve the Brokerage or the Designated Agent from their duty:

- (i) to account for all monies received by the Brokerage;
- (ii) of confidentiality to the Buyer;
- (iii) to return all documents and other materials, if any, provided by the Buyer.

14. Change in Representative Capacity of the Designated Agent:

- (i) If the Designated Agent is also the agent of a seller whose property the Buyer is interested in purchasing, the Designated Agent will:
 - (a) immediately advise the Buyer and the seller of all relevant facts and of the implications of concurrent representation;
 - (b) give the Buyer and the seller an opportunity to seek independent advice; and
 - (c) then seek their written informed consent to the Brokerage and the Designated Agent continuing to provide services to the Buyer and the seller as **Transaction Brokerage** on the terms and conditions specified in the Transaction Brokerage Agreement and in the [brochure] published by [name of Association].
- (ii) Should the Buyer refuse to consent, the Designated Agent will continue to represent the party, be it the Buyer or the seller, with whom it first entered into an agency relationship and the Brokerage will offer:
 - (a) to designate another member of the Brokerage to represent the other party as sole agent;
 - (b) to treat the other party as a customer; or
 - (c) to refer the other party to another brokerage.

15. Competing Buyers: If the Designated Agent is also the agent of a competing buyer interested in the same property as the Buyer, the Designated Agent will conduct itself in all respects in accordance with spirit of the provisions of clause 14 and provide the Buyer and competing buyer with the options stipulated therein.

16. Additional Provisions:

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17. Definitions: For the purposes of this Agreement:

- “**buyer**” means a person acquiring or attempting to acquire an interest in real estate by purchase;
- “**purchase**” includes an exchange, option, lease or other acquisition of an interest in real estate;
- “**sale**” includes an exchange, option, lease or other disposition of an interest in real estate;
- “**seller**” means a person disposing or attempting to dispose of an interest in real estate by sale.

18. This Agreement:

- (i) This Agreement includes, if signed by the Buyer and attached to this Agreement, the following documents:

.....

- (ii) No amendment to the terms of this Agreement shall be effective unless it is in writing and signed by the Buyer and the Brokerage.
- (iii) If there is conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision will supersede the standard pre-set provision to the extent of such conflict or discrepancy.
- (iv) This Agreement constitutes the entire agreement between the Buyer and Brokerage and the Designated Agent, and there are no representations, warranties, collateral agreements or conditions which affect this Agreement other than as expressed herein.
- (v) This Agreement will be read with all changes of number required by the context.

19. Buyer Acknowledgement: The Buyer, having received and read both this Agreement and the [name of brochure], and having been given the opportunity to request further information concerning this Agreement and the representation relationships described in the [name of brochure], agrees that:

- (i) this Agreement accurately sets out the terms agreed to by the Buyer and the Brokerage and the Designated Agent; and
- (ii) the Buyer has received a true copy of this Agreement.

SIGNED AND DELIVERED this [day] of [month], [year].

[Signature blocks for Buyer, Buyer’s Brokerage, Designated Agent and Witnesses]

TRANSACTION BROKERAGE AGREEMENT

[for use with Exclusive Designated Brokerage Agreements]

This Agreement (this Agreement) is Between:

The Buyer:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

The Seller:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

The Brokerage:

[name – address – phone - fax – e-mail]

And the Designated Agent:

[name – address – phone - fax – e-mail]

THIS AGREEMENT IS ENTERED INTO BY THE BUYER, THE SELLER, THE BROKERAGE AND THE DESIGNATED AGENT WITH RESPECT TO THE PROPERTY KNOWN AS:

.....
.....

(the Property) ON THE BASIS OF THE FOLLOWING FACTS:

- The Buyer is interested in purchasing, and the Seller is interested in selling, the Property;
- The Designated Agent concurrently represents both the Buyer and the Seller;
- Such concurrent representation by the Designated Agent of both the Buyer and the Seller prevents the Designated Agent from discharging the fiduciary obligations owed to the Buyer and the Seller respectively and, in particular, the obligations:
 - of utmost loyalty to the Buyer and to the Seller;
 - to act solely in the best interests of the Buyer and of the Seller;
 - to avoid all conflicts of interest including conflicts that may arise between the interests of the Buyer and of the Seller;
 - of full disclosure of all facts that may influence the decisions of the Buyer or of the Seller;and
 - to maintain the confidentiality of information obtained from the Buyer or from the Seller;
- Such concurrent representation by the Designated Agent is only permitted by law with the fully informed and voluntary consent of both the Buyer and the Seller;
- The Buyer and the Seller have read the [brochure name] published by [name of Association] and this Agreement, and have been given the opportunity to seek further information and independent advice concerning **Transaction Brokerage** representation and other relationships discussed therein;

THEREFORE THE BUYER AND THE SELLER CONSENT AND AGREE TO their continued representation by the Designated Agent now acting in the capacity of **Transaction Facilitator**, on the following terms:

1. **Impartiality:** The Transaction Facilitator will treat the interests of both the Buyer and the Seller in an even-handed, objective and impartial manner.
2. **Reasonable Care and Skill:** The Transaction Facilitator will exercise reasonable care and skill in the performance of its mandate under this Agreement.
3. **Accuracy of Information:** The Transaction Facilitator will not negligently or knowingly give false or misleading information to the Buyer or the Seller.
4. **Instructions:** The Transaction Facilitator will obey the instructions of the Buyer or the Seller to the extent that they are consistent with the other terms of this Agreement.
5. **Non-Disclosure of Certain Information:** The Transaction Facilitator will not disclose without the informed written consent of the Buyer or the Seller, as the case may be:
 - (i) that the Buyer may be prepared to offer a higher price or terms other than those contained in the offer to purchase;
 - (ii) that the Seller may be prepared to accept a lower price or terms other than those contained in the Seller's Exclusive Seller Designated Brokerage Agreement;
 - (iii) the motivation of the Buyer or the Seller for wishing to respectively purchase or sell the property; and
 - (iv) subject to clause 6 of this Agreement, personal information relating to the Buyer or the Seller and other information disclosed at any time in confidence by either to the Transaction Facilitator.
6. **Disclosure of Certain Information:** The Transaction Facilitator will disclose:
 - (i) to the Buyer, all material latent defects affecting the Property known to the Transaction Facilitator; and
 - (ii) to the Seller, all material facts relevant to the Buyer's ability to purchase the Property known to the Transaction Facilitator.
7. **Inspections and Inquiries:** The Transaction Facilitator will not conduct or arrange:
 - (i) an independent inspection of the Property for the Buyer and will not verify the accuracy or completeness of any information supplied or statements made by the Seller concerning the Property; or
 - (ii) an independent inquiry into the financial status of the Buyer for the Seller and will not verify the accuracy or completeness of any financial information supplied by the Buyer.
8. **No Attribution of Knowledge:** The Transaction Facilitator's knowledge concerning the Buyer or the Seller will not be attributed to the other or to the Brokerage.
9. **Vicarious Liability:** Neither the Buyer nor the Seller will be vicariously liable to the other for any acts of the Transaction Facilitator.
10. **Facilitation Services:**
 - (i) The Transaction Facilitator will:
 - (a) present to the Buyer and the Seller, in a timely manner, all offers and counter-offers to and from either regardless of whether the Property is already the subject of a contract;

- (b) convey to the Buyer and the Seller in a timely manner all information that either wishes to have communicated to the other;
 - (c) keep the Buyer and the Seller informed regarding the progress of the transaction;
 - (d) comply with the provisions of the [*name of Act*] and its regulations, and the rules and by-laws of the [*name of governing body*].
- (ii) The Transaction Facilitator will also perform for the Buyer and the Seller all necessary facilitation services, (that is, those services needed to assist the Buyer and the Seller to complete a transaction that do not require the exercise of discretion or judgment, or the giving of confidential advice or advocating on behalf of either the Buyer or the Seller) and will, when requested by the Buyer or the Seller:
- (a) provide real estate statistics and information on property including comparable property information available through listing services or other local data bases;
 - (b) provide standard form agreements of purchase and sale and other documents and assist in their preparation in accordance with the instructions of the Buyer or the Seller;
 - (c) provide the names of real estate appraisers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and the like, but the Transaction Facilitator will not recommend any particular professional to the Buyer or the Seller.

11. Brokerage's Responsibility:

- (i) The Brokerage will ensure that the Transaction Facilitator:
 - (a) complies with the Brokerage's policies and procedures governing Transaction Brokerage; and
 - (b) treats the interests of both the Buyer and the Seller in an even-handed, objective and impartial manner.
- (ii) The Brokerage will supervise the Transaction Facilitator and support staff to ensure that they properly fulfill this Agreement.
- (iii) The Brokerage will hold all monies received in respect of the transaction in trust in accordance with the provisions of the [*name of Act*].

12. Brokerage Remuneration: The Buyer and the Seller will remunerate the Brokerage in accordance with the terms of the Buyer's Exclusive Buyer Designated Brokerage Agreement and Seller's Exclusive Seller Designated Brokerage Agreement with the Brokerage respectively.

13. Prior Agreements: With the exception of clauses 6. A and 6.B in the Buyer's Exclusive Buyer Designated Brokerage Agreement and in the Seller's Exclusive Seller Designated Brokerage Agreement, which clauses specify the Transaction Facilitator's mandate as Designated Agent, the rights and obligations of the Buyer, the Seller, the Brokerage and the Transaction Facilitator will be determined in accordance with those agreements.

14. This Agreement:

- (i) No amendment to the terms of this Agreement shall be effective unless it is in writing and signed by the Buyer, the Seller, the Transaction Facilitator and the Brokerage.
- (ii) If there is conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision will supersede the standard pre-set provision to the extent of such conflict or discrepancy.
- (iii) Subject to clauses 12 and 13, this Agreement will constitute the entire agreement between the Buyer, the Seller, the Brokerage and the Transaction Facilitator, and there are no representations, warranties, collateral agreements or conditions, which affect this Agreement other than as expressed herein.
- (iv) This Agreement will be read with all changes of number required by the context.

15. Acknowledgement: The Buyer and the Seller, having both received and read this Agreement and the [name of brochure], and having been given the opportunity to request further information concerning this Agreement and the representation relationship described therein and in the [name of brochure], acknowledge that:

- (i) this Annex accurately sets out the terms agreed to by the Buyer, the Seller, the Brokerage and the Transaction Facilitator; and
- (ii) the Buyer and the Seller have both received a true copy of this Agreement.

SIGNED AND DELIVERED this [day] of [month], [year].

