



Regulatory Performance Review of the Real Estate Council of Alberta

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**Prepared by Field Law's
Professional Regulatory Group**

Per:

**James T. Casey, QC
Ayla Akgungor
Greg Sim
Jason Kully**

About the Real Estate Council of Alberta

Established in 1996, the Real Estate Council of Alberta (RECA) is the independent, non-government agency, responsible for regulating and governing industry professionals in the real estate brokerage, mortgage brokerage, property management and real estate appraisal sectors in Alberta. At present, there are almost 15,000 licensed industry professionals in Alberta.

Alberta is one of only a few jurisdictions in North America with a fully self-regulated real estate industry, RECA is the self-regulatory body through which industry professionals govern themselves. RECA is mandated to protect consumers and to provide services that enhance and improve the industry and the business of industry professionals.

RECA is committed to the public interest and its mission is to build consumer trust and confidence in industry professionals. Its goal is to be an impartial, principles-based governing body, facilitating excellence in self-regulation, individual responsibility and accountability, to advance knowledge, career preparation, and ongoing practice through professional development programs and services, and to establish and promote quality standards and performance improvement solutions in a fair and respectful manner that enhances public protection, trust, and confidence in the real estate industry. RECA is committed to continuous improvement and strives for excellence in all aspects of its operations.

RECA is composed of 12 Council members, representing residential and commercial real estate, property management, mortgage brokers, real estate appraisers, and the public. Council's responsibilities include determining, setting and enforcing standards of conduct and business practices for industry professionals, providing services that enhance and improve the industry, and administering the *Real Estate Act*, Bylaws, and *Real Estate Act Rules*.

Council is assisted by the Executive Director of RECA, a statutory position established by the *Act*, who serves as the chief administrative officer of Council. The Executive Director is responsible for the day-to-day management of RECA in accordance with the policy and budget established by Council. The Executive Director is supported by the Deputy Executive Director. Other senior members of RECA's administration, who assist Council and the Executive Director in fulfilling the objects of RECA, include:

- General Counsel;
- Trust Assurance and Practice Review Coordinator;
- Director of the Office of the Registrar;
- Director of the Professional Standards Unit;
- Manager of Professional Conduct Proceedings; and
- Practice Advisor.

About Field Law

Field Law celebrated its 100th anniversary in 2015. As a top five ranked regional law firm in western and northern Canada, Field Law is a proud, strong and independent firm with lawyers dedicated to professional excellence and the highest ethical standards. With offices in Calgary and Edmonton, Alberta and Yellowknife, Northwest Territories, more than 120 lawyers and 170 staff work together to provide a wide variety of legal services

Field Law's Professional Regulatory Group is devoted exclusively to providing advice to professional regulatory organizations and their tribunals on all facets of professional regulation. We currently have 10 members in our Group representing a broad range of regulators, providing advice and representation on issues relating to: professional discipline, registration, incapacity assessments, unauthorized practice, legislative and policy development, statutory interpretation, regulatory performance, governance, defence of litigation and human rights complaints against regulators, and contractual advice. The Professional Regulatory Group also provides customized training to regulatory tribunals, committees and boards. Members of the Professional Regulatory Group also act as independent legal counsel for a broad range of tribunals.

The Professional Regulatory Group was founded by James T. Casey, Q.C., who is considered to be one of the leading authorities in Canada on professional regulation. Jim is the author of one of the leading texts in the area, *The Regulation of Professions in Canada*. The leader of the Professional Regulatory Group is currently Greg Sim. Members of the team from the Professional Regulatory Group which conducted the "Regulatory Performance Review of the Real Estate Council of Alberta" are:

- James T. Casey, Q.C.;
- Ayla Akgungor;
- Greg Sim; and
- Jason Kully.

Table of Contents

	Page
1. Executive Summary	1
2. Role of the Real Estate Council of Alberta and Statutory Framework in Alberta	18
3. Scope of Review and Methodology	22
4. Guidance and Standards	27
5. Authorizations: Licensing and Registration	31
6. Managing and Processing Complaints	46
7. Hearings Administration	64
8. Trust Assurance and Practice Review	83
9. Other Standards	91
10. General Matters	95
11. Preparing for the Future	98
12. Conclusion	104
Appendix A: Summary of Recommendations	105
Appendix B: Assessment Criteria	111
Appendix C: People We Interviewed	116
Appendix D: Reports and Surveys Reviewed	117
Appendix E: Flow Charts	118

1. Executive Summary

Third-Party Reviews

RECA is committed to the pursuit of regulatory excellence and continuous performance improvement.¹ In that spirit, the Council of RECA asked that a third-party review of RECA's regulatory operations be undertaken.

Field Law's Professional Regulatory Group was asked to conduct the third-party review. RECA requested that five program areas be reviewed: Office of the Registrar, Professional Conduct Reviews, Conduct Proceedings, Administration of Hearings, and Trust Assurance and Practice Reviews. The work was undertaken from November 2015 to March 2016.

A "third-party review" is a rigorous, in-depth assessment by an outside body of the regulatory performance of the organization. In essence, a third-party review is a "regulatory check-up" focusing on what is working well in the organization, what is not working well, and where improvements can be made. A third-party review typically culminates in a number of recommendations that can be implemented by the regulatory organization to improve performance.

Third-party reviews are common in some countries such as the United Kingdom where, for example, the Professional Standards Authority provides oversight of nine statutory bodies that regulate health professionals in the United Kingdom and social workers in England. The Professional Standards Authority regularly reviews the performance of each of the regulators, providing recommendations for improvement where appropriate.²

In Canada, third-party reviews have been used in a number of different contexts. On occasion governments have ordered third-party reviews where there have been potential concerns about regulatory performance and governments want an objective source of information before considering policy decisions that could affect the regulator.³ In Canada, there are also some statutorily mandated reviews such as, for example, the oversight provide by the Fairness Commissioner in some provinces.⁴ Finally, there have been a few regulators that have initiated third-party reviews as a performance enhancement tool. For example, the Royal College of

¹ Real Estate Council of Alberta 2011-2016 Strategic Plan; Real Estate Council of Alberta Statement of Self-Regulation.

² Professional Standards Authority, "Annual Report and Accounts and Performance Review Report 2014/2015".

³ For example, see Donald J. Avison, "A College Divided: Report of the Fact Finder on the BC College of Teachers", October 2010; PWC, "Operational Review and Audit of the College of Denturists of Ontario", March 8, 2012; Dr. Dennis Kendel, "For the Sake of Students: Current and Future Teacher Regulation in the Province of Saskatchewan", September 2013.

⁴ See Section 21(1) of Ontario's *Fair Access to Regulated Professions and Compulsory Trades Act*, 2006, S.O. 2006, c. 31, which states that "Every three years or at such other times as the Fairness Commissioner may specify or at such times as may be specified in the regulations, the Fairness Commissioner shall give notice to a regulated profession that an audit must be conducted in respect of its registration practices and of its compliance with this Act and the regulations."

Dental Surgeons of Ontario arranged for a regulatory review by the Professional Standards Authority.⁵ More recently, the Real Estate Council of British Columbia established an Independent Advisory Group on real estate regulation in British Columbia to examine and review real estate licensee conduct and practices and the effectiveness of existing licensee regulation in light of important issues brought to the attention of the Real Estate Council of British Columbia, the Superintendent of Real Estate, and the government of British Columbia.⁶

Despite these initiatives, third-party reviews in Canada are still “leading-edge”. RECA is to be commended on the commitment to ongoing performance improvement as demonstrated by this review. We predict that in the years to come third-party reviews will become much more common in Canada as regulators and governments come to appreciate the benefits of rigorous reviews of regulatory performance to ensure that regulators are fully protecting and promoting the public interest.

Methodology

The methodology we followed in conducting the review is as follows:

1. Analysis of other third-party reviews of regulators to identify the most effective approaches.
2. Literature review of real estate regulation to identify emerging issues.
3. Develop detailed Assessment Criteria using (1) the “Standards of Good Regulation” from the Professional Standards Authority but adapting these standards to fit the regulatory context of RECA and (2) regulatory principles associated with high-performance regulators including “Right-Touch Regulation”.
4. Obtain agreement of RECA on the Assessment Criteria to be utilized.
5. Assess each of the five program areas against the Assessment Criteria gathering information about the programs from the following sources:
 - a. In-person meeting between the Field Law team, the senior management team at RECA, and Council liaison to discuss issues to be addressed.
 - b. Review of written policies and procedures from each of the five program areas.
 - c. Review of RECA website and online member portal, myRECA.
 - d. Interview broad cross-section of current and former Council members with hearing experience.
 - e. Interview the Executive Director and the Deputy Executive Director.
 - f. Interview the senior directors and managers in charge of each of the five program areas.

⁵ Professional Standards Authority, “A review conducted for the Royal College of Dental Surgeons of Ontario”, June 2013. See also the Honourable Patrick J. LeSage, “Review of the Ontario College of Teachers Intake, Investigation, and Discipline Procedures and Outcomes and the Dispute Resolution Program”, May 2012.

⁶ Independent Advisory Group – Terms of Reference, March 15, 2016.

- g. Interview Service Alberta officials who serve as the principal liaison with RECA on behalf of the Government of Alberta.
 - h. Review randomly selected case files from each program area assessing for compliance with the Assessment Criteria.
 - i. Review RECA tribunal decisions, appeals, and court decisions.
 - j. Review pre-existing surveys completed by RECA of participants in the regulatory process.
6. Review of applicable legislation and regulations to assess statutory compliance.
7. During the interviews of Council and former Council members, some interviewees identified discipline and registration cases which raised concern. Four particular cases were consistently raised. We reviewed these four cases to assess whether the cases highlighted any systemic areas of concern or need for improvement.
8. Identify key trends affecting regulators and assess RECA's regulatory readiness adapting to these trends.
9. Prepare recommendations for improvement.
10. Prepare the written report and submit to RECA.

During our review, we had the full cooperation of RECA and its staff. We requested extensive documentation and substantiation in all five program areas. No information was denied to us.

Findings

From this extensive review and analysis we arrive at the following fundamental findings:

1. As RECA has intensified its focus on ongoing performance improvement, considerable improvements have been made in the last few years.
2. RECA is a high-performing regulator meeting or exceeding almost all the Assessment Criteria in the five program areas.
3. With respect to the four controversial cases that were identified by some Council or former Council members, our review of the cases has not identified systemic areas of concern. However, our review of the concerns has led to a number of recommendations that are addressed below and in the full Report.
4. As expected, our review has identified a number of areas where improvements can be made resulting in 33 recommendations. The recommendations are summarized below along with a brief rationale. More detail on the rationale is found in the body of the Report. In this Executive Summary, we will not comment on the vast majority of regulatory activities where we did not identify any need for improvement. Instead, in this Executive Summary we focus on recommendations in the spirit of continuous quality improvement.

Recommendations

Guidance and Standards

- **Recommendation #1:** In the interest of transparency and to assist consumers in understanding the standards of conduct expected of industry professionals, consider including a link under the “Consumers” portal to “Standards of Conduct” that includes a summary of the Rules and other material relevant to the standards of conduct expected of industry professionals.

Rationale: In general, RECA’s website is an excellent, easily-accessible source of information for industry professionals and consumers. There is a link to the Rules but consumers may not understand that the “Rules” establish the standards of conduct (for further analysis, see the detailed discussion at pages 29-30 of the Report).

- **Recommendation #2:** Develop a “plain-language” summary of the Rules for reference by consumers.

Rationale: The standards of conduct expected of industry professionals are set out in the Rules. The Rules are drafted in a legislative style and are difficult for a consumer to understand. In the interests of transparency, a plain language summary of the Rules would be of assistance. RECA would need to make it clear that the “plain-language version” is only a summary and that the full-text Rules remain the authoritative document establishing the standards (for further analysis, see the detailed discussion at page 30 of the Report).

Authorizations: Licensing and Registration

- **Recommendation #3:** Increase the information available to applicants about how licensing criteria and requirements are interpreted and applied, particularly in relation to the questions associated with the good character of an applicant and the protection of the integrity and reputation of the industry. Consider preparing a policy document available to applicants explaining how these criteria are typically applied.

Rationale: The Rules provide that the Executive Director may refuse to issue a license or registration certificate where the applicant is not of good character and reputation or if registration would not be in the public interest, would harm the integrity of the industry, or would bring the industry into disrepute. These “regulatory tools” are powerful and appropriate. The strength of such criteria is their flexibility. However, the criteria are also very general in nature and highly

uncertain in their precise meaning and application. To assist in transparency, some regulators with “good character and reputation” requirements have prepared policy documents explaining how they apply these criteria. A publication available to applicants would provide greater transparency on how RECA applies the criteria in its Rules (for further analysis, see the detailed discussion at pages 38-39 of the Report).

- **Recommendation #4:** We recommend increased communication and collaboration between the Office of the Registrar and the Professional Standards Unit with respect to issues relating to the character of applicants or industry professionals. In order to enhance organization-wide consistency, we recommend that the two departments hold a joint training session to discuss how the two departments address “character issues” with the objective of developing an internal policy document providing guidance to both departments. The joint training session should also address when an issue will be addressed in the registration/renewal process and when it will be addressed as a discipline issue.

Rationale: Concern was expressed during the review process about the perceived lack of consistency between the registration and discipline process with respect to conduct that reflects upon the character of an applicant for registration or an industry professional. There is a strong perception among some Council or former Council members that there are inconsistent approaches to how seriously certain misconduct should be treated. “Character” issues are some of the most challenging for all regulators. Increasing collaboration, communication, and training on “character issues” between registration and discipline will enhance consistency of treatment. An in-depth examination of the issue by RECA resulting in an internal policy document will also enhance Council’s confidence that good character issues are being addressed consistently and appropriately (for further analysis, see the detailed discussion at page 40 of the Report).

- **Recommendation #5:** RECA should seek a change to its *Act* broadening the publication power so that conditions, restrictions and limitations on an industry professional’s registration can be included in the Public License Search. In the Public License Search, RECA should consider providing more specific information on the reason for an individual not being authorized and information on any findings of conduct deserving of sanction with a link to the specific decisions.

Rationale: The Public License Search on the website is a very useful tool for consumers to check to ensure that the industry professional is appropriately licensed. Including information in the Public License Search on conditions, restrictions, and limitations on an industry professional’s registration would enhance transparency. However, the *Act* does not explicitly authorize

publication of conditions, restrictions and limitations. Therefore, when the *Act* is next opened for revision, RECA should consider seeking a legislative change expanding the authority to publish information. If an industry professional is currently not authorized, then specific information for the reason for the non-authorization is not provided. The current information is very general. Providing more clarification on the specific status of an industry professional's registration would provide greater transparency as would including a summary of any findings of conduct deserving of sanction against an industry professional (for further analysis, see the detailed discussion at pages 43-44 of the Report).

- **Recommendation #6:** RECA may wish to consider increasing the information provided to the public as to the importance of using the Public License Search when forming a relationship with an industry professional.

Rationale: Emphasizing the need to ensure that consumers are dealing with a properly authorized industry professional will assist in combating unauthorized practice especially at a time of economic stress when unauthorized practice may increase (for further analysis, see the detailed discussion at page 44 of the Report).

Managing and Processing Complaints

- **Recommendation #7:** RECA should avoid a blanket policy concerning complaints by "strangers" to the transaction. Instead, RECA should consider accepting a complaint from any individual or organization, regardless of their relationship with the industry professional, so long as it is in writing and provides "reasonable particulars".

Rationale: Section 37(2) of the *Act* requires that a complainant provide "reasonable particulars" of the complaint. The Professional Standards Unit interprets this section to mean that a complaint by a "stranger" to the relationship with an industry professional or transaction would not have sufficient particulars to proceed. However, it is possible that even a "stranger" to a transaction or relationship could still provide reasonable particulars obtained through other parties. Therefore, in our view a blanket policy of not proceeding with complaints in these circumstances is not appropriate. Instead, each complaint should be individually assessed with respect to whether it contains reasonable particulars (for further analysis, see the detailed discussion at page 47 of the Report).

- **Recommendation #8:** When the *Real Estate Act* is open for revision, RECA should seek amendments expressly authorizing the informal resolution processes it uses.

Rationale: Resolving complaints informally in appropriate cases without proceeding to a full hearing is consistent with the principles of “Right-Touch Regulation”, fair treatment of industry professionals, and protection of the public. Formal hearings should be reserved for more serious cases and regulators should be encouraged to make fulsome use of alternative complaint resolution systems to achieve better outcomes more quickly and at less cost. RECA uses alternative complaints resolution processes. However, these processes are not explicitly set out in the *Real Estate Act*. In the British Columbia case of *Salway*, the Court held that a resolution pursuant to a resolution process not set out in the legislation was invalid. The *Salway* decision is not binding in Alberta but could be influential if an industry professional decided to later challenge a resolution to which they agreed. There are certainly reasonable arguments that an optional, consensual informal resolution process is permissible. However, to reduce the risk of a successful legal challenge, we recommend that when the *Act* is opened for revisions, RECA seek the inclusion in the *Act* of explicit authority for the alternative complaints resolution process it uses (for further analysis, see the detailed discussion at pages 51-52 of the Report).

- **Recommendation #9:** RECA may wish to consider changing its practice to generally provide a short time-frame to industry professionals to make written submissions prior to imposing interim suspensions. Where public protection requires an immediate interim suspension without waiting for submissions, RECA might consider adopting a practice of providing industry professionals with an opportunity to make written submissions asking for the Chair of Council to reconsider and change his or her decision imposing an interim suspension.

Rationale: RECA’s practice is not to provide the opportunity to industry professional’s to provide written submissions prior to imposing an interim suspension. The rationale for this practice is three-fold: 1) interim suspensions are only used in the most serious of cases, 2) public protection could be compromised if a suspension is delayed while waiting for submissions by the industry professionals and 3) the industry professional will be given an opportunity to make submissions in Court challenging the suspensions and will be able to make submissions at that stage with respect to whether the interim suspension is appropriate. However, some Court cases have held that procedural fairness requires that investigated professionals are required to be given an opportunity to make submissions prior to the imposition of an interim suspension and have over-turned interim suspensions on that basis. Reasonable counter-arguments can certainly be made but these cases do create some legal risk to RECA’s process. Providing a short time-frame for submissions also maximizes fairness to industry professionals. To reduce the legal risk and to maximize fairness to industry professionals, RECA could adopt a practice of generally providing a short opportunity such as between a few days to one week for an industry professional to make a written submission on whether an interim

suspension is appropriate. Where public protection requires such urgent action that no delay is tolerable, some regulators have adopted a practice of immediately imposing a suspension but providing an opportunity to the investigated professional to make written submissions on whether the decision-maker should reconsider and reverse the decision (for further analysis, see the detailed discussion at page 53 of the Report).

- **Recommendation #10:** RECA should assess the reason it is facing challenges in meeting the performance objective for the time taken to resolve Level 2 and Level 3 complaints. RECA will need to consider whether it is devoting sufficient resources to meet the performance objectives in this area.

Rationale: Using a “triage system” to assess the potential seriousness of complaints and then assigning the highest priority to the most serious complaints is considered a “best practice” for regulators. RECA follows this process. Establishing performance objectives for the time it takes to complete investigations is also a “best practice” for regulators. RECA should be commended for utilizing a triage system along with establishing performance objectives for completion times. RECA is experiencing some challenges in meeting the objectives for Level 2 and 3 complaints. In some cases, work load is causing significant delays in assigning Level 2 complaints to Professional Conduct Review Officers. RECA needs to assess the reason for the delay and consider if it is devoting sufficient resources to enable the performance objectives to be met (for further analysis, see the detailed discussion at page 57 of the Report).

- **Recommendation #11:** RECA may wish to establish a performance objective for the assignment of a Professional Conduct Review Officer to Level 2 complaints.

Rationale: Given that delays are being experienced in assigning Professional Conduct Review Officers to Level 2 complaints, establishing a specific performance objective for the time it takes to make the assignment may be useful (for further analysis, see the detailed discussion at page 58 of the Report).

- **Recommendation #12:** RECA may wish to consider implementing a non-binding guideline or policy to assist staff in determining how all types of complaints should be resolved, i.e. with an advisory note, letter of reprimand, administrative penalty (where authorized) or referral to hearing.

Rationale: Having a non-binding guideline can promote consistency in the selection of particular “regulatory tools” (for further analysis, see the detailed discussion at page 60 of the Report).

- **Recommendation #13:** RECA may wish revise its template letter of reprimand and administrative penalty to state that the Executive Director has determined

that there is sufficient evidence that the industry professional contravened a section(s) of the *Act* and that this is conduct deserving of sanction.

Rationale: Revisions of the language in the template would more closely track the language in the *Real Estate Act* of “sufficient evidence of conduct deserving of sanction” which is slightly different than the language in the templates (for further analysis, see the detailed discussion at pages 60-61 of the Report).

- **Recommendation #14:** RECA may wish to undertake a review of the administrative penalty amounts prescribed in its Bylaws to determine if the amounts are still considered to be at an appropriate level.

Rationale: While Hearing Panels can order industry professionals to pay fines of up to \$25,000 for each finding of conduct deserving of sanction, administrative penalties can range from \$500 to \$5,000. RECA should examine whether it still considers the amount to be appropriate (for further analysis, see the detailed discussion at page 61 of the Report).

- **Recommendation #15:** RECA may wish to consider providing a greater detail of information to industry professionals and complainants when a complaint is resolved, in particular, RECA may wish to consider stating why other outcomes were inappropriate.

Rationale: The closing letters sent to industry professionals and complainants do include some summary reasons but do not generally address why a matter was disposed of through one method as opposed to another. The inclusion of some additional detail would enhance transparency (for further analysis, see the detailed discussion at page 62 of the Report).

Hearings Administration

- **Recommendation #16:** RECA should consider implementing a process where Hearing Panels that are ratifying Consent Agreements provide reasons for their finding that the industry professional has engaged in unprofessional conduct as well as reasons for why the sanctions being imposed are appropriate orders for penalty given the conduct at issue. Given that the matter is proceeding by consent, the reasons provided by the Hearing Panels could be much shorter than a contested hearing but some reasons should be provided.

Rationale: Currently the Hearing Panels do not provide any reasons for accepting the admissions or the sanctions and instead simply provide a checkmark by a statement indicating that the Consent Agreement is approved. Given that the acceptance of the Consent Agreement is a finding of conduct deserving of sanction, transparency would be enhanced by providing some level of reasons

and would also enhance confidence that the Hearing Panels are appropriately considering whether the sanctions are appropriate (for further analysis, see the detailed discussion at page 66 of the Report).

