CANADIAN REGULATORS GROUP

Supplementary Paper No. 3

REVIEW OF INDUSTRY STANDARD FORM REPRESENTATION AGREEMENTS

WILLIAM FOSTER
FACULTY OF LAW
MCGILL UNIVERSITY

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1. INTRODUCTION

The purpose of this paper is essentially two-fold. First, it provides a brief overview of the duties inherent in the law of agency and highlights those that appear to be of particular concern to the representation relationships established between licensees (and their brokerages) and sellers and buyers.

Second, it provides a review and analysis of the provisions of the standard "agency" forms adopted by certain provincial real estate councils to determine to what extent they address issues of common concern or their provisions themselves raise concerns or questions. Two points must here be stressed:

- only the forms developed by provincial industry councils available on the Agency Task Force (ATF) members web-site have been included in this analysis (see below, Table 1: Standard Forms Reviewed); and
- no attempt has been made to analyze all provisions in every form provided; rather, the focus has been on those provisions that treat or raise issues that are, or should be, of concern to industry members.

Table 1: Standard Forms Reviewed

FORMS	JURISDICTION
Listing Agreement	AB, BC, MB, NS, ON, SK
Buyer Agency Agreement	BC, NS, ON, SK
(Limited) Dual Agency Agreement	AB, BC, NS, SK [ON]
Sub-Agency Agreement	BC
Customer Status Disclosure	AB
Confirmation of Representation	ON
Commission/Fee Agreement	BC, ON

Copies of these forms are attached in the Schedules (A through D) to this report.

2. OVERVIEW OF DUTIES INHERENT IN AGENCY RELATIONSHIPS

Table 2, below, summarizes the duties owed licensees in the three basic relationships that are commonly encountered by members of the real estate industry in Canada. These three relationships are:

- Licensee-client relationships (paradigm agency relationships) in which licensees (and their brokerages) act as agents of clients (whether they be sellers or buyers) and to whom the full range of agency duties are owed;
- Licensee-customer relationships in which the licensees have no agency relationship with customers (who are considered third parties) and to whom few duties are owed; and
- Dual agency relationships in which licensees (and/or their brokerages) have as clients both sellers and buyers in transactions; a relationship that is strictly circumscribed by the

law of agency and, when effectively established, demands a modification in the duties normally owed by licensees to their clients.

Table 2: Duties of Agents

DUTIES OF AGENT	CLIENT	DUAL AGENCY	CUSTOMER
I. General Obligations			
1. Perform mandate	√	√	
2. Obey instructions	√		
3. Act in person	√	√	
4. Honesty and fairness	√	√	√
5. Exercise care and skill	√	√	√
6. Disclose information to client	√	**(?)**	
7. Indemnify principal	√	√	
II. Fiduciary Obligations			
8. Loyalty	√		
9. Avoid all conflicts of interest	√		
10. Not act for both parties	√		
11. Not make secret profit	√	√	
12. Not buy client's property	√	√	
13. Not sell own property to client	√	√	
14. Not misuse confidential information	√	√	
15. Disclose all conflicts of interest	√	√	
III. Statutory Obligations			
16. To account	√	√	√
17. Misc. statutory duties	√	√	√

The existence of three common relationships, each marked by a different set of obligations, gives rise to a number of concerns.

First, there is the matter of disclosure of representative capacity. Given that licensees' relationships with persons interested in buying or selling property may take various forms involving different obligations, one issue of concern is the need for all involved in real estate transactions to be aware of the specific role that licensees are playing with respect to sellers and buyers to avoid misunderstanding and litigation. Consequently, one of the issues of concern is the extent to which the standard forms adequately disclose to clients and customers the representative capacity in which licensees are acting in their dealings with them? And, in those jurisdictions whose regulatory frameworks mandate disclosure by licensees of their representative capacity, do their standard forms adequately accomplish this?

Second, inherent in agency relationships, is the obligation of licensees to perform the mandate which they have accepted from their clients (see Table 2, #1, above). This prompts the question: what is it that licensees promise to do when they enter into listing agreements or buyer agency agreements? In particular, there appear to be some uncertainty as to what a "listing" entails: what precisely is the mandate of listing licensees?

Third, in light of licensees' duties (or, at least, those of their brokerages) to personally perform their mandates (see Table 2, # 3, above) unless their clients instruct otherwise, it must be determined whether authority to use the services of co-operating brokers is adequately addressed in the standard forms. Moreover, given that it is still accepted in some circles that co-operating brokers may be sub-agents of listing licensees, it is also necessary to ascertain the nature of the relationship, if any, that is envisaged by these agreements between listing licensees and co-operating licensees. Do the relevant provisions, attempt to pre-empt the potential argument that co-operating licensees are in law dual agents?

Fourth, the fundamental fiduciary obligations of agents of utmost loyalty (Table 2, # 8) and, in the absence of their clients' timely, fully informed and voluntary consent, to avoid all conflicts of interest (whatever form they may take) (Table 2, ## 9-15), continue to be the source of a number of industry concerns. Of particular concern are the issues of:

- dual agency (in its various emanations: single licensee dual agency and "in-firm" dual agency);
- receipt of remuneration from customers and other third parties; and
- disclosure to customers of information concerning client-sellers' properties.

While a number of these conflict of interest situations are addressed by some of the standard forms, it still must be asked: are they adequately and completely addressed?

Finally, a number of other issues are raised by particular clauses in some of the standard forms (for example, provisions dealing with commission, non-disclosure of competing offers, and the like). These have been identified and commented as they also are relevant to the relationships encountered by licensees.

All of the foregoing matters are addressed, as appropriate, in relation to the various standard forms listed in Table 2. More particularly, in the ensuing discussion regard is had:

- first, in Section 3, to the standard form listing agreements (reproduced in Schedule A);
- second, in Section 4, to the standard form buyer agency agreements (reproduced in Schedule B);
- third, in Section 5, to the standard form dual agency forms (reproduced in Schedule C); and
- fourth, in Section 6, to a number of miscellaneous forms relevant to representation relationships (reproduced in Schedule D).

3. LISTING AGREEMENTS

3.1 Definition

Black's Law Dictionary defines "listing" as "an agreement between a property owner and an agent, whereby the agent agrees to try and secure a buyer … for a specific property at a certain price and terms in return for a fee or commission."

Definitions of the term found in the regulatory frameworks of various jurisdictions (see Licensee Duties within the Real Estate Industry Regulatory Frameworks, Schedule A-2) are essentially similar:

> "any agreement or arrangement, whether written or oral, authorizing a person, for a reward or hope or promise thereof, to negotiate a sale, lease or other disposition of real estate" (Manitoba)
>
> "an agency agreement between a seller and a brokerage to market the seller's property" (Saskatchewan, Nova Scotia).

3.2 Licensees' Mandates

It will be recalled that a primary obligation of agents, thus of licensees acting in a representative capacity, is to perform their mandates. The definitions of listing, above, tell us what a licensee's general mandate is upon entering into such an agreement: namely, "to try and secure a buyer," "to negotiate a sale, lease or other disposition" and "to market the seller's property." However, they tell us very little as to what precisely licensees undertake to do on behalf of their client under a listing agreement.

Nor, with the exception of Quebec, are the regulatory frameworks more informative being concerned essentially only with certain formal requirements of listing (or representation) agreements. While the regulatory frameworks impose on licensees a range of obligations these are owed to clients generally (be they sellers or buyers) and are not specific to licensees appointed under listing agreements. Quebec, on the other hand, specifies in some detail the obligations of licensees under exclusive and, to a lesser extent, non-exclusive listing agreements affecting residential properties (see Annex A).

Thus, one has to turn to the listing agreements themselves to try to ascertain what it is that licensees undertake to do for their client-sellers. In such agreements one commonly finds two categories of licensee obligations:

- general agency obligations; and
- obligations specific to listing licensees.

3.2.1 General agency obligations

First, listing agreements stipulate that licensees:

- are obligated "to protect and promote [the seller's] interests" (Alberta, cl. 17.2);
- owe the duties of loyalty, obedience, confidentiality, reasonable care and skill, full disclosure and full accounting (Alberta, cl. 17.2; Nova Scotia, cl. 15; Saskatchewan, cl. 7.C);
- will act only as agent for the seller (unless the seller consents to a limited dual agency) (British Columbia, cl. 7.A & C; Manitoba, cl. 6.A & C; Nova Scotia, cl. 15; Saskatchewan, cl. 7.A);
- will not "accept remuneration from [a] buyer without the knowledge and consent of the seller" (British Columbia, cl. 7.A & C; Manitoba, cl. 6.A & C; Nova Scotia, cl. 15; Saskatchewan, cl. 7.D).

These obligations are not particular to industry members acting pursuant to a listing agreement; they are inherent in all agency relations, including buyer agency relationships, unless a particular agreement stipulates to the contrary. Consequently, they cannot be said to be the hallmarks of a listing agreement.

3.2.2 Obligations specific to listing agreements:

Thus, the question still remains, what licensee duties are special to listings? That is, what are licensees required to do, and not merely authorised to do. Some guidance, albeit meagre, is provided by standard form listings. For example:

- under the Ontario listing the licensee only appears to undertake to list the property of the seller (what this entails is not elaborated upon in the agreement);
- the British Columbia (cl. 7.B) and Nova Scotia (cl. 15) listings merely state that the licensee agrees to provide information about the property to co-operating agents, though the latter makes such disclosure subject to the consent of the seller;
- the Saskatchewan listing (cl. 7.B & E) provides that the licensee agrees to:
  - provide information about the property to buyers' agents;
  - assist in obtaining a buyer for the property; and
  - to that end will offer to remunerate the buyer's agent;
- finally, the Alberta listing (cl. 11) stipulates that the licensee will:
  - make "reasonable efforts to find a buyer;"
  - market the property through MLS;
  - not discourage industry members who are not members of the Board from selling the property; and
  - pay any remuneration due other licensees.