[Signature blocks for the Buyer, the Seller, the Transaction Facilitator and the Brokerage, and Witnesses]

CUSTOMER STATUS ACKNOWLEDGEMENT AND FEE AGREEMENT

[between Seller and Buyer's Brokerage]

This Customer Status Acknowledgement and Fee Agreement (this Agreement) is Between:

The Seller:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

And the Buyer's Brokerage (the Brokerage):

[name – address – phone - fax – e-mail]

IN CONSIDERATION of the Brokerage introducing the Buyer (the Client) to the Seller and the Seller's property (the Property) known as:

.....
.....

THE SELLER HEREBY ACKNOWLEDGES AND AGREES THAT:

1. **No Agency Representation:** The Seller has received and read both this Agreement and the [*name of brochure*], published by [*name of association*] and has been given the opportunity to request further information and independent advice concerning this Agreement and the representation relationships described in the [*name of brochure*] and the Seller:
 - (i) has chosen to forgo any agency representation, together with its advantages, protection and services;
 - (ii) understands that the Brokerage does not owe the Seller any agency obligations and, in particular, any fiduciary obligations; and
 - (iii) understands that the Brokerage will not provide the Seller with any services that require the exercise of discretion or judgment, or the giving of confidential advice, or the Brokerage advocating on behalf of the Seller.
2. **Brokerage is Agent of Client:** The Brokerage is the agent of its Client who is interested in the Seller's Property and, as agent, the Brokerage is obligated:
 - (i) to always act in the best interests of the Client;
 - (ii) not to provide information or advice to the Seller that is not in the interests of the Client; and
 - (iii) to communicate to the Client all information, whether or not of a confidential nature, that it receives from the Seller except for confidential information acquired in a prior agency relationship with the Seller.
3. **General Obligations:** The Brokerage's obligations to the Seller are limited to:
 - (i) exercising reasonable care and skill in the provision of such services as may be provided under clause 4;
 - (ii) not negligently or knowingly providing false or misleading information;
 - (iii) presenting to the Seller, in a timely manner, all offers and counter-offers to and from the Client regardless of whether the Property is already the subject of a contract;

- (iv) conveying to the Client in a timely manner all information that the Seller wishes to have communicated to the Client;
- (v) keeping the Seller informed regarding the progress of the transaction;
- (vi) holding all monies received with respect to a transaction in trust in accordance with the provisions of the *[name of Act]*;
- (vii) complying with the provisions of the *[name of Act]* and its regulations, and the rules and by-laws of the *[name of governing body]*.

4. Services Provided to Seller: The Brokerage may offer the Seller the following services:

- (i) provide real estate statistics and information on property including comparable property information available through listing services or other local data bases;
- (ii) providing standard form agreements of purchase and sale and other relevant form documents and acting as scribe in their preparation in accordance with the instructions of the Seller;
- (iii) providing the names of relevant real estate service providers, but the Brokerage will not recommend any particular service providers to the Seller.

5. Information: The Brokerage is authorized, at its discretion, to obtain information concerning the Property from any person, corporation or government or municipal agency.

6. Seller's Liability for Remuneration:

- (i) The Seller agrees to pay the Brokerage as Remuneration:
 - (a) *[amount]* percent (*[number]* %) of the purchase price *(initials)*; OR
 - (b) a flat fee of *[amount]* Dollars (\$ *[number]*) *(initials)*; OR
 - (c) a fee for services provided as specified in writing, signed by the Seller, in the Annex attached to this Agreement *(initials)*;

(PLUS applicable Goods and Services Tax and any other taxes payable in respect of the Remuneration)

if a legally enforceable agreement of purchase and sale is entered into between the Seller and the Client during the term of this agreement and, subject to clause 6(iii), whether or not the agreement of purchase and sale is completed.

- (ii) The Seller will pay the fee on the earlier of the date of actual completion of the agreement of purchase and sale, or the date stipulated in the agreement of purchase and sale for the completion of the said agreement.
- (iii) The Seller will be relieved of any obligation to pay the fee if the Client, without lawful justification, fails to complete the agreement of purchase and sale.

7. Deduction of Remuneration from Deposit and Proceeds of Sale: The Seller authorizes the Brokerage to deduct the fee owed the Brokerage from the deposit, if any, held by the Brokerage, and the Seller will instruct any lawyer acting for the Seller to deduct any outstanding balance of the fee from the proceeds of sale and pay the same to the Brokerage.

8. Use and Distribution of Information:

- (i) The Seller authorizes the Brokerage to use, disclose and retain all personal information provided for all purposes relating to such services as are provided by the Brokerage including:
 - (a) disclosing property information to the Client or other prospective buyers or brokerages; *(initial)*
 - (b) such other use as is consistent with the sale of the Property.

- (ii) The Seller authorizes the Brokerage to place the information, including any sale information, into the database of the *[listing service]* and the Seller consents to the listing service (*initial*):
 - (a) distributing the information to any persons authorized to use such service, which may include other brokerages, government departments, appraisers, municipal organizations and others;
 - (b) compiling, retaining and publishing any statistics including historical data.

9. Termination of this Agreement: This Agreement may be terminated at the will of either the Seller or the Brokerage but without prejudice to the acquired rights of either.

10. Applicable Law: This Agreement will be governed by the laws of the Province of *[name]* and the Seller and the Brokerage will submit to the jurisdiction of the Courts of the Province of *[name]* for the resolution of any disputes that may arise out of this Agreement.

11. This Agreement:

- (i) No amendment to the terms of this Agreement shall be effective unless it is in writing and signed by the Seller and the Brokerage.
- (ii) If there is conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision shall supersede the standard pre-set provision to the extent of such conflict or discrepancy.
- (iii) This Agreement shall constitute the entire agreement between the Seller and Brokerage and there are no representations, warranties, collateral agreements or conditions, which affect this Agreement other than as expressed herein.
- (iv) This Agreement shall be read with all changes of number required by the context.

12. Seller Acknowledgement: The Seller acknowledges:

- (i) the provision of the services listed in clause 4 by, and the payment of the fee specified in clause 6 to the Brokerage do not create an agency relationship between the Seller and the Brokerage;
- (ii) the Seller has been given the opportunity to request further information and independent advice concerning this Agreement and customer status and the representation relationships described in the *[name of brochure]*;
- (iii) this Agreement accurately sets out the terms agreed to by the Seller and the Brokerage;
- (iv) the Seller has received a true copy of this Agreement.

SIGNED AND DELIVERED this *[day]* of *[month]*, *[year]*.

[Signature blocks for Seller, Brokerage and Witnesses]

CUSTOMER STATUS ACKNOWLEDGEMENT

[between Buyer and Seller’s Brokerage]

This Customer Status Acknowledgement (this Acknowledgement) is Between:

The Buyer:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

And the Brokerage:

[name – address – phone - fax – e-mail]

The Buyer requests the Brokerage, which acts as the agent of the Seller (the Client), to provide facilitation services to assist the Buyer in purchasing the Client's property known as:

.....
.....

on the following terms:

1. **No Agency Representation:** The Buyer has received and read both this Acknowledgement and the [name of brochure], published by [name of association] and has been given the opportunity to request further information and independent advice concerning this Acknowledgement and the representation relationships described in the [name of brochure] and the Buyer:
 - (i) has chosen to forgo any agency representation, together with its advantages, protection and services;
 - (ii) understands that the Brokerage does not owe the Buyer any agency obligations and, in particular, any fiduciary obligations; and
 - (iii) understands that the Brokerage will not provide the Buyer with any services that require the exercise of discretion or judgment, or the giving of confidential advice, or the Brokerage advocating on behalf of the Buyer.

2. **Brokerage is Agent of Client:** The Brokerage is the agent of its Client in whose property the Buyer is interested and, as agent, the Brokerage is obligated:
 - (i) to always act in the best interests of the Client;
 - (ii) not to provide information or advice to the Buyer that is not in the interests of the Client;
 - (iii) to communicate to the Client all information, whether or not of a confidential nature, that it receives from the Buyer, except for confidential information acquired in a prior agency relationship with the Buyer.

3. **General Obligations to Buyer:** The Brokerage’s obligations to the Buyer are limited to:
 - (i) exercising reasonable care and skill in the provision of such facilitation services as may be provided under clause 4;
 - (ii) not negligently or knowingly providing false or misleading information;
 - (iii) presenting, in a timely manner, all offers and counter-offers to and from the Buyer regardless of whether the property is already the subject of a contract;
 - (iv) conveying to the Client in a timely manner all information that the Buyer wishes to have communicated to the Client;

- (v) keeping the Buyer informed regarding the progress of the transaction;
 - (vi) holding all monies received with respect to a transaction in trust in accordance with the provisions of the *[name of Act]*;
 - (vii) complying with the provisions of the *[name of Act]* and its regulations, and the rules and by-laws of the *[name of governing body]*.
- 4. Services Provided to Buyer:** The Brokerage may offer the Buyer the following services:
- (i) provide real estate statistics and information on property including comparable property information available through listing services or other local data bases;
 - (ii) provide standard form agreements of purchase and sale and other relevant form documents and act as scribe in their preparation in accordance with the instructions of the Buyer;
 - (iii) provide the names of relevant real estate service providers, but the Brokerage will not recommend any particular service providers to the Buyer.
- 5. No Liability for Remuneration:** The Buyer is not liable to pay the Brokerage any remuneration for any services that may be provided the Buyer by the Brokerage.
- 6. Use and Distribution of Information:** The Brokerage may use, disclose and retain personal information provided by the Buyer for purposes relating to such services as are provided by the Brokerage to the Buyer, including:
- (i) disclosing information to the Client and, as needed, to third parties retained by *(initial)* the Buyer to assist in the transaction;
 - (ii) providing the sale and other related information regarding any property purchased by the Buyer to the listing service (if the property purchased was listed on such a service) for reporting, appraisal and statistical purposes.
- 7. Applicable Law:** This Acknowledgement will be governed by the laws of the Province of *[name]* and the Buyer and the Brokerage will submit to the jurisdiction of the Courts of the Province of *[name]* for the resolution of any disputes that may arise out of this Acknowledgement.
- 8. Buyer Acknowledgement:** The Buyer acknowledges that:
- (i) the provision of the services listed in clause 4 by the Brokerage does not create an agency relationship between the Buyer and the Brokerage;
 - (ii) the Buyer has been given the opportunity to request further information and independent advice concerning this Acknowledgement and customer status and the representation relationships described in the *[name of brochure]*;
 - (iii) this Acknowledgement accurately sets out the terms of the relationship between the Buyer and the Brokerage;
 - (iv) the Buyer has received a true copy of this Acknowledgement.

SIGNED AND DELIVERED this *[day]* of *[month]*, *[year]*.