- **Recommendation #17:** RECA should consider adopting a process whereby the effect of a Hearing Panel's rejection of a Consent Agreement is made clear. Hearing Panels should specify when they are rejecting a Consent Agreement that they are not making a finding that the industry professional has not engaged in conduct deserving of sanction and that the Hearing Panel is simply requesting further information before making a determination as to whether or not to accept the Consent Agreement. RECA may wish to consider revising its Consent Agreement templates so that the Hearing Panel may specify why it has rejected the Consent Agreement.

Rationale: In the current process the Hearing Panels do not specify why they have rejected a Consent Agreement. Transparency and appropriate feedback would be enhanced if the Hearing Panels specified why they rejected the Consent Agreement. For example, if they felt that there was insufficient information provided or the sanctions were inappropriate, then this should be specified (for further analysis, see the detailed discussion at page 67 of the Report).

- **Recommendation #18:** RECA should ensure that members of the Hearing Panels are aware of the process for seeking further information from either the Case Presenter or the industry professional during the course of a Consent Agreement hearing or should consider amending the Consent Agreement process to allow for in-person attendance of the parties to present the Consent Agreement.

Rationale: During our interviews some Hearing Panel members were uncertain about the process to seek additional information. Asking questions at a Consent Agreement teleconference is awkward because both parties are not in attendance. There is a process in place for Hearing Panel members to seek further information where necessary but the process needs to be more clearly communicated to Hearing Panel members (for further analysis, see the detailed discussion at page 68 of the Report).

- **Recommendation #19:** RECA may wish to develop additional measures to assist self-represented industry professionals in the hearing process. Examples of additional possible measures include:
 - The publication for self-represented industry professionals should explicitly state that they are strongly encouraged to have legal representation. The publication could explicitly state that due to the legalistic nature of the hearing process, most industry professionals who do not have legal representation find the process very difficult.

The objective is to ensure that the industry professionals clearly understand the challenges of proceeding without legal counsel.

- We heard many concerns that some industry professionals do not understand until the hearing starts how formal the process will be. Some industry professionals may think that this was simply going to be a meeting among colleagues. There is no good reason for this misconception since RECA's publications clearly describe the formality of the hearing processes. However, sometimes industry professionals have a "head in the sand" approach ignoring the reality of the impending process. To help industry professionals clearly understand the formality of the process and the set-up of the hearing room, RECA could develop a short video made available to self-represented industry professionals showing a demonstration of a mock hearing process.
- Develop checklists for industry professionals that they can use and follow to guide themselves through the hearing process. While the current resources available to self-represented members are excellent, a short check-list that is followed by all participants during the hearing process could significantly assist in keeping hearings on track.
- Develop a system where industry professionals have the same access to the previous Hearing Panel decisions as the Case Presenters.
- Regularly assess the need for training of Hearing Panel and Appeal Panel members on how to effectively deal with self-represented industry professionals. (Note as a result of the input we received during this review on the challenges of dealing with self-represented industry professionals, we recommended and developed a training session on this topic that we presented to Hearing and Appeal Panel members in March 2016).
- Develop a list of experienced defence counsel who are prepared to act on behalf of industry professionals in RECA conduct proceedings. Advise industry professionals that they can obtain the list from the Practice Advisor.
- Enhance the role of the Practice Advisor in providing procedural advice and direction to industry professionals by making industry professionals aware, through the formal correspondence exchanged during the hearing process, of their ability to contact the Practice Advisor and discuss the hearing process in a confidential manner. The Practice Advisor will need to ensure that he does not provide substantive advice on defending the allegations or on the best course of action to be taken by the industry professionals but can properly provide advice on standard procedures and options available.

Rationale: Self-represented industry professionals present very significant challenges. This is no different than any other profession. Significant levels of concern were expressed during our review about how RECA can best ensure that self-represented industry professionals are fairly treated without compromising the need to hold hearings that are legally sound. The recommendations outlined above would advance these objectives (for further analysis, see the detailed discussion at pages 71-73 of the Report).

- **Recommendation #20:** When the *Real Estate Act* is opened for revisions, RECA should recommend amendments that provide clear direction on the processes to be followed in appeals by complainants of dismissals of complaints.

Rationale: Section 40 of the *Real Estate Act* provides that complainants can appeal the dismissal of complaints. However, unlike many other professional statutes, the *Real Estate Act* does not provide any direction on the process to be followed at the appeal with respect to who are the parties to the appeal. In the absence of any direction in the legislation, RECA has had to establish the procedures to be followed (for further analysis, see the detailed discussion at page 73 of the Report).

- **Recommendation #21:** RECA should review its current process for s. 40 appeals by complainants and consider whether any steps need to be taken to restructure the current process, taking into account the requirements for procedural fairness and statutory compliance.

Rationale: The role of the industry professional and the Executive Director in s. 40 appeals needs to be examined. The issue of disclosure to the complainant to ensure a fair process needs review while taking into account issues of confidentiality (for further analysis, see the detailed discussion at pages 74-75 of the Report).

- **Recommendation #22:** While unanimity in decision-making should be encouraged and efforts made to build consensus among panel members, RECA may want to consider a process where Hearing or Appeal Panel members who do not agree with the majority decision are not required to sign the decision in a manner which indicates agreement. A process could be adopted where the decision is simply issued by the “Hearing Panel” or the “Appeal Panel” and signed by the Chair on behalf of the Panel rather than its individual members. If the decision is only signed by the Chair, it is still essential that all Panel members review and provide input on the drafts. Panel members must still indicate they are satisfied with the decision before it is issued even if it is only signed by the Chair.

Rationale: Some Panel members have indicated their discomfort in being required to sign decisions which seem to indicate that they agree with the decision when in fact they do not. The process suggested above addresses this concern. Alternatively, RECA could develop a process in which Panel members may, in appropriate cases, issue written dissents. However, that process has its own problems. We consider the process set out above to be a superior option (for further analysis, see the detailed discussion at pages 75-76 of the Report).

- **Recommendation #23:** RECA may want to consider “just-in-time” training initiatives for Hearing and Appeal Panel members so that members have ready access to training at any point where members feel that they need to be refreshed on the hearing process. An example of such types of training includes webinars that could be accessed by Panel members on demand. This type of webinar would address the fundamentals of the hearing process that could be reviewed in advance of a hearing. The fundamentals webinar would be supplemented by annual in person training addressing more complex issues.

Rationale: Given the declining number of hearings and lengthy periods of time between hearings for Panel members, having “just-in-time” training resources available is more important (for further analysis, see the detailed discussion at pages 76-77 of the Report).

- **Recommendation #24:** Enhance opportunities for Panel members to serve as “shadow Panel members” where they attend hearings but are not a formal member of the Panel. The “shadow Panel member” would sit with the Panel during the hearing but would not ask questions. The “shadow Panel member” would caucus with the Panel but could not participate in discussions or the decision-making. RECA would need to develop a formal policy on the parameters of this process and ensure that participants in a hearing did not have any objections to the process.

Rationale: Given the declining number of hearings, a “shadow Panel member” process would enhance learning opportunities from the hearings that do proceed (for further analysis, see the detailed discussion at page 77 of the Report).

- **Recommendation #25:** Consider creating an “adjudicative sub-set” of Council that would sit on Hearing and Appeal Panels.

Rationale: Given the declining number of hearings and appeals, it is increasingly difficult to ensure that all Council members obtain sufficient hearing experience. More focused training could be provided to this smaller group of Council members who would develop more experience. In making this recommendation, we do recognize the challenges arising from the desire to have Council members

with different industry backgrounds available for hearings (for further analysis, see the detailed discussion at pages 77-78 of the Report).

- **Recommendation #26:** RECA should consider preparing a glossary of the types of industry professionals regulated by RECA. The glossary should be provided to public members on Hearing Panels who do not have real estate backgrounds.

Rationale: The glossary would be an easy to use, useful resource for public members (for further analysis, see the detailed discussion at page 78 of the Report).

- **Recommendation #27:** RECA should consider establishing a system of retaining independent legal counsel from outside RECA to attend hearings and appeals to provide advice to Panels on legal and procedural issues and provide advice and recommendations on a Panels' draft decisions.

Rationale: General Counsel typically acts as independent legal counsel to Hearing and Appeal Panels but does not generally attend the hearings or appeals. It is extremely challenging to provide comprehensive advice when independent legal counsel did not attend the hearing. In addition, Hearing and Appeal Panels obtain much greater benefit from independent legal counsel who are in the hearings and can obtain "real-time" advice as serious issues arise. In some cases, independent counsel can steer Panels away from significant errors. Given the challenge in adjudicating cases using formalized legal processes, most leading regulators now provide their panels with the benefit of independent legal counsel who attend the hearings. Utilizing independent legal counsel from outside the organization also enhances the important appearance of impartiality and independence. If RECA decides to adopt this process, then it should select independent legal counsel from law firms who do not act as the case presenter for the Executive Director (for further analysis, see the detailed discussion at pages 78-79 of the Report).

- **Recommendation #28:** We have the following recommendations arising from our review of the [REDACTED] decision which was controversial with some Council or former Council members:
 - Provide training to Panel members on when direct evidence is required and when inferences from evidence may be made.
 - Provide training to Panel members on how to address areas of concern to the Panel when the industry professional is not present or self-represented.
 - When the *Real Estate Act* is opened, RECA should consider if it is optimal for Council members to sit on Hearing Panels or whether their adjudicative duties should be restricted to hearing appeals.

Rationale: The [REDACTED] case was challenging in part because the industry professional decided not to attend so no one was there to present the industry professional's perspective. If the industry professional is not in attendance or is self-represented, then Hearing Panel members may have an issue or concern that is not being addressed. In these circumstances the Hearing Panel members should raise the issue during the hearing with the Case Presenter and ask for comments on the issue. Training should be provided on how to do this properly. In addition, training should be provided on when direct evidence is required and when a Hearing Panel may draw an inference. Council members being required to sit on appeal of a fellow Council member's decision creates natural sources of tension. When revisions to the *Act* are considered, RECA should consider whether this is the best structure. The [REDACTED] case reinforces our view that independent legal counsel in attendance at the hearing would be very valuable since the Hearing Panel could have received advice on how to best get submissions on the issue of a lack of direct evidence. Finally, we have no concerns that the Executive Director chose to appeal in this case. That is part of the process in the *Real Estate Act* and an important part of the checks and balances in the system (for further analysis, see the detailed discussion at pages 79-81 of the Report).

Trust Assurance and Practice Review

- **Recommendation #29:** RECA may wish to consider including the reason for the performance review in the letter sent to the brokerage advising that a review will take place in the near future.

Rationale: The letters to brokerages do not identify the reason for the review. For example, the letters do not indicate whether the review is part of the regular 5 year cycle, or that a concern has been identified in the year-end reporting, or any other reason. Specifying the reason for the review would increase transparency (for further analysis, see the detailed discussion at page 84 of the Report).

- **Recommendation #30:** RECA may wish to formally establish the minimum time between the initial notice and request for information and the performance of the review. The minimum amount provided should provide sufficient time for brokers to gather the necessary information.

Rationale: During our review process some concerns were expressed whether the amount of notice provided to brokers was sufficient to collect and provide information. We were advised during the review that the department strives to provide between 1 and 3 weeks advance notice, with efforts being made to provide the maximum notice. It would be useful for RECA to specify a minimum

amount of notice that is reasonable (for further analysis, see the detailed discussion at pages 84-85 of the Report).

- **Recommendation #31:** We recommend that practice reviewers across the Province meet and address: 1) the typical practice review issues arising from the audits and 2) the advice that should be provided in these circumstances. As additional issues arise in practice reviews, we recommend that the department establish processes to share amongst each other the advice being provided by practice reviewers.

Rationale: During our review, some significant concerns were expressed about whether the advice being provided to brokerages regarding practice review issues was consistent across the province. During the review process it was difficult to assess whether this is a real matter of legitimate concern because most brokers would not be aware of the advice being provided to other brokerages. However, consistency of practice advice is important. Consistency will be enhanced by greater communication among practice reviewers with respect to the advice being given (for further analysis, see the detailed discussion at page 88 of the Report).

Other Standards

No specific recommendations

General Matters

- **Recommendation #32:** Provide for an education session for Council on the entire discipline process and generalized outcomes of the discipline process.

Rationale: An in-depth understanding of the discipline process will assist Council members in fulfilling their governance obligations (for further analysis, see the detailed discussion at page 96 of the Report).

- **Recommendation #33:** When the *Real Estate Act* becomes open for amendments, RECA should examine the statutory objectives, the composition of Council, and the appointment process as opposed to an election process, and assess whether this structure remains optimal.

Rationale: Under the current structure, RECA has been able to develop and excel as a regulator. However, when the *Real Estate Act* is opened for amendment, the focus will be on whether the structure remains optimal for the future (for further analysis, see the detailed discussion at pages 96-97 of the Report).

Preparing for the Future

As part of the review process, we identified a number of trends and changes in the regulatory landscape most likely to affect RECA in the years ahead. Being able to identify key trends and changes and to proactively address these challenges is a crucial part of effective governance of self-regulating professions. Our full discussion of these trends and changes is in Section 11 of the Report but can be summarized as follows:

1. Opening of the *Real Estate Act* for amendments.
2. The Alberta Government's review of agencies, boards, and commissions (the "ABC Review").
3. Expansion of the role of public members.
4. Increased skepticism of the value of professional self-governance structures.
5. Tension between the competing societal values of transparency and privacy.
6. Increasing impact on regulators of human rights principles and human rights litigation.
7. Third-party reviews of professional regulatory organizations.
8. Policy-maker focus on the effect of professional regulation on competition.
9. On-line training resources for adjudicators.
10. The growing impact of the "Rethinking Regulation" movement.
11. The growing impact in Canada of the principles of "Right-Touch Regulation".
12. Utilization by regulators of risk management tools.
13. Consideration of the value of "single level licensing" as opposed to "entity regulation".
14. The impact of a prolonged recession on the industry and the need to focus regulatory resources on the affected areas.

Conclusion

As the reader will note, our recommendations are detailed and extensive. The extensive nature of our recommendations has resulted from three factors:

1. This Report was prepared in the spirit of continuous performance improvement adopted by RECA as part of its culture. Even where regulatory processes are working well, we search for areas where improvements can be made.
2. The in-depth detailed nature of this review.
3. Our desire that RECA obtain the most value from its investment in this review process.

However, the detailed and extensive nature of our recommendations should not obscure our fundamental conclusion – RECA is a high performance regulator meeting or exceeding almost all the Assessment Criteria in the five program areas. RECA should be commended for its commitment to regulatory excellence and continuous performance improvement.

2. Role of the Real Estate Council of Alberta and Statutory Framework in Alberta

Given that we are assessing RECA's regulatory performance, it is important to understand its statutory role and its statutory framework.

RECA is established as a corporation under s. 3 of the *Real Estate Act*. Real estate, mortgage, and real estate appraisal professionals are all regulated by the *Real Estate Act*, and the *Act* delegates the administration of the *Act*, including the power to authorize, regulate, and govern these professionals, to RECA.

Real estate professionals include real estate associates, associate brokers, real estate brokers and real estate brokerages. Real estate industry professionals provide services to assist with buying and selling property, provide property management services, and solicit, negotiate, or obtain an agreement for a trade in real estate.

Mortgage brokerage professionals include mortgage associates, mortgage brokers and mortgage brokerages. Mortgage brokerage professionals, on behalf of another person, solicit a person to borrow or lend money that will be secured by a mortgage, negotiate mortgage transactions, administer mortgages, and trade in mortgages.

Real estate appraisal professionals include appraisers and candidates. Appraisers and candidates estimate the value of an interest in real estate and provide real estate appraisal consulting services.

The Legislature has expressly conferred on the RECA Council, acting through its Executive Director, a public interest responsibility to regulate the real estate industry and to protect the public from conduct deserving of sanction by industry professionals. The Executive Director is a statutory position established by the *Act*. He or she is appointed by the Council and serves as chief administrative officer of Council.

RECA has the power and privileges associated with being a self-governing profession. There are three groups with an interest in the effectiveness and fairness of the self-governance of the professions: the public, the profession itself, and members of the profession who are subject to regulation and potentially discipline.

If the public perceives that a profession is not properly functioning in the public's interest, there may be pressure on the government to either re-examine or revoke a profession's self-governing status. Members of the profession have an interest in ensuring that their profession is operating in the public interest and that the public perceives this to be the case.

RECA's mandate, under s. 5 of the *Act*, is to:

1. Set and enforce standards of conduct for the industry in order to promote the integrity of the industry, to protect consumers affected by the industry, and to protect against, investigate, detect and suppress mortgage fraud as it relates to the industry.
2. Provide services that enhance and improve the industry and the business of industry professionals.
3. To administer the *Act* as provided in the *Act*, the regulations, the Bylaws and the Rules.

Pursuant to s. 12 of the *Act*, Council is granted the discretion and authority to make Rules, among other things:

1. Prescribing or adopting standards of conduct and business standards for industry professionals.
2. Regulating the rights, duties, powers and obligations of industry professionals in the carrying on of the business of an industry professional.
3. Respecting the issuing of authorizations for the purposes of s. 17.

In accordance with s. 17 of the *Act*, no person is permitted to trade in real estate as a real estate broker, deal as a mortgage broker, act as a real estate appraiser or advertise himself or herself as a mortgage broker, real estate broker or real estate appraiser unless he or she obtains the appropriate license to do so from RECA.

Pursuant to s. 12 of the *Act*, RECA has made the *Real Estate Act* Rules which, among other things, set out the requirements and processes associated with authorization and licensing, as well as which set out the standards of conduct for industry professionals that supplement the obligations found in the *Real Estate Act*. The *Act* and Rules provide a comprehensive set of standards industry professionals are expected to follow in their day-to-day practices.

As set out in s. 16 of the Bylaws, RECA's Council has delegated the administration of the *Act*, the Bylaws, and the Rules to the Executive Director. This is permitted by s. 15 of the *Act*. Pursuant to s. 17 of the Bylaws, the Executive Director may further delegate his duties and the exercise of his powers and functions to a member of RECA's staff. This further delegation is authorized by s. 15(2) of the *Act*.

Sections 1 to 39 of the Rules regard the licensing and registration process. The Executive Director has delegated his duties and powers regarding licensing and registration to the Director of the Office of the Registrar.

Section 2 of the Rules set out the different classes of licenses that may be authorized by RECA. In order to become licensed to practice as a mortgage or real estate professional or real estate appraiser in Alberta, applicants must meet the necessary educational requirements,

satisfactorily pass the licensing examinations, comply with the Education Codes of Conduct, submit a completed application with the required application fee, be at least 18 years of age and provide proof of identity, provide a Criminal Record Check, and meet certain other requirements set out in the Rules. There are additional requirements in the Rules for licensing as a brokerage.

In the normal course, if all licensing requirements are met by an applicant, RECA will issue a license and a registration certificate. The certificate will be deemed to be proof of registration with RECA and will entitle the applicant to practice as either a real estate or mortgage professional or a real estate appraiser. In certain cases, however, RECA may impose terms, conditions, or restrictions on a license or refuse to issue a license.

The complaints and disciplinary process is set out in detail in Part 3 of the *Act*. The Executive Director has delegated his duties and powers regarding complaints and discipline to the Director of the Professional Standards Unit.

Where a complaint is made with respect to the conduct of an industry professional, RECA must commence an investigation into the conduct of the member and appoint a person to commence such an investigation, or refuse to investigate the complaint if certain criteria are not met.

If RECA performs an investigation, known as a Professional Conduct Review, it may determine that no further action is warranted and dismiss the complaint. On the other hand, if there is sufficient proof that the industry professional committed conduct deserving of sanction, the industry professional may be disciplined by the Executive Director (or his delegate) or the matter may be referred to a Hearing Panel, which can also impose disciplinary sanctions.

“Conduct deserving of sanction” is not specifically defined in the *Act*. Generally speaking, when conduct of an industry professional falls below expected standards, it is conduct deserving of sanction. The industry standards of practice are set out in Part 2 of the Rules.

The *Act* provides for the appeal of both the licensing or disciplinary decisions of the Executive Director. The appeal may be to a Hearing Panel or an Appeal Panel, depending on the circumstances. An Appeal Panel is comprised of Council members and possibly members of the Law Society of Alberta.

The Executive Director (and his delegates), the Hearing Panel, and the Appeal Panel all have specific roles in the licensing and discipline process.

RECA has also passed Bylaws which, among other things, establish the contraventions of the *Act* and Rules that can be sanctioned by an administrative penalty, establish the monetary value of the administrative penalties, provide guidelines on costs after a hearing, and establish the procedure for appointing Hearing and Appeal Panels.

The *Act*, Rules and Bylaws are intended to protect consumers and to enhance, improve, and promote the integrity and professionalism of the industry. RECA's mandate is to ensure that these aims are being met.

Accordingly, we were asked to identify where RECA was performing well in carrying out its mandate and to identify any areas for improvement.

3. Scope of Review and Methodology

Methodology

In establishing a process for the review of RECA's performance in carrying out its mandate and its overall performance as a regulator, we analyzed other publically available reviews of regulators to determine the strengths and weaknesses of the methodology used.

Our review indicated that the general approach used in these types of reviews is to identify a specific set of criteria, which are believed to be indicators of "good regulation", and then to compare the available evidence and information to the criteria to determine if the criteria have been met.

An alternative approach sometimes used is to look at the evidence and information gathered and to assess if any problems can be identified based on an analysis of the information, which is performed while keeping general concepts of good regulation, such as fairness and transparency, in mind.

The fundamental difference between the two methodologies is that one begins with an identifiable standard or criterion in mind and then looks to see if there is evidence to meet the standard. The other looks at the evidence and sees what problems/successes can be gleaned from the evidence having consideration for more general regulatory concepts. Each methodology has its strengths and its weakness.

Similarly, a variety of different assessment criteria, "best practices", or concepts of good regulation have been used to measure the performance of a regulator.

Based on our substantial examination and analysis of other reviews, we determined that the United Kingdom's Professional Standards Authority's *Standards of Good Regulation* are the "gold standard" of assessment criteria. These standards have been used for many years in the United Kingdom to complete fulsome reviews of health professional regulators.