It is evident that little uniformity exists among the standard form listing agreements as to what licensees expressly undertake to do. Thus, they provide no greater guidance as to the hallmarks of a "listing" than do the definitions referred to above.

It may be noted that in all listing agreements sellers also "authorize" licensees to undertake various acts; but the very nature of an "authority" is to confer on licensees the discretion, not the duty, to perform them. It may be the implicit understanding of the sellers and licensees that the latter will, in fact, perform them. However, the mere failure on the part of licensees to perform such acts will not, in and of itself, constitute a breach of their agreement with the sellers. Rather, to hold licensees accountable in such situations, sellers would have to establish that the reasonably competent and diligent licensees would perform such acts and, thus, the failure of their licensees to perform constitutes negligence on their part.

It must also be noted that, in some instances, acts authorized by sellers, if undertaken by licensees in the absence of such authorization, would constitute a breach by the latter of a basic agency obligation. (These acts, where relevant, are discussed further below.) Moreover, it must be observed that the listing agreements reviewed impose a greater range of specific obligations on sellers (and correlative rights on licensees), the majority of which appear to be directed either to ensuring that licensees are remunerated by their clients, or held harmless by them in the event of a possible action by a customer.

In conclusion, it must be asked: what do reasonable and competent industry members perceive to be their obligations on accepting a listing of property? Are these obligations adequately reflected in the listing agreements? If not, should they be reflected in these agreements or, at the very least, in other material that is provided potential sellers before they enter into such agreements? After all, sellers should be entitled to know, with some precision, what services licensees will provide them.

3.3 Use of Co-operating Licensees

It will be recalled that an obligation imposed on licensees by the law of agency is that of personal performance of their mandate under listing agreements. Personal performance does not necessarily mean performance by the individual licensee who negotiates the listing with the seller. However, it does mean performance by employees of the brokerage with whom the seller has entered into the listing agreement.

Prima facie, therefore, use of co-operating licensees under the local MLS, especially if they are to act as sub-agents of the seller, is prohibited without sellers' prior authorization. This is recognized in all listing agreements, which provide for sellers' consent to the utilization of MLS arrangements (Alberta, cl. 16.6; British Columbia, cl. 4; Manitoba, cl. 4; Nova Scotia, cl. 4; Ontario, cl. 3; Saskatchewan, cl. 4).

However, as already mentioned, the use of MLS arrangements may give rise to dual agency problems in which co-operating licensees are seen as representing both buyers and sellers. While, as noted in the first report to the ATF (section 4.3), recent case law suggests that a mere listing under an MLS arrangement will not necessarily lead to co-operating licensees being viewed as sub-agents of sellers. Nevertheless, to further minimize the risks of dual agency, it is suggested, that it is important that the role of co-operating licensees be clearly articulated in the listing agreement.

This is best accomplished in British Columbia listing (cl. 4.A) which provides that the listing licensee may

> "cooperate with other agents acting for a prospective buyer or, with the written consent of the seller, as a sub-agent of the listing agent."

The Saskatchewan (cl. 4.A) and Manitoba (cl. 7.D) provisions are even more straightforward, simply declaring that listing licensees will cooperate with other brokerages who will act as buyers' brokerages. The sub-agency option for co-operating licensees is not even contemplated by the listing agreements. Thus, for listing licensees to appoint sub-agents, it is implicit that the consent of their clients would have to be obtained.

The Ontario provision (cl. 3) that deals with the role of co-operating licensees is not as neat as the foregoing. It provides that the seller

> understands that the co-operating broker may be acting as either as sub-agent of the listing broker or as a buyer's agent representing the interests of the buyer, and … understand[s] that unless … otherwise informed, the co-operating broker is representing the interests of the buyer.

This clause is not as effective as that of the British Columbia listing as it is somewhat convoluted. Moreover, it suggests that the consent of the seller is not required for a sub-agency to arise; the matter appears to be left in the hands of the licensees who will determine the nature of the co-operating licensee's role and simply "inform" the seller.

The Alberta and Nova Scotia listings are silent as to the relationship established between listing and co-operating licensees; although the Nova Scotia agreement (cl. 15) states that licensees may only act as sub-agents with the consent of the seller. This latter provision leaves the question

begging (particularly as the consent need not be in writing): is such consent to be inferred from the authorization to use the MLS?

Of these approaches to the treatment of the role of co-operating licensees, that of British Columbia is to be preferred as it expressly deals with the sub-agency issue in the context of co-operating licensees: co-operating licensees represent buyers unless a sub-agency relationship is expressly agreed to in writing by the seller. This approach clearly notifies sellers of the possibility of sub-agency which can only be established with the agreement and awareness of all involved.

Finally, all listing agreements contain provisions authorizing listing licensees to remunerate co-operating licensees and requiring that the amount of such remuneration to be disclosed to the seller (Alberta, cl. 6.2; British Columbia, cl. 5.C; Manitoba, cl. 5.C; Nova Scotia, cl. 5(a); Ontario, cl. 3; Saskatchewan, cl. 3). These provisions are necessary to avoid sellers questioning why they, through their representative, are remunerating buyers' licensees which, logically, should be done by the buyers themselves. After all, if sellers' licensees are prepared to part with a portion of their remuneration to buyers' licensees, sellers, not unreasonably, may ask their licensees to lower their rate of commission and let buyers' licensees look to their buyer-clients for their remuneration.

3.4 Licensee Remuneration

All listing agreements treat in some detail the circumstances under which licensees will be entitled to remuneration. These provisions, with few exceptions, are un-remarkable having been in common use for a number of years. A number of matters, however, call for some comment.

3.4.1 Sellers' refusal to contract

First, is the clause, found in the Alberta (cl. 10.1(d)) listing agreement which stipulates that remuneration is payable by the seller where

> "a buyer is found who is willing and able to complete the sale upon the terms outlined in [the listing] but you [the seller] refuse to sign the purchase contract."

Similar clauses are to be found in the British Columbia (cl. 5.A.iii) and Saskatchewan (cl 5.A) listing agreements. In addition, in the British Columbia agreement (cl. 8.B) the seller agrees to accept

> "[an] offer made during the term of this contract by a person ready, willing and able to purchase on the terms set out in this contract."

Such clauses make no allowance for sellers who withdraw their properties from the market for "reasonable cause" (for example, the employment transfer is cancelled; change in family circumstances dictates a change in plans; and the like). Thus, some would view them as somewhat harsh for they leave sellers, who reasonably take their property off the market, at the mercy of their licensees' brokerages who may, or may not, relieve them from their liability under such a clause. It is suggested that such clauses do not conform to the common understanding of persons who deal with industry members and would need to be drawn to the attention of (at least lay) sellers to be effective.

Moreover, these clauses seem to lack the element of "fairness" that is to be expected of licensees in their dealings with clients according to some regulatory frameworks. Consequently, the clause in the Manitoba listing agreement (cl. 5.B.i), which deals with the same issue, is to be preferred. It states that the seller is obligated to pay the licensees remuneration

> "if a buyer presents an unconditional offer to purchase … upon the terms outlined in this listing contract but the seller does not accept the offer to purchase without cause …."

It may be noted that the Ontario listing agreement (cl. 3) is implicitly of the same effect as the Alberta provision, whereas the Nova Scotia agreement is silent on the matter.

3.4.2 Indefinite duration of liability for remuneration

Second, a number of listing agreements contain clauses, in addition to the traditional "over-holding" clause, that appear to be designed to protect licensees' rights to remuneration after both the agreement and the period stipulated in the "over-holding" clause have expired.

Thus, the British Columbia agreement (cl. 5.A.ii.b) stipulates that the seller will pay the licensee's remuneration on a legally enforceable contract being entered into by the seller and the buyer

> "at any time after the period described in [the over-holding clause] where the efforts of the listing agent or co-operating agent were an effective cause."

Similar clauses are to be found in the Manitoba (cl. 5.A.iii) and Saskatchewan (cl. 5.A.ii) agreements.

It can be argued that, unlike over-holding clauses, such provisions, in their effect, violate the spirit, if not the letter, of the statutory requirement that all listings clearly signify the date on which they will expire. They expose sellers to potential liability for remuneration for an indeterminate period of time as, notwithstanding the expiry of both the listing agreement and the over-holding period, sellers' liability persists. This issue does not yet appear to have been raised in litigation but, on their face, these clauses inject considerable uncertainty as to the effective date of expiration of these agreements.

3.4.3 Remuneration of co-operating licensees

In all listing agreements sellers either confer on listing licensees the authority to remunerate co-operating licensees, or are advised that the former will pay any remuneration due the latter. No agreement advises sellers of the other available option, namely, that co-operating licensees will look to their buyer-clients for their remuneration. Nor, as discussed immediately below, do these agreements deal with the quantum of listing licensees' remuneration where buyers in fact remunerate their own licensees. Given the obligation of licensees always to act in the best interests of their clients, it would seem that the first of these matters, at least, should be expressly drawn to their seller-clients' attention. After all, why should sellers subsidize buyers' transaction costs, especially where the co-operating licensees represent buyers.

If, however, co-operating licensees are appointed, and act, as sub-agents of sellers, as was traditionally the case, then it is only reasonable that their remuneration be borne by sellers.

3.4.4 Quantum of remuneration where buyer compensates own licensee

Third, while all the listing agreements specifically identify the amount or rate of remuneration listing licensees will receive, they are silent as to what "discount, if any, is to be offered sellers by their licensees where, in fact, buyer licensees are directly compensated by their own clients. Are selling licensees entitled to the full remuneration initially agreed to by their sellers? The agreements suggest an affirmative answer to this question.

As discussed below (see Section 3.4.1), this matter is addressed in some buyer agency agreements. It would, thus, seem only appropriate for it also to be addressed in listing agreements.