[Signature blocks for Buyer, Brokerage and Witnesses]

EXCLUSIVE SELLER BROKERAGE AGREEMENT

This Exclusive Seller Brokerage Agreement (this Agreement) is Between:

The Seller:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

And the Seller’s Brokerage (the Brokerage):

[name – address – phone - fax – e-mail]

In consideration of the Brokerage listing the Seller’s property (the Property) known as:

.....

the Seller hereby gives the Brokerage the exclusive right to offer for sale the Property for the price of _____ Dollars (\$) plus applicable Goods and Services and other relevant taxes (and upon the terms, if any, set out in the Schedule hereto or at such other price and terms acceptable to the Seller), on the following terms:

1. Term of Agreement: This Agreement will commence at 11:59 p.m. on the [??] day of [month], [year] and will expire at 11:59 p.m. on the [??] day of [month], [year].

2. Brokerage’s Mandate:

2.A Obligations: The Brokerage will discharge the following obligations:

- (i) to use best efforts to market the Property and to promote the interests of the Seller;
- (ii) at the earliest reasonable opportunity, to advise any buyer interested in the Property that the Brokerage is the agent of the Seller;
- (iii) subject to clause 12, to act as only the Seller’s agent;
- (iv) to obey all lawful instructions of the Seller;
- (v) to fulfill its fiduciary obligations of loyalty, confidentiality and of full disclosure of all conflicts of interest that may arise between the Seller’s interests and those of the Brokerage or buyers;
- (vi) not to appoint another brokerage to act on behalf of the Seller as a sub-agent without the Seller’s prior written consent;
- (vii) to exercise reasonable care and skill in the performance of this Agreement;
- (viii) to assist the Seller in negotiating favourable terms and conditions with a buyer and in preparing and complying with a legally binding agreement of purchase and sale for the Property;
- (ix) to disclose to buyers all material latent defects affecting the Property known to the Brokerage;
- (x) to hold all monies received by the Brokerage in accordance with the provisions of the [name of Act];
- (xi) to present, in a timely manner, all offers and counter-offers to and from the Seller even when the Property is already the subject of an agreement of purchase and sale;
- (xii) to disclose to the Seller, in a timely manner, all relevant facts affecting the transaction known to the Brokerage;
- (xiii) to keep the Seller fully informed regarding the progress of the transaction;
- (xiv) to advise the Seller to obtain expert advice on matters of importance to the Seller;

(xv) to comply with all provisions of the [*name of Act*] and its regulations, and the rules and by-laws of the [*name of governing body*].

2.B Additional Services: The Seller requests, and the Brokerage agrees to provide, the following additional services [*Seller to initial*]:

- (i) to list the Property with the listing service(s) of the [*name of Association*]; YES NO
- (ii) to cooperate with brokerages working with buyers and to offer such brokerages a portion of the Remuneration to which the Brokerage may be entitled under clause 4.A in the amount of [*amount*] Dollars (\$*number*) or [*amount*] percent (*number*%) of that Remuneration; YES NO
- (iii) to obtain verification of mortgage, property and school taxes, improvement charges, tenancy information and other similar information with respect to the Property; YES NO
- (iv) to advertise the Property; YES NO
- (v) to place a “for sale” sign on the Property; YES NO
- (vi) to install a lock-box on the Property to provide access to authorized persons; YES NO
- (vii) to show the Property at times acceptable to the Seller and, if any, tenants; YES NO
- (viii) to arrange “open-house” showings of the Property; YES NO
- (ix) the services listed below:

.....

3. Use and Distribution of Information:

- (i) The Seller consents to the collection, use and disclosure of personal information by the Brokerage for the purpose of this Agreement and such other use as is consistent with listing and marketing of the Property including, but not limited to:
 - (a) retaining and disclosing any listing and sales information, including price, which may be used by the Brokerage for any purpose relating to its business including conducting comparative analyses and disclosing such information to other persons such as appraisers and brokerages;
 - (b) providing to present and past customers and clients marketing materials, newsletters and other information that the Brokerage believes may be of interest to them.
- (ii) Subject to clause 2.B(i), the Seller consents to placement of the listing and sales information by the Brokerage into the database of the appropriate listing service and acknowledges that the database of the listing service is the property of the listing service.
- (iii) The Seller further acknowledges that the Brokerage and the listing service may:
 - (a) distribute the information to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others;
 - (b) compile, retain and publish any statistics including historical listing service data which may be used by the Brokerage and licensed listing service members to conduct comparative market analyses; and

- (c) make such other use of the information as the listing service(s) deems appropriate in connection with the listing, marketing and selling of real estate.

4. Brokerage's Remuneration:

4.A Remuneration: The Seller will pay the Brokerage as Remuneration:

- (a) *[amount]* percent (*[number]* %) of the purchase price (*initials*); OR
 (b) a flat fee of *[amount]* Dollars (\$) *[number]*) (*initials*); OR
 (c) a fee for services as specified in writing, signed by the Seller, in the Annex attached to this Agreement (*initials*);

(PLUS applicable Goods and Services Tax and any other taxes payable in respect of the Remuneration):

- (i) if, during the term of this Agreement, a legally enforceable agreement of purchase and sale, from whatever source obtained, is entered into between the Seller and a buyer (other than a buyer who has been specifically excluded in writing from this Agreement) AND the sale is completed OR the Seller, without legal justification, fails to complete the sale; OR
 (ii) if, within *[number]* days (*[number]* days) (the Hold-Over Period) of the expiration of this Agreement, a legally enforceable agreement of purchase and sale is entered into between the Seller and a buyer (other than a buyer who has been specifically excluded in writing from this Agreement) who was introduced to the Property or the Seller during the term of this Agreement, by whatever means or person and whether or not the Brokerage is the effective cause of such agreement of purchase and sale AND the sale is completed OR the Seller, without legal justification, fails to complete the sale; OR
 (iii) if, during the term of this Agreement, an unconditional offer to purchase the Property upon the terms specified in this Agreement is presented to the Seller which the Seller refuses to accept; PROVIDED that under clause 4.A(ii) if, on the expiration of this Agreement, the Seller enters an exclusive seller brokerage agreement with another brokerage for the payment of a remuneration or fee the Seller's liability to the Brokerage will be reduced by the amount paid by the Seller under the subsequent exclusive seller brokerage agreement.

4.B Alternative Compensation: The Seller will pay the Brokerage Alternative Compensation, in the amounts specified below:

- (i) if, during the term of this Agreement or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered into between the Seller and a buyer and the buyer, without legal justification, fails to complete the sale, the Seller will pay the Brokerage, from monies, if any, forfeited by the buyer or recovered by the Seller from the buyer, *[percentage]* of such amount or the Remuneration specified in clause 4.A, whichever is the less;
 (ii) if, during the term of this agreement, the Seller should withdraw the Property from the market the Seller will reimburse the Brokerage for all reasonable expenses incurred in the performance of this Agreement prior to the date on which the Seller notifies the Brokerage in writing of the Seller's decision, provided that such reimbursement will not prejudice any other claim to remuneration to which the Brokerage may become entitled under clause 4 of this Agreement.

4.C Payment of Remuneration: The Seller will pay the Remuneration or Alternative Compensation owing to the Brokerage:

- (i) in the case of the Remuneration, on the date established for completion of the sale of the Property; or
 (ii) in the case of the Alternative Compensation, within *[number]* of days of receipt of a written demand of payment from the Brokerage.

4.D Deduction of Remuneration from Deposit and Proceeds of Sale:

- (i) The Seller authorizes the Brokerage, upon the date established for the completion of the sale, to deduct the Remuneration owed to the Brokerage from the deposit, if any, held by the Brokerage and will pay any balance of Remuneration owed in accordance with clause 4.C.
- (ii) The Seller irrevocably and unconditionally instructs any lawyer acting on behalf of the Seller to deduct from the deposit and proceeds of sale, or moneys forfeited by or recovered from the buyer any Remuneration or Alternative Compensation that remains owing to the Brokerage after it has exercised its right, if any, under clause 4.D(i) and to pay such Remuneration or Alternative Compensation to the Brokerage.

4.E Limitation on Other Remuneration: The Brokerage agrees not to accept any other remuneration, whatever its form (including finder's fees, referral fees and gifts) and from whatever source (including the buyer, a mortgage lender, another brokerage or contractor), directly or indirectly related to its agency under this Agreement unless, before accepting such remuneration, the Brokerage has:

- (i) fully disclosed in writing to the Seller all relevant facts relating to the offer of remuneration including the maximum amount to be received; and
- (ii) obtained the Seller's written consent to the Brokerage receiving such remuneration.

5. Referral of Inquiries: The Seller will immediately advise the Brokerage:

- (i) during the term of this Agreement, of all inquiries by, and to deliver to it all offers to purchase from, interested buyers or their representatives received by the Seller; and
- (ii) during the Hold-Over Period, of any offers presented to the Seller by, or made by the Seller to, a buyer introduced to the Seller during the term of this Agreement which offer is accepted by the Seller or a buyer as the case may be.

6. Seller's Warranty: The Seller warrants that:

- (i) the Seller has the authority to sell the property and to enter into this Agreement;
- (ii) that spousal consent:
 - (a) for the sale of the Property has been obtained [initial]; OR
 - (b) is not necessary for the sale of the Property [initial];
- (iii) on the purchase of the Property, Goods and Services Tax:
 - (a) will be payable [initial]; OR
 - (b) will not be payable [initial];
- (iv) the Seller has disclosed to the Brokerage all third party claims and interests in the Property known to the Seller;
- (v) the Property is not currently the subject of an exclusive seller brokerage agreement;
- (vi) the Seller has disclosed to the Brokerage all material latent defects affecting the Property known to the Seller;
- (vii) the Seller will provide the Brokerage with all information necessary for the listing and marketing of the Property;
- (viii) all information provided to the Brokerage is accurate to the best of the Seller's knowledge;
- (ix) the Seller will immediately advise the Brokerage of any material change in the physical condition or status of the Property or in the information provided by the Seller.

7. Indemnification: The Seller will hold harmless and indemnify the Brokerage for any claims that may arise from its reasonable and good faith reliance on representations made, or information provided by the Seller.