The Professional Standards Authority is an independent body which oversees the work of nine statutory bodies that regulate health professionals in the United Kingdom and social workers in England. It reviews the regulator's performance and audits and scrutinizes their decisions and governance. As a "meta-regulator", the Professional Standards Authority is a leading organization in the development of literature and principles related to the regulation of professions.

The *Standards of Good Regulation* have been used in Canada, in a modified form, to complete a detailed review by the Professional Standards Authority of the Royal College of Dental Surgeons of Ontario, as well as an internal review by the College of Medical Technologists of Ontario of their own regulatory processes. This type of review allows regulators to benchmark their performance in relation to the standards expected of other regulators.

Further, we identified that there are a number of more general principles for good regulation that are widely, if not unanimously, accepted. Transparency, fairness, accountability, proportionality, consistency, and agility have all been identified as key to good regulation. These principles align with approaches for “right-touch regulation”. As a result, these principles are also often used as assessment criteria.

As the statutory context in which RECA operates is different than in the United Kingdom, we worked with RECA to adapt the Professional Standards Authority’s *Standards of Good Regulation* to ensure they were applicable and relevant to the work of RECA and the legislative framework in which RECA operates. The *Standards of Good Regulation* as adapted for RECA are set out in Appendix B.

The methodology for this review involved an assessment of RECA’s performance, based on all the evidence and information gathered, against the *Standards of Good Regulation* as adapted for RECA to determine if the standards had been met.

At the same time, during both the gathering and review of information and evidence, we probed the information and looked for issues of concern based on more general principles of good regulation. These *Regulatory Principles* are also set out in Appendix B.

The combination of these two approaches seeks to provide the benefits of the two different methodologies used for these types of reviews, while also avoiding some of the weaknesses of the methodologies.

The Assessment Criteria in Appendix B is a combination of the adapted *Standards of Good Regulation* and the *Regulatory Principles* followed by high-performance regulators.

Scope of Review

The Assessment Criteria are those that we identified as being required in order for RECA to be an effective regulator. However, they do not reflect the full range of RECA’s activities or the full range of the positive steps RECA takes to be a successful regulator. Accordingly, we have not explored and assessed all of the areas in which RECA is involved. For example, we have not explored RECA’s Education Program in detail.

We also did not review areas in which RECA had already undertaken a recent assessment of its performance. For example, we did not review RECA’s privacy policies or performance as RECA completed a substantial Privacy Audit in the first quarter of 2015.

We reviewed RECA’s performance in five regulatory program areas:

1. Office of the Registrar
 - a. Licensing and suitability approvals, renewals and refusals

- b. Suspensions and cancellations
 - c. Application of terms, conditions, and restrictions on a license or authorization
 - d. Other reviews permitted under the legislation
- 2. Professional Conduct Reviews
 - b. Complaint evaluation
 - c. Investigations
 - d. Resolution of complaints
 - e. Determination of how to proceed on complaint
- 3. Conduct Proceedings
 - a. Setting standards and guidance
 - b. Enforcement of standards and guidance
 - c. Sanction determination procedures
- 4. Administration of Hearings
 - b. Consent Agreement processes
 - c. Hearing and Appeal Panel Guidelines
 - d. Conduct of a hearing or appeal
 - e. Decisions
- 5. Trust Assurance and Practice Review
 - a. Work plan
 - b. Risk assessment and scheduling practices
 - c. Post-review-procedures and reporting
 - d. Outcomes

Between November 2015 and March 2016, we:

1. Reviewed the legislation applicable to RECA, including the *Real Estate Act*, regulations, Bylaws, *Real Estate Act* Rules and other relevant statutes.
2. Reviewed the substantial documentary evidence provided by RECA, including relevant policies, procedures, guides, letter templates, report templates and other documentation.
3. Reviewed RECA's website, www.reca.ca.
4. Reviewed myRECA, RECA's electronic licensing and industry professional management portal.
5. Reviewed publically available information, as provided by RECA and as discovered in our own research.

6. Examined a sample of case files of different types of processes for each program area, which included correspondence to and from RECA, records of what occurred, and outcomes.
7. Reviewed all Hearing and Appeal Panel decisions published on RECA's website.
8. Reviewed all reported decisions involving RECA from the Alberta Courts, administrative tribunals, and the Office of the Information and Privacy Commissioner.
9. Met with and interviewed the Executive Director and Deputy Executive Director.
10. Met with and conducted in-depth interviews of the key individuals in each of the program areas.
11. Met with and conducted an in-depth interview of the Practice Advisor.
12. Met with Government Officials.
13. Met with and interviewed current and former Council members.
14. Met with and interviewed members of the Hearing and Appeal Panel roster, including public members and industry professionals.
15. Reviewed surveys and other reports published by RECA.
16. Reviewed literature on real estate and real estate regulation to identify emerging issues and trends.

The names of the individuals we spoke with are set out in Appendix C.

We did not survey individual industry professionals as that was determined to be beyond the scope of the review. We were able to get a sense of the industry's perception of RECA as RECA conducts numerous surveys of industry professionals. These include general surveys, as well as surveys of the professional's outlook after being the subject of a complaint and after being the subject of a Trust Assurance and Practice Review.

The list of the surveys and reports we reviewed are set out in Appendix D.

We are of the opinion that the information collected and reviewed, the examination of actual files and decisions, and the discussions with the stakeholders, enabled us to come to a complete and fair assessment of RECA's performance against the identified Assessment Criteria.

In sections 4-10 of this Report, we address whether RECA meets the Assessment Criteria. We identify the *Standards of Good Regulation* as adapted for RECA and describe some of the evidence considered. The *Regulatory Principles* set out in the Assessment Criteria are specifically discussed where relevant. Although not all of the *Regulatory Principles* from the Assessment Criteria may be specifically discussed, many overlap with the discussion of the *Standards of Good Regulation* as adapted for RECA and they were all included as part of our overall assessment of RECA. We do not discuss all of the evidence and information gathered in our review but highlight the especially relevant parts. We comment on RECA's established good practices and make recommendations arising from our assessment.

In section 11, we address the challenges RECA may face in the future and provide advice and recommendations as to how RECA can address these challenges.

4. Guidance and Standards

Standards of competence and conduct reflect up to date practice and legislation. They prioritize public protection.

As indicated above, RECA is granted authority under the *Real Estate Act* to establish the standards of conduct for the industry. RECA has set these standards in Part 2 of the *Real Estate Act* Rules. There are standards of conduct which apply to all industry professionals, as well as standards which apply to each of the real estate, mortgage brokerage, and property appraisal industries. The standards cover a wide range of responsibilities and prohibitions. A review of the standards indicates that there is a commitment to the protection of the interests of the public and consumers.

RECA is active in ensuring that guidance and standards are comprehensive and up to date. Pursuant to the *Real Estate Act*, RECA's Council has the ability to introduce new rules regarding the standards of competence and conduct, as well as to amend the existing rules. This allows RECA to be agile and to react to changes in the industry on an efficient basis, without requiring a change to the *Act* itself.

When RECA is considering changes to the standards of practice, it will seek input from industry professionals and trade associations to gain their perspectives and insights into the changes under consideration. The information and advice received from the associations is taken into account in RECA's decision making process. While the perspective of industry professionals and trade associations are important, RECA advised that it prioritizes public protection when considering changes. Accordingly, RECA will also seek to engage the public and groups representing consumers in the development and review of standards.

We have reviewed the Rules and we are convinced that RECA is active in ensuring that the standards of conduct are up to date and that the standards prioritize the interests of the public and consumers. RECA provides a clear framework that industry professionals should meet when providing services to consumers and the public.

Additional guidance helps licensees to apply RECA's standards of competence and conduct to specialist or specific issues including addressing diverse needs arising from public protection.

RECA is active in ensuring that industry professionals are aware of the standards of conduct and guidance and the need to meet the standards. RECA provides a comprehensive range of information and support services designed to assist industry professionals in meeting industry standards.

RECA publishes additional or supplementary guidance through a number of communications, including the website. The website contains guides and industry tools which assist in ensuring industry professionals are aware of the expectations.

The website also contains “Information Bulletins” on topics of interest to industry professionals. The Bulletins explain the expectations to industry professionals, outline responsibilities, and provide practice tips to ensure the standard is met.

Beyond the website, RECA provides additional guidance in the RECA Blog, posts on RECA’s social media accounts, and articles in the monthly newsletter, the *Regulator*.

In addition, RECA’s Practice Advisor responds to broker and broker delegate questions and inquiries with information, guidance and advisory services that support them in their responsibilities and duties. He provides advice to brokers and their delegates regarding the interpretation of the *Act* and the Rules. All conversations with the Practice Advisor are confidential and without prejudice. This means that licensees can have discussions about serious matters without it having any effect on their role as an industry professional. The Practice Advisor also drafts articles for the RECA newsletter and the RECA Blog.

As part of the Trust Assurance and Practice Review program, discussed in more detail in Section 8 of this Report, RECA focuses on practice improvement and compliance. RECA will assist in identifying potential deficiencies in practice, prior to any harm to a consumer occurring, and will make recommendations on ways in which the deficiency can be addressed. This is performed in an educational manner without disciplinary action, except in the most serious cases involving trust shortages.

Taking this evidence into account, we are satisfied that RECA is active in providing significant guidance to help licensees apply RECA’s standards of competence and conduct.

In development and revision of guidance and standards, RECA takes account of stakeholders’ views and experiences, external events and developments, international regulation and best practice, and learning from other areas of its work.

As indicated above, when RECA is considering changes to the standards of practice, it seeks input from industry professionals, trade associations, the public, and groups representing consumers.

RECA also takes account of the government’s views and experiences, as it maintains an ongoing relationship with Service Alberta staff and meets annually with the Minister of Service Alberta.

RECA consults widely with real estate regulators in other jurisdictions and other stakeholders. RECA representatives attend conferences and other training to ensure that RECA is aware of developments and trends in the industry and in professional regulation.

Our review indicates that RECA is active and outward looking in its engagements. It scans the industry and regulatory environment to stay informed and to identify emerging issues. We note that RECA has created a *Stakeholder Engagement Policy* and that RECA commits itself to providing “stakeholder engagement opportunities in advance of significant decisions that will

affect its industry professionals and it will maintain ongoing and consistent engagement with stakeholders outside of specific consultation initiatives”.

Our review also indicates that RECA has a serious commitment to best practices in self-regulation. It has actively embraced the concept of “right-touch regulation” and is committed to continuous development and improvement.

The standards of conduct properly account for the input of relevant stakeholders. We are satisfied that RECA meets this standard.

The standards and guidance are published in accessible formats. Licensees, potential licensees, consumers and members of the public are able to find the standards and guidance published by RECA and can find out about the action that can be taken if the standards and guidance are not followed.

The standards and guidance, found in the *Real Estate Act* Rules, are published on RECA’s website and are accessible to anyone. If a Rule is amended or added, notice will be provided in the “Council Resolutions” section of the website.

We have reviewed RECA’s website and find that it has an intuitive design, is easy to navigate, and is good at directing the user to relevant links or other sections of the website. Accordingly, the Rules are accessible.

The website also has a section dedicated entirely to “Consumers”. This portal removes some of the content that is only applicable to the industry professionals themselves. The removal of irrelevant content simplifies the navigation experience for consumers. At the same time, the standards of conduct and other important documents remain present for consumers to review. A consumer can also access the “Industry” portal should they wish to review other content.

The website provides links as to how consumers and members of the public can make a complaint against an industry professional. The links include information and advice within the website itself, as well as links to a number of useful guides published in PDF format. The guides are written in plain language and are organized in a format which is easy to access and understand. The guides also contain links to the Rules where the standards and guidance are found.

There is also information on the website which outlines RECA’s complaints and discipline processes. We comment on the complaints process further in this Report in the “Managing and Processing Complaints” section.

We are satisfied that RECA meets this standard.

However, while the standards of conduct and guidance are available on the website and are easily accessible, RECA may wish to consider improving how they are identified on the website.

While the “Consumers” portal on the website has a tab described as “Legislation & Standards”, there is no subsequent link labelled as “Standards of Conduct”. There is a link to the Rules, which contain the standards of conduct, but a consumer may have difficulty identifying that this is the proper link if they are not already aware of it. A consumer or member of the public without any prior knowledge of the regulatory regime may not be aware of that fact that the standards of conduct are found in the Rules and that there is no separate stand-alone document identifying the standards of conduct.

Similarly, although the Rules set out the standards of conduct, the Rules are not the most user-friendly. They are drafted in a legislative format, meaning they are text heavy, are not in plain language, and contain a number of sub and sub-sub-rules. RECA may wish to consider developing a more consumer friendly version of the standards of conduct found in the Rules, such as a summarized version of the standards or a plain language version. RECA would need to ensure that it was clear that there were not two different sets of standards and that the consumer friendly version is just a simplified version of the Rules, but that the Rules ultimately govern the conduct of industry professionals and are the standard applicable for any complaint or licensing issue.

Recommendation #1: In the interest of transparency and to assist consumers in understanding the standards of conduct expected of industry professionals, consider including a link under the “Consumers” portal to “Standards of Conduct” that includes a summary of the Rules and other material relevant to the standards of conduct expected of industry professionals.

Recommendation #2: Develop a “plain-language” summary of the Rules for reference by consumers.

5. Authorizations: Licensing and Registration

The Office of the Registrar is responsible for the eligibility, training and authorization (licensing and registration) of persons seeking to be industry professionals. This includes reviewing applications from those seeking to become industry professionals and providing industry education that is required to qualify for an industry authorization. This also involves the annual renewal of industry authorizations, the development of re-licensing education requirements, and the review of circumstances affecting an industry professional's ability to retain an authorization.

Overall, RECA's authorization practices are fair, transparent, accessible, and demonstrate RECA's commitment to the *Regulatory Principles*. The policies, procedures and processes within RECA's licensing and registration regime protect the public interest while also being fair and impartial to applicants.

Only those who meet the relevant requirements are licensed.

The *Real Estate Act* establishes the authority of RECA to establish the requirements for licensing and authorization in Alberta. RECA has set out the requirements for registration in the Rules.

To become a licensed real estate, property management, mortgage, or real estate appraisal professional, an individual must meet the initial eligibility requirements. An individual must be at least 18 years of age, have a minimum of a Canadian high school diploma or assessed foreign equivalent, be proficient in English, be a Canadian citizen or have a Permanent Resident Card or Work Permit, and complete a free online course (real estate appraisal and mortgage broker applicants do not need to complete the course). Real estate appraisal applicants must also provide a letter of good standing from a recognized Canadian appraisal association.

There are additional requirements in the Rules for licensing as a brokerage.

In assessing the equivalency of foreign degrees and the results of English proficiency exams, RECA utilizes the expertise of other organizations, such as the Government of Alberta's International Qualifications Assessment Service, and the input that they provide. Upon receiving the results of the assessment provided by these organizations, RECA reviews and determines if the applicant has met the educational requirement.

If the applicant meets all of the requirements, they become eligible to enrol in the applicable pre-licensing education for the desired industry sector.

RECA is responsible for the creation and administration of the pre-licensing education. RECA took on this responsibility in 2011 and worked to create the courses. Upon completion of the course, which is available online and accessible at the learner's own pace, the learner must pass a multiple choice examination with a mark of 70% or higher. Learners are given 18 months to complete each course and exam, but can apply for an extension. An individual who fails an

exam is provided with a breakdown of their grades in each section, advising them of the sections in which they may have had an issue with. The individual is also given an opportunity to re-write the exam in the 18 month period if they fail the first time they write the exam.

If an individual is licensed as an industry professional in another province, they are not required to complete the pre-licensing education and will be granted a license, provided they meet the other eligibility requirements. However, individuals from any province besides British Columbia and Nova Scotia must complete a Consumer Relationships e-learning course on designated agency and transaction brokerage within 120 days of being issued their license. RECA has imposed this educational requirement as this type of education and practice is not found in those provinces.

Similarly, an individual can apply to be exempted from the pre-licensing education requirements if they possess satisfactory knowledge, skills, and experience in order to provide competent service under a license. RECA provides a process for applicants to demonstrate satisfactory experience and knowledge of current industry practices before an exemption is considered and granted. If the pre-licensing education is waived, the applicant must still write and pass all examinations prescribed for the class of license. This ensures that they have the required knowledge and skills.

Upon completion of the pre-licensing education, the applicant must provide a Certified Criminal Record Check, obtain employment with a brokerage, and complete the licensing and registration application with their broker.

RECA has moved to a paperless licensing application. The entire process is completed online through the myRECA portal.

The registration application includes 8 questions which have “yes or no” answers. These questions are intended to mirror other requirements for registration set out in the Rules. Pursuant to s. 14 of the Rules, an individual is not eligible to be registered in particular circumstances. These circumstances include a failure by the individual to meet the legislative requirements, or to complete the application process, or to pay the required fees. Similarly, pursuant to s. 34 of the Rules, an individual’s application may be refused or granted subject to terms and conditions where particular circumstances exist. These include if it would not be in the public interest or it would harm the integrity of the profession to issue a license or if the person is not of good character and reputation or is otherwise unfit to be licensed.

The Certified Criminal Record Check is also used to assess these circumstances, as well as to confirm the applicant’s identity. If the Criminal Record Check reveals a conviction, the same process as outlined below when an applicant answers “yes” will apply.

If an applicant answers “no” to all of the registration application questions, indicating there are no circumstances that would impact their registration, and meets the other eligibility requirements, the licensing process will continue without issue. Once a broker confirms the

application and the individual pays the required fees, the individual will automatically be granted the appropriate license within the myRECA platform.

If an applicant answers “yes” to any of the questions, the applicant will be asked to provide additional documentation relating to the issue. Based on which question is answered in the affirmative, the myRECA platform indicates which documents should be provided. For example, one question asks whether the individual is subject to a criminal investigation, criminal proceedings, or has ever been charged or convicted of a criminal offence, excluding provincial or municipal highway offences. If the individual answers yes, the myRECA platform will request that a copy of the police report, the criminal information, a sworn statement from the individual in regard to the circumstances of the charge, and other relevant information be provided to RECA for review.

If a “yes” answer is received, the Office of the Registrar will review the application as well as the supporting information provided by the applicant. If information is missing or if RECA has additional questions, RECA will ask the applicant additional questions or request additional documentation. RECA may also attempt to obtain additional information or documentation on its own accord. For example, RECA may contact a witness to an alleged incident or request court transcripts if they are available.

Our file review indicates that RECA will expend time and resources seeking out additional relevant information. For example, although applicants are required to provide a sworn statement as to the events of a criminal charge, we noted that in one case the applicant attempted to minimize the charge and their involvement. RECA obtained the police report and other relevant information to determine if the applicant’s statement was accurate. Based on the fact that the police report and the statement were dissimilar, RECA requested an explanation from the applicant as to the discrepancy and asked that the applicant provide further information. We commend RECA for taking these active steps to ensure that only those who meet the requirements are licensed.

If there is a delay in obtaining and reviewing any information, RECA will advise the applicant for the reason in the delay.

Once all of the information is gathered and assessed, the Director of the Office of the Registrar will make a determination as to whether the applicant should be issued a license, whether the license should be refused, or if a license should be granted subject to terms and conditions.

If a license without conditions is not issued, the Director will provide written notice to the applicant advising of the Director’s proposed decision and outlining the reasons for the decision.

If the Director determines that the license should be refused or terms and conditions should be imposed, the letter to the applicant invites the applicant to provide arguments or further

information, in either verbal or written form, prior to the final decision being made. It also indicates that the applicant has the right to retain legal counsel.

After a consideration of all the evidence and submissions, including further submissions if the applicant chooses to make them, the Director of the Office of the Registrar makes a determination as to whether the applicant should be issued a license.

If the application is refused or restrictions are imposed, a letter is sent to the individual outlining the evidence and information considered and outlining the reasons why the license was refused or why restrictions were imposed. From our review of templates and the files, the reasons provided are detailed and well-reasoned. The individual is also notified of the right to appeal the decision.

If an individual is concerned that there is something in their past or some circumstance exists that may prevent them from being licensed, i.e. a criminal record or a bankruptcy, the individual may request a Suitability Review, pursuant to s. 19 of the Rules, prior to expending the time and costs necessary to complete the education and to obtain employment with a brokerage.

The Suitability Review application contains questions that mirror the first time licensing and registration application questions. The prospective industry professional is given an opportunity to provide supporting documentation to indicate why the individual should be licensed. Once the information is received and reviewed, the individual is provided an opinion stating whether or not an authorization would be granted if the same information was received in an application. As part of the review, RECA may also gather additional evidence.

When all of the information is gathered and assessed, the Director of the Office of the Registrar will make a determination as to whether the applicant is suitable to be issued a license, whether the license would be refused, or if a license would be granted subject to terms and conditions.

Once a determination is made, a letter is sent to the individual outlining the decision. If the Suitability Review indicates that the applicant would be refused a license or a license would be approved subject to terms and conditions, the letter sets out the evidence and information considered and outlines the reasons why the license would be refused or granted subject to restrictions. The letter also identifies things the applicant may do to increase the success of an application, such as taking restitution measures.

From our review of template letters and the sample files, the reasons provided after a Suitability Review are fulsome, detailed and well-reasoned.

The individual is also notified that there is no right of appeal from a Suitability Review. The individuals who are notified that they would be successful on a licensing application are also

advised that the decision is not binding on the subsequent application if the member failed to provide all the relevant information or provided false or misleading information.

The Office of the Registrar has policies and procedures which apply to processing of licensing applications and Suitability Reviews. These policies and procedures outline the type of information that should be requested, the considerations that should inform the decision as to whether the individual will be licensed, and the process to be followed. Our review indicates that these policies and procedures are appropriate, thorough, detailed and conform to the *Regulatory Principles*.

Our review of the application process and the policies and procedures indicates that RECA is committed to ensuring that only those who meet the requirements are licensed. At the same time, RECA is committed to ensuring that applicants have the ability to provide additional information and to make submissions on their application. This ensures that those who actually meet the relevant requirements are not refused a license based on an artificially imposed barrier, for example a criminal record, without an individualized assessment.

RECA's licensing procedure allows for qualified individuals to become licensed in Alberta without unnecessary obstacles while still protecting the public by ensuring only those with the requisite knowledge, skills, and experience are licensed. We note that based on the 2015 Dashboard Report, 2 applications were refused in the 2014-2015 fiscal year and 5 applications were refused in 2013-2014. We have been advised that there have been 3 registration appeals in the past 12 to 18 months. This indicates that RECA is taking appropriate action to refuse licenses where necessary.