It may be noted that this issue, and that immediately above, flow from the shift in the role of co-operating licensees, the shift from sub-agency to "presumed" or actual buyer agency. This shift has, or should have, implications for licensee remuneration and its treatment in representation agreements.

3.4.5 Commission not "fixed by law"

Finally, a clause unique to the Alberta listing agreement needs to be mentioned. This clause (cl. 16.2) provides:

> "The amount of the commission and alternate compensation are not fixed by law."

While one may appreciate the intent behind such a clause, it begs the question: are they "fixed" by other means and, thus, do they violate any anti-competition norms? Indeed, it can be asked whether any such declaration is meaningful as the matter addressed is one of fact: either remuneration rates are fixed or they are not.

3.5 Disclosure of Information Concerning the Property

It will be recalled that in the first report presented to the ATF (section 6.3), the use of property disclosure statements by selling licensees was identified as a potential problem in that, to the extent that these statements disclose to buyers information that sellers are not legally obliged to disclose, it could be questioned whether, in providing such statements to buyers and their licensees, sellers' licensees were acting in their clients' best interests.

However, in that report it was also indicated that conduct that amounted to a breach of a fiduciary obligation was permitted where it was undertaken with the clients fully informed consent. To this end, all listing agreements contain provisions whereby sellers authorize their licensees passing to buyers information concerning their properties.

Thus, the British Columbia listing (cl. 4.B & 9.A) explicitly authorizes the licensee to publish the Sellers' Property Disclosure Statement, and the seller acknowledges that "information relating to the property may be disclosed to persons interested in the property."

The Manitoba and Saskatchewan listings (cl. 4.B and cl. 4.A, respectively) are similar. They authorize the licensee to publish the Sellers' Property Disclosure Statement (when attached and signed by the seller). Additionally, the Saskatchewan agreement (cl. 9.F) also has the seller acknowledge and agree that the licensee "shall disclose to the buyer all material defects about the physical condition of the property known to the" licensee.

The Alberta listing (cl. 13.2 & 16.5(b)) asks the seller to warrant the accuracy of certain information relating to the property and authorizes the licensee to

> "to use, disclose and retain all personal information provided for all purposes relating to the listing and marketing of the property including … disclosing property information to prospective buyers."

The Ontario listing (cl. 11) is similar in effect to that of Alberta..

Finally, the Nova Scotia provision (cl. 16) is very general, simply stipulating that the seller authorizes the licensee "to use, disclose and retain information provided for purposes relating to the listing and marketing of the property."

While it can be argued that, by these clauses, sellers have consented to their licensees disclosing information concerning their properties to buyers and their licensees, the questions remains as to whether: first, sellers are truly consenting to the disclosure of all defects affecting their properties?; and, second, does sellers' consent to complete disclosure qualify as fully informed and voluntary consent?

With respect to the first question, given the generality of the Alberta, Ontario and Nova Scotia provisions, it is arguable that sellers are not conferring on licensees any greater authority of disclosure than that conferred by law. That is, licensees authority of disclosure is co-extensive with sellers' duty of disclosure, namely, to disclose all "material defects" as that term is understood in law.

Concerning the second question, for sellers' consent to be fully informed they would have to be aware of the information that is being disclosed and, where relevant (for example in the case of patent and non-material latent, defects), that they and their licensees are under no legal obligation to disclose such information. Without such knowledge not only is their consent not informed, arguably, it would not even be voluntary as the sellers may be operating under the mistaken belief that they (and their licensees) are legally obliged to disclose all such information to prospective buyers. And, while it is true that "ignorance of the law is generally no defence," this principle has little application where persons have employed professionals to advise them in a transaction.

Indeed, the only provision that appears to reflect the law, and does not expose licensees to allegations that they are not acting in their sellers' best interests, is that of Saskatchewan whereby the seller acknowledges and agrees that the licensee "shall disclose to the buyer *all material defects* about the physical condition of the property known to the" licensee (emphasis added). This provision, it is suggested, constrains the authority of sellers' licensees to disclose information to material information, that is, information which by law is required to be disclosed by sellers (and, by extension, their licensees) to buyers. (What constitutes material information has been canvassed in some detail in the first report to the ATF: see section 6.2.)

3.6 Remuneration from Third Parties

It is a basic principle of agency law that agents may only be remunerated by their principal. For agents to accept any remuneration from a third party is a violation of their fiduciary obligations - unless they have their principals' fully informed, timely and voluntary consent to such a course

of action. To this end, a number of listing agreements (British Columbia, cl. 7.A & C; Manitoba, cl. 6.A & C; Nova Scotia, cl. 15; Saskatchewan, cl. 7.D) explicitly provide that licensees will not "accept remuneration from [a] buyer without the knowledge and consent of the seller."

In addition, the listing agreements of Nova Scotia (cl. 10) and Ontario (cl. 9) expressly provide that should listing or co-operating licensees assist buyers in arranging mortgages they may receive additional finder's fees from the lenders. Further, the Nova Scotia, but not the Ontario, agreement requires that licensees disclose the amount of such fee to the seller. Of these two clauses, that of Nova Scotia is to be preferred as it requires disclosure of the actual fee to be received; whereas the Ontario clause merely seeks to obtain seller's prior approval to licensees receiving such fees.

What is notable about the clauses treating both remuneration by buyers and finder's fees, apart from the Nova Scotia finder's fee provision, is their vagueness as to:

- when disclosure must be made;
- what it must consist of; and,
- arguably, its form.

Prior consent to a future course of action, which may or may not take place, and the details of which clients are ignorant, is not effective consent. At best, the clauses merely put sellers on notice of possible future conflicts of interest that may confront their licensees, but they do not relieve licensees from making timely disclosure (when an actual conflict presents itself) or full disclosure (full details, including the amount to be received).

It may also be noted that no listing agreement refers to the possibility of licensees receiving other rewards (referral fees and the like) from third parties as a result of the relationships established by the listing agreement. This silence does not relieve licensees from their fiduciary obligation to disclose all forms of remuneration received, directly or indirectly, as a result of their appointments as listing licensees.

3.7 Non-Disclosure of Competing Offers

In the second report to the ATF, concern was expressed about the propriety of some regulatory frameworks prohibiting sellers' licensees from advising their clients and buyers of the existence of competing offers that may have been received for the formers' properties. Arguably, the withholding of such information is unobjectionable if sellers consent to it after being made aware of the implications of such a course of action.

Thus, it is somewhat surprising that this matter is addressed in only one listing agreement (Nova Scotia, cl. 18). This clause gives sellers the right to determine for themselves whether the existence of competing offers is to be disclosed to interested buyers. The clause, however, does not address the issue of disclosure of the terms of the offers, which matter, it is suggested, should also be left to the discretion of sellers. The buyers' wishes should not be a factor as they are not clients of listing licensees and, thus, cannot expect the latter to be concerned with their best interests.

3.8 Agency Disclosure

All listing agreements address the issue of disclosure of representation even though it is not

universally mandated by all regulatory frameworks.

3.8.1 Single agency

Inherent in the very nature of listing agreements is the fact that sellers are appointing licensees (and their brokerages) to represent them as agents in the marketing of their properties. That is, agency relationships are created between licensees and sellers upon the execution of such agreements. Nevertheless, to remove any room for misunderstanding, and in keeping with the trend towards greater disclosure of representative capacity, most listing agreements also contain an express provision that confirms that an agency relationship is created between the seller and licensee (and brokerage) by the agreement (see Alberta, cl. 17.1), or that the licensee is acting as agent for the seller (British Columbia, cl. 7.A; Manitoba, cl. 6.A; Nova Scotia, cl. 15; Ontario, preamble; Saskatchewan, cl. 7.A). These provisions are unremarkable and raise no difficulties.

3.8.2 Concurrent representation of buyers and other sellers

The listing agreements, with the apparent exception of that of Alberta, also inform sellers that:

- listing licensees are not in breach of their obligations to sellers by simultaneously acting as the representatives of buyers and other sellers (British Columbia, cl. 9.B & C; Manitoba, cl. 7.C; Nova Scotia, cl. 16; Ontario, cl. 3; Saskatchewan, cl. 9.B & 10); and
- they may be approached by licensees to vary the nature of this initial representation relationship should a buyer they represent become interested in the seller's property (Manitoba, cl. 7.C; Nova Scotia, cl. 16; Ontario, cl. 3; Saskatchewan, cl. 9.B).

These clauses in and of themselves raise no difficulty, though the latter group raise the spectre of dual agency, discussed immediately below.

3.8.3 Dual agency

All the listing agreements address the issue of the dual agency which will arise should sellers' licensees (and/or their brokerages) also represent potential buyers of those sellers' properties. Since the issue of dual agency is discussed below in greater depth (see Section 5), to avoid unnecessary repetition, the comments here are restricted to the manner in which this issue is presented in the standard form listings.

In the British Columbia agreement (cl. 10), it is simply stated that if a buyer represented by the listing licensee becomes interested in the seller's property,

> "the listing agent will seek the written consent of the seller and the prospective buyer to continue to act as their limited dual agent;" and "where the seller and the prospective buyer have consented … the listing agent's duties will be modified by the limitations described in the brochure published by the [BCREA] …."

The Nova Scotia provision (cl. 16) is identical to that of British Columbia for all material purposes; and the Manitoba clause (cl. 7.C) is of similar effect:

> "When the listing brokerage also acts for a potential buyer … of a listed property, both the buyer and the seller will be asked to sign an acknowledgement of limited joint representation which will set out the limits of the brokerages agency duties."

None of these clauses pose any difficulties. They put sellers on notice that when a potential dual situation arises they will be informed, provided with further information (particularly with regard

to the change in the licensees duties to them) and their consent to the dual agency will be sought.