- 8. Miscellaneous Provisions:** The Seller agrees that:
- (i) the Brokerage may represent other sellers and, subject to clause 12, buyers;
 - (ii) the Brokerage cannot disclose to the Seller confidential information obtained through any other agency relationship to which the Brokerage is a party;
 - (iii) the Brokerage will not be obligated to seek additional offers to purchase while the Property is subject to an unconditional agreement of purchase and sale;
 - (iv) if the Property is owned by a limited company, a sale of shares representing a controlling interest in the limited company will constitute a sale for the purposes of this Agreement;
 - (v) this Agreement will be governed by the laws of the Province of *[name]* and the Seller and the Brokerage will submit to the jurisdiction of the Courts of the Province of *[name]* for the resolution of any disputes that may arise out of this Agreement.
- 9. Termination of this Agreement:** Without prejudice to the acquired rights of the Seller or the Brokerage, this Agreement will terminate on:
- (i) the expiration of the term of this Agreement as specified in clause 1;
 - (ii) on an earlier date than that specified in clause 1 if mutually agreed to by the Seller and the Brokerage in writing;
 - (iii) a completed sale of the Property prior to the expiration of the term of this Agreement;
 - (iv) the suspension or cancellation of the Brokerage's license to trade in real estate;
 - (v) the bankruptcy or insolvency of the Brokerage or if it is in receivership;
 - (vi) at the option of the non-defaulting party, exercised in writing, on a material breach of any of the terms of this Agreement by either the Seller or the Brokerage.
- 10. Brokerage's Duties on Termination of Agreement:** Immediately on the termination of this Agreement, the Brokerage will:
- (i) remove the Property as an active listing on any listing service;
 - (ii) cease all marketing activities on behalf of the Seller;
 - (iii) remove all signs from the Property;
 - (iv) return all documents and other materials provided by the Seller..
- 11. Continuing Duties:** The termination of this Agreement, for whatever reason, does not relieve the Brokerage from its duty:
- (i) to account for all monies received by the Brokerage;
 - (ii) of confidentiality to the Seller.
- 12. Change in Representative Capacity of Brokerage:**
- (i) If the Brokerage is also the agent of a buyer who becomes interested in the Property, the Brokerage will:
 - (a) immediately advise the Seller and the buyer of all relevant facts and of the implications of concurrent representation;
 - (b) give the Seller and the buyer an opportunity to seek independent advice; and
 - (c) then seek their written informed consent to the Brokerage continuing to provide services to the Seller and the buyer as either
 - Transaction Brokerage; or
 - Designated Brokerage;
 to facilitate the transaction on the terms and conditions specified in the Transaction Brokerage Agreement or Designated Brokerage Agreement and in the *[brochure]* published by *[name of Association]*.

- (ii) Should the Seller refuse to consent, the Brokerage will continue to represent the party, be it the Seller or the buyer, with whom it first entered into an agency relationship and offer to treat the other party as a customer or to refer the other party to another brokerage.

13. Additional Provisions:

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14. Definitions: For the purposes of this Agreement:

- “**buyer**” means a person acquiring or attempting to acquire an interest in real estate by purchase;
- “**purchase**” includes an exchange, option, lease or other acquisition of an interest in real estate;
- “**sale**” includes an exchange, option, lease or other disposition of an interest in real estate;
- “**seller**” means a person disposing or attempting to dispose of an interest in real estate by sale.

15. This Agreement:

- (i) This Agreement includes, if signed by the Seller and attached to this Agreement, the following documents:

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.....

- (ii) No amendment to the terms of this Agreement shall be effective unless it is in writing and signed by the Seller and the Brokerage.
- (iii) If there is conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision will supersede the standard pre-set provision to the extent of such conflict or discrepancy.
- (iv) This Agreement will constitute the entire agreement between the Seller and Brokerage and there are no representations, warranties, collateral agreements or conditions which affect this Agreement other than as expressed herein.
- (v) This Agreement will be read with all changes of number required by the context.

16. Seller’s Acknowledgement: The Seller, having received and read both this Agreement and the [name of brochure], and having been given the opportunity to request further information concerning this agreement and the representation relationships described in the [name of brochure], acknowledges that:

- (i) this Agreement accurately sets out the terms agreed to by the Seller and the Brokerage; and
- (ii) the Seller has received a true copy of this Agreement.

SIGNED AND DELIVERED this [day] of [month], [year].

[Signature blocks for Seller, Seller’s Brokerage and Witnesses]

EXCLUSIVE BUYER BROKERAGE AGREEMENT

This Exclusive Buyer Brokerage Agreement (this Agreement) is Between:

The Buyer:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

And the Buyer’s Brokerage (the Brokerage):

[name – address – phone - fax – e-mail]

In consideration of the Buyer’s Brokerage assisting the Buyer to purchase a
..... [*insert type of property*]..... property in the Market Area(s) described as:

.....
.....
the Buyer hereby gives the Brokerage the exclusive right to act as the agent for the Buyer on the following terms:

1. Term of Agreement: This Agreement will commence at 11:59 p.m. on the [??] day of [*month*], [*year*] and will expire at 11:59 p.m. on the [??] day of [*month*], [*year*].

2. Brokerage’s Mandate:

2.A Obligations: The Brokerage will discharge the following obligations:

- (i) to use best efforts in locating a property in the specified Market Area(s) that meets all the material requirements identified by the Buyer and, generally, to promote the interests of the Buyer;
- (ii) at the earliest reasonable opportunity, to advise any seller in whose property the Buyer is interested that the Brokerage is the agent of the Buyer;
- (iii) subject to clause 10, to act only as the Buyer’s agent;
- (iv) to obey all lawful instructions of the Buyer;
- (v) to fulfill its fiduciary obligations of loyalty, confidentiality and of full disclosure of all conflicts of interest that may arise between the Buyer’s interests and those of the Brokerage, sellers or competing buyers;
- (vi) not to appoint another brokerage to act on behalf of the Buyer as a sub-agent without the Buyer’s prior written consent;
- (vii) to exercise reasonable care and skill in the performance of this Agreement;
- (viii) to seek out and advise the Buyer in a timely manner of properties available for sale in the Market Area which may meet the Buyer’s requirements, including those listed with other brokerages, those “for sale by owner” and other available properties known to the Brokerage;
- (ix) to use best efforts to discover relevant facts pertaining to any property for which the Buyer is considering making an offer;
- (x) to hold all monies received by the Brokerage in accordance with the provisions of the [*name of Act*];
- (xi) to present, in a timely manner, all offers and counter-offers to and from the Buyer even where a property is already the subject of an agreement of purchase and sale;
- (xii) to disclose to the Buyer, in a timely manner, all relevant facts known to the Brokerage affecting a property or a transaction;
- (xiii) to keep the Buyer fully informed regarding the progress of the transaction;
- (xiv) to advise the Buyer to obtain expert advice on matters of importance to the Buyer;

- (xv) to disclose to the Buyer the existence and terms of any competing offers for a property in which the Buyer is interested known to the Brokerage;
- (xvi) to assist the Buyer in negotiating favourable terms and conditions and in preparing a legally binding agreement of purchase and sale;
- (xvii) to comply with all relevant provisions of the [*name of Act*] and its regulations, and the rules and by-laws of the [*name of governing body*].

2.B Additional Services: The Buyer requests, and the Brokerage agrees to provide at the Buyer's expense, where applicable, the following additional services [*Buyer to initial*]:

- (i) to advertise for suitable properties; YES NO
- (ii) to assist the Buyer arrange financing; YES NO
- (iii) to assist the Buyer to arrange for inspections of a property; YES NO
- (iv) to assist the Buyer to arrange for appraisals of a property; YES NO
- (v) to assist the Buyer in arranging for a search of title to a property; YES NO
- (vi) the other services listed below:

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3. Use and Distribution of Information:

- (i) The Buyer consents to the collection, use and disclosure of personal information by the Brokerage for purposes that relate to the services provided the Buyer by the Brokerage and such other uses as are consistent with the purchase or prospective purchase of a property.
- (ii) The Buyer agrees that information regarding any property purchased by the Buyer through the Brokerage may be retained and disclosed by the Brokerage and any cooperative listing service(s) for reporting, appraisal and statistical purposes.

4. The Brokerage's Compensation:

4.A Retainer: The Buyer will pay the Brokerage on the signing of the Agreement a retainer fee of Dollars (\$.....) which

- (a) will be credited (*initials*)
- (b) will not be credited (*initials*)

towards any Remuneration or Alternative Compensation payable by the Buyer to the Brokerage under clauses 4.B and 4.D of this Agreement.

4.B Remuneration: The Buyer will pay the Brokerage as Remuneration:

- (a) [*amount*] percent ([*number*] %) of the purchase price (*initials*); OR
- (b) a flat fee of [*amount*] Dollars (\$ [*number*]) (*initials*); OR
- (c) a fee for services as specified in writing, signed by the Buyer, in the Annex attached to this Agreement (*initials*);

(PLUS applicable Goods and Services Tax and any other taxes payable in respect of the Remuneration):

- (i) if, during the term of this Agreement, a legally enforceable agreement of purchase and sale, from whatever source obtained, is entered into between the Buyer and a seller (other than a seller or a property that has been specifically excluded in writing from this Agreement) AND the purchase is completed OR the Buyer, without legal justification, fails to complete the sale; OR

- (ii) if, within [number] days ([number] days) (the Hold-Over Period) of the expiration of this Agreement, a legally enforceable agreement of purchase and sale is entered into between the Buyer and a seller (other than a seller or a property that has been specifically excluded in writing from this Agreement) whose property was introduced to the Buyer during the term of this Agreement, by whatever means or person and whether or not the Brokerage is the effective cause of such agreement of purchase and sale AND the purchase is completed OR the Buyer, without legal justification, fails to complete the sale; OR
- (iii) if during the term of this Agreement, an unconditional offer to purchase the Property upon the terms specified in this Agreement is presented to the Buyer which the Buyer refuses to accept; PROVIDED that under clause 4.B(ii) if, on the expiration of this Agreement, the Buyer enters into an exclusive buyer brokerage agreement with another brokerage for the payment of a remuneration or fee the Buyer's liability to the Brokerage will be reduced by the amount paid by the Buyer under the subsequent exclusive buyer brokerage agreement.

4.C Source of Remuneration:

- (i) The Buyer authorizes the Brokerage to request payment of the Remuneration specified in clause 4.B, or part thereof, from [*Buyer to initial*]:
 - (a) the brokerage representing the seller; YES NO
 - (b) the seller, where the seller has not listed the property with a brokerage. YES NO
- (ii) Where the amount so received by the Brokerage is:
 - (a) less than the Remuneration specified in clause 4.B, the Buyer will pay to the Brokerage the outstanding balance;
 - (b) more than the Remuneration specified in clause 4.B, the Brokerage will pay to the Buyer the excess balance.

4.D Alternative Compensation: The Buyer will pay the Brokerage Alternative Compensation, in the circumstances and amounts specified below:

- (i) if, during the term of this Agreement or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered into between the Buyer and a seller and the seller, without legal justification, fails to complete the sale, the Buyer will pay the Brokerage the Remuneration specified in clause 4.B should the Buyer obtain an order for specific performance of the contract with the seller;
- (ii) if, during the term of this Agreement or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered between the Buyer and a seller and the seller, without legal justification, fails to complete the sale, the Buyer will pay the Brokerage from monies, if any, recovered by the Buyer from the seller in settlement of the Buyer's claim against the seller, [*percentage*] of such amount recovered or [*percentage*] of the Remuneration specified in clause 4.B, whichever is the less;
- (iii) if during the term of this agreement the Buyer should withdraw from the market, the Buyer will reimburse the Brokerage for all reasonable expenses incurred in the performance of this Agreement prior to the date on which the Buyer notifies the Brokerage in writing of the Buyer's decision, provided that such reimbursement will not prejudice any other claim to remuneration to which the Brokerage may become entitled under clause 4.B or clause 4.D of this Agreement.

