

## Not Too Little, Just Too Late

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Just a day before Premier Christy Clark announced the end of self-regulation for the British Columbia real estate profession, an Independent Advisory Group issued its highly anticipated report on the industry. The report did not call for the end of self-regulation (so the Premier's decision was likely political). Instead the report recommended significant reforms that were aimed at ensuring that self-regulation in the sector would serve the public interest. These wide-ranging and extensive recommendations may be of interest to self-regulators wishing to avoid a similar fate.

The report identified a number of serious concerns that required action, including:

- A practice of embedded compensation and undisclosed conflicts of interest by practitioners.
- Reliance by the regulator on external complaints (rather the mandatory reporting by practitioners or comprehensive inspections by regulators).
- Lenient sanctions for disciplinary matters and inadequate communication by the regulator of those decisions.
- The handling of many complaints by well-resourced self-interest bodies within the industry (rather than referring the complaints to the regulator).
- Brokers had insufficient authority to supervise the conduct of real estate agents partly

because of the rule changes made by the regulator.

- The governance structure of the regulator fostered the possibility of the industry's views dominating over the public interest. For example, the ratio of elected to appointed public members on the Board / Council was 14:3.
- The regulator was not sufficiently proactive in educating the public about real estate issues and risks posed by unethical practitioners.
- The low bar of entry to practise in terms of education, particularly in the areas of conduct and ethics.
- The lack of proficiency testing in continuing professional development.

A number of the recommendations made in the report may also be of interest to regulators including:

- On renewal, all practitioners should have to sign a statement affirming familiarity with the regulator's Code of Ethics and Professional Conduct (to help reduce confusion with the industry's voluntary code of ethics).
- Representing both sides in the same transaction should be banned and disclosure rules should require full, clear and ongoing disclosure to individual clients of all financial benefits received by practitioners and of the professional duties the practitioner has towards their clients.
- The regulator should proactively review and, where necessary, promote changes to standard forms and contracts used by practitioners to ensure full, fair and clear consumer disclosure.

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### FOR MORE INFORMATION

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# Grey Areas

## A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

- The regulator should apply more stringent suitability (i.e., good character) assessment criteria to applicants for registration.
- There should be a mandatory reporting requirement on practitioners whenever they become aware of apparent misconduct that places the public at risk.
- The regulator should set up confidential reporting hotlines or whistle-blower programs open to both the profession and the public.
- The regulator should focus additional resources, including timely consumer alerts, on preventing and disciplining aggressive and predatory marketing practices that target vulnerable individuals.
- The regulator's inspection / audit program should move beyond trust funds and general documentation to include greater examination of business practices and practitioner conduct.
- Maximum disciplinary fines should be increased along with the authority to require disgorgement of the proceeds of misconduct.
- The regulator should publish information about its complaints and discipline decisions in a manner that is accessible and easy for consumers to use and to understand.
- Half of the regulator's Council should be publicly appointed, non-industry individuals.
- An independent body should be established by the government that has oversight of the effectiveness of the regulator's decisions (akin to the UK Professional Standards Authority).
- The regulator should increase educational requirements for entry to practise including in the areas of ethics and proficiency in the English language.
- The regulator should "implement mandatory continuing education with content and testing

that reinforces a [practitioner's] ethical obligations, conduct requirements, and duties to consumers".

- The regulator should improve communications with the public including "retaining professional communication advisors or additional staff with experience in consumer education and literacy, to assist with developing and implementing a comprehensive plan to increase consumer education and awareness and to restore public confidence" and making "increased use of timely consumer alerts, which equip consumers to identify, avoid, and report [practitioner] misconduct".

While the genesis of many of these recommendations is found in the current conditions in the frantic real estate market in Vancouver, British Columbia, the recommendations have components that other regulators would be wise to consider. Of course, many of these recommendations have corresponding risks associated with them. For example, a confidential whistle-blower hotline would create a complex set of challenges relating to the conflicting duty of disclosure in discipline matters (which would undermine the confidentiality assurances that could be offered to the whistle-blower). However, the recommendations still warrant consideration.

The report is valuable reading for any Canadian regulator and can be found at:

[http://www.recbc.ca/wp-content/uploads/IAGReport\\_June2016.pdf](http://www.recbc.ca/wp-content/uploads/IAGReport_June2016.pdf).