The listing agreements of Saskatchewan, Ontario and Alberta differ from the foregoing provisions in a number of important and material respects. First, the Saskatchewan agreement (cl. 10) provides:

> "The seller's brokerage shall disclose to the seller his/her agency relationship with buyer prior to the seller's brokerage presenting a contract of purchase and sale from the buyer to the seller, but shall not disclose such relationship before that time;" and
> "The duties of the seller's brokerage will be modified by the limitations of limited dual agency described in the [SREA] brochure … which the seller acknowledges he/she has read and agreed to."

These provisions prompt several comments. First, at common law the duty of disclosure is triggered the moment a potential conflict of interest (dual agency) arises. Thus, it would seem that disclosure must as soon as a buyer expresses a serious interest in a seller's property. The first sentence of the Saskatchewan clause clearly suggests that this will not be the case; that, in effect, disclosure will be contemporaneous with the presentation of an offer from the buyer. Such disclosure does not satisfy the common law requirement of timely disclosure. Secondly, such disclosure as provided for by the clause casts doubt on whether the consent of sellers is truly voluntary since sellers are "put on the spot" when their licensees make the disclosure upon presenting the offer. Sellers, who have placed trust and confidence in their licensees, may feel they have no real option but to accept the dual agency if they are not to lose the deal; or they may feel that to refuse the offer of dual agency will destroy the relationship of trust and confidence that they have established with their licensees. Finally, it is not clear what the seller "has agreed to" after having read the brochure - to the dual agency? If that is the import of the second sentence of the clause, it is of little effect since, for the consent of the seller to be fully informed, a seller needs to know all of the terms of the transaction that have been negotiated by the listing licensee while acting as dual agent. Uninformed consent in advance to a dual agency is likely to be considered ineffective.

The provisions of the Ontario listing agreement (cl. 3) raise similar problems to the Saskatchewan provisions. Although, unlike the Saskatchewan agreement, the limitations on the duties of licensees in dual agency situation are specified in the Ontario form, it stipulates:

> "In the event that the listing broker has entered or enters into a buyer agency agreement with a prospective buyer … I [the seller] hereby consent to the listing broker acting as dual agent for the transaction, however, the listing broker is required to inform me [the seller] in writing of a dual agency situation at the earliest practical opportunity and in all cases prior to any offer to purchase … being submitted …."

Here again, the consent of sellers is being sought to a future possibility and, as such, the consent does not qualify as a fully informed consent. The clause does not call for the further consent of sellers on being notified of an actual dual agency situation; nor does it call for full disclosure of all material facts, merely notification of the existence of a dual agency relationship. Moreover, the timing of the disclosure called for by the clause is potentially problematic since full disclosure must always be made as soon as a potential conflict of interest arises. Disclosure "prior" to an offer being made is too indefinite and, again, may raise questions as to whether any subsequent consent, if in fact obtained, is truly voluntary.

Finally, the Alberta agreement (cl. 17.4 & 17.5), after explaining when dual agency arises and describing the manner in which a licensee's agency duties are thereby modified, simply provides:

> "The seller authorizes the seller's agent to act as a dual agent …."

This clause suggests that licensees have a free hand to enter into dual agency relationships with potential buyers – an understanding supported by the fact that the Alberta dual agency consent form (discussed below, Section 5) is directed solely at buyers. Be that as it may, the above clause provides for: no further communication by licensees to sellers when, in fact, a dual agency arises; no disclosure of material facts that may influence the decision of sellers as to whether they will accept their licensees acting as dual agents; and no further consent. In short, the Alberta clauses, like those of Ontario and Saskatchewan, simply put sellers on notice that the issue of dual agency may arise and the effect a dual agency will have on licensees' agency obligations. However, this clause does not constitute a valid and effective consent to licensees entering into particular dual agency relationships at some future time since the consent given on the execution of a listing agreement does not qualify as timely, fully informed consent.

4. BUYER AGENCY AGREEMENT

4.1 Definition

No regulatory framework provides a definition of the term "buyer agency agreement." However, a definition of "buyer agency" is provided, namely "a legal relationship between a member and a client who is a buyer" (see Licensee Duties within the Real Estate Industry Regulatory Frameworks, Schedule A-2). Thus, it may be assumed that a buyer agency agreement is the agreement that gives rise to this relationship.

4.2 Licensees' Mandates

However, as with the definitions of listing agreements, discussed above, that of buyer agency gives no clear indication as to what is demanded of licensees in fulfilling their obligation to perform their mandates. Nor, again, are the regulatory frameworks (including that of Quebec, in this instance) more informative being concerned essentially only with certain formal requirements of listing agreements or representation agreements.

Thus, one has to turn to the buyer agency agreements themselves to try to ascertain what it is that licensees undertake to do for their client-sellers. In such agreements, as is the case with listing agreements discussed above (see Section 3.2), one finds two categories of licensee obligations:

- general agency obligations; and
- obligations specific to listing licensees.

4.2.1 General agency obligations

First, one finds in certain, but not all, buyers agency agreements provisions to the effect that the licensee will:

- "act as the Buyer's advocate by protecting and promoting the Buyer's best interest - the agent's duties include: confidentiality, undivided loyalty, to obey all lawful instructions of the Buyer, to exercise reasonable care and skill, to account for all money and property,

to disclose all facts, if known, any information relevant to the transaction, to abide by the … [the relevant provisions of the industry's regulatory framework]" (Nova Scotia, cl. 2.c);
- "exercise duties of loyalty, obedience, competence, confidentiality, accountability and disclosure to the buyer" (Saskatchewan, cl. 3.D); and
- act only as agent for the buyer unless the buyer consents to a limited dual agency (British Columbia, cl. 2.B); Nova Scotia, cl. 2.C; Saskatchewan, cl. 3.C & D).

Again, these obligations are not special to industry members acting pursuant to a buyer agency agreement; they are inherent in all agency relations unless a particular agreement stipulates to the contrary. Consequently, such obligations cannot be said to be the hallmarks of a buyer agency.

4.2.2 Obligations specific to buyer agency agreements

Thus, the question remains, what licensee duties are particular to buyer agency? Again, some guidance is provided in these agreements.

For example, under the Ontario buyer agency agreement (cl. 4) all that the licensee undertakes is "to assist the buyer in locating" a property.

The Saskatchewan agreement (cl. 3.A & B) provides more information, namely, the licensee will:
- "assist the buyer in finding a property and in negotiating the terms of the purchase;"
- "provide the buyer with information about properties listed on the [MLS]" and of such other properties the licensee "is aware;" and
- assist the buyer "at the buyer's request and expense to obtain inspections, surveys, title searches and similar information which the buyer may require in deciding whether to purchase a property."

The mandate of licensees under the Nova Scotia buyer agency agreement is similar to that of Saskatchewan; it is to (cl. 2.A & B):
- "seek out, and inform the Buyer about properties which may meet the Buyer's requirements, including those listed on the MLS system, private sales and unlisted properties;" and
- "represent the Buyer and to offer assistance regarding price, financing, chattels, inspections, appraisals, closing costs and all other relevant details relating to the transaction."

However, the British Columbia buyer agency agreement is potentially the most informative. The agreement itself merely states that a licensee will "make the buyer aware of properties located in the …. [MLS marketing area] or such other properties that the buyer's agent is aware … and … perform such other services as may be set out on … [the attached schedule]." However, the agreement is accompanied by "Information about the Exclusive Buyer's Agent Contract" that identifies a range of services that licensees are trained to provide. These services are:

1. Identifying desirable types of properties to acquire.
2. Locating properties available to view and consider.
3. Preliminary investigation and timely information gathering.
4. Viewing properties and providing guidance and advice.
5. Selecting the right property on which to make an offer.

6. Preparing a legally binding contract ….
7. Negotiating favourable terms and conditions.
8. Assisting in arranging suitable financing if necessary.
9. Assisting in arranging property inspections and other needed services.
10. Assisting in the completion and possession process.

While reasonable buyers may normally believe that all of these functions ordinarily fall within the mandate of licensees that, apparently, is not the case. Buyers have to indicate on the schedule attached to the agreement what it is that they desire the licensee to do. (And, it may be noted in passing, that it appears that whether purchasers opt for all or merely one of the services listed, the cost to them may very well be the same since there is no suggestion to the contrary in the agreement.)

Be that as it may, this list of services is the most comprehensive and clear statement of what may be encompassed in the mandate of licensees representing buyers. Consequently, thought might be given to the adoption of such a statement in all buyer agency agreements as the "default setting." A provision could also be included allowing buyers to opt out of particular service. (In addition, thought should be given to the identification of a similar list of services that should be provided by listing licensees.)

Thus, as with listing agreements, it is evident that some, though little, uniformity exists among the standard form buyer agency agreements reviewed, as to what licensees expressly undertake to do on behalf of buyers.

4.2.3 Limitation on mandates

All buyer agency agreements seek to exonerate licensees from responsibility for ensuring the accuracy of any factual information concerning the state of the property that may be provided to the buyers (British Columbia, cl. 3.G; Nova Scotia, cl. 3.G; Ontario, cl. 5; Saskatchewan, cl. 2.G). It is unlikely, however, that these provisions will protect buyers' licensees from their own negligence. The clauses will not shield them from liability if it is established that a reasonable licensees would have been aware of a (potential) "problem" and would have drawn it to the attention of their buyer-client. Moreover, the Ontario clause, which appears to seek to free licensees from all liability, even for failure to bring patent defects to their buyer-clients' attention, is likely to be of little effect. Unless, licensees can establish that they (reasonably) had not inspected the property for or with their client, failure to discuss potential patent defects with the latter would amount to negligence.

4.3 Co-operating Licensees

Use of co-operating licensees to assist buyers in locating suitable properties is touched on only in the Nova Scotia buyer agency agreement, which states:

> "The buyer's agent may cooperate with listing agents representing the owners of properties which appear to meet the buyer's requirements."

While the meaning and intent of this provision is clear, it is difficult to see what it adds to obligation of buyers' licensees to seek suitable properties through the MLS. Cooperation, in the general sense of the term, should be the order of the day for licensees representing buyers and those representing sellers, for that is in the best interests of their respective clients.