4.E Payment of Remuneration: The Buyer will pay the Remuneration or Alternative Compensation owing to the Brokerage:

- (i) in the case of the Remuneration, on the date established for completion of the purchase; or
- (ii) in the case of the Alternative Compensation, within [*number*] of days of receipt of a written demand of payment from the Brokerage.

- 4.F Limitation on Other Remuneration:** Subject to clause 4.C, the Brokerage agrees not to accept any other remuneration, whatever its form (including a finder's fee, referral fee or gift) and from whatever source (including the seller, a mortgage lender, another brokerage or a contractor), directly or indirectly related to its agency under this Agreement unless, before accepting such remuneration, the Brokerage has:
- (i) fully disclosed in writing to the Buyer all relevant facts relating to the offer of remuneration including the maximum amount to be received; and
 - (ii) obtained the Buyer's written consent to the Brokerage receiving such remuneration.
- 5. Referral of Inquiries:** The Buyer will immediately advise the Brokerage:
- (i) during the term of this Agreement :
 - (a) of all properties within the Market Area(s) in which the Buyer is interested; and
 - (b) of all inquiries by, and all offers to sell from, interested sellers or their representatives received by the Buyer;
 - (ii) during the Hold-Over Period, of any offers presented to the Buyer by, or made by the Buyer to, a seller introduced to the Buyer during the term of this Agreement which offer is accepted by the Buyer or a seller as the case may be.
- 6. Buyer's Warranty:** The Buyer warrants that the Buyer:
- (i) is not currently represented by any other brokerage and will not enter into another exclusive buyer brokerage agreement with another brokerage during the term of this Agreement with respect to the same Market Area;
 - (ii) has disclosed to the Brokerage all of the material requirements that the Buyer is seeking in a property.
- 7. Miscellaneous Provisions:** The Buyer agrees that:
- (i) subject to clauses 10 and 11, the Brokerage may represent other sellers and buyers;
 - (ii) the Brokerage cannot disclose to the Buyer confidential information obtained through any other agency relationship to which the Brokerage is a party;
 - (iii) the Brokerage will not be obligated to seek additional properties of interest to the Buyer once the Buyer is a party to an unconditional agreement of purchase and sale for a property;
 - (iv) if a property purchased is owned by a limited company, a purchase of shares representing a controlling interest in the limited company will constitute a purchase for the purposes of this Agreement;
 - (v) this Agreement will be governed by the laws of the Province of [name] and the Buyer and the Brokerage will submit to the jurisdiction of the Courts of the Province of [name] for the resolution of any disputes that may arise out of this Agreement.
- 8. Termination of this Agreement:** Without prejudice to the acquired rights of the Buyer or the Brokerage, this Agreement will terminate on:
- (i) the expiration of the term of this Agreement as specified in clause 1;
 - (ii) on an earlier date than that specified in clause 1 if mutually agreed to by the Buyer and the Brokerage in writing;
 - (iii) a completed purchase of a property prior to the expiration of the term of this Agreement;
 - (iv) the suspension or cancellation of the Brokerage's license to trade in real estate;
 - (v) the bankruptcy or insolvency of the Brokerage or if it is in receivership;
 - (vi) at the option of the non-defaulting party exercised in writing, on a material breach of any of the terms of this Agreement by either the Buyer or the Brokerage.
- 9. Continuing Duties:** The termination of this Agreement, for whatever reason, does not relieve the Brokerage from its duty:
- (i) to account for all monies received by the Brokerage;

- (ii) of confidentiality to the Buyer;
- (iii) to return all documents and other materials, if any, provided by the Buyer.

10. Change in Representative Capacity of Brokerage:

- (i) If the Brokerage is also the agent of a seller in whose property the Buyer is interested, the Brokerage will:
 - (a) immediately advise the Buyer and the seller of all relevant facts and of the implications of concurrent representation;
 - (b) give the Buyer and the seller an opportunity to seek independent advice; and
 - (c) then seek their written informed consent to the Brokerage continuing to provide services to the Buyer and the seller as either
 - Transaction Brokerage; or
 - Designated Brokerage;
 on the terms and conditions specified in the Transaction Brokerage Agreement and the Designated Brokerage Agreement and in the [brochure] published by [name of Association].
- (ii) Should the Buyer refuse to consent the Brokerage will continue to represent the party, be it the Buyer or the seller, with whom it first entered into an agency relationship and offer to treat the other party as a customer or to refer the other party to another Brokerage.

11. Competing Buyers: If the Brokerage is also the agent of a competing buyer interested in the same property as the Buyer, the Brokerage will conduct itself in all respects in accordance with spirit of the provisions of clause 10 and provide the Buyer and competing buyer with the options stipulated therein.

12. Additional Provisions:

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13. Definitions: For the purposes of this Agreement:

- “**buyer**” means a person acquiring or attempting to acquire an interest in real estate by purchase;
- “**purchase**” includes an exchange, option, lease or other acquisition of an interest in real estate;
- “**sale**” includes an exchange, option, lease or other disposition of an interest in real estate;
- “**seller**” means a person disposing or attempting to dispose of an interest in real estate by sale.

14. This Agreement:

- (i) This Agreement includes, if signed by the Buyer and attached to this Agreement, the following documents:
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- (ii) No amendment to the terms of this Agreement shall be effective unless it is in writing and signed by the Seller and the Brokerage.
- (iii) If there is conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision will supersede the standard pre-set provision to the extent of such conflict or discrepancy.
- (iv) This Agreement will constitute the entire agreement between the Buyer and Brokerage and there are no representations, warranties, collateral agreements or conditions which affect this Agreement other than as expressed herein.
- (v) This Agreement will be read with all changes of number required by the context.

15. Buyer Acknowledgement: The Buyer, having received and read both this Agreement and the [*name of brochure*], and having been given the opportunity to request further information concerning this Agreement and the representation relationships described in the [*name of brochure*], acknowledges that:

- (i) this Agreement accurately sets out the terms agreed to by the Buyer and the Brokerage; and
- (ii) the Buyer has received a true copy of this Agreement.

SIGNED AND DELIVERED this [*day*] of [*month*], [*year*].

[Signature blocks for Buyer, Buyer's Brokerage and Witnesses]

TRANSACTION BROKERAGE AGREEMENT

[for use with Exclusive Brokerage Agreements]

This Agreement (this Agreement) is Between:

The Buyer:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

The Seller:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

And the Brokerage:

[name – address – phone - fax – e-mail]

THIS AGREEMENT IS ENTERED INTO BY THE BUYER, THE SELLER AND THE BROKERAGE WITH RESPECT TO THE PROPERTY KNOWN AS:

.....
.....

(the Property) ON THE BASIS OF THE FOLLOWING FACTS:

- The Buyer is interested in purchasing, and the Seller is interested in selling, the Property;
- The Brokerage concurrently represents both the Buyer and the Seller;
- Such concurrent representation of both the Buyer and the Seller by the Brokerage prevents it from discharging its fiduciary obligations to the Buyer and the Seller respectively and, in particular, the obligations:
 - of utmost loyalty to the Buyer and to the Seller;
 - to act solely in the best interests of the Buyer and of the Seller;
 - to avoid all conflicts of interest including conflicts that may arise between the interests of the Buyer and of the Seller;
 - of full disclosure of all facts that may influence the decisions of the Buyer or of the Seller;
 - and
 - to maintain the confidentiality of information obtained from the Buyer or from the Seller;
- Such concurrent representation by the Brokerage is only permitted by law with the fully informed and voluntary consent of both the Buyer and the Seller;
- The Buyer and the Seller have read the [brochure name] published by [name of Association] and this Agreement, and have been given the opportunity to seek further information and independent advice concerning **Transaction Brokerage** representation and other relationships discussed therein;

THEREFORE THE BUYER AND THE SELLER CONSENT AND AGREE TO their continued representation by the Brokerage now acting in the capacity of **Transaction Facilitator**, on the following terms:

1. **Impartiality:** The Brokerage will treat the interests of both the Buyer and the Seller in an even-handed, objective and impartial manner.
2. **Reasonable Care and Skill:** The Brokerage will exercise reasonable care and skill in the performance of its mandate under this Agreement.
3. **Accuracy of Information:** The Brokerage will not negligently or knowingly give false or misleading information to the Buyer or the Seller.
4. **Instructions:** The Brokerage will obey the instructions of the Buyer or the Seller to the extent that they are consistent with the other terms of this Agreement.
5. **Non-Disclosure of Certain Information:** The Brokerage will not disclose without the informed written consent of the Buyer or the Seller, as the case may be:
 - (i) that the Buyer may be prepared to offer a higher price or terms other than those contained in the offer to purchase;
 - (ii) that the Seller may be prepared to accept a lower price or terms other than those contained in the Seller's Exclusive Seller Brokerage Agreement;
 - (iii) the motivation of the Buyer or the Seller for wishing to respectively purchase or sell the property; and
 - (iv) subject to clause 6, personal information relating to the Buyer or the Seller and other information disclosed at any time in confidence by either to the Brokerage.
6. **Disclosure of Certain Information:** The Brokerage will disclose:
 - (i) to the Buyer, all material latent defects affecting the Property known to the Brokerage; and
 - (ii) to the Seller, all material facts relevant to the Buyer's ability to purchase the Property known to the Brokerage.
7. **Inspections and Inquiries:** The Brokerage will not conduct or arrange:
 - (i) an independent inspection of the Property for the Buyer and will not verify the accuracy or completeness of any information supplied or statements made by the Seller concerning the Property; or
 - (ii) an independent inquiry into the financial status of the Buyer for the Seller and will not verify the accuracy or completeness of any financial information supplied by the Buyer.
8. **No Attribution of Knowledge:** The Brokerage's knowledge concerning the Buyer or the Seller will not be attributed to the other.
9. **Vicarious Liability:** Neither the Buyer nor the Seller will be vicariously liable to the other for any acts of the Brokerage.
10. **Facilitation Services:**
 - (i) The Brokerage will:
 - (a) present to the Buyer and the Seller, in a timely manner, all offers and counter-offers to and from either regardless of whether the Property is already the subject of a contract;
 - (b) convey to the Buyer and the Seller, in a timely manner, all information that either wishes to have communicated to the other;
 - (c) keep the Buyer and the Seller informed regarding the progress of the transaction;
 - (d) hold all monies received in respect of the transaction in trust in accordance with the provisions of the [*name of Act*];
 - (e) comply with the provisions of the [*name of Act*] and its regulations, and the rules and by-laws of the [*name of governing body*].
 - (ii) The Brokerage will also perform for the Buyer and the Seller all necessary facilitation services, (that is, those services needed to assist the Buyer and the Seller to complete a transaction that do

not require the exercise of discretion or judgment, or the giving of confidential advice or advocating on behalf of either the Buyer or the Seller) and will, when requested by the Buyer or the Seller:

- (a) provide real estate statistics and information on property including comparable property information available through listing services or other local data bases;
- (b) provide standard form agreements of purchase and sale and other documents and act as scribe in their preparation in accordance with the instructions of the Seller;
- (c) provide the names of real estate appraisers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and the like, but the Brokerage will not recommend any particular professional to the Buyer or the Seller.