We note that RECA's registration and licensing process is paperless and if the applicant does not self-report an issue, the license will be granted automatically without RECA reviewing the license. This raises a concern that unqualified applicants may be licensed.

However, practically speaking, we recognize this concern cannot be avoided. Even if RECA reviewed all applications, if the applicant was not truthful and did not report issues of concerns, RECA would likely grant the license without further investigation. It is not feasible to independently investigate all applications.

RECA addresses this concern by requiring the applicant to declare that "All responses and information provided by me to RECA in this application are true, complete and accurate. I make this declaration conscientiously knowing that it is of the same force and effect as if it was made under oath." In the event an applicant makes a false statement, RECA is able to take the necessary action. Pursuant to s. 38.1 of the Rules, RECA may suspend or cancel an industry professional's license if they withheld or provided false information in the process of applying for a license.

The requirements for applicants for registration are clearly set out on the website. This information is easily accessed and includes a step by step guide to becoming licensed (which

includes the different means by which an applicant may establish each of the requirements), a link to the online application form, and information on the Suitability Review. The website clearly sets out the different license types and identifies any differences in the registration requirements for each of the license types.

The website also contains a guide that provides information on what to expect in a licensing review during the evidence gathering stage and about the ability to make submissions. Our review of template letters sent to members during the licensing review, as well as our review of case files, indicates that members are also made aware of the relevant requirements in these letters.

Taking all of the above into consideration, we are satisfied that RECA meets this standard.

The licensing process, including the management of appeals, is fair, based on RECA's standards, efficient, timely, transparent, secure, and continuously improving.

The licensing process is dictated by the *Real Estate Act*, the Rules, and the Bylaws. RECA has established practices for the review and assessment of applications in accordance with this legislation.

The general licensing process is outlined above. Our review indicates that decisions on licensing and registration are based on the assessment of the requirements and conditions set out in the *Act*, the Rules, and the policies and procedures.

As indicated above, the quality and quantity of information readily available to potential applicants on the website is commendable. The information is comprehensive, clear, detailed and easy to navigate. This information is on both the initial licensing requirements and the licensing process itself.

The myRECA application platform is easy to access and use and there are detailed tutorials on how to access and use the platform. It is intuitive and user-friendly. The introduction of the myRECA online registration platform is also evidence of continuous improvement. We have been advised that there has been a substantial increase in the use of Suitability Reviews since the introduction of the system and view this to be a positive.

As also indicated above, the Office of the Registrar has policies and procedures which apply to the processing of licensing applications and suitability reviews. These policies and procedures outline the type of information that should be requested, the considerations that should inform the decision as to whether the individual will be licensed, and the process to be followed. Our review indicates that these policies and procedures are fulsome, detailed, appropriate and conform to the *Regulatory Principles*.

We reviewed template letters and sample files to determine if the policies and procedures were being followed and applied consistently. We reviewed 10 files and evaluated them against

the assessment criteria. These files included Suitability Reviews, licenses granted subject to terms and conditions, license refusals, the imposition of terms and conditions after a notification by an industry professional under s. 40 of the Rules, education reviews, and licensing approvals.

We found there to be consistency in applying the policies and procedures and consistency in the licensing and authorization decision making process. Similar facts were treated in the same manner and the policies and procedures were followed in each and every case. The Director of the Office of the Registrar works alongside Licensing Compliance Officers in reviewing applications but the final decision is within the Director's discretion in each case. This increases the consistency in the process.

Overall, we found the licensing process to be transparent and fair. Throughout the entire process an applicant is kept informed of potential concerns with their application. They are advised that they should provide any relevant information and are provided the opportunity to make oral or written submissions, including providing further information, after being advised of the potential issues but before any final decision is made. They are also advised that they can retain counsel during the process. Once a final decision is made, extensive reasons are provided to the applicant as to the information that was considered relevant and as to why the decision was made. Fairness is also increased by the consistent application of the policies and procedures.

The licensing process is efficient and timely and is supported by electronic case tracking in RECA's internal software. As indicated above, if the applicant answers "no" to the application questions, the licensing approval from RECA is automatic. Although further delays may occur as the result of applicant or brokerage inaction in completing the necessary steps or providing necessary information, our review indicates that RECA is responsive and limits delays.

If the applicant answers "yes" to any of the questions, the process may take longer as there is an evidence gathering stage, an evidence review stage, and a decision making stage. RECA advised that it is difficult to estimate a length of time for a review as it is impossible to predict the amount of information that will be reviewed. This is the case because each criminal charge or other circumstance is unique and requires a proper assessment. If there is a delay in obtaining and reviewing this information, RECA will advise the applicant for the reason in the delay.

Applicants can track and see the progress of their license in real time within the myRECA platform. The application is also tracked through RECA's internal system to ensure efficient and effective file management. From our review of the files we found the process to be efficient and timely.

We did not identify any concerns with the fees charged by RECA for the various licensing processes. RECA advised us that the fees are intended to allow RECA to "break even" but that

this is generally not the case as the fees are lower than the costs expended. We believe the fees charged are fair and that they are not a barrier to licensing.

We did not identify any issues with privacy concerns or breaches of security in the licensing and authorization. All information is securely retained electronically and any originals received are destroyed or returned to the applicant.

An individual whose license is refused, cancelled or restricted by terms and conditions has the right to appeal the decision to an Appeal Panel. The individual receives notification of this whenever a decision of this type is made. The overall appeal process is discussed in detail below in "Hearings Administration". However, we note that the appeal process is fair and transparent as a full hearing is contemplated and detailed written reasons are issued after a decision. Further, based on our review of the letter templates and sample files, applicants who have terms or conditions imposed or who are refused a license are always clearly advised of the reason for the decision as well as their ability to appeal the decision.

During the initial stages of our review, we noted that decisions to refuse a license or to impose conditions on a license were not published or publicly available. We also noted that Appeal Panel decisions from an appeal of a licensing refusal or the imposition of terms and conditions were not available.

However, in February 2016, RECA amended its Publication Policy to publish these decisions on the website and in the Case Summaries on a non-identifiable basis. This means that all personal information of the applicant will be removed but the reasons for the refusal or the imposition of terms, as well as any Appeal Panel decision related to a licensing decision, will be made available. This is an excellent balance of fairness and transparency and is evidence of continuous improvement.

Further, of particular note, we believe the Suitability Review is an excellent example of good regulation by RECA. Applicants are provided a means to determine if they are likely to be issued a license prior to incurring the time and cost associated with the pre-licensing education. Applicants are advised of any potential issues they may have an impact on their application and are provided suggestions on how to address the concerns. This is an excellent example of a transparent and fair process.

Overall, the licensing process appears to be fair, transparent, effective, reasonable, and based on RECA's standards. We consider this criterion to be satisfied.

We would however make a recommendation in regard to making some additional information available to applicants in the licensing process.

Although applicants are advised of the requirements for registration, and the application questions and Suitability Review flag the issues which may be of concern to RECA in an application, RECA may wish to consider increasing the information about how licensing criteria

and requirements are interpreted and applied. For example, RECA could provide information on what is considered by the Office of the Registrar in determining if an applicant is of “good character” or “fit to practice” or if licensing the applicant would “harm the reputation of the industry”. These are all concepts that are difficult to provide a precise definition for, especially when the decision to issue a license is a discretionary one made based on an analysis of all the factors, but a guidance document without “hard and fast” rules, could be made available to the public. To assist in transparency, some regulators with “good character and reputation” have prepared policy documents explaining how they apply these criteria. A publication available to applicants would provide greater transparency on how RECA applies the criteria in its Rules. By way of example, RECA could indicate how a criminal record may be relevant and what kind of information RECA will assess in determining if an individual with a criminal record should not be granted a license. Some of this information is found in the description of the Suitability Review process but the information could be reproduced in a standalone guide. Further, based on our review of the policies and procedures, most of this information is found within the internal policy documents. RECA may wish to consider creating a version for the public and potential applicants.

During our review, we were also advised that some applicants were unaware of the type of investigations RECA would be conducting after an applicant answered “yes” to a question and that some applicants were unaware that particular circumstances would have an impact on their application. Although the questions are intended to identify public protection concerns and concerns associated with the protection of the integrity and reputation of the industry, this may not be clear to applicants. Making the information discussed above available would assist applicants in identifying what RECA deems to be relevant and how that information will be analyzed and assessed by RECA.

Recommendation #3: Increase the information available to applicants about how licensing criteria and requirements are interpreted and applied, particularly in relation to the questions associated with the good character of an applicant and the protection of the integrity and reputation of the industry. Consider preparing a policy document available to applicants explaining how these criteria are typically applied.

While we consider the standard to be met, we would also make a recommendation to ensure consistency in the decisions made by the Office of the Registrar and the Professional Standards Unit.

During our review concerns were raised about the perceived lack of consistency between the registration and discipline process with respect to conduct that reflects upon the character of an applicant for registration or an industry professional. Of particular concern were decisions made by the Office of the Registrar to refuse a license or to impose restrictions on the basis that it would not be in the public interest or it would harm the integrity of the industry and decisions by the Professional Standards Unit to impose discipline for violations of s. 42(g) of the Rules, which requires industry professionals to not engage in conduct that “undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into

disrepute.” Concerns were raised that, despite the underlying conduct being generally the same, the discipline typically imposed by the Professional Standards Unit was much “softer” than the Office of the Registrar’s typical decision to refuse a license or to impose terms and conditions.

As part of our review of sample files and published decisions, we found that there was room for improvement in the consistency of decisions made by the Office of the Registrar and the Professional Standards Unit.

Accordingly RECA may wish to consider having both program areas apply the same criteria in determining how similar conduct or a similar issue should be addressed. This is most relevant over concerns about an individual’s character and the reputation of the industry. RECA should also consider organizing an opportunity for the two departments to communicate in order to discuss how to address situations involving similar conduct. RECA may also wish to consider training both departments on this issue together or introducing one policy on these issues, applicable to both program areas.

Recommendation #4: We recommend increased communication and collaboration between the Office of the Registrar and the Professional Standards Unit with respect to issues relating to the character of applicants or industry professionals. In order to enhance organization-wide consistency, we recommend that the two departments hold a joint training session to discuss how the two departments address “character issues” with the objective of developing an internal policy document providing guidance to both departments. The joint training session should also address when an issue will be addressed in the registration/renewal process and when it will be addressed as a discipline issue.

Related to the issue of consistency between the Office of the Registrar and the Professional Standards Unit were the repeated concerns we heard during our review about a small number of registration decisions. We heard numerous concerns from some members of Council or former members of Council that these registration decisions indicated that RECA’s licensing process was not fair, transparent, or consistent. Other members of Council or former members of Council did not share those perspectives.

Although this review is intended to be about RECA’s overall performance as a regulator and the systems in place and not about second guessing specific decisions made in individual cases, we acknowledge that individual cases may reveal larger issues within the regulatory structure itself. As a result of this, and the consistency in which particular cases were identified, we ensured that we reviewed both the decisions and the case files for these “controversial cases” to determine if they raised systemic issues about the underlying process. As a result, we have examined in detail the cases of [REDACTED], [REDACTED] and [REDACTED].

In a case involving [REDACTED], [REDACTED] an industry professional appealed the decision by the Director of the Office of the Registrar to refuse his registration certificate renewal application.

The professional was first licensed and registered with RECA in February 2013. He was licensed despite the fact he failed to answer the question of whether he was the subject of a criminal investigation or charged with an offence, even though he had been charged with a criminal offence on January 12, 2012. During the September 2013 renewal application, the individual answered “no” to the same question, as he believed it meant had there been a change in circumstances since his last application. On October 7, 2013, the individual advised RECA he had been criminally charged (a separate offence than the one from January 12, 2012). RECA commenced a review of the individual’s license and registration. On January 8, 2014, the individual pleaded guilty to two criminal charges. On September 23, 2014, the industry professional completed his registration renewal application. This renewal application was refused on the basis the individual had provided false information on his initial licensing application and because the criminal investigation indicated he was not of good character. The industry professional appealed, stating his convictions were minor, that he had turned his life around, and that he posed no danger to the public. The Appeal Panel dismissed the appeal and refused the application for a registration certificate on the basis that the individual had provided false information in the course of applying for a license, it would not be in the public interest to issue a registration certificate, and the individual was not of good character and was unfit to be licensed.

We believe that the concern over this case may arise because of a perception that the matter should have been a complaint investigated and assessed by the Professional Standards Unit, and not a registration refusal by the Office of the Registrar.

However, having reviewed the case file, we have determined that this was treated as a registration issue because the criminal investigation and criminal charges occurred prior to the individual becoming licensed. It was not the guilty plea that was of concern to the Office of the Registrar, which occurred after he was registered. It was the pre-licensing conduct and the misrepresentations during the licensing process that resulted in the individual’s license being refused on renewal. Had the only issue been the criminal conviction which occurred after the individual was licensed, while it may have resulted in a complaint to the Professional Standards Unit, it would not likely have resulted in a refusal of the license by the Office of the Registrar. RECA’s licensing process is not intended to be used as a disciplinary measure but it is intended to ensure that individuals are fit to be licensed.

We recognize that the Appeal Panel included the criminal conviction and sentence as a reason the individual’s registration certificate should be refused which was an additional reason to uphold the refusal.

Our review of the [REDACTED] decision did not identify any systemic concerns except to highlight the need for RECA to commit to an in-depth examination of “character issues” to ensure clarity and consistency. This issue has already been addressed in the previous recommendation.

In the case involving [REDACTED] [REDACTED] an industry professional appealed the decision to deny his registration certificate to transfer to a new brokerage. On February 20, 2014, the individual

entered into an agreement with the Alberta Security Commissions admitting that he had engaged in a breach of Alberta securities laws and that he had acted contrary to the public interest. This was in relation to conduct which occurred prior to his licensing with RECA. The individual provided notice to the Executive Director about the breach of the securities laws in accordance with s. 40 of the Rules. The individual was advised his license was under review and that conditions were being imposed. The individual was terminated by his broker as a result of the conditions and when he sought employment with a new broker, he was advised his application for a registration certificate with the new brokerage was denied. On appeal, the Appeal Panel overturned this decision and approved his application for a registration certificate. In doing so, the Appeal Panel found the individual was of good character and that it would not harm the integrity of the industry or the public interest if he was registered. In coming to this conclusion, the Appeal Panel looked at Administrative Penalties issued to industry professionals for failing to disclose infractions pursuant to s. 40 of the Rules. The Appeal Panel noted that these fines were much less serious than a registration cancellation.

Again, the concern with this case appears to be the perception that the Office of the Registrar has the ability to cancel or refuse licenses for conduct that would result in a much less serious penalty if it was dealt with by the Professional Standards Unit. We would note again that the Office of the Registrar determined it had jurisdiction to proceed as the alleged conduct occurred prior to the individual becoming licensed with RECA. In this case it was the acts which made up the breach of the laws, not the act of finally being convicted, which was of concern. Therefore, it was the type of conduct that would have gone into the assessment of whether a license would have been initially granted.

We also note that the Appeal Panel appears to have considered this decision in the context of what the appropriate “punishment” should be, as it looked to the penalties imposed in cases where Administrative Penalties were issued. Further, the Administrative Penalties were issued for failing to report incidents as required by s. 40 of the Rules, not the actual underlying incidents.

The fact that an Appeal Panel overturned a decision does not in and of itself present a reason for general concern. The appeal process is part of the checks and balance in the system. Our examination of the [REDACTED] case did not identify any general systemic issues of concern except that the case, like the [REDACTED] case, highlights the importance of a general examination by RECA of how the organization addresses “good character” issues and the need to work on ensuring consistency between registration and discipline decisions.

In the case involving [REDACTED] [REDACTED] the industry professional appealed the decision to refuse her application for registration. The individual sought registration and engaged in correspondence with the Office of the Registrar. These communications became problematic and the Office of the Registrar advised the individual that her application was refused because she provided false or misleading information during her application and because she made false allegations in regard to the communications she had with RECA during the licensing process which suggested she was not of good character and was unfit to be authorized. On appeal, the

Appeal Panel determined that the evidence did not support the fact that the individual provided false or misleading information and determined that there was insufficient evidence she demonstrated bad character. As a result, the Appeal Panel found that the basis upon which the application was refused could not be supported.

Our examination of the [REDACTED] decision did not identify any systemic issues of concern. One can debate whether the original decision was appropriate or not but that is not the focus of our review. The Appeal Panel was of the view that the original decision was inappropriate and reversed the decision. That is part of the ordinary check and balances in a registration system.

As discussed above, having reviewed the entirety of RECA's licensing and authorization system, including the three "controversial cases" identified above, we are satisfied that RECA's licensing process is generally fair, transparent and consistent although as noted earlier, it is important that RECA conduct an in-depth analysis of how it handles good character issues.

Through RECA's register, everyone can easily access information about licensees, except in relation to their health, including whether there are restrictions on their practice.

RECA has a public register, the Public License Search, which is accessible from the main page of the website. From the website it is easy for anyone to check if an industry professional is licensed and to check their registration certificate. The design of the search is easy to navigate and there is a substantial amount of information available.

The Public License Search can be searched by either the name of the industry professional or name of the brokerage or the location of the industry professional or brokerage.

This Public License Search contains information on current and former industry professionals, including whether the professional is currently authorized and licensed, or if their license has been suspended, cancelled or if there was a lifetime withdrawal. The Public License Search provides information on the professional's license class, their license and brokerage history, what industry sectors they practice in, the name of the brokerage they are employed with and the location of the brokerage.

However, the Public License Search does not provide any information with respect to any terms and conditions which may be present on an industry professional's license. More information could be provided to inform the public of any limits on the way an industry professional is allowed to practice. Section 55(1) of the *Act* provides that the Executive Director may publish information concerning the refusal, cancellation, or suspension of an authorization. However, the section does not explicitly state that information concerning terms, conditions, and limitations on an industry professional's license can be published. Given the sensitivity surrounding privacy legislation and the advantages of clear statutory authority to publish information, we recommend that when the *Act* is open for revisions, RECA seek authority to publish information concerning terms, conditions, and limitations to enhance transparency for consumers and other industry professionals.

Further, if an individual is not currently authorized, the Public License Search states the individual is “Not Authorized” or that the “Authorization is currently suspended, cancelled or is a lifetime withdrawal”. The Public License Search does not differentiate between a suspension, cancellation, or lifetime withdrawal and does not indicate the specific reason behind the lack of the authorization. RECA may consider providing more specific detail on the state of a professional’s license, such as stating if the authorization is suspended or if it has been cancelled. RECA may also consider including a discipline history of any findings of conduct deserving of sanction on the Public License Search to enhance transparency.

Recommendation #5: RECA should seek a change to its Act broadening the publication power so that conditions, restrictions and limitations on an industry professional’s registration can be included in the Public License Search. In the Public License Search, RECA should consider providing more specific information on the reason for an individual not being authorized and information on any findings of conduct deserving of sanction with a link to the specific decisions.

Consumers, service users and members of the public can find and check a licensee’s licensing, and are aware of the importance of doing so.

Anyone can check the registration information regarding a licensee in the Public License Search. As discussed above, the Public License Search is easily accessible from the website’s main page. We note that it is relatively prominent on the website. We also note that when the “Consumers” portal is accessed on the website, the “Search for an Industry Professional” link is included in the list of “Feature Resources”.

However, while consumers and members of the public can find and check a license, we believe that they may not be aware of the importance of doing so. Our review of the website and other material indicates that there is not a significant amount of messaging or advice to consumers and members of the public as to the importance of ensuring an industry professional is properly licensed and authorized when engaging in a service relationship.

RECA may wish to consider increasing the information provided to the public as to the importance of using the Public License Search when forming a relationship with an industry professional. Efforts can be made on the website, in guides, and in other messaging to stress with consumers and members of the public the importance of checking the Public License Search. This will assist in avoiding harm caused by unlicensed or unauthorized practice.

Recommendation #6: RECA may wish to consider increasing the information provided to the public as to the importance of using the Public License Search when forming a relationship with an industry professional.

Risk of harm to the public and of damage to public confidence in the profession related to unlicensed practice and non-licensees undertaking a protected act is managed in a proportionate and risk based manner.

Section 17 of the *Real Estate Act* provides that no person can trade in real estate as a real estate broker, deal as a mortgage brokerage, act as a real estate appraiser or advertise or hold themselves out as a mortgage broker, real estate broker, or real estate appraiser unless that person holds the appropriate authorization issued by RECA.

Action is taken to address unlicensed practice, as well as to address RECA members who undertake activity for which they are not licensed. Both of these issues are dealt with through the Professional Standards Unit. RECA will employ the services of the Professional Conduct Review Officers to investigate the improper activity. If an industry professional registered with RECA is undertaking activity outside of the scope of their license and proper authorization, the member will likely face disciplinary proceedings. If an individual is practicing without any license at all, RECA lacks the jurisdiction to discipline the individual. Nonetheless, RECA will investigate the matter so that it has the necessary evidence and information to handle the issue by other means.

Unlicensed activity is handled through obtaining an injunction in the Court of Queen's Bench, prohibiting the individual from continuing the activity. An injunction may also be obtained against industry professionals to prohibit them from undertaking activity for which they are not authorized. Although the *Real Estate Act* does not expressly permit RECA to seek an injunction, RECA has successfully pursued injunction orders at the Court of Queen's Bench to address improper activity. After being granted the injunction, RECA posted a News Release on its website advising that the injunction had been obtained and advising members of the public to avoid the individual.

Further, although the Trust Assurance and Practice Review process generally does not result in disciplinary action, if unlicensed activity is uncovered in the process, it will be reported and immediate action will be taken by RECA to address the issue. Similarly, if the Practice Advisor receives a report of unlicensed activity, the Practice Advisor will recommend that the person reporting make a complaint or the Practice Advisor will confirm that he can pass the information along to the Professional Standards Unit for investigation.

We are satisfied that RECA meets this standard.

We note there is a possibility that unlicensed practice may increase in the future given the current issues facing the Alberta economy, the housing market and the increasing unemployment rate. There is a risk that individuals will begin to take on protected acts while purposefully avoiding the costs associated with education and licensing. We would recommend that RECA continue to be vigilant and to take the appropriate action when necessary.

6. Managing and Processing Complaints

RECA is responsible for setting standards of practice for the real estate, mortgage brokerage and real estate appraisal industries. This role serves both the industry and the public: in order to create consumer confidence and trust in the industry it is essential to regulate and protect against unprofessional practices.