4.4 Licensee Remuneration

All buyer agency agreements, as is the case with listing agreements, treat in some detail the circumstances under which licensees will be entitled to their remuneration. These clauses, in the main, are un-remarkable. However, a number of matters call for some comment.

4.4.1 Remuneration by listing licensee or seller

In all buyer agency agreements, buyers agree that their licensees may look to listing licensees for their remuneration or to sellers where the property is not listed. These clauses pose no problem in principle. Their acceptance by buyers constitutes consent to their licensees engaging in a course of conduct that would otherwise constitute a breach of their fiduciary obligations to their buyer-clients.

However, as already mentioned, for consent to be effective it must be informed. Thus, it is necessary that buyers be aware of the amount of remuneration their licensees will be paid by the other party (be it the listing licensee or the seller). This requirement is not clearly fulfilled in any agreement - for example:

- in the Nova Scotia agreement the amount to be received from sellers is identified, but not that which may be received from a listing licensee (Nova Scotia, cl. 5); whereas
- in the British Columbia, Ontario and Saskatchewan agreements the maximum remuneration payable is identified with the buyer being liable for any deficiency (difference between the agreed amount and that actually recovered from the listing licensee or the seller) (British Columbia, cl. 4; Ontario, cl. 2; Saskatchewan, cl. 4.A).

Of these two approaches the latter best meets the requirements of full disclosure as buyers are aware of their maximum exposure for remuneration. Further, these agreements require disclosure of the amount to be paid buyer licensees by listing licensees or sellers (British Columbia, cl. 4.B; Ontario, cl. 2; Saskatchewan, cl. 4.D). Thus, they ensure full disclosure which is particularly important if their licensees are receiving from the other party an amount which exceeds that which the buyers have agreed to pay. For licensees to receive such an amount without disclosure would amount to their receiving a prohibited secret profit.

Finally, it may be noted that, to the outside observer, the fact that listing agreements, but not buyer agency agreements, provide for remuneration sharing by licensees appears rather odd. It is, of course, fully understandable within the traditional framework of licensee relationships under cooperative (MLS) arrangements in which co-operating licensees were seen as sub-agents of listing licensees. However, with the growth in buyer agency, it is perhaps time for remuneration arrangements between seller and buyer licensees to be rethought to see to what extent the paradigm agency situation can be applied to the industry; that is, the situation in which sellers and buyers are directly responsible for remunerating their own licensees. This paradigm does not foreclose “double-ending” (dual agency) in the appropriate circumstances, but it may well have an impact on commission rates because, in essence, each party would be responsible for one-half the “normal” commission.

4.4.2 Buyer’s refusal to contract

Buyer agency agreements, in general, are more lenient on buyers who withdraw from a transaction or the market, than are listing agreements on sellers who refuse to accept an offer that meets their terms (see above, Section 3.4.2). No doubt this is because many more variables enter

into buyers' decisions than is the case with sellers for whom acceptable "terms" for doing business can be more simply and objectively established from the listing information.

4.4.3 Indefinite liability for remuneration

It may again be noted that the British Columbia buyer agency agreement (cl. 5.A.ii.b) stipulates that the buyer will pay the licensee's remuneration on a legally enforceable contract being entered into by the seller and the buyer

> "at any time after the period described in [the over-holding clause] where the efforts of the buyer's agent were an effective cause."

As with the similar term in the British Columbia listing agreement, discussed above, this clause exposes buyers to potential liability for remuneration to their licensees for an indeterminate period of time. They need to be re-examined if it is felt all representation agreements should clearly signal a date on which they and, as importantly, their effects, expire.

4.5 Remuneration from Third Parties

As is the case with some listing agreements, a number of buyer agency agreements address the issue of buyers' licensees receiving some form of remuneration from a third party (other than listing licensees or sellers). To this end:

- the British Columbia (cl. 4.E) agreement states that the buyer's agent will advise the buyer of any remuneration (other than the commission agreed to) received in respect of the property; and
- the Nova Scotia (cl. 3.K) and Ontario (cl. 6) agreements seek the buyers' consent to receipt by their licensees of a fee from a lender for assisting in arranging finance.

These clauses contain the same potential weaknesses as similar clauses found in the listing agreements to which reference is made above (see Section 3.6). Moreover, the clauses of Nova Scotia and Ontario treat only one source of potential third party remuneration; and it must be born in mind with respect to the British Columbia clause that all third party remuneration that is received by virtue of the representation relationship, not just in respect of the property, must be disclosed.

4.6 Agency Disclosure

All standard form buyer agency agreements reviewed address the issue of disclosure of representation even though it is not universally mandated by all regulatory frameworks.

4.6.1 Single agency

Inherent in the very nature of buyer agency agreements is the fact that buyers appoint licensees (and their brokerages) to represent them as agents in the locating properties; that is, that an agency relationship is created between licensees and buyers. Nevertheless, to remove any room for misunderstanding, and in keeping with the trend towards greater disclosure of representative capacity, most standard form buyer agency agreements also contain an express provision that confirms that an agency relationship has been created by the agreement between the buyer and licensee (and brokerage) (see British Columbia, cl. 1. A & B & 2.B; Nova Scotia, cl. 1.A; Ontario, preamble & cl. 3; Saskatchewan, cl. 1.A & 3.B). These provisions, like the similar ones in listing agreements, are unremarkable and raise no difficulty.

4.6.2 Representation of buyers and other sellers

As with listing agreements, the buyer agency agreements also inform buyers that their licensees are not in breach of their obligations to them by simultaneously acting as the representatives of other buyers or sellers, even where the other buyers may be interested in the same properties as the first (British Columbia, cl. 5.A & B; Nova Scotia, cl. 3.H; Ontario, cl. 3; Saskatchewan, cl. 5).

In addition, the agreements put buyers on notice that they may be approached by licensees to vary the nature of this initial representation relationship should they become interested in a property listed with buyers' licensees (British Columbia, cl. 6; Nova Scotia, cl. 4; Ontario, cl. 3; Saskatchewan, cl. 6).

These clauses contain in them two potential problems: first, concurrent representation of competing buyers; and, second, the spectre of dual agency.

4.6.3 Competing buyers

It is well known that licensees may not act for both parties to a transaction without the fully informed, voluntary and timely consent of their clients. It is also well established that licensees cannot act for two or more parties whose interests are in conflict absent similar consent. Thus, where licensees purport to act for competing buyers they are acting for parties whose interests conflict and who they may only represent concurrently with the appropriate consent of both.

The problem raised by the clauses that treat this possibility is that they seek buyers' consent, in advance, to licensees' concurrently representing competing buyers. Thus, as with the similar clauses in listing agreements, consent is being sought to a future possibility before all facts are known. Any consent obtained in these circumstances cannot qualify as valid consent. In addition, no buyer agency agreement attempts to inform buyers of the implications of such concurrent representations and the attendant constraints on the nature of the representation buyers may expect. All that competing buyers are advised is that licensees:

- cannot disclose confidential information obtained through any other representation relationship (British Columbia, cl. 5.C; Nova Scotia, cl. 3.I); and
- must be "impartial and equally protect the interests" of all competing buyers (Ontario, cl. 3).

It may be noted that "equal protection" of the interests of such buyers (to which reference is made in the Ontario agreement), of course, is an impossibility given the conflicting fiduciary obligations owed competing buyers by licensees.

This is not to say that licensees may never represent competing buyers. Rather it means that licensees must make full and timely disclosure of all facts and the implications of such representation to each competing buyer, and then obtain the informed and voluntary consent of each to the arrangement. In essence, the duty of disclosure and the nature of the consent are analogous to that required in dual agency situations.

Finally, buyer agency agreements should clearly indicate that where licensees are acting for competing buyers, licensees cannot disclose to each buyer the terms of any competing offers made by their competitors for a property. This, after all, is one of the most important negative implications of representation by licensees who are also acting for competitors. This issue does

not appear to be adequately addressed by the confidentiality clauses (British Columbia, cl. 5.C; Nova Scotia, cl. 3.I; Ontario, cl. 3) in these agreements.

4.6.4 Dual agency

The standard form buyer agency agreements, like the listing agreements, address the issue of the dual agency which will arise should licensees (and/or their brokerages) represent both buyers and potential sellers of properties in which buyers are interested. The issue of dual agency is discussed below in greater depth (see Section 5). Thus, to again avoid unnecessary repetition, the comments here are restricted to the manner in which the issue is presented in buyer agency agreements.

The Ontario (cl. 3) and Saskatchewan (cl. 6) clauses that treat dual agency are identical in all material respects to those found in their listing agreements (see above, Section 3.8.3) and raise the same issues. Thus, they require no further elaboration here.

However, the British Columbia and Nova Scotia clauses are not identical to those in their listing agreements. The Nova Scotia clause (cl. 4) states:

> " A. If the Buyer's Agent is also the agent of the Seller, the Buyer's Agent will seek the written consent of the Buyer and the Seller to continue to act as their Limited Dual Agent to facilitate the purchase of that specific property. If the Buyer and the Seller do not consent to the Buyer's Agent acting as their Limited Dual Agent the Buyer's Agent will, with respect of that property, cease acting as the agent of the Buyer but may continue to act as the agent of the Seller."
> "B. Where the Buyer and Seller have consented to the Buyer's Agent acting as their Limited Dual Agent, the Buyer's Agent's duties will be modified by the limitations described in the Limited Dual Agency Agreement."

The British Columbia clause (cl. 6) on the issue of dual agency is virtually identical to the foregoing; the only difference is that buyers are advised that the modifications to the duties of licensees are to be found in a brochure.