11. Brokerage's Responsibility:

- (i) The Brokerage will ensure that the member of the Brokerage providing facilitation services to the Buyer and the Seller under this Agreement:
 - (a) complies with the Brokerage's policies and procedures governing Transaction Brokerage; and
 - (b) treats the interests of both the Buyer and the Seller in an even-handed, objective and impartial manner.
- (ii) The Brokerage will supervise the member of the Brokerage and support staff providing facilitation services to the Buyer and the Seller to ensure that they properly fulfill this Agreement.

12. Brokerage Remuneration: The Buyer and the Seller will remunerate the Brokerage in accordance with the terms of the Buyer's Exclusive Buyer Brokerage Agreement and Seller's Exclusive Seller Brokerage Agreement with the Brokerage respectively.

13. Prior Agreements: With the exception of clauses 2.A and 2.B specifying the Brokerage's mandate in the Buyer's Exclusive Buyer Brokerage Agreement and the Seller's Exclusive Seller Brokerage Agreement respectively, the rights and obligations of the Buyer, the Seller, and the Brokerage will be determined in accordance with those agreements.

14. This Agreement:

- (i) No amendment to the terms of this Agreement shall be effective unless it is in writing and signed by the Buyer, the Seller and the Brokerage.
- (ii) If there is conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision will supersede the standard pre-set provision to the extent of such conflict or discrepancy.
- (iii) Subject to clauses 12 and 13 of this Agreement, this Agreement will constitute the entire agreement between the Buyer and the Seller and the Brokerage, and there are no representations, warranties, collateral agreements or conditions, which affect this Agreement other than as expressed herein.
- (iv) This Agreement will be read with all changes of number required by the context.

15. Acknowledgement: The Buyer and the Seller, having both received and read this Agreement and the [name of brochure], and having been given the opportunity to request further information concerning this Agreement and the representation relationship described therein and in the [name of brochure], acknowledge that:

- (i) this Agreement accurately sets out the terms agreed to by the Buyer, the Seller and the Brokerage; and
- (ii) the Buyer and the Seller have both received a true copy of this Agreement.

SIGNED AND DELIVERED this [day] of [month], [year].

[Signature blocks for the Buyer, the Seller and the Brokerage, and Witnesses]

EXCLUSIVE SELLER DESIGNATED BROKERAGE AGREEMENT

This Exclusive Seller Designated Brokerage Agreement (this Agreement) is Between:

The Seller:

[name – address – phone – fax – e-mail]

[name – address – phone - fax – e-mail]

And the Seller’s Brokerage (the Brokerage):

[name – address – phone - fax – e-mail]

THIS AGREEMENT IS ENTERED INTO BY THE SELLER AND THE BROKERAGE ON THE BASIS OF THE FOLLOWING FACTS:

- The Brokerage represents the Seller and may represent buyers interested in the Seller’s property;
- Concurrent representation by the Brokerage of both the Seller and buyers interested in the Seller’s property prevents the Brokerage from discharging the fiduciary obligations it owes to each of the Seller and the buyers;
- Concurrent representation is permitted by law only with the fully informed and voluntary consent of the Seller;
- The Seller has read the [brochure name] published by [name of Association] and this Agreement and has been given the opportunity to seek further information and independent advice concerning representation by a **Designated Brokerage** and the other relationships discussed therein;
- The Seller wishes both to retain the services of the Brokerage, and to benefit from agency representation together with its advantages, protection and services;
- The Brokerage is prepared to designate separate agents to act as sole agent for and in the interests of the Seller, on the one hand, and of any buyer interested in the property who is also represented by the Brokerage, on the other hand;
- The Brokerage has in place, and has communicated to the Seller its policies and procedures to ensure that a designated agent does not communicate any information prejudicial to the interests of the Seller to other members of the Brokerage, including other designated agents;

THEREFORE THE SELLER AND THE BROKERAGE AGREE that the Brokerage, acting as a Designated Brokerage, will list the Seller’s property known as:

.....
 (the Property) and the Seller gives the Brokerage the exclusive right to offer for sale the Property for the price of Dollars (\$) plus applicable Goods and Services and other relevant taxes (and upon the terms, if any, set out in the Schedule hereto or at such other price and terms acceptable to the Seller) on the following terms:

1. **Term of Agreement:** This Agreement will commence at 11:59 p.m. on the [??] day of [month], [year] and will expire at 11:59 p.m. on the [??] day of [month], [year].
2. **Designated Agent:**
 - (i) The Brokerage will designate [name of agent(s)] (the Designated Agent) to serve as sole agent for the Seller and will designate other members of the Brokerage to serve as sole agents of any buyers also represented by the Brokerage who are interested in the Property.
 - (ii) If, for any reason, the Designated Agent ceases to be licensed with the Brokerage, the Brokerage will designate another member of the Brokerage to serve as sole agent for the Seller.
 - (iii) The Broker will not appoint another brokerage to act on behalf of the Seller as a sub-agent without the Seller’s prior written consent.
3. **Agency Relationship and Brokerage’s Responsibility:**
 - (i) The Seller agrees that an agency relationship will exist only with the Designated Agent and not with the Brokerage.
 - (ii) The Seller agrees that the Brokerage’s responsibilities will be limited to:
 - (a) treating the interests of both the Seller and potential buyers of the Property in an even-handed, objective and impartial manner;
 - (b) ensuring compliance by the Designated Agent with the Brokerage’s policies and procedures governing designated agents;
 - (c) supervising the Designated Agent and support staff to ensure the Designated Agent fulfills its mandate under this Agreement;
 - (d) holding all monies received by the Brokerage in trust in accordance with the provisions of the [name of Act].
4. **Brokerage’s and Designated Agent’s Undertaking:** The Brokerage and the Designated Agent undertake that they have not, and will not, disclose, any confidential information concerning the Seller to any other member of the Brokerage or other person unless:
 - (i) authorized by the Seller; or
 - (ii) required by law.
5. **No Attribution of Knowledge:** The Designated Agent’s knowledge will not be attributed to the Brokerage or to its designated agents representing buyers.

6. Designated Agent’s Mandate:

- 6.A:**
- (i) to use best efforts to market the Property and to promote the interests of the Seller;
 - (ii) at the earliest reasonable opportunity, to advise any buyer interested in the Property that the Designated Agent is the Seller’s agent;
 - (iii) subject to clause 16, to act as only the Seller’s agent;
 - (iv) to obey all lawful instructions of the Seller;
 - (v) to fulfill its fiduciary obligations of loyalty, confidentiality and of full disclosure of all conflicts of interest that may arise between the Seller’s interests and those of the Brokerage, the Designated Agent or buyers;
 - (vi) to exercise reasonable care and skill in the performance of this Agreement;
 - (vii) to assist the Seller in negotiating favourable terms and conditions with a buyer and in preparing and complying with
 - (viii) a legally binding agreement of purchase and sale for the Property;
 - (ix) to disclose to buyers all material latent defects affecting the Property known to the Designated Agent;
 - (x) to present, in a timely manner, all offers and counter-offers to and from the Seller even when the Property is already the subject of an agreement of purchase and sale;
 - (xi) to disclose, in a timely manner, to the Seller all relevant facts affecting the transaction known to the Designated Agent;
 - (xii) to keep the Seller fully informed regarding the progress of the transaction;
 - (xiii) to advise the Seller to obtain expert advice on matters of importance to the Seller;
 - (xiv) to comply with the provisions of the [name of Act] and its regulations, and the rules and by-laws of the [name of governing body].

6.B Additional Services: The Seller requests, and the Designated Agent agrees to provide, the following additional services [Seller to initial]:

- (i) to list the Property with the listing service(s) of the [name of Association]; YES NO
- (ii) to cooperate with brokerages working with buyers and to offer such brokerages a portion of the Remuneration to which the Brokerage may be entitled under clause 8.A in the amount of [amount] Dollars (\$number) or [amount] percent (number%) of that Remuneration; YES NO
- (iii) to obtain verification of mortgage, property and school taxes, improvement charges, tenancy information and other similar information with respect to the Property; YES NO
- (iv) to advertise the Property; YES NO
- (v) to place a “for sale” sign on the Property; YES NO
- (vi) to install a lock-box on the Property to provide access to authorized persons; YES NO
- (vii) to show the Property at times acceptable to the Seller and, if any, tenants; YES NO
- (viii) to arrange “open-house” showings of the Property; YES NO
- (ix) the services listed below:

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7. Use and Distribution of Information:

- (i) The Seller consents to the collection, use and disclosure of personal information by the Brokerage and Designated Agent for the purpose of this Agreement and such other use as is consistent with listing and marketing of the Property including, but not limited to:
 - (a) retaining and disclosing any listing and sales information, including price, which may be used by the Brokerage for any purpose relating to its business including conducting comparative analyses and disclosing such information to other persons such as appraisers and brokerages;
 - (b) providing to present and past customers and clients marketing materials, newsletters and other information that the Brokerage believes may be of interest to them.
- (ii) Subject to clause 6.B(i), the Seller consents to placement of the listing and sales information by the Brokerage into the database of the appropriate listing service and acknowledges that the database of the listing service is the property of the listing service.
- (iii) The Seller further acknowledges that the Brokerage and the listing service may:
 - (a) distribute the information to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others;
 - (b) compile, retain and publish any statistics including historical listing service data which may be used by the Brokerage and licensed listing service members to conduct comparative market analyses; and
 - (c) make such other use of the information as the listing service deems appropriate in connection with the listing, marketing and selling of real estate.