The Professional Standards Unit facilitates the administration of complaints, performs conduct reviews (investigations) and implements conduct processes (discipline and enforcement action). It has a mandate to enforce industry conduct standards and to protect the public. Within the Professional Standards Unit, RECA's Professional Conduct Review program conducts two types of investigations, investigations into unauthorized activity and investigations into the conduct of industry professionals. The Director of the Professional Standards Unit, as the Executive Director's delegate, may also impose discipline where appropriate and where authorized to do so.

An overview of the investigation process is found in the "Investigation Process" flow chart found in Appendix E. An overview of the disciplinary process is found in the "Disciplinary Process" flow chart found in Appendix E.

Overall, the processes for handling complaints are fair, transparent, and consistent with "right-touch regulation". The policies, procedures and processes within RECA's complaints regime protect the public interest but are also fair to industry professionals.

Anybody can make a complaint about a licensee.

Pursuant to s. 37(1) of the *Act*, any "person" can make a complaint about the conduct of an industry professional.

RECA receives complaints from consumers, industry professionals, industry associations, financial institutions, law enforcement agencies, and other regulatory bodies. There are no circumstances in which RECA will reject a complaint from a complainant who has standing so long as it is submitted in writing. In the event that a complainant is unable to submit the complaint in writing, RECA will accept a complaint filed by someone else on that person's behalf. For example, a relative may file a complaint on behalf of an elderly individual or an individual with diminished capacity.

However, RECA interprets s. 37(1) of the *Act* such that complaints must have sufficient particulars about the subject matter of the complaint, and as such only certain complainants with direct involvement with the subject matter of a complaint would have standing to make the complaint. An example would be where a condominium owner complains about a property management professional. As the property manager is engaged by the condominium board, rather than by the individual condominium owner, RECA might decline to accept the complaint and advise the condominium owner to have the condominium board bring the complaint.

This policy is based on s. 37(2) of the *Act* which requires a complainant to provide reasonable particulars of the complaint. RECA has interpreted this provision to mean that “strangers” to a relationship with an industry professional or transaction would not have sufficient particulars to proceed with a complaint.

The standard that anyone can make a complaint is generally met as RECA accepts complaints about a licensee from anyone who is in sufficient proximity to the licensee. In the event that someone is not in sufficient proximity, RECA advises the person of who may in a better position to make a complaint.

However, RECA may wish to consider whether s. 37 of the *Act* is to be interpreted more broadly. RECA could consider accepting a complaint from any individual or organization, regardless of their relationship with the industry professional, so long as some “reasonable particulars” are provided. RECA’s investigatory regime is well equipped to identify sources of information and to obtain more information about a complaint if necessary.

Recommendation #7: RECA should avoid a blanket policy concerning complaints by “strangers” to the transaction. Instead, RECA should consider accepting a complaint from any individual or organization, regardless of their relationship with the industry professional, so long as it is in writing and provides “reasonable particulars”.

Where necessary the executive director (or delegate) can initiate an investigation without relying on the receipt of a complaint.

The Executive Director, or the Director of the Professional Standards Unit acting as the Executive Director’s delegate, has the authority, pursuant to s. 38(1)(b) of the *Act*, to initiate an investigation without relying on the receipt of a complaint when there is a belief that the conduct of an industry professional may constitute conduct deserving of sanction. The belief may be based on information found in the media, the results of a Trust Assurance and Practice Review, or other sources which are determined to be credible.

RECA’s “Annual Report” for the fiscal year ending September 30, 2015 confirms that of the 934 complaints addressed by RECA, 260 of them were initiated internally within RECA. We note some comments in the results of the Professional Conduct Review Process Participant Survey suggest that industry professionals did not receive notice of the complainant’s identity. We expect these comments arose in internally generated complaints where no external complainant had come forward.

RECA has the necessary power to meet this standard and is exercising that power when necessary.

Information about complaints is shared with other organizations within the relevant legal frameworks.

RECA responds to requests from other regulatory bodies to share information. The information sharing is in accordance with privacy legislation.

In very serious cases, such as those involving mortgage fraud or trust defalcation, RECA will reach out to law enforcement or to other regulators to determine whether the other organization is already aware of the issue and whether they are also investigating. This may result in requests to RECA to disclose further information. In these instances RECA also ensures that the sharing of information is in accordance with privacy legislation.

We are satisfied that RECA works with other organizations and appropriately shares information within the applicable legal frameworks, including privacy legislation.

RECA will investigate a complaint, determine if there is a case to answer and take appropriate action including the imposition of sanctions.

Pursuant to ss. 38 and 38.1 of the *Act*, RECA must investigate all complaints, unless an investigation is refused in accordance with the circumstances identified in s. 21 of *the Real Estate Act (Ministerial) Regulation*. These circumstances are limited. If an investigation is refused, RECA will take appropriate actions and dismiss the complaint. If a complaint is dismissed in accordance with the Regulation, RECA advises the complainant of their right to appeal the decision.

RECA has created a Voluntary Broker Resolution Process (VBRP) to facilitate the resolution of complaints that are less serious in nature. This process has been created to facilitate an environment where the complainant and industry professional can discuss issues openly with the industry professional's broker without fear of those discussions being used in other proceedings. This process provides brokers and industry professionals with the opportunity to resolve disputes with clients or customers on their own, prior to any formal investigation process being launched by RECA.

In some circumstances, after an investigation has been commenced, RECA will suggest the VBRP. The VBRP can be commenced any time after a complaint is made, all the way up and until a complaint is dismissed or enforcement action is taken.

If the VBRP is successful, the investigation into a complaint will be terminated. If it is unsuccessful or any party refuses to participate, the investigation into the complaint continues.

Similarly, RECA has also used an alternative process to address certain types of complaints, such as advertising complaints. In these situations, a Professional Conduct Review Officer will engage the broker of the industry professional being complained about to address the issue at the brokerage level before treating the matter as a formal complaint. If the broker is able to resolve

the issue, RECA will dispose of the matter without an investigation and resolve it on a non-disciplinary basis. If the broker is unsuccessful in resolving the matter and if an investigation would be warranted, an investigation into the complaint will proceed.

The majority of complaints are investigated and result in RECA taking appropriate action after the investigation is completed.

The *Act* and the rules do not prescribe any required steps in the investigation of a complaint. The only requirements are that the Executive Director investigate the complaint, dispose of it by a means set out in s. 39 of the *Act*, or refuse to investigate or discontinue an investigation if the circumstances set out in the Regulation exist. The Executive Director has properly delegated this function to the Director of the Professional Standards Unit. Based on our review, the RECA complaints investigation process meets the statutory requirements.

Upon receiving a complaint, it is assessed by RECA's Intake Team. The Intake Team includes one senior Professional Conduct Review Officer, one junior Professional Conduct Review Officer, an administrator, and any Professional Conduct Review Officer currently in training.

There is a goal of completing a "Review 1" within 5 days of receiving a complaint. This is an initial review to confirm whether the complaint is within RECA's jurisdiction, whether it alleges conduct deserving of sanction, and whether further investigation is appropriate or if the complaint should be dismissed. Upon completion of "Review 1", opening letters are sent to the industry professional and the complainant. If the complaint is dismissed, the parties are advised of this and any appeal rights they may have.

Our file review indicated that investigations into complaints were refused where appropriate and where permitted by the legislation. We noted examples of this where the complainant was not responsive to requests for further information and particulars, where the complaint was based on pure speculation, and conduct that would not require authorization and is therefore outside RECA's jurisdiction, such as a contractual dispute among industry professionals and others.

If the complaint is not dismissed, the letter to the industry professional requests a response to the complaint and asks the industry professional to provide any information or documentation deemed relevant. The letter to the complainant advises that an investigation is being commenced. Once the industry professional responds to this letter, the complaint is assigned to a Professional Conduct Review Officer for a "Review 2", which is a more detailed analysis.

At "Review 2", the Officer reviews the complaint, the industry professional's response and any corresponding documentation received. RECA may also gather statements and documents from other sources, including the industry professional's brokerage or broker or additional information from the complainant and industry professional. RECA's goal is to complete "Review 2" within 30 days of receiving a complaint but this may be extended if the Officer determines that further information must be gathered.

If there is insufficient evidence of any conduct deserving of sanction at this stage, the investigation may be discontinued and the complaint may be dismissed. Similarly, the investigation may be discontinued if any of the circumstances identified in the *Real Estate Act (Ministerial) Regulation* exist.

If there is evidence of conduct deserving of sanction or further investigation is necessary, the complaint is classified as Level 1, 2, or 3, according to its seriousness and complexity.

Level 1 complaints are the least serious. Where after “Review 2”, the Intake Professional Conduct Review Officer determines that the investigation is complete, a recommendation will be made to the Executive Director’s delegate as to how the complaint should be resolved. The recommendation may be to dismiss the complaint for insufficient evidence, issue an advisory note or letter of reprimand or administrative penalty to the industry professional or potentially a referral to a Hearing Panel.

Level 2 complaints are more serious. These complaints usually involve evidence of repetitive conduct. They require analysis using RECA’s investigation software, the gathering of more information from the complainant, the industry professional, and other relevant parties, the involvement of RECA legal counsel and face-to-face interviews. Due to the increased complexity and seriousness of Level 2 complaints, they are assigned to a staff Professional Conduct Review Officer to investigate. As some time may be required before an Officer becomes available to address the investigation, the Intake Professional Conduct Review Officer will consider whether there is a risk that evidence may become unavailable in the future. In order to address any concern, steps will be taken to secure sources of evidence when necessary. RECA has also added resources on a temporary basis to secure evidence that may otherwise become unavailable in the future.

Level 3 complaints are the most serious and usually involve mortgage fraud or trust defalcation. These complaints also require analysis using RECA’s investigation software, the gathering of more information from the complainant, the industry professional, and other relevant parties, the involvement of RECA legal counsel and face-to-face interviews. They are assigned to a Professional Conduct Review Officer immediately.

For both Level 2 and Level 3 complaints, once the Officer determines that the investigation is complete and all relevant information has been gathered, a recommendation will be made to the Executive Director’s delegate as to how the complaint should be resolved. The recommendation may be to dismiss the complaint for insufficient evidence, issue an advisory note or letter of reprimand or administrative penalty to the industry professional, or potentially a referral to a Hearing Panel.

Overall, we are satisfied that RECA meets this standard to investigate complaints, determine if there is a case to assess, and take appropriate action.

Our review of RECA's policies and procedures indicates that a "triage system" is used to assess the nature and seriousness of a complaint. This enables RECA to identify and address the most serious complaints where there is a risk to the public on a first priority. It also allows RECA to ensure that evidence and information is not lost due to the passage of time.

The investigation process also allows RECA to continually assess the complaint and to determine how the complaint should be addressed. Although RECA has the authority to refuse to investigate a complaint or to discontinue a complaint, our review indicates that RECA exercises this authority with a public protection goal in mind. RECA does not seek out opportunities to dismiss valid complaints. For example, pursuant to s. 21 of the *Real Estate Act (Ministerial) Regulation*, RECA may refuse to investigate a complaint or discontinue an investigation where the conduct complained of is not a breach of the legislation or there is insufficient evidence of a breach. RECA will only exercise this discretion to determine there is not a breach of the legislation where the particulars provided by the complainant and industry professional make it clear that the industry professional in fact complied with the Rules and expectations. We saw no indication that RECA uses this discretion improperly. For example, this discretion is not used where there is a possibility of conduct deserving of sanction but insufficient evidence currently exists to determine factually what occurred.

Our review of RECA's investigation process revealed policies and procedures which were compliant with the requirements of the legislation and which were aimed at assessing all of the facts prior to making a determination as to how the complaint should be dealt with. This is consistent with a focus on public protection.

Resolving complaints informally in appropriate cases without proceeding to a full hearing is consistent with the principles of "right-touch regulation", fair treatment of industry professionals, and protection of the public. Formal hearings should be reserved for more serious cases and regulators should be encouraged to make fulsome use of alternative complaint resolution systems to achieve better outcomes more quickly and at less cost.

However, we have identified a concern in relation to the VBRP and the alternative process used to address other types of complaints, such as advertising complaints. These processes are not expressly authorized by the *Real Estate Act*. In similar situations, courts have determined that the resolution of a complaint in a manner that is not expressly contemplated by the statute may be invalid.⁷ There is uncertainty whether the principles in the *Salway* decision from British Columbia would be accepted in Alberta and there are certainly reasonable arguments that consensual alternative resolution processes not explicitly addressed in legislation are permissible. However, the *Salway* decision would potentially be influential to an Alberta Court considering a challenge to a resolution. Accordingly, it is possible that a resolution of a complaint under these processes may be later challenged by any of the parties and there is a risk that the resolution will be declared invalid.

⁷ *Salway v. Assn. of Professional Engineers and Geoscientists of BC*, 2009 BCCA 350.

Although these alternative processes are consistent with the principles of “right-touch regulation”, RECA is limited by the current legislation which provides a specific list of responses to a complaint, none of which include the VBRP or the other alternative processes. RECA may wish to advocate for the inclusion of an alternative complaint resolution process in future revisions to the *Real Estate Act*.

Recommendation #8: When the *Real Estate Act* is open for revision, RECA should seek amendments expressly authorizing the informal resolution processes it uses.

All complaints are reviewed on receipt and serious cases are prioritized and where appropriate considered for an interim suspension.

As discussed above, all complaints are reviewed and classified based on their seriousness and complexity. There is a “triage” system and RECA does not operate on a “first in, first out” basis. Serious cases are prioritized in order to ensure that all serious complaints where there is a risk to the public are a first priority and that necessary evidence is collected.

Section 53(1) of the *Real Estate Act* provides that the Chair of RECA’s Council can temporarily suspend or restrict the authorization of an industry professional at any time. Section 38(4.2) of the *Act* also states that RECA’s Executive Director can suspend the authorization of an industry professional where the professional refuses to cooperate with the investigation of a complaint.

Temporary orders suspending or restricting an industry professional’s authorization pending the outcome of a complaint are rare. RECA advised that a temporary suspension under s. 53(1) is only undertaken if the Professional Conduct Review Officer is in possession of evidence of a serious risk to the public. Generally, if a suspension is imposed, it is imposed after the industry professional has had a chance to at least respond to the complaint. However, there may be cases where, in the presence of incontrovertible evidence of a risk to the public, a temporary order is sought prior to the industry professional having a chance to make any response.

RECA does not currently include a step in its processes for temporary suspensions or restrictions under ss. 53 and 38(4.2) to seek the industry professional’s position prior to recommending or implementing the suspension or restriction. Although RECA generally only imposes the suspension after the industry professional responds to the complaint, the industry professional is not given the opportunity to specifically address the interim suspension as they are not advised one is being considered. RECA has taken the position that s. 53(2) of the *Act*, which provides the industry professional the ability to apply to the Court of Queen’s Bench for a stay of the interim suspension, is an adequate remedy.

RECA’s use of interim suspensions and restriction after a complaint indicates a proper application of “right-touch regulation”. RECA is hesitant to suspend or restrict industry professionals in the absence of a finding of conduct unbecoming, but RECA is also prepared to take the necessary action when the public and consumers are at risk. This strikes the right balance of fairness to industry professionals and protection of the public.

RECA may wish to consider its interim suspension and restriction policy to provide for notice to an industry professional that a suspension is being considered and to allow an industry professional to make submissions regarding the suspension prior to a decision being made. Recent jurisprudence has confirmed that members of regulated professions have substantial procedural rights when regulatory decisions with serious ramifications on their livelihood are being considered.⁸ These rights would include the right to know what information the regulator has collected so far and the right to provide submissions directly to the decision maker before the decision to suspend or restrict the industry professional's practice is made.

Providing a short time-frame for submissions maximizes fairness to industry professionals. To reduce the legal risk and to maximize fairness to industry professionals, RECA could adopt a practice of generally providing a short opportunity such as between a few days to one week for an industry professional to make a written submission on whether an interim suspension is appropriate.

In the most extreme cases, where an immediate suspension is necessary for public protection, RECA may wish to offer the opportunity for the professional to make subsequent submissions that RECA should re-consider the suspension.

Where a s. 38(4.2) suspension is being considered, RECA should continue to ensure there is a process to warn about a suspension for non-cooperation and seek the industry professional's position on the suspension before any decision is made by the Executive Director. We noted that although RECA's policy for suspensions when industry professionals are not compliant with investigations does not provide for a warning that the Executive Director may suspend, the correspondence on files in which non-compliance was identified did include express warnings about the possibility of suspension under s. 38(4.2).

Recommendation #9: RECA may wish to consider changing its practice to generally provide a short time-frame to industry professionals to make written submissions prior to imposing interim suspensions. Where public protection requires an immediate interim suspension without waiting for submissions, RECA might consider adopting a practice of providing industry professionals with an opportunity to make written submissions asking for the Chair of Council to reconsider and change his or her decision imposing an interim suspension.

⁸ *Park v. Institute of Chartered Accountants (Alberta)*, 2002 ABQB 880; *Hannos v. Registered Nurses Assn. (British Columbia)*, [1996] B.C.J. No. 138 (B.C. Sup. Ct.)

The complaints process is transparent, fair, timely, proportionate and focused on public protection.

RECA has a statutory duty to protect the public. The complaints process set out in the *Act* and the Rules is designed to ensure public protection, as well as the preservation of the procedural rights of industry professionals.

If RECA completes a “Review 1” and determines the complaint is within RECA’s jurisdiction and alleges conduct deserving of sanction, RECA will open an investigation and send an opening letter to the complainant and industry professional. While the opening letter does not identify specific Rules that may have been breached, RECA describes the general facts and issues in the complaint that RECA will be investigating and requests a response. The industry professional is advised of the “case to meet” and given a chance to provide their side of the story.

If additional issues are identified which may amount to conduct deserving of sanction, RECA will send a further notice to the industry professional identifying the issues and stating RECA’s intention to investigate those additional issues, as permitted by s. 38(3) of the *Act*. If additional issues are identified, the industry professional is asked to respond to these issues as well.

The industry professional under investigation is given an opportunity to respond and provide submissions during the investigation prior to any recommendation or decision being made. The complaints process has many stages, each with many options, and there are a number of checks and balances employed by RECA throughout the process.

Similarly, there are a number of options available to RECA to address a complaint during the Professional Conduct Review process, each of which allows RECA to address the complaint in a proportionate manner. If the circumstances are appropriate, RECA has the authority to discontinue an investigation and is not required to continue to investigate a complaint where there is no likelihood of a finding of conduct deserving of sanction. At the same time, if a complaint is discontinued, the complainant is provided with an opportunity to appeal the decision.

RECA publishes comprehensive guides about the Professional Conduct Review process for both complainants and industry professionals. These guides include information on the circumstances in which a complaint may be dismissed, how the investigation process will be conducted and what the potential outcome of the complaint may be. These guides increase transparency since the participants can obtain a good understanding of the process and potential outcomes of an investigation.

The guides are available on the RECA website. They are written in plain language and address a significant number of questions or concerns that may arise during the process. RECA regularly refers to these online guides in correspondence during the process. The availability of information about the process and the transparency of the process are high.

Individuals involved in the Professional Conduct Review Process are required to continually assess files to identify potential conflicts of interest and discuss them with the Director of Professional Standards. There is currently no formal process to identify and evaluate potential conflicts of interest. Nonetheless, we did not identify any concerns of an unfair process.

As also discussed above, industry professionals and complainants are notified of the process that will be followed in the investigation, each is given an opportunity to provide information related to the complaint, and RECA will determine if further interviews, with the complainant or third parties, or the production of other documentation, is necessary as part of the investigation.

While the level of fairness to which industry professionals and complainants are entitled to during the investigation process is lower than the degree of fairness owed to industry professionals in a conduct hearing, RECA attempts to ensure that the parties are made aware of the complaint, kept informed and that both have an appropriate opportunity to provide information. This in turn increases confidence in the process, both from the industry professional and the complainant.

We requested and were provided with 21 files for review and evaluation against the Assessment Criteria. These included files resolved for insufficient evidence, matters that were refused for specific reasons and complaints which were resolved with letters of reprimand, advisory notes and administrative penalties.

Based on our review, the complaints and investigation process followed meets the requirements of being both procedurally and substantively fair. RECA provides a clear framework so that consumers and members of the public can hold industry professionals to account by making a complaint when the standards of conduct are not followed.

In addition, the Professional Conduct Review process is focused on the principles of “right-touch regulation”. However, “right-touch regulation” should not be confused with “light touch regulation”. “Right-touch regulation” still requires the appropriate regulatory force to be imposed against an industry professional in cases where it is appropriate and we observed this to be the case. However, a hearing may not be necessary in every case given the availability of other options such as a non-disciplinary advisory note, a letter of reprimand, or an administrative penalty.

We are satisfied that the complaints process is aimed at public protection, as evidenced by the “directive” courses of action which can be imposed on the industry professional during the investigation. The process addresses the substance of complaints and protects the interests of the public, but does so in an appropriate manner not requiring a hearing for every complaint.

We consider that RECA meets this standard.

Complaints are dealt with as quickly as possible taking into account the complexity and type of case and the conduct of both sides. Delays do not result in harm or potential harm to consumers and service users. Where necessary RECA protects the public by means of interim suspension.

RECA will not wait for law enforcement or another organization to complete an investigation prior to proceeding with the investigation of a complaint. RECA will move as quickly as possible and conduct a parallel investigation involving its own information collection and assessment. RECA will also impose an interim suspension or restrictions where it is necessary to protect the public but these situations are rare.

As discussed above, RECA first performs a “Review 1” to determine if the complaint is within its jurisdiction and whether it will be investigated, which is then followed by a “Review 2” which categorizes complaints based on complexity and seriousness and which determines if further investigation is needed. RECA seeks to investigate complaints without delay and has set an expectation that a “Review 1” will be completed within 5 days and that a “Review 2” will be completed within 30 days.

According to the most recent Dashboard Report that we reviewed, as of December 31, 2015, there is only complaint that has remained at the “Review 2” stage for longer than 30 days. We are satisfied that RECA is performing the initial assessment and analysis of a complaint without delay.

Once the “Review 2” is completed, the complaints are classified as Level 1, Level 2, or Level 3, with Level 1 being the least complex and Level 3 being the most complex. A Level 1 complaint does not require further investigation beyond the “Review 2” and is generally resolved shortly after the “Review 2” is completed. Level 2 and Level 3 complaints require further investigation and information gathering. Level 3 complaints are immediately assigned to a Professional Conduct Review Officer for investigation while Level 2 complaints are assigned when an Officer has capacity. RECA has set a performance objective that Level 2 and Level 3 complaints will be resolved within 12 months of the complaint being received.