These provisions differ from those in the British Columbia and Nova Scotia listing agreements through the addition of the second sentence in clause A; and it is this passage that poses a potential problem. This sentence, in essence, seeks to confer on licensees the right to terminate buyer agencies if buyers will not agree to their acting as dual agents in transactions. It can be argued, with some justification, that there is an element of coercion in these provisions and, as a result, that any consent given by buyers is not truly voluntary. This is particularly true where it is a buyer who is the first to enter into representation agreement with a licensee. The buyer may have placed trust and confidence in their licensee and may feel they have no option but to accept the dual agency if they are not to lose a deal; or a buyer may feel that to refuse the offer of dual agency will destroy the relationship of trust and confidence that they have established with their licensee. In effect this provision tells buyers they have two options:

- accept the offer of dual agency; or
- find another licensee to represent them (with no guarantee that the buyer will not encounter the same dilemma with a new licensee).

It would be fairer for representation agreements (be they buyer agency or listing agreements) to advise clients that where they withhold consent to their licensee acting as dual agent, licensees

will then represent the first party (buyer or seller) with whom a representation agreement was concluded. Moreover, the agreements should explicitly state that, notwithstanding the termination of a representation agreement with a party, no confidential information divulged by that party to the licensee will be disclosed. The existing confidentiality clauses in these agreements do not clearly address this contingency. Such a provision would signal to licensees the fact their obligation of confidentiality is not coterminous with their representation relationship.

5. DUAL AGENCY FORMS

Industry concern with the issue of dual agency is evident from the fact that, in addition to its treatment in listing and buyer agency agreements, four jurisdictions, Alberta, British Columbia, Nova Scotia and Saskatchewan, have adopted standard forms that deal specifically with this issue; while one, Ontario, deals with it in a form entitled "Confirmation of Co-operation and Representation."

Before turning to a review of the contents of these forms it should be noted that:

- the British Columbia, Nova Scotia and Saskatchewan dual agency forms are designed to supplement their listing and buyer agency agreements;
- the Alberta dual agency form is designed solely for use by listing licensees with buyers who are not themselves represented by licensees (i.e. buyers who have not entered into buyer agency agreements with licensees); and
- the Ontario "Confirmation of Co-operation and Representation" form is not designed specifically to address the issue of dual agency but rather to clarify for buyers and sellers the representative role the licensees involved in transactions are playing, only one of which roles may be that of dual agent.

Before turning to a review of the provisions of these forms, three (those of Alberta, Ontario and Saskatchewan) require a preliminary word.

First, as noted, the Alberta dual agency form is directed only to buyers. It appears to be premised on the understanding that listing licensees have already received valid and effective consent to act as dual agents upon their seller-clients executing listing agreements. However, as already discussed above (see Section 3.8.3), this is questionable. Fully informed, timely and voluntary consent must be obtained when, not before, potential dual agency situations arise. Thus, subject to what is said below, while the Alberta form may be adequate for the purpose of obtaining buyers' consent to dual agency situations, the renewed consent of sellers must also be obtained. It is for this reason that the treatment of dual agency in British Columbia, Nova Scotia and Saskatchewan is to be preferred.

Second, the Ontario form is designed to "confirm" pre-existing representation relationships, including that of dual agency. It simply asks sellers and buyers to confirm that they "have received, read and understand" the information contained in the form. The form does not seek their consent to the establishment of the representation relationships described therein. Thus, like the Alberta form, it also appears to be premised on the understanding that licensees have already received valid and effective consent from their clients to act as dual agents upon their execution of listing or buyer agency agreements. However, as already discussed above (see above, Sections 3.8.3 and 4.6.4), this is questionable; and again the treatment of dual agency in British Columbia,

Nova Scotia and Saskatchewan is to be preferred.

In addition, the Ontario form (cl. 1.b) only appears to treat the issue dual agency where licensees have initially obtained a listing agreement and then seek to enter into a buyer agency agreement; it does not cover the converse situation. This needs to be addressed to avoid potential difficulties.

Third, the Saskatchewan dual agency form, like those above, appears to be premised on licensees having first accepted to represent sellers under listing agreements (cl. 1-3) and, therefore, does not appear to easily accommodate situations in which licensees encounter dual agency situations having first accepted to represent buyers. This may be a source of confusion in particular cases although, in this form, it is otherwise clear that the consent of both buyers and sellers is being sought to the dual agency.

In what follows, regard is had to the issues raised by the various dual agency forms that are relevant to determining whether, upon signature by the parties, they can be said to have given timely and fully informed consent to licensees acting as dual agents.

5.1 Timely Consent

It will be recalled that both the listing and buyer agency agreements in British Columbia and Nova Scotia provide that licensees will seek the consent of the respective parties to act as dual agents when licensees find themselves acting for both parties in a transaction. Unlike the situation in Alberta, Ontario, and Saskatchewan, the parties consent is neither sought in advance nor presumed to exist upon their having signed the initial listing or buyer agency agreement.

Moreover, it may be assumed that in British Columbia and Nova Scotia buyers and sellers will be informed and their consent sought when the potential dual agency situation arises; there is no suggestion, as there is in the Manitoba listing agreement and the Saskatchewan listing and buyer agency agreements, that informing the parties of the dual agency can wait until an offer is ready to be presented by buyer to seller which, as discussed above, is problematic given fiduciary disclosure requirements.

5.2 When Does Dual Agency Arise

This matter is explicitly treated in only one standard form, that of Alberta, which informs buyers that

> "Dual agency occurs when one brokerage (the dual agent) trading in real estate from one or more locations, represents both [buyer] and the seller, or more than one buyer, with respect to the potential purchase of the property."

Such a statement is useful as it directs the attention of the parties, who may otherwise be unaware of the meaning of dual agency, to the issue. However, it must be noted that dual agency only exists where both parties (buyers and sellers) to transactions are represented by licensees or their brokerages. Thus, it is inaccurate to state that such a relationship is also created when licensees or their brokerages represent competing buyers. That being said, as discussed above (see Section 4.6.3), this latter situation gives rise to many of the same issues involved in dual agency.

In all other forms it is implicit that a dual agency relationship is involved when both parties are

represented by the same licensee or brokerage; and the matter is also treated in the agency information brochures of Alberta, British Columbia, Nova Scotia and Saskatchewan.

5.3 Nature of Dual Agency

Only one dual agency form, namely that of Saskatchewan (cl. 4), informs buyers and sellers of the nature of the dual agency (i.e. single licensees, "in-firm, same branch," or "in-firm, different branch") involved in the particular transaction, and to which consent is being sought. The absence of this information from the forms of the other jurisdictions is perhaps surprising as it is information that buyers and sellers require to make a fully informed decision as to whether they will consent to dual agency. For example, it is information that is relevant to assessing the risks of inadvertent disclosure of confidential information.

5.4 Reason for Consent

Only two dual agency forms attempt to provide any reasons as to why the consent of buyers and sellers is necessary to dual agency.

First, the Saskatchewan form (cl. 6) states that "the brokerage may only act as the agent for both the buyer and the seller with the acknowledgement of both of them." This phrase, in simply advising that dual agency is prohibited without the "acknowledgement" of the parties, does not explain why the acknowledgement of buyers and sellers is necessary to such a representation relationship; and, it is inadvertently misleading since the law does not merely require the parties "acknowledgement" but, rather, their timely and fully informed consent to the relationship.

Second, the Alberta form, in a text box at the top, states:

> "as required by … [RECA's] Code of Conduct, a real estate brokerage (including its brokers, associate brokers and agents) must only act for one party in a transaction, unless there is full disclosure to all parties, and the dual agency is agreed to in writing. The client must fully understand the implications of dual agency and give an informed consent in writing prior to entering into a real estate transaction."

The form then sets out the fiduciary obligations of licensees and advises buyers that these must be modified in a dual agency situation (see discussion below, Section 5.5).

The Alberta provisions are more informative than those of Saskatchewan. Nevertheless, the statement in the text box is also inadvertently misleading on two counts. First, it suggests that the source of the prohibition of dual agency is RECA's Code. It is not. The prohibition is imposed by the common law and has been codified by RECA. Thus, as stated, it suggests that, if it were not for the provision in the Code, dual agency would be unregulated. Second, it is somewhat ambiguous in its treatment of the time at which consent must be obtained. Consent must be sought when the potential dual agency situation arises; to state that consent is needed prior to the parties entering into a real estate transaction is inaccurate.

Moreover, with respect to Alberta, it may be asked: why it is that reasons for an understanding of, and consent to, dual agency are explicitly provided to buyers by this form, while no similar reasons are provided sellers in the listing agreement?

Given the need for the timely fully informed consent of both seller and buyer to dual agency, it

would be advisable for the forms that treat dual agency to clearly inform them of the reasons for the special attention paid to this relationship. In addition, it may be noted, that while the agency information brochures of Alberta, British Columbia, Nova Scotia and Saskatchewan provide basic information on the various representation relationships that may exist between licensees and buyers and sellers, none provide reasons for the special regulation of dual agency.

Indeed, none of the brochures present dual agency as a deviation from the norm. It is presented simply as one form of agency relationship in which certain modifications to licensee duties are called for. Few, if any, of the negative implications of such relationships are identified.

5.5 Implications of Dual Agency

To ensure that buyer and seller consent to dual agency is truly fully informed, they need to be apprised of the implications of such relationships for the nature and level of representation that licensees (and their brokerages) can provide. To achieve this it is necessary that buyers and sellers are aware, first, of the duties owed by licensees representing a single client and, second, of the modifications that result to these duties in a dual agency relationship.

Only the Alberta form deals with the first issue. This form (which it must be recalled is directed only to buyers) stipulates:

> "The buyer's agent is obligated to protect and promote [the buyer's] interests. Specifically, the buyer's agent owes [the buyer] the fiduciary duties of loyalty, obedience, confidentiality, reasonable care and skill, full disclosure, and full accounting."

Again, while it is true that the foregoing information is supplied buyers and sellers by the agency information brochures, there is much to be said for expressly identifying in the dual agency form the basic duties of licensees so that buyers and sellers have a point of comparison with the limited obligations of licensees in a dual agency relationship. In the absence of a statement of licensees' duties in the dual agency forms, buyers and sellers are obliged to consult the brochures to fully appreciate what is being proposed.