8. Brokerage’s Remuneration:

8.A Remuneration: The Seller will pay the Brokerage as Remuneration:

- (a) [amount] percent ([number] %) of the purchase price (initials); OR
 - (b) a flat fee of [amount] Dollars (\$ [number]) (initials); OR
 - (c) a fee for services as specified in writing, signed by the Seller, in the Annex attached to this Agreement (initials);
- (PLUS applicable Goods and Services Tax and any other taxes payable in respect of the Remuneration):

- (i) if, during the term of this Agreement, a legally enforceable agreement of purchase and sale, from whatever source obtained, is entered into between the Seller and a buyer (other than a buyer who has been specifically excluded in writing from this Agreement) AND the sale is completed OR the Seller, without legal justification, fails to complete the sale; OR
- (ii) if, within [number] days ([number] days) (the Hold-Over Period) of the expiration of this Agreement, a legally enforceable agreement of purchase and sale is entered into between the Seller and a buyer (other than a buyer who has been specifically excluded in writing from this Agreement) who was introduced to the Property or the Seller during the term of this Agreement, by whatever means or person and whether or not the Brokerage is the effective cause of such agreement of purchase and sale AND the sale is completed OR the Seller, without legal justification, fails to complete the sale; OR
- (iii) if, during the term of this Agreement, an unconditional offer to purchase the Property upon the terms specified in this Agreement is presented to the Seller which the Seller refuses to accept;

PROVIDED that under clause 8.A(ii) if, on the expiration of this Agreement, the Seller enters an exclusive seller brokerage agreement with another brokerage for the payment of remuneration the Seller's liability to the Brokerage will be reduced by the amount paid by the Seller under the subsequent exclusive seller brokerage agreement.

8.B Alternative Compensation: The Seller will pay the Brokerage Alternative Compensation, in the amounts specified below:

- (i) if, during the term of this Agreement or Hold-Over Period, a legally enforceable agreement of purchase and sale is entered into between the Seller and a buyer and the buyer, without legal justification, fails to complete the sale, the Seller will pay the Brokerage, from monies, if any, forfeited by the buyer or recovered by the Seller from the buyer, [percentage] of such amount or the Remuneration specified in clause 8.A, whichever is the less;
- (ii) if, during the term of this Agreement, the Seller should withdraw the Property from the market the Seller will reimburse the Brokerage for all reasonable expenses incurred in the performance of this Agreement prior to the date on which the Seller notifies the Brokerage in writing of the Seller's decision, provided that such reimbursement will not prejudice any other claim to remuneration to which the Brokerage may become entitled under clause 8 of this Agreement.

8.C Payment of Remuneration: The Seller will pay the Remuneration or Alternative Compensation owing to the Brokerage:

- (i) in the case of the Remuneration, on the date established for completion of the sale of the Property; or
- (ii) in the case of the Alternative Compensation, within [number] of days of receipt of a written demand of payment from the Brokerage.

8.D Deduction of Remuneration from Deposit and Proceeds of Sale:

- (i) The Seller authorizes the Brokerage, upon the date established for the completion of the sale, to deduct the Remuneration owed to the Brokerage from the deposit, if any, held by the Brokerage and will pay any balance of Remuneration owed in accordance with clause 8.C.
- (ii) The Seller irrevocably and unconditionally instructs any lawyer acting on behalf of the Seller to deduct from the

deposit and proceeds of sale, or moneys forfeited by or recovered from the buyer any Remuneration or Alternative Compensation that remains owing to the Brokerage after it has exercised its right, if any, under clause 8.D(i) and to pay such Remuneration or Alternative Compensation to the Brokerage.

8.E Limitation on Other Remuneration: The Brokerage and Designated Agent agree not to accept any other remuneration, whatever its form (including finder's fees, referral fees and gifts) and from whatever source (including the buyer, a mortgage lender, another brokerage or contractor), directly or indirectly related to its agency under this Agreement, unless, before accepting such remuneration, the Brokerage and Designated Agent have:

- (i) fully disclosed in writing to the Seller all relevant facts relating to the offer of remuneration including the maximum amount to be received; and
- (ii) obtained the Seller's written consent to the Brokerage or the Designated Agent receiving such remuneration.

9. Referral of Inquiries: The Seller will immediately advise the Designated Agent:

- (i) during the term of this Agreement, of all inquiries by, and to deliver to it all offers to purchase from, interested buyers or their representatives received by the Seller; and
- (ii) during the Hold-Over Period, of any offers presented to the Seller by, or made by the Seller to, a buyer introduced to the Seller during the term of this Agreement which offer is accepted by the Seller or a buyer as the case may be.

10. Seller's Warranty: The Seller warrants that:

- (i) the Seller has the authority to sell the property and to enter into this Agreement;
- (ii) spousal consent:
 - (c) for the sale of the Property has been obtained□ [initials]; OR
 - (d) is not necessary for the sale of the Property□ [initials];
- (iii) the Seller has disclosed to the Designated Agent all third party claims and interests in the Property known to the Seller;
- (iv) the Property is not currently the subject of any other exclusive seller brokerage agreement;
- (v) the Seller has disclosed to the Designated Agent all material latent defects affecting the Property known to the Seller;
- (vi) the Seller will provide the Designated Agent with all information necessary for the listing and marketing of the Property;
- (vii) all information provided to the Designated Agent is accurate to the best of the Seller's knowledge;
- (viii) the Seller will immediately advise the Designated Agent of any material change in the physical condition or status of the Property or in the information provided by the Seller.

11. Indemnification: The Seller will hold harmless and indemnify the Brokerage and the Designated Agent for any claims that may arise from their reasonable and good faith reliance on representations made and information provided by the Seller.

12. Miscellaneous Provisions: The Seller agrees that:

- (i) the Brokerage and the Designated Agent may represent other sellers and, subject to clause 16, buyers;
- (ii) the Brokerage and the Designated Agent cannot disclose to the Seller confidential information obtained through any other agency relationship;

- (iii) the Brokerage and the Designated Agent will not be obligated to seek additional offers to purchase while the Property is subject to an unconditional agreement of purchase and sale;
- (iv) if the Property is owned by a limited company, a sale of shares representing a controlling interest in the limited company will constitute a sale for the purposes of this Agreement;
- (v) this Agreement will be governed by the laws of the Province of [name] and the Seller, the Brokerage and the Designated Agent will submit to the jurisdiction of the Courts of the Province of [name] for the resolution of any disputes that may arise out of this Agreement.

13. Termination of this Agreement: Without prejudice to the acquired rights of the Seller or the Brokerage, this Agreement will terminate:

- (i) on the expiration of the term of this Agreement as specified in clause 1;
- (ii) on an earlier date than that specified in clause 1 if mutually agreed to by the Seller and the Brokerage in writing;
- (iii) on a completed sale of the Property prior to the expiration of the term of this Agreement;
- (iv) on the suspension or cancellation of the Brokerage’s license to trade in real estate;
- (v) on the bankruptcy or insolvency of the Brokerage or if it is in receivership;
- (vi) at the option of the non-defaulting party, exercised in writing, on a material breach of any of the terms of this Agreement by either the Seller or the Brokerage or the Designated Agent.

14. Brokerage's and Designated Agent’s Duties on Termination of the Agreement: Immediately on the termination of this agreement, the Brokerage and the Designated Agent will:

- (i) remove the Property as an active listing on any listing service;
- (ii) cease all marketing activities on behalf of the Seller;
- (ii) remove all signs from the Property;
- (iii) return all documents and other materials provided by the Seller.

15. Continuing Duties: The termination of this Agreement does not relieve the Brokerage and the Designated Agent from their duty:

- (i) to account for all monies received by the Brokerage;
- (ii) of confidentiality to the Seller.

16. Change in Representative Capacity of Designated Agent:

- (i) If the Designated Agent is also the agent of a buyer who becomes interested in the Property, the Designated Agent will:
 - (a) immediately advise the Seller and the buyer of all relevant facts and of the implications of concurrent representation;
 - (b) give the Seller and the buyer an opportunity to seek independent advice; and
 - (c) then seek their written informed consent to the Brokerage and the Designated Agent continuing to provide services to the Seller and the buyer as **Transaction Brokerage** on the terms and conditions specified in the Transaction Brokerage Agreement and in the [brochure] published by [name of Association].

- (ii) Should the Seller refuse to consent, the Designated Agent will continue to represent the party, be it the Seller or the buyer, with whom it first entered into an agency relationship and the Brokerage will offer:
 - (a) to designate another member of the Brokerage to represent the other party as sole agent;
 - (b) to treat the other party as a customer; or
 - (c) to refer the other party to another brokerage.

17. Additional Provisions:

.....

18. Definitions: For the purposes of this Agreement:

“**buyer**” means a person acquiring or attempting to acquire an interest in real estate by purchase;
 “**purchase**” includes an exchange, option, lease or other acquisition of an interest in real estate;
 “**sale**” includes an exchange, option, lease or other disposition of an interest in real estate;
 “**seller**” means a person disposing or attempting to dispose of an interest in real estate by sale.

19. This Agreement:

- (i) This Agreement includes, if signed by the Seller and attached to this Agreement, the following documents:
 -
 -
 -
 -
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- (ii) No amendment to the terms of this Agreement shall be effective unless it is in writing and signed by the Buyer and the Brokerage.
- (iii) If there is conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision will supersede the standard pre-set provision to the extent of such conflict or discrepancy.
- (iv) This Agreement will constitute the entire agreement between the Seller and Brokerage and the Designated Agent, and there are no representations, warranties, collateral agreements or conditions which affect this Agreement other than as expressed herein.
- (v) This Agreement will be read with all changes of number required by the context.

20. Seller’s Acknowledgement: The Seller, having received and read both this Agreement and the [name of brochure], and having been given the opportunity to request further information concerning this agreement and the representation relationships described in the [name of brochure], agrees that:

- (i) this Agreement accurately sets out the terms agreed to by the Seller, the Brokerage and the Designated Agent; and
- (ii) the Seller has received a true copy of this Agreement.

BUYER/SELLER INFORMATION BROCHURE

INTRODUCTION:

The purpose of this brochure is to provide general information to buyers and sellers on issues that should be considered in the purchase and sale of residential real estate. For further information buyers and sellers may consult the [*name of publications*] available at [*web address of regulatory organization or by contacting address of regulatory organization*].

However, this brochure and other material provided by a Brokerage or available on the website **is not a substitute for expert advice** from an appropriate professional.

REPRESENTATION RELATIONSHIPS:

If you have sought the assistance of a real estate brokerage representative you should have already discussed with them the different types of relationships that you can establish with the brokerage. These relationships include:

- Designated agency;
- Sole agency;
- Transaction brokerage;
- Customer status.

The brokerage representative should have given you a brochure that provides you with basic information concerning your rights and responsibilities and those of a brokerage representative in each of these relationships. A brokerage representative's obligations to you will vary depending on the relationship chosen. The brokerage representative will discuss the various relationships with you and answer any questions you may have before you choose the relationship you wish to enter into. It is for you to choose the relationship which best suits your particular needs and you should signify your choice in a document signed by you. Further information on the different relationships is provided at [*web address of regulatory organization or by contacting address of regulatory organization*].