“Resolved” means that a recommendation has been made by the Director of the Professional Standards Unit as to how to address the complaint. This includes the dismissal of the complaint for insufficient evidence, the issuing of an advisory note, letter of reprimand, or administrative penalty to the industry professional, or the referral to a Hearing Panel.

Setting performance objectives with respect to timeliness in the investigation and hearing process is a “best practice” for regulators, although many regulators do not do so. RECA is to be commended for adopting this practice. Some regulators find performance objectives based on “averages” to be less useful than performance objectives based on the “mean” time to complete investigation since the “averages” are often skewed by a few exceedingly complex and lengthy investigations. Some regulators will adopt performance objectives with respect to

timing using structures such as: “80% of all investigations will be completed within 12 months of receipt of the complaint.”

According to the Dashboard Report, there are 34 complaints that are classified as Level 2 which are awaiting assignment to an available Professional Conduct Review Officer. Of these 34 complaints, 27 have been awaiting assignment for longer than 6 months. There are an additional 89 complaints, consisting of both Level 2 and Level 3 complaints, currently assigned to an Officer for investigation. Of these 89 complaints, 45 have been under investigation for longer than 12 months.

We have been advised that some of the complaints which have been under investigation for longer than 12 months are legacy matters that predate current processes. Additionally, in some cases key persons have become unavailable such that proceeding may be very difficult. Many regulators have some problems with investigation files that have been difficult to advance for some reason or another so it is not surprising that RECA is no different. We were advised that RECA is making effort to resolve these legacy files wherever possible.

We are of the opinion that RECA attempts to address complaints as quickly as reasonably possible and seeks to avoid any harm to the public and consumers arising from delay.

However, based on our review, RECA is facing challenges meeting the performance objective for Level 2 and Level 3 complaints. Although RECA has set an expectation that it will complete the investigation of these complaints within 12 months, a significant number of Level 2 complaints have not been assigned to a Professional Conduct Review Officer after 6 months. The delay in assigning the complaint indicates that the completion of the complaint will likely take longer than 12 months. The Dashboard Report also indicates that about half of the Level 2 and Level 3 complaints currently under investigation have been under investigation for over 12 months. Further, although Level 3 complaints are assigned to an Officer immediately after being classified, the investigations into these complex files are detailed and lengthy, and as a result, generally take longer than 12 months to resolve.

RECA could consider whether it needs to change the performance objectives for Level 2 and 3 complaints. However, all regulators should strive to meet reasonable performance objectives with respect to the length of investigations. Rather than lengthening the time lines of the objective, a better “high performance” approach would be for RECA to examine options to improve the performance with respect to the timeliness of investigations of Level 2 and Level 3 matters, including examining whether more resources are needed to meet the performance objectives

Recommendation #10: RECA should assess the reason it is facing challenges in meeting the performance objective for the time taken to resolve Level 2 and Level 3 complaints. RECA will need to consider whether it is devoting sufficient resources to meet the performance objectives in this area.

RECA may wish to establish a performance objective for the assignment of a Professional Conduct Review Officer to Level 2 complaints. Given that delays are being experienced in assigning Professional Conduct Review Officers to Level 2 complaints, assigning a specific performance objective for the time it takes to make the assignment may be useful. The expectation may be that a Level 2 complaint will be assigned to an Officer within a particular time frame of the complaint being assessed as Level 2. RECA can then measure and assess the time it takes to assign an Officer to a Level 2 complaint, as well as the time it takes to resolve the Level 2 and 3 complaints, against the performance objectives.

Recommendation #11: RECA may wish to establish a performance objective for the assignment of a Professional Conduct Review Officer to Level 2 complaints.

All parties to a complaint are kept updated on the progress of their case and supported to participate effectively in the process.

RECA maintains contact with industry professionals and complainants throughout the complaints process. Although RECA does not provide proforma updates on a set schedule, RECA provides updates as the complaint moves through the Professional Conduct Review process milestones. RECA has set performance targets for the completion of particular stages in the process and RECA provides substantive notices about the complaint to the complainant and industry professional at the completion of each stage. This ensures that there is no significant period of time without any direct communication with the participants regarding the status of the investigation.

Although RECA does not routinely send proforma updates to complainants and industry professionals, we observed examples of ad hoc update letters when determined to be warranted.

In addition, RECA strives to respond to inquiries from complainants and industry professionals on a timely basis and provides the answer or clarification necessary for the individuals to effectively participate in the process.

Parties are also provided the Professional Conduct Review Officer's contact information to facilitate communication and RECA allows complainants and industry professionals a choice as to whether they communicate with the Officer with written correspondence or electronic correspondence. Complainants and industry professionals interact with the officers throughout the complaints process and the officers are available to answer any questions.

The nature and content of the written correspondence that is provided is generally appropriate. We did not identify any concerns about RECA using language that was "heavy handed" or inappropriate. The correspondence sent by RECA reflects a neutral tone, suggesting to both the complainant and the industry professional that the investigation will be conducted in a fair and appropriate manner.

Based on our review of template letters, as well as the correspondence found in the sample files, we are confident RECA meets this standard.

All decisions, at every stage of the process, are well reasoned, consistent, protect the public and maintain confidence in the profession.

RECA undertakes a number of initiatives to ensure that this standard is met.

RECA provides a significant amount of training to Professional Conduct Review Officers, including basic training relating to the relevant legislation and standards and more advanced industry-specific training, such as the RECA industry professional pre-licensing courses, principles of administrative justice, and investigations training. There is also training on dealing with difficult individuals and interpersonal skills.

Upon completion of the investigation process, the Officers provide a report to the Director of the Professional Standards Unit, the Executive Director's delegate, as the Executive Director or his delegate is ultimately responsible for making the decision as to whether a complaint will be dismissed or if enforcement action will be undertaken.

This report must include an executive summary of the file, a list of the issues examined with reference to the legislation, a summary of the relevant evidence, a list of aggravating and mitigating factors considered, and the recommended outcome. The recommended outcome is based on an assessment of the factors accepted to be appropriate when determining a sanction in professional discipline, as well as the guiding factors of "right-touch regulation". In addition, the report recommendations must be verifiable with references to the supporting evidence such as document numbers and reference times in audio or interview recordings.

The Director of the Professional Standards Unit reviews all recommendations and makes the final decision. This promotes consistent decision making and ensures that the final decision is made by the proper authority.

We were advised by the Director of the Professional Standards Unit that he and the Professional Conduct Review staff discuss regulatory principles, such as consistency and public protection, on a daily basis. We were also advised that the Professional Standards Unit focuses on achieving appropriate and proportional outcomes rather than on seeking the most serious possible outcomes in every case.

We are satisfied that the overall Professional Conduct Review process is proportional and focused on achieved appropriate outcomes based on well-reasoned and consistent regulatory decisions.

We have reviewed a full range of types of recent decisions in a number of cases files and we found the outcomes to be appropriate and committed to public protection. We found the decisions to be based on thorough and appropriate investigation processes set out elsewhere in

this discussion. During the review process, we heard concerns that decisions in the complaints process were both “too soft” and “too harsh”. This is to be expected when surveying any group of participants in a regulatory process given the variety of perspectives involved. In our review, we did not see a manifestation of either of these concerns. While there was some variance in the severity of the sanction each case, there was also variance in the facts. The decisions reached in the cases we reviewed were consistent with public protection and maintaining confidence in the industry. It is always possible to question the outcome of a particular case but we did not identify any systemic issues of concern.

In our review, we also heard concerns that there was a lack of consistency in the decision making process. We note there is no legislated formula to determine whether a given type of conduct deserving of sanction should result in a particular action under s. 39 of the *Act*, such as an advisory note, a dismissal of the complaint, a letter of reprimand, an administrative penalty (when authorized under the Bylaws), or a referral to a Hearing Panel.

We understand for certain types of files, such as condominium size listings, Professional Conduct Review has developed a process of reviewing the conduct and considering mitigating and aggravating factors to then place a particular type of conduct along this spectrum, effectively developing a non-binding process for the exercise of discretion under s. 39. Conduct on the more serious end of the spectrum is treated more seriously than conduct where a number of mitigating factors place it on the less serious end of the spectrum. A report is then prepared and provided to the Director for the final determination. This process appropriately balances factors to assess the severity of conduct and guides the exercise of discretion by the Executive Director’s delegate.

RECA might benefit from a non-binding guideline or policy to assist staff in making recommendations as to determine how all types of complaints should be resolved, i.e. with a dismissal, an advisory note, letter of reprimand, administrative penalty (where authorized) or referral to hearing. This guideline or policy could assist in the consistent application of the proper considerations when making a recommendation and would provide examples of the type of conduct properly resolved by each action. It would be non-binding, to ensure that the proper discretion was still exercised by the Executive Director’s delegate, but it would assist in promoting consistency amongst the recommendations to the Director of the Professional Standards Unit.

Recommendation #12: RECA may wish to consider implementing a non-binding guideline or policy to assist staff in determining how all types of complaints should be resolved, i.e. with an advisory note, letter of reprimand, administrative penalty (where authorized) or referral to hearing.

On reviewing example letters of reprimand and administrative penalties, we note that these documents state the conclusion that the industry professional contravened a requirement or rule and that this is conduct deserving of sanction. This is different language than provided for in s. 39(1)(b) of the *Act*, which empowers the Executive Director to refer matters to a hearing

panel, issue letters of reprimand and impose administrative penalties where the Executive Director “determines that there is sufficient evidence of conduct deserving of sanction”. RECA may wish to revise its template letter of reprimand and administrative penalty forms to mirror the language in s. 39(1)(b) to say that the Executive Director has determined that there is sufficient evidence that the industry professional contravened a requirement and that this is conduct deserving of sanction. This will minimize the risk of a successful challenge on jurisdictional grounds.

Recommendation #13: RECA may wish to revise its template letter of reprimand and administrative penalty to state that the Executive Director has determined that there is sufficient evidence that the industry professional contravened a section(s) of the *Act* and that this is conduct deserving of sanction.

We also understand that the prescribed administrative penalties for conduct are generally out of touch with the current real estate market. While Hearing Panels have authority to order industry professionals to pay fines of up to \$25,000 for each finding of conduct deserving of sanction, the administrative penalties range from \$500 to \$5,000. These amounts are no longer appropriate given their relationship to, for example, average real estate commissions. This may undermine the protection of the public and the confidence of the public in the process as an industry professional may regard an administrative penalty as a cost of doing business rather than a proper deterrent to avoid breaching the standards of conduct. RECA may also wish to consider implementing penalty ranges for breaches in order to give more flexibility in fashioning appropriate administrative penalties for the circumstances.

Recommendation #14: RECA may wish to undertake a review of the administrative penalty amounts prescribed in its Bylaws to determine if the amounts are still considered to be at an appropriate level.

All final decisions, apart from matters relating to the health of a professional, are published and communicated to relevant stakeholders.

If a complaint is resolved during the Professional Conduct Review process and no hearing is held before Hearing Panel, the decisions made on behalf of the Executive Director are communicated to the industry professional and the complainant after the decision is made as required by the *Real Estate Act*.

Complainants and industry professionals are sent a closing letter describing the outcome, such as the dismissal of the complaint or the delivery of an advisory note to the industry professional. Alternatively, the letter may enclose a separate letter of reprimand or an administrative penalty document. The letter concludes by advising of any applicable right of appeal.

We have reviewed templates of closing letters used in the Professional Conduct Review process as well as examples of these letters from case files. In the case of a dismissal of a complaint for

insufficient evidence of conduct deserving of sanction, the closing letters provide the complainant and the industry professionals with summary reasons for the decision and notice of the right to seek an appeal to the Hearing Panel. We note that letters of reprimand and administrative penalties also provide the industry professional with the particulars of the contravention which describes the evidence deemed by the Executive Director's delegate to be sufficient evidence to exercise his discretion under s. 39(1)(b). These documents also provide notice of the industry professional's appeal rights. We note that RECA also telephones complainants when complaints are dismissed to advise them of the decision and to answer complainant questions.

Although RECA's closing letters to industry professionals and complainants do include some summary reasons for the decision, we noted that those reasons generally do not explain why matters resolved by advisory note did not amount to conduct deserving of sanction.

We also noted that the summary reasons in closing letters did not explain why the matter was disposed of by one means rather than another. For example the closing letters do not generally mention that a matter could be disposed of by advisory note, letter of reprimand, administrative penalty (where authorized) or by referral to hearing and why those other outcomes are inappropriate. The inclusion of some additional detail would enhance transparency.

Recommendation #15: RECA may wish to consider providing a greater detail of information to industry professionals and complainants when a complaint is resolved, in particular, RECA may wish to consider stating why other outcomes were inappropriate.

If a complaint is referred to a Hearing Panel, the complainant and the industry professional are advised in writing and the matter is then turned over to Conduct Proceedings for further handling.

Pursuant to s. 55 of the *Act*, RECA has broad authority to publish information about a person's withdrawal from industry membership and about prosecutions and disciplinary action. All Professional Conduct Review enforcement actions (letters of reprimand and administrative penalties) and lifetime withdrawals from the industry while the member is under the threat of discipline for improper conduct are posted on the website. An industry professional's name will not be included in a letter of reprimand posted online, but it will be included in an administrative penalty or a lifetime withdrawal from the industry. In addition, an industry professional's licensing status is published in the Public License Search on the RECA website available to the public at any time, as discussed above.

Notice of all enforcement actions are also summarized in RECA's Case Summaries newsletter. The Case Summaries publication is distributed to industry professionals by email and available to the public on RECA's website.

All enforcement actions, other than lifetime withdrawals from the industry, are published and maintained on the RECA website for a period of two years. Lifetime withdrawals will remain published on the website for the individual's lifetime. All of these decisions are also available indefinitely at the RECA offices in hard copy or electronic form.

RECA also publishes a stand-alone notice of industry professionals who permanently withdraw from the industry while under the threat of discipline.

In addition, the RECA "Annual Report" includes aggregate data about the number of complaints received, the Professional Conduct Review proceedings, and the outcomes of the complaints.

RECA's communication and publication of decisions is transparent and this standard is generally met. We commend the steps that RECA goes through to ensure that final decisions are published transparently to the public. However, as indicated above, RECA may wish to consider improving on the information provided to industry professionals and complainants when a complaint is resolved.

Information about complaints is securely retained.

Currently, complaints and any information received during an investigation are scanned and handled by electronic means only using RECA's dedicated software. The original hard copies of documentation are either returned to the individual who provided the information or the hard copy is securely destroyed. RECA does not maintain hard copies of any of its information.

RECA has encrypted its computer hard drives, phones, and laptop computers and maintains a firewall to avoid external access to its data.

Older complaint and investigation files that exist on paper are stored in locked cabinets. The entire RECA office is secured electronically so that only authorized RECA employees can enter particular areas. During our attendance at the RECA office, we noted that the electronic security prevented unauthorized access and that access was limited to those with key-cards. Access to the locked cabinets containing complaint information is restricted to Professional Conduct Review staff that require access.

All RECA staff must also sign a Confidentiality Agreement as a term of their employment.

RECA has a Retention and Destruction Policy, an Official Records Policy, a Records Scanning Policy and an Information Protection Policy, all of which are detailed and all of which were previously reviewed as part of the 2015 Privacy Audit.

RECA is committed to the protection of privacy and to meeting, and exceeding, the obligations imposed by privacy legislation. This standard is being met.

7. Hearings Administration

Under the *Real Estate Act*, RECA has the authority to hold formal hearings to inquire into possible breaches of the *Act* by industry professionals and discipline misconduct when appropriate. Pursuant to s. 39(1) of the *Act*, the Executive Director, or his delegate, may refer a complaint to a Hearing Panel if there is sufficient evidence of conduct deserving of sanction. As discussed above, the Executive Director or his delegate may also issue a letter of reprimand or impose an administrative penalty where authorized if there is sufficient evidence of conduct deserving of sanction. The determination of the appropriate disposition is a discretionary decision made based on an assessment of the facts and other relevant factors.

If a decision is made by the Director of the Professional Standards Unit, acting as the Executive Director's delegate, to refer a complaint to a Hearing Panel, the file is transferred to RECA's Conduct Proceedings staff. The staff is comprised primarily of lawyers, who have administrative assistance. Conduct Proceedings is primarily responsible for fulfilling the statutory objectives relating to disciplinary proceedings which take place before a Hearing Panel. Hearings before a Hearing Panel may be contested hearings or may proceed by way of a Consent Agreement. Appeals from letters of reprimands and administrative penalties issued by Conduct Review are also heard by a Hearing Panel with Conduct Proceedings representing the Executive Director at the hearing. Finally, a Hearing Panel also hears appeals by complainants under s. 40 of the *Act* when a complainant appeals the Executive Director's decision to dismiss a complaint.

The Hearing Panel is comprised of Council members, industry peers, and public members. The Panel hears the evidence and determines whether the industry professional's conduct should be sanctioned. If an industry professional is sanctioned, the professional has a right of appeal. The appeal is heard by an Appeal Panel comprised of Council members and members of the Law Society of Alberta.

RECA's Hearings Administration staff operate independently from the Conduct Proceedings staff. Hearings Administration staff select the members of Hearing Panels, ensure that the members of Hearing Panels do not have conflicts of interest in sitting on a particular matter, coordinate training and education initiatives for the members of Hearing Panels, and provide general administrative support to the members of Hearing Panels, including ensuring that Hearing Panels have access to independent legal counsel to assist the Hearing Panels with procedural and legal matters.

Overall, we are satisfied that the hearings process is transparent, fair, and compliant with the principles of natural justice.

Where appropriate, alternative methods that are proportionate are used to resolve a complaint prior to a hearing.

As discussed above in the section on Handling Complaints, the *Real Estate Act* contemplates and RECA utilizes alternative methods such as reprimands and administrative penalties to resolve complaints prior to a hearing.

A complaint is transferred to Conduct Proceedings once the Director of the Professional Standards Unit determines there is sufficient evidence of conduct deserving of sanction and that the conduct in the complaint warrants a hearing, as opposed to a different enforcement action as discussed above. This means that alternative methods have already been considered and determined to not be appropriate given the circumstances of the complaint.

However, once a complaint is referred to hearing, it may proceed as a contested hearing or by way of a Consent Agreement. Conduct Proceedings undertakes efforts to reach agreement with the industry professional in order to avoid a contested hearing. RECA may enter into a Consent Agreement with the industry professional in which the professional admits to conduct deserving of sanction and agreement is reached on an appropriate sanction and costs. Sections 46 and 47 of the *Real Estate Act* contemplate the use of admissions of conduct deserving of sanction in the hearing process.

Conduct Proceedings will draft an agreement for the industry professional to review and consider. The agreement includes a statement of facts, an acknowledgement by the member of the breach and the conduct deserving of sanction, and an agreement on the sanction and costs.

Our review of the Consent Agreement process indicates that this is a consensual and voluntary process. Industry professionals are advised they are not required to enter into the agreement and are advised that they can proceed to a hearing. A review of various documents used by Conduct Proceedings including Consent Agreement checklists, template letters and call records reveals that industry professionals are informed at various points that the Consent Agreement process is voluntary. Documents available on the RECA website also make clear that the Consent Agreement process is voluntary. The industry professional is given significant time to review the proposed Consent Agreement and suggest changes and is advised they can have a lawyer review it prior to replying or agreeing to the contents of the Consent Agreement.

While there is a recognition in the Conduct Proceedings department that Consent Agreements may result in reduced costs awarded against the industry professional (as compared to a full contested hearing), and that this may serve as an inducement for industry professionals to enter into Consent Agreements, this is simply a reality of the process. It is clear that Conduct Proceedings does not use this fact as leverage in their dealings with industry professionals.

Many of the formal documents used by Conduct Proceedings to communicate with industry professionals about the hearings process are written in plain language format. This aids in ensuring that industry professionals understand the process and the options available to them.

We did not find any suggestion that industry professionals were being forced or coerced into entering Consent Agreements.

If a Consent Agreement is reached, it must be provided to the Hearing Panel for consideration. The Hearing Panel is clothed with authority under the *Real Estate Act* to make determinations as to whether an industry professional has engaged in conduct deserving of sanction. Accordingly, the Hearing Panel must consider whether or not it agrees, based on the facts and acknowledgment set out in the Consent Agreement, that the industry professional has engaged in conduct deserving of sanction.

During the course of our review, we examined a number of Consent Agreements. When the Consent Agreement is accepted by the Hearing Panel, the Hearing Panel places a checkmark beside the following statement at the end of the Consent Agreement: “The Consent Agreement is Approved”. No reasons for decision are provided by the Hearing Panel.

While the *Real Estate Act* does not expressly require a Hearing Panel to issue reasons for decision, reasons for decision are often required as a component of procedural fairness and reasons for decision are certainly recommended as a best practice. Even if the Hearing Panel is prepared to adopt the facts set out in the Consent Agreement, and recognizing that s. 47(2) of the *Real Estate Act* deems an admission of conduct, once accepted by the Hearing Panel, to be a finding of the Hearing Panel that the conduct of the industry professional is conduct deserving of sanction, it is nevertheless recommended that the Hearing Panel provide some reasons for its decision.

By ratifying the Consent Agreement, the Hearing Panel is, in essence, making a finding of conduct deserving of sanction and the Hearing Panel should be prepared to provide reasons for this finding. The Hearing Panel should also provide reasons as to why the sanctions set out in the Consent Agreement are appropriate orders for penalty given the particular circumstances of the case.

Recommendation #16: RECA should consider implementing a process where Hearing Panels that are ratifying Consent Agreements provide reasons for their finding that the industry professional has engaged in unprofessional conduct as well as reasons for why the sanctions being imposed are appropriate orders for penalty given the conduct at issue. Given that the matter is proceeding by consent, the reasons provided by the Hearing Panels could be much shorter than a contested hearing but some reasons should be provided.

If a Consent Agreement is rejected by the Hearing Panel, RECA’s policy and procedure documents state that the Consent Agreement may be re-drafted for a second consideration or a contested hearing will be held. As when a Hearing Panel accepts a Consent Agreement, when a Hearing Panel rejects a Consent Agreement, it appears that the Hearing Panel simply places a checkmark beside the following statement at the end of the Consent Agreement: “The Consent

Agreement is not Approved". No reasons are given as to why the Consent Agreement is not approved.