The second issue, the modification of licensee duties that occurs as a result of the acceptance of a dual agency, is dealt with in all of the dual agency forms. (It should be noted that similar provisions are to be found in the listing agreements of Alberta (cl. 7.4) and Ontario (cl. 3) and the buyer agency agreement of Ontario (cl. 3). Thus, the discussion that follows applies equally to these provisions.)

While much of the information provided buyers and sellers with respect to the "modification" of licensees' obligations is the same in all forms there are a number of differences. Consequently, the provisions of each form are first set out followed by discussion.

On the issue of the modification of licensee duties, the Alberta form states:

> "The dual agent:
> (a) will not, without prior written authority, disclose:
> (i) to the seller that [the buyer] will pay a higher price than the offered price (or countered price),
> (ii) to [the buyer] that the seller will accept a price lower than the listed price,
> (iii) to the seller the reason that [the buyer] is buying,

(iv) to [the buyer] the reason that the seller is selling, and
(v) to [the buyer] or other buyers the terms and conditions of competing offers;
(b) except as set out in (a), will owe no duty of confidentiality and will disclose to [the buyer] and seller all facts known that materially affect or may materially affect the marketability or value of the property."

The British Columbia form (cl. 3) provides that licensees' duties will be modified as follows:

"a) the agent will deal with the buyer … and the seller … impartially;
b) the Brokerage will have a duty of disclosure to both the buyer … and the seller … except that:
i) the agent will not disclose that the buyer … is willing to pay a price or agree to terms other than those contained in the offer, or that the seller … is willing to accept a price or terms other than those contained in the listing;
ii) the agent will not disclose the motivation of the buyer … to buy or the seller … to sell unless authorized by the buyer … or the seller …;
iii) the agent will not disclose personal information about either the buyer … or the seller … unless authorized in writing;
c) without limiting 3(b) the agent will disclose to the buyer … defects about the physical condition of the property known to the agent."

The Nova Scotia form (cl. 3) differs from that of British Columbia in only one material respect; it contains an additional provision to the effect that

"d) the agent may disclose all comparable property information to the seller … and the buyer … at any time."

The Ontario form (cl. 3) provides that:

"The Listing Broker must be impartial and equally protect the interests of the Seller and the Buyer in this transaction. The Listing Broker has a duty of full disclosure to both the Seller and the Buyer, including a requirement to disclose all factual information about the property known to the Listing Broker.
However, the Listing Broker shall not disclose:
That the Seller may or will accept less than the listed price, unless otherwise instructed in writing by the Seller;
That the Buyer may or will pay more than the offered price, unless otherwise instructed in writing by the Buyer;
The motivation of or personal information about the Seller or Buyer, unless otherwise instructed in writing by the party to which the information applies, or unless failure to disclose would constitute fraudulent, unlawful or unethical practice;
The price the Buyer should offer or the price the Seller should accept;
And; the Listing Broker shall not disclose to the Buyer the terms of any other offer.
However, it is understood that factual market information about comparable properties and information known to the Listing Broker concerning potential uses for the property will be disclosed to both Seller and Buyer to assist them to come to their own conclusions."

Finally the Saskatchewan form (final paragraph) stipulates:

"a) the brokerage will not disclose that the buyer will pay a price or agree to terms other than those contained in the offer or that the seller will accept a price or terms other than

those contained in the … [listing];
b) the brokerage will not disclose the motivation of the buyer to buy or the seller to sell unless authorized by the appropriate party;
c) the brokerage shall disclose all material defects about the physical condition of the property known to the brokerage;
d) the brokerage will not represent the interests of either the buyer of the seller to the advantage of one over the other;
e) the brokerage will not disclose personal or financial information of either the buyer of the seller unless authorized by the appropriate party."

A number of these clauses require comment. The first are the clauses that advise the parties that licensees will advise buyers of all defects affecting sellers' property. These provisions appear to be biased in favour of buyers especially if there is no legal obligation on licensees (or sellers) to make such disclosures (as has been suggested in the first report to the ATF). They appear to contradict the assertion in some forms that buyers and sellers will be treated impartially. That is, that neither party will be represented in a manner that is more advantageous to one over the other. This bias is compounded by the provisions that explicitly (in the case of Saskatchewan) or implicitly (in the cases of Alberta, British Columbia, Nova Scotia, Ontario) preclude licensees from passing on to sellers any information concerning the financial status of buyers; information, that for sellers, can be as important as information concerning property defects is for buyers.

It is also arguable that the foregoing disclosure requirement is weighted particularly against sellers who are approached by their listing agent to agree to a dual agency relationship. Such sellers, given their initial understanding that their licensees are representing only them, may have voluntarily disclosed information concerning their properties that they were under no legal obligation to disclose, which information will now be disclosed to buyers given the modification in the duties of the sellers' licensees. Sellers are not advised of this repercussion of consenting to a dual agency; nor are they advised that in a single agency relationship their licensees are under no legal obligation to disclose all defects, but only all "material" defects as defined by the law.

Second, the provisions in the Alberta and Ontario forms that preclude licensees from disclosing to buyers the terms of competing offers, appear to be in the interests of neither sellers nor buyers: the former may well be interested in their licensees conducting what would be a form of "auction" of their properties; the latter may well be interested in "out-bidding" their competition for the property not only as to price but also terms. Moreover, these provisions appear to have little relevance to dual agency per se.

Third, the wording of the Alberta form suggests that the fiduciary obligations identified are merely "modified" in dual agency situations. This is somewhat misleading as three of the fiduciary obligations listed (loyalty, obedience and full disclosure) cease to exist; and a fourth (confidentiality) is severely modified. In fact, all of the forms and the agency information brochures, in so far as they provide that licensees obligations are only "modified" or "limited" in dual agencies, fail clearly to signal to buyers and sellers the true implications of such relationships on the fiduciary obligations of licensees.

Fourth, a number of forms (British Columbia, Nova Scotia, Ontario, and Saskatchewan) also provide that "personal information" will not be disclosed. No definition or explanation ir offered as to what is meant by "personal information" in the context of real estate transactions. Clarification is needed to ensure that all involved share the same understanding of "personal information" to ensure no inadvertent disclosures are made by either party under the mistaken

belief that the information is personal and will not be disclosed by the licensee.

5.6 Full Disclosure

Finally, it is questionable whether the forms and the agency information brochures provide buyers and sellers with sufficient information to make fully informed decisions as to whether they, in fact, wish voluntarily to enter into dual agency relationships. The advantages and disadvantages of the various relationships are not clearly indicated, it being left to the parties (who, more often than not, are ignorant of the law of agency, the duties of licensees and the legal and practical ramifications of the various representation relationships) to make the determination themselves on a reading of the forms and the brochures. Nor is it suggested that if the parties do not appreciate the implications of dual agency seek further advice.

Importantly in this regard, the forms and brochures omit one crucial piece of information – nowhere are the parties advised that a dual agency relationship will result in individual licensees (and/or their brokerages) "double ending;" nowhere is it stated that dual agency is financially beneficial to licensees (and/or their brokerages). The dual agency forms merely provide that any previous agreements that may exist between buyers and seller are modified to the extent provided in the dual agency form, again leaving it to buyers and sellers to work out the full implications of the new arrangement for their existing relationship. (And, it is worth noting that neither listing agreements nor buyer agency agreements advert to the possibility of "double ending.")

While dual agency relationships may not be uncommon in the industry, it must be kept in mind that they are an exception to the norm in the law of agency and, though not prohibited, are strictly circumscribed. However, apart from the statement in the text box in the Alberta form and provisions in other forms to the effect that buyer and seller agree that it is not a breach of duty for a licensee to represent both, there is little information in the forms and brochures to put buyers and sellers on notice that dual agency relationships are truly exceptional and attract special attention in law. This, coupled with the fact that dual agency forms will be presented to buyers and or sellers by licensees with whom the former will have often established a strong professional working relationship involving trust and confidence, the impression is created that dual agency is simply one of the forms of representation provided by licensees and brokerages.

6. MISCELLANEOUS FORMS

6.1 Authorization of Sub-Agency

In the discussion of the provisions of listing agreements that dealt with the issue of co-operating licensees (see above, Section 3.3), it was noted that it is advisable that the role of such licensees be clearly specified, preferably as has been accomplished in the British Columbia listing agreement which authorizes licensees to

> "cooperate with other agents acting for a prospective buyer or, with the written consent of the seller, as a sub-agent of the listing agent."

Such treatment minimizes, if not avoids, the potential argument that co-operating licensees are sub-agents and, thus, the fiduciaries of sellers and, if they also represent buyers interested in the

sellers properties, are in a dual agency relationship with both sellers and buyers. Moreover, such a clause ensures that clients have clearly authorized their licensees to delegate performance of their mandates to sub-agents which, as noted, is prohibited without the consent of the client.

To this end British Columbia has adopted an "Authorization of Sub-Agency" form in which, first, sellers specifically authorize the listing licensee to appoint a (named) sub-agent and, second, the buyer's acknowledgement is sought to the fact that the sub-agent is not the representative of the buyer.

This form is simple but adequate. The only potential criticism it is that it only addresses the appointment of sub-agents by listing licensees and not licensees representing buyers. The use of sub-agents by the latter may be unusual; but if it is not, then thought may be given to developing a generic form that could be used by both listing and buyer licensees seeking authority to appoint sub-agents.

Finally, and simply for the purpose of clarification, thought might be given to adding a clause to the effect that the sub-agent will be remunerated by the licensee making the appointment.

6.2 Customer Status Disclosure Acknowledgement

If disclosure of representative capacity by licensees is to be fully effective, not only must licensees' clients be aware of who is (are) their representatives, but customers must also be aware of who is (are) not their representatives. The execution of listing and buyer agency agreements by sellers and buyers meets the first concern.