AGREEMENT OF PURCHASE AND SALE:

The Agreement of Purchase and Sale (sometimes referred to as the “interim agreement,” “purchase contract” or “offer”) is the standard form document used to set out the terms and conditions of a transaction – the contract - between a buyer and seller. Potential buyers and sellers, whether clients or customers, should ask for a copy of this document so they can become familiar with its basic clauses. These standard form agreements may be modified to reflect the particular requirements and concerns of buyers and sellers. Accordingly, familiarity with the clauses will help them:

- be better equipped to understand the process of negotiating a purchase or sale of a property;
- know what questions to ask their brokerage or legal representative;
- better appreciate what is involved in the preparation of an offer or acceptance.

CONDITION OF THE PROPERTY:

Caveat emptor is a Latin expression meaning, "let the buyer beware" - that is, buyers must exercise great care when purchasing a property. It is the responsibility of buyers to take the necessary steps to satisfy themselves about such matters as:

- the condition of a property;
- its suitability for their particular needs;
- ensuring their particular concerns are appropriately reflected in the terms of the offers they make.

Sellers, on the other hand, cannot conceal defects and can not mislead buyers about the condition or other attributes of their properties; they must answer honestly questions that they may be asked. In addition, sellers must also disclose to buyers any “**material latent defects**” known to them that affect their properties.

- A “**latent** defect” is one that is not discoverable through the exercise of reasonable vigilance during an inspection of a property;
- A “**material** defect” is one that reasonable persons would agree is a significant shortcoming in a property in light of the particular circumstances of the transaction.

It is not possible to provide a comprehensive list of defects that qualify as “material latent defects,” but they include the following categories of defects:

- defects that render a property dangerous or potentially dangerous to the occupants;
- defects that render a property unfit for habitation;
- defects that render a property unfit for the purpose for which the buyer is acquiring it, at least where the buyer has made this purpose known to the seller or seller’s brokerage;

and may include:

- defects that would involve great expense to remedy;
- local authority and similar notices received by the seller that prejudicially affect a property; and
- lack of appropriate municipal building and other permits for a property.

Prudent buyers should, for example:

- ask specific questions concerning such matters as the structure of the property, the roof system, any water seepage, the condition of mechanical systems and other equipment and any notices from a local or municipal authority;
- carefully analyze the condition of each of the components of the property;
- verify the condition of a component of the property where the buyer may be of the opinion that a problem may exist;
- enlist the services of a professional inspector to assist in determining the condition of a property;
- make their offers to sellers conditional, for example, on a satisfactory inspection of the property by a qualified individual.

INSPECTION & PROPERTY REPORTS:

There are many types of inspections and reports available that focus on different aspects of a property that buyers may wish to have prepared by an appropriately qualified individual, usually, for a fee. The information provided in these reports allows buyers to make better informed decisions. Below is a list of the more common reports and inspections available to buyers.

Appraisal Report: provides guidance about the value of a property and may be required by mortgage companies or obtained by buyers who want to establish the value of a property.

Electrical Inspection: an inspection of the electrical system and components of a property which will identify the deficiencies, if any.

Engineers Report: provides information on the structural integrity of any buildings.

Environmental Report: assists in determining if there are any environmental problems with a property.

Furnace and Chimney Inspection: assists in determining if the furnace and the chimney meet current safety and insurance standards.

Gas Line Inspection: undertaken by a natural gas utility, determines the integrity of gas lines and if any improvements to the property have been built over the gas service lines requiring their relocation.

Home Inspection: provides information on the physical condition of a property.

Municipal Compliance Report: from the municipality provides information relating to (non)compliance with municipal bylaws and regulations, or to waivers granted by the municipality.

Plumbing Inspection: an inspection of the plumbing and drainage components of a property outlining any deficiencies.

Property Condition Disclosure Statement: a statement provided by a seller concerning the condition of a property.

Real Property Report/Surveyors Certificate: a report showing the property boundaries and the location of all improvements in relationship to those boundaries.

Septic/Sewer Inspection: determines the condition of the sewer/septic system.

Title Search: ascertains the ownership of land and whether there are any easements, restrictive covenants, leases, mortgages and encumbrances and charges registered against the land.

Water Quality/Quantity Test: determines the recovery rate and quality of the water supply.

Wood Stove/Fireplace Inspection: undertaken to determine if the wood stove or fireplace meets insurance requirements.

In addition, buyers may request other inspections/reports concerning specific components of a property such as the roof, air conditioner, etc.

Brokerage representatives, when instructed by their clients, will both make an offer conditional on receipt and approval of satisfactory inspections/reports by their clients, and allow for a reasonable time for their clients to make an informed decision.

OFFERS, COUNTER-OFFERS & ACCEPTANCES:

When buyers have located a property they wish to purchase it is customary for them, through the brokerage representative, to make an offer on a standard form Agreement of Purchase and Sale to the seller. (However, there is nothing to prevent the reverse from happening - a seller may make an offer to a buyer - but for present purposes it is assumed the offer originates with the buyer.) The offer may be accepted by the seller or modified and returned to the buyer as a counter-offer. This exchange of counter-offers may go on until the buyer or seller accepts the terms proposed by the other or withdraws from the negotiations. Where buyers and sellers are working with brokerage representatives, the exchange of offers, counter-offers and acceptances is conducted through their representatives.

However, buyers and sellers must understand that their brokerage representatives:

- cannot make or accept an offer on behalf of a buyer or seller unless they have been clearly authorised to do so;
- are their agents for the purposes of communicating and receiving notice of offers, counter-offers and acceptances unless this authority has been clearly withheld.

Buyers and sellers need to be aware that, in general (there are exceptions to the following):

- an offer or counter-offer may be withdrawn at any time before it is accepted even if it is said to be irrevocable for a certain time;
- the withdrawal of an offer or counter-offer is only effective once its withdrawal is communicated to the party to whom it was made or to their duly authorised agent;
- an acceptance of an offer or counter-offer is only effective once the acceptance is communicated to the party who made the offer or counter-offer or to their duly authorised agent;
- an acceptance must be communicated in the manner required and by the time prescribed, if any, by the offer or counter-offer;

- when an offer or counter-offer has been accepted there is a binding contract between buyer and seller, despite the fact performance of the contract may be conditional on certain conditions having to be satisfied (for example, the buyer being approved for a mortgage).

MULTIPLE OFFERS:

Particularly in an active real estate market, sellers may receive multiple offers for their property. Buyers and sellers should have an understanding of the process they may encounter if a multiple offer situation arises.

A seller's brokerage representative must communicate all offers to the seller as they are received. However, there are no rules that govern the order in which the seller must respond to the multiple offers; nor is the seller obliged to accept the highest offer. It is for the seller to decide which, if any, offer is acceptable, to which, if any, the seller wants to make a counter-offer, or whether all offers should be rejected.

Moreover, in general, neither the seller nor the seller's brokerage representative is under any obligation to disclose to a buyer that other buyers have also made offers for or are interested in the seller's property. Nevertheless, such disclosure is generally in the seller's best interests and will be made after the seller's brokerage representative and seller have discussed the issue. Disclosure, when made, may be merely of the existence of other offers or may include the terms of such offers. It may not always be in a seller's interests for the brokerage representative to conduct an "auction" of the seller's property.

If buyers' brokerage representatives learn of competing offers this, including the details of any such offers if they are known, must be disclosed to buyers so they can determine what will be their next step.

Finally, a seller cannot unconditionally accept more than one offer at a time. Nevertheless, a seller may unconditionally accept one offer, while making a counter-offer to a second buyer agreeing to sell to such buyer if the sale to the first buyer does not go through. It is for the second buyer to decide whether such a condition is acceptable.

CONDITIONAL OFFERS:

Buyers, in addition to making their offers conditional on the receipt of satisfactory inspections/reports, commonly insert other conditions to meet their particular needs. Such conditions include, but are not limited to, obtaining:

- satisfactory financing;
- a satisfactory inspection of the property (or specific components of the property);
- a buyer to purchase their current property;
- a building or renovation permit;
- a rezoning of the property;
- the approval of a third party to the transaction (e.g. a parent, lawyer, employer, etc.);
- confirmation of satisfactory tenancy information;
- satisfactory information concerning a mortgage to be assumed;
- satisfactory insurance for the property.

AUTHORITY TO CONTRACT:

Persons who enter into:

- representation agreements with brokerages;
- agreements of purchase and sale of property; or
- other contractual arrangements;

must have the authority to enter into such contracts. If they do not, they may incur personal liability for misrepresenting their authority.

VERBAL CONTRACTS:

Buyers and sellers should be aware that, while verbal contracts of purchase and sale are not prohibited by the law they are not, with rare exceptions, enforceable in the courts. Accordingly, it is wise for buyers and sellers to communicate all offers, counter-offers, withdrawals and acceptances in writing to minimise the risk of misunderstandings and disappointment at a later date.

DEPOSITS:

There is no rule of law that either requires buyers to pay a deposit on making an offer or that determines the amount of a deposit. However, in practice, sellers are often not prepared to consider offers that are not accompanied by a deposit. A deposit serves two purposes: it will be credited towards the price the buyer agrees to pay; and it is a clear signal that a buyer is serious about purchasing the seller's property because, once the seller accepts the buyer's offer, the seller may lose other potential buyers. Sellers generally have the right to retain the deposit when buyers fail, without a valid reason, to complete the transaction.

PROPERTY INSURANCE:

It sometimes happens (fortunately not frequently) that, through no fault of the seller, a property can suffer damage from accidental causes (for example, fire, flooding, high winds, etc) between the date the contract is entered into by a buyer and a seller and the date set for completion of the transaction. An important question that must be considered before a contract is entered into is: who bears the risk of such accidental damage once there is a binding contract? At law it is presumed that, once a binding contract is entered into, the property is "at the risk of the buyer." However, this presumption is often completely or partly reversed by a clause in the Agreement of Purchase and Sale. Accordingly, it is important for potential buyers and sellers to determine:

- whether the Agreement of Purchase and Sale contains a "risks clause" - if there is no clause the risks according to the law are the responsibility of buyers;
- if there is a "risks clause," to whom are the risks allocated until completion of the transaction - buyers, sellers or both?;
- what property insurance coverage is needed by buyers and sellers to adequately protect themselves against any risks for which they have responsibility.

Even if the risks are allocated to buyers, prudent sellers will retain their property insurance until the transaction is completed to protect their interest and investment in the property in case the sale does not go through.

GST & OTHER TAXES:

Buyers and sellers need be aware that the purchase and sale of property, including residential property, may have tax implications. Prudent buyers and sellers should seek appropriate advice as to the tax implications, if any, of a transaction before they enter into a contract.