It is not clear in this scenario whether the Hearing Panel's rejection of the Consent Agreement means that the Hearing Panel is unable to make a decision on the issue of conduct deserving of sanction because of a lack of information, for example, or whether the Hearing Panel is making a finding that Conduct Proceedings has failed to establish that the industry professional engaged in conduct deserving of sanction. If, by not approving the Consent Agreement, the Hearing Panel is actually making a determination that the industry professional has not engaged in conduct deserving of sanction, then the matter must end here and Conduct Proceedings cannot make a second attempt to "re-try" the matter by way of a revised Consent Agreement or a contested hearing. If it were to do so, this would likely raise a concern with the principles of res judicata as it could be argued that the Hearing Panel has already considered and decided the matter.

However, if it is simply the case that the Hearing Panel feels that they do not have enough information to proceed or that the matter should instead proceed by way of a contested hearing and the Hearing Panel's rejection of the Consent Agreement does not amount to a finding that the industry professional has not engaged in conduct deserving of sanction then there is less concern with the process. In this event, it is important that the Hearing Panel be clear that it has not made any findings and is simply asking the parties to provide additional information or proceed in a different manner. The effect of the Hearing Panel's rejection of the Consent Agreement should be made more transparent.

Recommendation #17: RECA should consider adopting a process whereby the effect of a Hearing Panel's rejection of a Consent Agreement is made clear. Hearing Panels should specify when they are rejecting a Consent Agreement that they are not making a finding that the industry professional has not engaged in conduct deserving of sanction and that the Hearing Panel is simply requesting further information before making a determination as to whether or not to accept the Consent Agreement. RECA may wish to consider revising its Consent Agreement templates so that the Hearing Panel may specify why it has rejected the Consent Agreement.

Finally, we note with respect to Consent Agreements that the Consent Agreement process is not expressly provided for in the *Real Estate Act*. As discussed above, case law involving other regulators has found that settlement processes not contemplated by their enabling legislation are outside the jurisdiction of the regulator and accordingly, cannot be used by the regulator.

Here, however, ss. 46 and 47 of the *Act* specifically contemplate the use of admissions made by industry professionals and where accepted by the Hearing Panel, the admission is deemed to be a finding by the Hearing Panel that the conduct of the industry professional is deserving of sanction. To this extent, we are comfortable that the Consent Agreement process would fall within what is contemplated by ss. 46 and 47.

However, it is clear that the Act requires admissions made by industry professionals to be dealt with by a Hearing Panel in the context of a hearing. As long as the Consent Agreement process is aligned with the procedural fairness and other requirements of the hearing process, then the risk of the Consent Agreement process being found to be outside RECA's jurisdiction is significantly reduced. However, where the Consent Agreement process appears more as a mere ratification of a settlement agreement and less like a hearing (for example, where no reasons are given by the Hearing Panel), then the risk of the Consent Agreement process being found to be outside of RECA's jurisdiction increases.

Although the Consent Agreement must be presented to the Hearing Panel, the Consent Agreement is normally presented to the Hearing Panel solely by way of documents and the parties do not appear before the Hearing Panel. Often the Hearing Panel convenes by conference call rather than in person to deal with Consent Agreements. We do not have concerns with proceeding by way of a documentary hearing, however, during our review, some concerns were expressed by Panel members as to the lack of an ability to question the Case Presenter or the industry professional on the contents of the Consent Agreement. In some cases, Hearing Panel members felt that certain information was missing from the Consent Agreement or that certain information needed to be clarified. They felt constrained in having to make decisions without all the information they felt was necessary to the case.

We were advised that the Hearing Panel can refer questions back to the Hearings Administrator and that those questions will then be provided to the parties in writing for a response. This process is set out in a Consent Agreement guidelines document. We are satisfied that the Hearing Panel has the ability to ask questions of the parties, although it would be helpful to reinforce to members of these Hearing Panels that they do have the ability to seek further information if it is crucial to their decision-making process.

Alternatively, the parties could attend in person before the Hearing Panel to present the Consent Agreement and be available for questions.

Recommendation #18: RECA should ensure that members of the Hearing Panels are aware of the process for seeking further information from either the Case Presenter or the industry professional during the course of a Consent Agreement hearing or should consider amending the Consent Agreement process to allow for in-person attendance of the parties to present the Consent Agreement.

In general, we are satisfied that, where appropriate, RECA uses alternative methods to resolve a complaint prior to a contested hearing.

Hearings are held as quickly as possible taking into account the complexity and type of case and the conduct of both sides. Delays do not result in harm or potential harm to consumers and service users.

When Conduct Proceedings receives a file which is to be heard by a Hearing Panel, RECA reviews the entire file and determines which allegations are appropriate. Once allegations are determined, a hearing is set. The hearing date may be adjourned where necessary but RECA attempts to avoid unnecessary delays.

We recognize that the scheduling of hearings is often difficult given the number of individuals who must attend on the same date. However, we did not note any significant procedural delay in holding hearings or having Consent Agreements approved by a Panel. Any small delay did not result in harm to the public or prejudice the ability of the industry professional to defend the matter, as all evidence had been obtained and maintained by the time a complaint is referred to a hearing.

RECA has set a provisional benchmark of completing a hearing within 8 months of the file being received by Conduct Proceedings. RECA tracks the days that a file is opened and has advised us that hearings are generally held within this 8 month window.

As with investigations, setting performance standards for the time to hold a hearing is a “best practice” for regulators. RECA is to be commended for following this process.

While the *Real Estate Act* does not set out specific timelines within which decisions of Hearing and Appeal Panels must be rendered, Hearings Administration has set a goal of issuing their written decisions within 30 days of a hearing’s completion. In practice, it is often closer to 60 days before the reasons for decision are released. We are satisfied that issuing reasons for decisions within these timeframes falls well within reasonable expectations for the issuance of timely decisions. Given the complexity of preparing reasons that meet the standard expected by the Courts, we consider even 60 days to be entirely reasonable.

We are satisfied that RECA meets this standard.

The hearings process is transparent, fair, timely, proportionate and focused on public protection.

When a decision is made to refer a complaint to a hearing, the industry professional receives a notice of hearing. This notice sets out the allegations of the conduct deserving of sanction, including particulars of the facts alleged and the alleged sections of the legislation which have been contravened. The industry professional receives the entire investigation file, which contains all of the evidence gathered, when the notice of hearing is issued. On occasion, RECA will redact private information from the investigation file if it is not relevant to the industry professional’s defence. This process ensures a fair and transparent hearing while also protecting privacy.

We were not able to attend a hearing during this review. However, we are familiar with the process and are of the opinion that the hearings process is fair and focused on public protection.

The hearing is a full administrative hearing in which Conduct Proceedings staff present the case against the industry professional and in which the industry professional is given the opportunity to respond and defend themselves against the allegation. Procedural and substantive fairness is maintained throughout the process. Although it is a formal process, this formal process is one required to ensure that RECA complies with the requirements of such a hearing when the livelihood of the industry professional may be affected.

RECA has published a significant amount of information and a number of guides for industry professionals in relation to the hearings process. There is information on the hearings process, the procedure at the hearing including how evidence and submissions are made, the role of the Hearing Panel, and the importance of coming prepared for a formal procedure. There is also information specifically targeted to industry professionals who intend to represent themselves. RECA also makes the Hearing and Appeal Panel Practice and Procedures Guidelines available to the public. All of this information is available on the website and is easily accessible. Further, it is all in plain language as RECA has committed to ensure that it is communicating effectively.

Our review of this information indicates that RECA makes serious efforts to ensure that industry professionals are aware of the formality of the hearings process and to ensure that industry professionals are prepared. We note that the guides include a "Standard Steps in a Hearing" section which sets out the standard steps that will occur in a hearing. This is very useful information which improves the transparency of the process.

After a hearing, the Hearing Panel will issue written decisions. If it determines there was no conduct deserving of sanction, the process is finished. If the Panel determines there was conduct deserving of sanction, the Panel will request submissions on sanctions and costs in writing or the Panel will reconvene for the presentation of evidence and submissions. This is a proportionate process which also ensures that the industry professional has a fair and timely hearing.

During our review, a significant number of concerns were raised in regard to industry professionals who represent themselves in front of a Hearing or Appeal Panel. Concerns were raised that the industry professionals did not understand the process, did not realize the process would be so formal, and did not understand the serious consequences of not being prepared. Concerns were identified that the "deck was stacked" against self-represented industry professionals.

Hearing Panel members reported a sense that when industry professionals attend at the hearings on their own, they are taken aback by the formality and legalistic nature of the hearing

process. Often it seems that the industry professional did not appreciate that the process would be akin to a courtroom proceeding.

There is a growing concern over self-represented individuals in all legal processes, including in the courts and in professional discipline hearings. Legal counsel is expensive and many individuals are seeking to avoid this cost by representing themselves.

The hearing process is set out in the *Real Estate Act* and is legalistic by nature. RECA does, and must, abide by the hearing process set out in the *Act*. However, while the nature of the process cannot be changed, our review of the information available to industry professionals shows that RECA makes considerable efforts to ensure that industry professionals are aware of the process and procedure used at a hearing and the importance of legal counsel. The information and guides that are available do a very good job of explaining the hearings process in an accessible manner. Information on how the hearing process works is available on the RECA website and Case Presenters spend significant time explaining the hearing process to self-represented industry professionals.

We understand that industry professionals may also contact RECA's Practice Advisor to obtain advice on the complaint and hearing process. The Practice Advisor advised that he is available to advise members as to the nature of the process and to provide information as to how the industry professional may navigate the process.

Hearing Panel members also report that significant time is taken during hearings to provide information on process to self-represented members and that every opportunity is extended to the self-represented industry professional to ensure that they receive a fair hearing. One concern was reported by a Hearing Panel member about the industry professional's ability to access precedent decisions given that only the two most recent years of Hearing Panel decision are available through RECA's website. The concern stemmed from the fact that the Case Presenters, through internal means, have access to all Hearing Panel precedent decisions. However, industry professionals appear to only have access to the RECA website to review the previous two years of Hearing Panel decisions. This led to some unease about whether the industry professional would be able to put his or her best foot forward in preparing a defence.

We were advised by Conduct Proceedings that, if asked, Case Presenters will provide industry professionals with access to hearing panel precedent decisions beyond what is available on the website. The process to provide access to previous Hearing Panel decisions is cumbersome and requires decisions to be searched and stored on a disk. Because of these difficulties, the ability to access decisions of Hearing Panels beyond what is on the website is not currently broadly advertised to industry professionals. However, access will be provided if asked.

While we are satisfied that RECA is making significant efforts to ensure a fair process for self-represented industry professionals, given the increasing numbers of self-represented industry professionals and the concerns raised about self-represented industry professionals in the

context of this review, RECA may wish to consider additional steps to provide assistance to self-represented industry professionals.

Recommendation #19: RECA may wish to develop additional measures to assist self-represented industry professionals in the hearing process. Examples of additional possible measures include:

- The publication for self-represented industry professionals should explicitly state that they are strongly encouraged to have legal representation. The publication could explicitly state that due to the legalistic nature of the hearing process, most industry professionals who do not have legal representation find the process very difficult. The objective is to ensure that the industry professionals clearly understand the challenges of proceeding without legal counsel.
- We heard many concerns that some industry professionals do not understand until the hearing starts how formal the process will be. Some industry professionals may think that this was simply going to be a meeting among colleagues. There is no good reason for this misconception since RECA's publications clearly describe the formality of the hearing processes. However, sometimes industry professionals have a "head in the sand" approach ignoring the reality of the impending process. To help industry professionals clearly understand the formality of the process and the set-up of the hearing room, RECA could develop a short video made available to self-represented industry professionals showing a demonstration of a mock hearing process.
- Develop checklists for industry professionals that they can use and follow to guide themselves through the hearing process. While the current resources available to self-represented members are excellent, a short check-list that is followed by all participants during the hearing process could significantly assist in keeping hearings on track.
- Develop a system where industry professionals have the same access to the previous Hearing Panel decisions as the Case Presenters.
- Regularly assess the need for training of Hearing Panel and Appeal Panel members on how to effectively deal with self-represented industry professionals. (Note as a result of the input we received during this review on the challenges of dealing with self-represented industry professionals, we recommended and developed a training session on this topic that we presented to Hearing and Appeal Panel members in March 2016).
- Develop a list of experienced defence counsel who are prepared to act on behalf of industry professionals in RECA conduct proceedings. Advise industry professionals that they can obtain the list from the Practice Advisor.
- Enhance the role of the Practice Advisor in providing procedural advice

and direction to industry professionals by making industry professionals aware, through the formal correspondence exchanged during the hearing process, of their ability to contact the Practice Advisor and discuss the hearing process in a confidential manner. The Practice Advisor will need to ensure that he does not provide substantive advice on defending the allegations or on the best course of action to be taken by the industry professionals but can properly provide advice on standard procedures and options available.

While the overall hearings process meets the criteria of being transparent, timely, fair, proportionate, and focused on public protection, we did identify some concerns with respect to the procedures and processes in place for a complainant appeal under s. 40 of the *Real Estate Act*. This provision allows a complainant to appeal a decision not to investigate a complaint or to discontinue investigating a complaint and to appeal a decision that no further action will be taken with respect to the complaint.

One of the significant challenges with complainant appeals is that s. 40 of the *Real Estate Act* provides no direction of the process to be followed. In the absence of any direction, RECA has been required to develop processes it considers appropriate. Given the ambiguity in the *Real Estate Act* concerning complainant appeal processes, we recommend that when the *Act* is opened for revisions that RECA seek amendments providing specificity concerning the processes to be followed.

Recommendation #20: When the *Real Estate Act* is opened for revisions, RECA should recommend amendments that provide clear direction on the processes to be followed in appeals by complainants of dismissals of complaints.

Currently, if an appeal is taken by a complainant, the parties to the appeal are the Executive Director and the complainant. The industry professional about whom the complaint was filed is advised of the appeal and the fact that he or she may attend the appeal as an observer but the industry professional is not a party to the appeal nor is he or she permitted to make any submissions, written or oral, to the Hearing Panel.

The first concern identified with respect to the s. 40 complainant appeal process is the parties to the appeal. In the current process the Executive Director plays an active part in the appeal hearing as party. However, the Executive Director is the decision maker from whose decision the complainant has appealed. Unless permitted by statute, in the normal case, an administrative law decision maker is not permitted to become a party to an appeal in order to defend the merits of his or her decision.

Further, it is not clear that s. 40 contemplates having the Executive Director as an active party to the complainant appeal process in order to defend the decision. Rather, more commonly in these types of processes, the parties are the complainant and the industry professional. We note that in accordance with s. 40(2) of the *Real Estate Act*, the Hearing Panel must notify the

complainant and the industry professional of its decision. There is no corresponding statutory requirement to notify the Executive Director of the decision. This would seem to suggest that the *Real Estate Act* contemplates the parties to a s. 40 appeal as being the complainant and the industry professional, rather than the complainant and the Executive Director.

If this is the case, then there is significant concern that, under the current process, the industry professional is being deprived of his or her right to be heard in a s. 40 complainant appeal. Likewise, there is concern that the Executive Director is playing an active role in defending his decision when this is not normally contemplated in administrative law proceedings and does not appear to be contemplated by s. 40 of the *Real Estate Act*.

A further significant concern with the s. 40 appeal process is that the complainant is not provided with a copy of the investigation materials which led to the decision not to investigate, to discontinue the investigation or not to take any further action. The investigation materials are available, however, to both legal counsel for the Executive Director and to the members of the Hearing Panel. One Hearing Panel member expressed significant discomfort at having access to materials to which one of the parties to the appeal did not have access. The view expressed was that if the Hearing Panel had the materials then both parties should likewise have access to the materials.

The reason cited for why the complainant is not provided with the investigation materials is one of confidentiality. There is concern from RECA's perspective that the investigation materials contain private information about the industry professional and that if the investigation materials are provided to the complainant, there is concern about the use that the complainant would make of the materials. For example, the complainant could post the materials on the Internet. RECA's view is that the contents of the investigation report should remain private unless and until the contents are made public through the hearing process.

There are varying practices among regulatory bodies with respect to the disclosure to the complainant of the investigation materials in the context of an appeal or review of the dismissal of a complaint against a regulated professional. However, in our view, the failure to provide the complainant with the same access to the investigation materials as is provided to the lawyer for the Executive Director and the Hearing Panel may raise a concern about procedural fairness. Without access to the investigation report, the complainant may be deprived of the information which led the Executive Director to discontinue the complainant proceedings. It will be difficult for the complainant to argue that the Executive Director should not have discontinued the complaint when the complainant is not fully aware of what led the Executive Director to his decision.

Protecting the confidentiality of the industry professional's private information is a valid concern. However, this must be weighed against the complainant's right to procedural fairness in a s. 40 appeal. There may be ways in which RECA could take steps to preserve confidentiality while also providing procedural fairness to the complainant. Examples include requiring the complainant to sign a confidentiality agreement or allowing the complainant to attend on RECA

premises to review the investigation materials without taking copies or removing the materials from the building.

Recommendation #21: RECA should review its current process for s. 40 appeals by complainants and consider whether any steps need to be taken to restructure the current process, taking into account the requirements for procedural fairness and statutory compliance.

Decisions and sanctions are well reasoned, consistent, protect the public and maintain confidence in the profession.

For each matter going before a Hearing Panel, a decision-writer is appointed to write the decision of the Hearing Panel. A draft decision is then circulated to all members of the Hearing Panel for input and a draft of the decision is reviewed by independent legal counsel prior to the decision being finalized and released to the parties. A template is available to the decision writer so that consistent formats are used during the decision writing process. Decisions are generally well-reasoned and set out findings of fact and reasons for decision, both in the findings of conduct deserving of sanction and in the findings related to sanction.

A rigorous process is in place at RECA to ensure that Hearing Panel members are not sitting on hearings where they might have a conflict of interest with respect to the industry professional who is the subject of the hearing. Appropriate steps are also taken to ensure that the composition of each Hearing Panel complies with statutory requirements.

The sanctions available to the Panels include the suspension or cancellation of a license, a reprimand, an order imposing restrictions on a license, a fine not exceeding \$25,000 for each finding of conduct deserving of sanction, an order prohibiting re-authorization for a period of time or until conditions are met, and any other order agreed to by the parties.

One concern raised by Hearing and Appeal Panel members with respect to the decision-writing process is the requirement that decisions be rendered by simple majority with no dissent. Some Panel members expressed discomfort with having to put their names to a decision where they did not fundamentally agree with the outcome. Requiring a Panel member to sign off on a decision that they do not agree with also engages transparency concerns in the decision-making process.

Recommendation #22: While unanimity in decision-making should be encouraged and efforts made to build consensus among panel members, RECA may want to consider a process where Hearing or Appeal Panel members who do not agree with the majority decision are not required to sign the decision in a manner which indicates agreement. A process could be adopted where the decision is simply issued by the "Hearing Panel" or the "Appeal Panel" and signed by the Chair on behalf of the Panel rather than its individual members. If the decision is only signed by the Chair, it is still essential that all Panel members review and provide input on the drafts. Panel members must still

indicate they are satisfied with the decision before it is issued even if it is only signed by the Chair.

Panel members reported that they are generally very satisfied with the presentation of the cases by the Case Presenters. They report that the materials provided to them and the case precedents are useful and helpful to them in determining the matter.

Panel members also conveyed that they are generally very satisfied with the training provided to them by RECA in order to prepare them for their role as Panel members. Panel members advised that at the outset of their appointment to a Hearing Panel they are asked to take a Foundation of Administrative Justice course. Panel members are also provided with an annual training session sponsored by RECA. There also significant written materials available to hearing panel members including a Hearing and Appeal Practice and Procedures Guidelines and Pointers for RECA Panel Members, which Panel members report are very useful and appreciated.

RECA provides regular and intensive training and has adopted “best practices” in many areas of training. While there is high satisfaction with the training provided to Panel members, Panel members did express significant concern there are limited to opportunities to learn through the actual hearing experience since RECA runs relatively few hearings. Panel members also expressed concern that because significant time might pass between hearings, it can be difficult to acquire and maintain experience with running hearings. Further, while the opportunity to shadow Panel members is available, the fact that there are relatively few hearings taking place means that there are limited opportunities to undertake “shadow” training.

Statistics provided by Hearings Administration and Conduct Proceedings confirm that the number of hearings has decreased over the last three years whereas administrative penalties, advisory notes and reprimands appear to have increased. This may simply be reflective of the types of complaints coming into RECA or it may reflect a focus by RECA on “right-touch regulation” with the result that fewer matters are being dealt with by full scale contested hearings.

Due to the declining number of hearings and appeals, Hearing Panel and Appeal Panel members have less “real-time” adjudicative experience. As a result, we received considerable feedback that many do not feel fully prepared for their role despite regular training. In general, there are five ways regulators can help adjudicators perform excellent work:

1. Excellent written resources – RECA already has these in place.
2. A strong training program – This is already in place but a focus on “just-in-time” resources would make it even stronger.
3. Strong administrative support – This is already in place.
4. Providing opportunities for regular hearing experience – This is currently challenging given the decline in the number of hearings.

5. Providing independent legal counsel to attend the hearing or appeal and provide assistance to the panel.

Recommendation #23: RECA may want to consider “just-in-time” training initiatives for Hearing and Appeal Panel members so that members have ready access to training at any point where members feel that they need to be refreshed on the hearing process. An example of such types of training includes webinars that could be accessed by Panel members on demand. This type of webinar would address the fundamentals of the hearing process that could be reviewed in advance of a hearing. The fundamentals webinar would be supplemented by annual in person training addressing more complex issues.

While we were advised that the opportunity to attend hearings as a learning experience is available for Panel members even when they are not appointed to that Panel, many Panel members did not seem to be aware of these opportunities. Given the relatively few hearings that take place, we recommend that RECA place more emphasis on Panel members participating as “shadow Panel members” where members actually sit with the Panel during the hearing but do not participate in asking questions during the hearing. The “shadow Panel member” caucuses with the Panel but cannot participate in the discussion or in the decision-making process. If RECA adopts this process, it should develop a formal policy setting the parameters. Participants in a hearing where there will be a “shadow Panel member” should be given a copy of the policy and asked if they have any objections. If they have any objections, then the individual should not sit as a shadow Panel member on that case. This process would ensure that RECA obtains maximum training value from the hearings that do proceed.