The second concern is best met also through written notice to customers as to their status in relationship to licensees. As discussed in the first report to the ATF, no particular formal requirements must be met for the establishment of agency relationships; they may arise through the express agreement of the licensee and buyer or seller, or an agency relationship may be implied from their conduct. Consequently, to minimize the risk of persons, who licensees consider to be customers, alleging that implied agency relationships have arisen, it is advisable that licensees, in writing, notify those they consider to be customers of that fact. While such notification will not necessarily be determinative of the nature of the relationship between licensee and such party, it will provide strong support for the argument that the relationship was one of licensee-customer.

Such a form has been developed in Alberta. The form briefly explains the agency-client relationship and the position of customers, and seeks the acknowledgement of the latter to the fact that they are customers, and not clients, of the licensee. Again, this form appears adequately fulfills its objectives. However, it could be strengthened if there was provision for the signature of the licensee making the disclosure and the date on which disclosure was made - particularly if, for whatever reason, a customer refuses to sign the acknowledgement.

6.3 Confirmation of Co-operation and Representation

Ontario has developed a comprehensive form which listing and co-operating licensees may use to disclose to buyers and sellers the representative capacity in which they are acting in a particular transaction. In brief, the options available are:

- listing licensees represents solely the seller;

- listing licensee is in a dual agency relationship with seller and buyer;
- co-operating licensee is a sub-agent of the seller, will represent only the seller, and will be remunerated by the listing licensee;
- co-operating licensee represents solely the buyer, is not a sub-agent of the seller, but will be remunerated by the listing licensee;
- co-operating licensee represents solely the buyer, is not a sub-agent of the seller, and will be remunerated by the buyer;

Listing and co-operating licensees are required to indicate the capacity in which they are acting in a transaction and to sign the form. Provision is also made for the buyer and seller to signify that they have received, read and understood the form.

Apart from the treatment of the issue of dual agency in this form (discussed above, Section 5.5), the details of which should be treated in a form dedicated for that purpose, the "Confirmation of Co-operation and Representation" form is a useful and comprehensive way in which to effect disclosure of representative capacity. Nevertheless two questions are raised by the form. First, it assumes that dual agency will always arise by a listing licensee subsequently entering into buyer agency agreement. As worded the form does not allow for the possibility of a buyer's licensee subsequently entering into a listing agreement with a seller in whose property the buyer is interested. This possibility should be accommodated in the form.

Second, it assumes buyers' licensees will always be "co-operating" licensees in a transaction. If that is invariably the case, the form is adequate; if that is not always the case, then provision should be made to allow buyer licensees also to declare their representative capacity.

6.4 Fee Agreements

Two jurisdictions, British Columbia and Ontario, have developed forms for use by buyer licensees who look to seller-customers for remuneration. The forms, *inter alia*, advise the seller that the licensee is the representative of the buyer, not the seller, and will not provide any agency services to the latter. Furthermore, the forms seek the seller's agreement to remunerate the licensee notwithstanding the licensee is not the seller's representative and advises the seller that such payment will not make the licensee the seller's representatives.

These forms are unexceptional but for one omission. While it is true that buyer agency agreements authorize buyers' licensees to look to sellers (or their licensees) for remuneration, the fee agreements would be strengthened if provision was made for buyers to consent to the particular remuneration arrangement reached between their licensees and sellers. It will be recalled that the fiduciary duty of disclosure is a continuing one, calling for disclosure as new facts become known relevant to the fiduciary relationship. Consequently, licensees must keep their buyer-clients apprised of all new facts relating to the formers remuneration, particularly when it is to come from the other party to the transaction.

This issue is addressed in part by the British Columbia, though not the Ontario, form. At the bottom of the British Columbia form the buyer-client is asked to "acknowledge an agency relationship with the buyer's agent." This is a very ambiguous request: what is it the buyer is being asked to acknowledge? Consequently, such forms should specifically ask for the buyer's "consent" to the agreement reached by their licensee with the seller to avoid any misunderstanding as to whether "acknowledgement" of a pre-existing relationship is the

equivalent of consenting to the particular remuneration arrangement between the licensee and seller.

7. CONCLUSION

The report first provided an overview of agency duties in the three representation relationships that may be encountered by licensees, namely:

- licensee-client relationships;
- licensee-customer relationships; and
- dual agency relationships.

This was followed by a brief discussion of the main concerns confronting licensees especially in licensee-client and dual agency relationships to provide some focus for the review of the provincial standard forms.

The review of these standard forms, particularly listing agreements, buyer agency agreements and dual agency forms, disclosed a range of concerns and issues that need to be addressed. It is true that many of the concerns and issues identified have not yet been the subject of litigation. However, their identification provides an opportunity to address them before they do become the subject of litigation or other consumer action should that need be felt.

An objective reading of the listing and buyer agency agreements suggests that their provisions are weighted in favour of licensees and their brokerages. Licensees in fact promise very little though they do seek the authority (i.e. discretion) to perform a range of acts (performance of a number of which would be problematic without their client's consent). Some would even say that the main thrust of these agreements is, first, to protect licensee remuneration (sometimes from a number of sources); second, to insulate them from liability to clients and customers; and, third, to confer on them a right to indemnity from their clients. Indeed, when one compares the obligations imposed on licensees to those imposed on clients there does appear to be an imbalance favouring the former.

In addition, the treatment of potential conflict of interest situations (e.g. dual agency, competing buyers, third party remuneration) in the various forms (and brochures), raises questions as to whether adequate disclosure is being made: is it sufficiently timely, complete and continuing to meet the fiduciary requirement that any consent given be fully informed and voluntary consent to the actual conflict that eventuates. On balance few, if any, forms appear to be satisfactory in this regard.

It must be remembered that the standard form agreements prepared by the industry are, in essence consumer contracts or, to use another term, "contracts of adhesion." Although certain elements of these contracts may, in truth, be negotiable, this is not commonly known to buyers and sellers. This is particularly true in the residential market where most buyers and sellers are consumers who have little, if any, knowledge in real estate transactions; experience or expertise, in the range of services offered by or to be expected from licensees; and knowledge of the terms on which licensees conduct business. When confronted with such standard forms, as in other aspects of life in which they are confronted with "standard forms," buyers and sellers may feel that they have little option but to sign if they wish to be represented by a licensee.

Finally, as observed in the second report to the ATF (section 8.2) there is a real risk that where ambiguity or uncertainty exists in the meaning or import of terms in these standard forms, the documents will be interpreted *contra proferentum* – that is, they will be given the interpretation that is most favourable to the party (buyer or seller) who is not the author of the documents. In other words, they will be given an interpretation that favours the client(s). The end result for licensees could be loss of their right to remuneration and, as the case law suggests, even liability to their clients or customers. These possibilities need to be avoided, or at least minimized through a re-examination of a number of provisions of existing forms.

ANNEX A: QUEBEC LISTING LICENSEE'S MANDATE

Licensee's Obligation	Exclusive	Non-Exclusive
I. Normally associated with agency		
1. Act honestly, diligently and competently	9(1)	9(1)
2. Promptly inform the seller if the licensee has (a) any interest in a property or (b) wishes to acquire an interest in a property covered by the listing agreement	9(9)	9(6)
3. Promptly inform the seller if the licensee receives any compensation from a third party	9(10)	9(7)
4. Promptly inform the seller in writing that the licensee is also representing the buyer for compensation	9(11)	9(8)
5. Where the terms are met, must buy the property and not collect any commission, if the licensee agreed to this	9(13)	
6. Where a licensee agrees to purchase the property, the terms must be set out in the listing agreement	9(13)	
II. Specific to listing of property		
7. Promptly present to the seller all offers for property covered by the agreement	9(2)	9(2)
8. Regularly keep the seller abreast – orally – of what is happening	9(3)	9(3)
9. Verify all facts contained in advertising	9(4)	9(4)
10. Give a copy to the seller of any document describing the property in issue that is apt to be given to prospective buyers	9(5)	
11. Obtain seller's permission to advertise any price other than that stipulated in listing agreement	9(6)	
12. Not to use 'sold' anywhere (including advertising) unless a valid offer has been properly accepted	9(7)	9(5)
13. Remove any signs placed on the property as soon as the listing agreement expires	9(7)	9(5)
14. Stipulate in the listing agreement what advertising the licensee undertakes to do at his, her or its expense	9(12)	
15. "to do, at his expense, the advertising described" in the agreement		9(9)
16. Give a copy to the seller of any document describing the property in issue that is apt to be given to prospective buyers	9(5)	
17. Where the listing agreement allows it, inform the seller that the licensee has authorized another licensee to advertise the property	9(14)	
18. If a seller has requested that the property be listed in with a MLS, send him, her or it proof that information pertaining to the property has been sent to the MLS	9(8)	
19. Fulfill specific undertakings	9(12)	
20. Fulfill "any promise, guarantee or other advantage offered by the licensee to the seller or buyer" even if the licensee agreed to do it free of charge	9(12)	
21. Stipulate in the listing agreement "guarantee or other advantage or other advantage offered by the licensee to the seller or buyer of the immovable, for consideration or free of charge"	9(12)	
22. Where a licensee authorized to act on behalf of the seller in the agreement is no longer authorized or able to do this, promptly provide the seller with a name of another licensee designated to replace him or her.	9(15)	
23. Promptly inform the seller and offer the name of another agent designated to act for him, her or it where an agent authorized to act under the listing agreement is no longer employed by the licensee regardless of whether the seller agrees to cancel the original agreement.	9(16)	
24. Promptly inform the seller in writing if the licensee loses his, her or its professional accreditation or is otherwise unable to fulfill his, her or its	9(17)	

Licensee's Obligation	Exclusive	Non-Exclusive
duties		
25. Forbidden from seeking compensation where the property "is sold to any of the persons designated hereinafter within [X] days following the signing of this contract"	9(18)	