Recommendation #24: Enhance opportunities for Panel members to serve as “shadow Panel members” where they attend hearings but are not a formal member of the Panel. The “shadow Panel member” would sit with the Panel during the hearing but would not ask questions. The “shadow Panel member” would caucus with the Panel but could not participate in discussions or the decision-making. RECA would need to develop a formal policy on the parameters of this process and ensure that participants in a hearing did not have any objections to the process.

Given the declining number of hearings and appeals, it is becoming increasingly challenging for RECA to ensure that Panel members participate in a sufficient number of hearings or appeals to maintain a high level of adjudicative skills. In addition, training a very large pool of adjudicators takes a significant amount of resources.

RECA should consider whether it would be beneficially to create a sub-set of Council which would participate in the hearing and appeal process. We recognize the challenges associated with having different types of industry professionals available for hearings, but recommend that RECA consider whether having all Council members in the “adjudicator” pool remains optimal.

Recommendation #25: Consider creating an “adjudicative sub-set” of Council that would sit on Hearing and Appeal Panels.

Public members on the Hearing Panels also noted that because RECA regulates many types of industry professionals (e.g. real estate brokerage, real estate broker, real estate associate, mortgage broker, real estate appraiser, etc.) that a glossary defining each type of professional would be helpful for those panel members without real estate backgrounds.

Recommendation #26: RECA should consider preparing a glossary of the types of industry professionals regulated by RECA. The glossary should be provided to public members on Hearing Panels who do not have real estate backgrounds.

Panel members are supported in their roles by independent legal counsel. Currently, this function is performed by RECA’s General Counsel. Panel members report high satisfaction with the ability to access legal counsel and with the support provided by legal counsel. In most cases, legal counsel does not normally attend hearings in person but is generally available by telephone to provide procedural advice and direction to the Hearing and Appeal Panels.

Legal advice provided to Hearing must be provided by independent legal counsel in the sense that the legal counsel giving advice to the hearing panels cannot also give legal advice to either the industry professional or the Case Presenter as the parties to the matter before the hearing panel. RECA is very cognizant of the importance of General Counsel remaining neutral and independent when giving advice to Hearing Panels and currently takes steps to ensure that the General Counsel does not have any prior involvement in the matter and that the General Counsel does not get involved in providing any advice or direction to either party to the hearing. Appropriate safeguards and screens are in place to ensure that General Counsel remains independent. We note further that the General Counsel’s office is located separate and apart from Conduct Proceedings.

As noted above, General Counsel generally does not attend the hearing but is available for advice. Certainly this is valuable but in our experience this is also a very challenging structure. It is difficult to provide comprehensive advice as independent counsel when that individual did not attend the hearing. Independent counsel will not be aware of all the nuances or the arguments advanced unless completely and fully briefed by the Panel members. In some circumstances, independent legal counsel may have to read the transcripts to understand in more detail what took place. There is no doubt that independent legal counsel who does not attend the hearing faces a very tough task in providing comprehensive advice.

In addition, when challenging issues arise at a hearing or appeal, the Panel needs the advice right then at the hearing or in caucus. Being able to provide “real time” advice provides great assistance to panels.

Most major regulators now provide independent legal counsel for their Hearing and Appeal Panels who attend the hearings and appeals and caucus with the Panels. There are many

important constraints on the proper role of independent legal counsel that are beyond the scope of this Report. However, we would note that for those regulators who provide this resource for their Panels, the Panel members are strongly of the view that this is a very important resource that greatly helps them in the performance of their challenging adjudicative duties.

Of course there is a cost associated with establishing a system of independent legal counsel attending hearings and appeals. However, in our experience the cost is fairly predictable and manageable because no preparation time is required of the independent legal counsel. In our experience, the cost associated with independent legal counsel from outside law firms represents a very small proportion of the overall cost of the discipline process for large regulators.

Utilizing independent legal counsel from an outside law firm also enhances the appearance of neutrality. Some may argue that General Counsel acting as independent counsel does not appear truly “independent” given the role of General Counsel as part of the overall management structure of RECA. While we do not agree with this argument given the careful structure that has been developed to ensure appropriate separation of function, having independent legal counsel attending hearings and appeals enhances the appearance of neutrality. We would note that if RECA chose to adopt this structure, the law firm or law firms selected to provide independent legal counsel should not be involved in any role as case presenters on behalf of the Executive Director so that there is sufficient separation of function.

Recommendation #27: RECA should consider establishing a system of retaining independent legal counsel from outside RECA to attend hearings and appeals to provide advice to Panels on legal and procedural issues and provide advice and recommendations on Panels’ draft decisions.

During our review repeated concerns were expressed with one conduct decision heard by a Hearing Panel, which was then appealed to an Appeal Panel. As discussed above, although this Report is about RECA’s overall performance as a regulator and not about decisions in particular cases, we acknowledge that individual cases may reveal larger issues within the regulatory structure itself. As a result of this, and the consistency in which this case was identified, we ensured that we reviewed the Hearing Panel decision, the Appeal Panel decision, and the case file to determine if systemic issues existed.

In a case involving █████ █████ █████ disciplinary proceedings were brought against a real estate professional for a breach of s. 42(g) of the Rules. It was alleged that the industry professional engaged in conduct that undermined public confidence in the industry, harmed the integrity of the industry or brought the industry into disrepute by operating a motor vehicle after consuming alcohol, becoming involved in an accident which killed another driver after the industry professional crossed a median, and pleading guilty to operating a motor vehicle in a manner that was dangerous causing death. The industry professional did not attend the hearing. The Hearing Panel found that the industry professional was not acting in his

professional capacity at the time but that his “off-duty” conduct could constitute conduct deserving of sanction. The Hearing Panel concluded that there was insufficient evidence of a breach of s. 42(g) and concluded that “specific evidence on the elements in the rule must be gathered and led at a hearing permitting a hearing panel to make the finding”. As a result, the panel did not find there was conduct deserving of sanction.

The Executive Director appealed this decision. The industry professional did not appear on the appeal either. On appeal, the Executive Director submitted the Hearing Panel made three errors of fact and law by determining it could not find a breach of s. 42(g) without evidence, by failing to determine itself whether the conduct breached s. 42(g) and by disregarding evidence. The Appeal Panel determined the Hearing Panel’s decision was unreasonable because it misdirected itself that actual evidence was needed to establish a breach of the rule in question when it was open to the Hearing Panel to make inferences in order to reach a decision. The Appeal Panel also determined the Hearing Panel erred in placing little weight on a statement made by the industry professional without adequate explanation. The Appeal Panel concluded that it could reasonably infer that the industry professional’s conduct breached s. 42(g) of the Rules and found that the individual’s conduct was deserving of sanction. As a result, industry professional’s license was cancelled.

Our examination of the █████ case did not identify any systemic concerns. However, we do have two observations and three recommendations arising from the case. We observe that █████ is the type of case where the presence of independent legal counsel at the actual hearing could have been extremely beneficial. Independent counsel could have played a valuable role in explaining that actual evidence was not necessary and that it was within the Hearing Panel’s ability to make the necessary finding. Alternatively, independent counsel could have advised the Hearing Panel of their ability to question the Executive Director’s representative as to whether evidence was necessary. This reinforces our previous recommendation that independent legal counsel attend hearings and appeals.

Our second observation is with respect to the fact that the Executive Director appealed the decision. In conversations with participants in the case, some seemed to feel that somehow it was inappropriate for the Executive Director to appeal. That is simply not the case. While appeals by the Executive Director are rare, the *Real Estate Act* expressly contemplates such appeals. It is part of the checks and balances in the *Act* and is to be utilized by the Executive Director where the issues are judged to be of sufficient importance, as in the █████ case.

Our three recommendations arising from the review of the █████ case are as follows:

1. Provide specific training to Hearing Panel members on when direct evidence is required and when instead inferences may be drawn.
2. Provide specific training to Hearing Panel members on how to address issues of concern to the Panel when the industry professional is self-represented or not present. If the panel has concerns that we not explicitly addressed by the case presenter, then the

Panel should identify the concern to the Case Presenter and ask him or her to address. That way the specific areas of concern (in the █████ case the lack of direct evidence) can be fully canvassed and considered by the Hearing Panel with the benefit of full submissions on the issue.

3. Part of the tension and ill-feeling about the █████ case arose due to the fact that a member of Council sat on a Hearing Panel as mandated by s. 36(2) of the *Real Estate Act* and then colleagues on Council were required to sit on appeal of the Hearing Panel's decision. Council members sitting in appeal of other Council members' decisions is awkward in a collegial body and is a natural source of potential conflict. When the *Real Estate Act* is opened for revisions, RECA should consider whether it is appropriate or necessary for Council members to sit on Hearing Panels or whether their adjudicative role should be restricted to appeals.

Recommendation #28: We have the following recommendations arising from our review of the █████ decision which was controversial with some Council or former Council members:

- Provide training to Panel members on when direct evidence is required and when inferences from evidence may be made.
- Provide training to Panel members on how to address areas of concern to the Panel when the industry professional is not present or self-represented.
- When the *Real Estate Act* is opened, RECA should consider if it is optimal for Council members to sit on Hearing Panels or whether their adjudicative duties should be restricted to hearing appeals.

Decisions are published and communicated to relevant stakeholders.

As discussed above, pursuant to s. 55 of the *Act*, RECA has broad authority to publish information about a person's withdrawal from industry membership and about prosecutions and disciplinary action.

The industry professional and complainant are sent a copy of the written decision of the Hearing Panel. If a matter is appealed, they are also provided a copy of the Appeal Panel's written decision.

It is RECA's policy that all disciplinary Hearing Panel and Appeal Panel decisions, whether misconduct is found or not, should be publicly available. RECA's policy is also to make all ratified Consent Agreements publicly available.

As such, all ratified Consent Agreements, Hearing Panel decisions and Appeal Panel decisions are posted on the website. An industry professional is identified by name in these documents. These decisions are also summarized in RECA's Case Summaries newsletter. The Case

Summaries publication is distributed to industry professionals by email and available to the public on RECA's website.

As of February 2016, RECA has committed to publishing registration Appeal Panel decision. Information published will not identify the person who was refused a license or registration by name and no personal information about that person will be published. We believe this is an excellent balance between transparency and fairness to the individual. The publication of these decisions will assist in ensuring consistent and fair decision making and will provide other potential licensees with information on what may result in the refusal of a license. At the same time, the publication will not reveal unnecessary private information.

All decisions are published and maintained on the RECA website for a period of two years. They are also available indefinitely at the RECA offices in hard copy or electronic form.

RECA's communication and publication of decisions is transparent and this standard is met. We commend the steps that RECA takes to ensure that final decisions are published and made available as publishing the decisions promotes the integrity of the industry and protects the general public in a number of ways. We also commend RECA on taking the steps to protect the privacy of individuals where necessary.

Documentation relating to the hearings process is sufficient and retained.

The documentation related to hearings process is extensive and comprehensive. Both the Hearings Administration and Conduct Proceedings departments have developed and utilize comprehensive checklists and guidelines to ensure consistency of process and standardized formats for administrative procedures, correspondence, forms and hearing documents and procedures. Both departments have done extensive and excellent work in developing the processes and documentation related to the hearings process.

Documentation related to specific hearing matters is retained in an individual paper file format and is also retained electronically through Iken document management software. Files are not closed until the relevant appeal periods have passed.

Hearing Panel decisions are removed from the RECA website after a period of two years, but all Hearing Panel decisions are retained internally by RECA.

We are satisfied that the documentation relating to RECA's hearing process meets the assessment criteria.

8. Trust Assurance and Practice Review

The Trust Assurance and Practice Review program provides assistance to industry professionals with respect to accounting and legislative requirements by providing advice related to trust accounts and record keeping, developing effective record keeping and administrative procedures, and identifying and resolving potential problems. The program serves to reduce the occurrence of activities in violation of the *Real Estate Act* or the Rules.

Real estate and mortgage brokerages must report annually as to whether they received or held trust funds. If they did, the brokerages must have an external accountant report to RECA on specified area with regard to the operating of the trust account(s). Trust Assurance and Practice Review responsible for ensuring that RECA receives the required report within the appropriate time period and for conducting a review of the records and operations of brokerages.

Overall, the Trust Assurance and Practice Review process is consistent with the *Regulatory Principles* and meets or exceeds the *Standards of Good Regulation* as adapted for RECA.

Documentation relating to the selection process for licensees subject to an assessment is sufficient and retained.

Due to the number of brokerages and industry professionals in Alberta and the resources available to RECA, including the number of reviewers employed by RECA, Trust Assurance and Practice Reviews are scheduled on a chronological basis. They are generally performed on brokerages on a 5 year cycle. If a brokerage does not have a trust account, the review cycle is generally longer as there is less risk to the public necessitating the review. Approximately 250 to 280 reviews are completed each year.

The 5 year cycle and chronological scheduling is maintained in a spreadsheet based on a database of existing brokerages in Alberta. The spreadsheet keeps track of information reported by the brokerage and identifies when the last review was completed and when the next review should be completed in the cycle.

The spreadsheet of brokerages also identifies brokerages that change their business model, which can include a change to the practice area or a significant change in the size of the practice. These brokerages will generally be moved up on the review cycle. If RECA receives information of concern, either in the mandatory year end Accountant Report or from other sources, the brokerage will also be moved up in the review cycle.

If RECA performs a review and identifies concerns in a review, RECA may schedule a follow-up review within twelve months to determine if the concerns have been adequately addressed. The scheduling of these follow-up reviews is maintained on the spreadsheet.

RECA maintains a separate scheduling spreadsheet and database for new brokerages or existing brokerages which have a new broker. RECA will attempt to complete a review of these

brokerages on an expedited basis. The new brokerage spreadsheet keeps track of these brokerages until the initial review is completed. The brokerage will then be moved into the standard 5 year cycle spreadsheet.

The scheduling of reviews may also depend on the geographical location of the brokerages and the availability of reviewers. However, the chronological cycle still informs this selection process.

Other than conducting an expedited review of new brokerages, of brokerages which change their business model, of brokerages which report information of concern and conducting follow-up reviews, there is no formal selection process for the brokerages. The general chronological cycle is the reason for the majority of reviews.

The reason for the review is noted in the scheduling spreadsheet which is maintained by the Coordinator of the Trust Accounting and Practice Review program. We were also advised that the brokerage will generally be told the reason for the review during the phone call used to schedule the review. However, there is no written documentation sent to the brokerage or kept on each file indicating the reason for the review.

We are satisfied that RECA maintains sufficient internal documentation relating to the selection process in the spreadsheets. The brokerage databases maintained in the two spreadsheets is sufficient to allow for the selection of brokerages, to maintain the chronological cycle, and to document when a brokerage is reviewed.

We are also satisfied that RECA's process for selecting brokerages for a review is based on a sufficient risk assessment. Working with the resources available and the practicalities of carrying out reviews, we are satisfied that RECA attempts to prioritize reviews of brokerages where there is a higher risk to the public.

In an effort to increase transparency and consistency, RECA may wish to consider including the reason for the scheduling of the review in the letter sent to the brokerage advising that a review will take place in the near future. This reason may be that it is a scheduled review within the 5 year cycle, or that a concern has been identified in the year end reporting, or any other reason. Specifying the reason for the review would increase transparency. The scheduling letter would also be kept on the file.

Recommendation #29: RECA may wish to consider including the reason for the performance review in the letter sent to the brokerage advising that a review will take place in the near future.

During our review, concerns were raised about the time between the first notice by RECA to a brokerage that a review needed to be completed, which also contains a request for information, and the actual performance of the audit and review. The concerns were that not enough time was provided to the brokerages to collect and provide the information.

RECA advised that a review will generally be scheduled one to three weeks in advance, with efforts being made to provide the maximum notice. In our file review, we did not note any unreasonable short time periods between the initial notice by RECA and the performance of the review.

Nonetheless, RECA may wish to consider creating a formal policy outlining the minimum time between the initial notice and request for information and the performance of the review.

Recommendation #30: RECA may wish to formally establish the minimum time between the initial notice and request for information and the performance of the review. The minimum amount provided should provide sufficient time for brokers to gather the necessary information.

Formal evaluation criteria exist for the selection of a practice reviewer.

The selection of a practice reviewer is an informal process based on the location of the brokerage, the availability of reviewers, and the size and/or complexity of the audit and review.

The Trust Assurance and Practice Review program has four reviewers. Three of the reviewers have significant experience while one is relatively new to the program. Three of the reviewers are based in Calgary while one is based in Edmonton.

The reviewer located in Edmonton will generally review the brokerages located in and around the Edmonton area and the northern part of Alberta, while the reviewers located in Calgary will review the brokerages in and around the Calgary area and the southern part of Alberta. The larger and more complex brokerages will be reviewed by a reviewer with sufficient experience.

The selection process also seeks to ensure impartiality on the part of the reviewer. A reviewer with a personal or former professional relationship with a brokerage, or any suggestion of a conflict of interest, will not conduct the review. We note there is not a formal conflict of interest policy and that conflicts are handled on an informal basis. Given the limited number of reviewers, we are satisfied that the informal basis is sufficient to address any concerns of a lack of impartiality.

Due to the limited number of reviewers, the presence of formal evaluation criteria is largely unnecessary in the selection of a practice reviewer. It would also likely be impractical given the resources available to RECA and the number of brokerages. Accordingly, even in the absence of formal evaluation criteria, we are satisfied that RECA takes appropriate steps to select a practice reviewer.

Practice review files contain sufficient information which supports the activities and goals of the Trust Assurance and Practice Review.

The Trust Assurance and Practice Review is carried out in accordance with a standard review program, called the “Brokerage File Review”. There are a number of tests and procedures related to banking information, trust reconciliation, and file review which must be completed for all brokerages. Depending on the size of the operations, some of the tests will be completed on a specified sample basis. The results of these tests and procedures are recorded and kept on the file. The standard review program also includes a program checklist which is completed by the reviewer and kept on file.

In advance to the review, a request for information and documentation is made to the brokerage. A questionnaire containing a number of questions about the brokerage, its operations, and its policies and procedures is also sent to the brokerage. The completed questionnaire and documentation is reviewed when the reviewer attends at the brokerage. The questionnaire is kept on file.

Upon completion of the standard review program, the reviewer completes a memorandum outlining the summary of the findings based on the tests and procedures carried out. From this summary, a letter to the brokerage is drafted which outlines the concerns, identifies the legislative requirements not being met, and suggests ways in which the brokerage can address the concerns. A response to this letter from the brokerage is requested and generally required. All of this information is maintained on the file.

We reviewed a sample of files and found all of this information to be present on each file.

A significant part of the Trust Assurance and Practice Review is ensuring that brokerages maintain proper financial records and documentation. The completed standard review program, the checklists, and the results of the tests conducted, all of which are maintained on the file, support this goal.

The Trust Assurance and Practice Review is also intended to identify practice issues for industry professionals prior to those issues being reported to the Professional Standards Unit and potentially resulting in enforcement proceedings. It is intended to educate individuals on the requirements of the *Act* and Rules and to ensure that individuals are complying with the requirements. There is an attempt to ensure compliance through education.

The letter sent to the brokerage identifying any concerns with the requirements and the fact that RECA requires follow-up from the brokerages showing how they will address the concerns supports RECA’s goal of having industry professionals’ correct improper conduct. This allows RECA to encourage corrective action in a proportionate manner without pursuing formal discipline.

We have been advised that the file contents of a review are maintained for 12 months. After 12 months, RECA retains a scanned copy of the letter sent to the brokerage after the review and the reply from the brokerage.

We are of the view that the files contain sufficient information which supports the activities and goals of the Trust Assurance and Practice Review.

The process for Trust Assurance and Practice Review is proportionate, timely and is focused on ensuring licensees meet RECA's standards.

The Trust Assurance and Practice Review is intended to identify violations of the *Act* and Rules prior to the violation resulting in any harm to a consumer or the public. It is about addressing deficiencies and ensuring compliance through education to the industry professionals. The process is effective at identifying violations which are contrary to the *Act* or the standards of practice but which violations might be of low risk of causing harm to consumers. Accordingly, some of the violations are unlikely to result in a complaint of conduct deserving of sanction. RECA, through the Trust Assurance and Practice Review, provides a means to address these deficiencies which otherwise might never be identified.

The letter sent to the broker after the review is similar to an advisory note issued to an industry professional after a complaint is made. It is not a disciplinary action but instead assists the broker and other industry professionals in the brokerage in taking corrective action to address the issues identified. This is educational in nature and provides industry professionals with guidance and advice on the steps necessary to take to ensure they do not face potential disciplinary action in the future.

The Trust Assurance and Practice Review is also focused on ensuring that industry professionals actually take remedial action and address the violations and bring themselves into compliance with the legislative requirements. The review provides suggestions for compliance and requires follow-up to ensure the brokerage addresses the issues in a proper manner.

The process also appears to be as timely as it can be, given the available resources. Although the 5 year cycle is a rather long period, there are means to conduct a review in cases where there is increased risk and a greater need. With the number of brokerages and the limited number of reviewers, the 5 year cycle meets the standard of timeliness. We also noted in our file review that the results of the review are reported to the brokerage in a very timely fashion.

If unlicensed or unauthorized practice is identified during the review, RECA will take immediate steps to refer the matter to the Professional Standards Unit to ensure the matter is dealt with appropriately and to ensure the public is protected.

We are of the opinion that RECA meets this standard. The Trust Assurance and Practice Review program is an excellent example of regulating industry professionals in a proportionate and fair manner while still ensuring protection of the public is a primary concern.

During our review, we were made aware of concerns regarding the consistency of the reviews conducted by different reviewers. The concerns were that different reviewers provided contradictory advice as to the practices of different brokerages, with one reviewer identifying something as a problem while the other reviewer indicated it was the proper way. Concerns were also raised that the same reviewer provided contradictory advice to different brokerages on the same issue.

We did not identify any inconsistent reporting or advice in our file review. Further, we were advised that the majority of letters sent to brokerages after a review are reviewed by the Coordinator of the program as part of maintaining consistency, fairness and transparency.

It is possible this concern arose from a misinterpretation of the letter provided to the brokerage or that it arose as a result of the reviewer reviewing sample files in a large brokerage for one review while the other review involved performing the tests and procedures on all files in a smaller brokerage. This would result in different information being reviewed, with different concerns being identified as a result.

Although we did not uncover any inconsistency in the review results, we recognize that consistency in the reviews is important. The fact that one of the reviewers is in a different city and the fact that the reviewers spend a great deal of time on the road indicates there may be a lack of information sharing and discussion between the reviewers. RECA may wish to consider increasing meetings and conferences between the reviewers to discuss the standard review program and the concerns being identified in order to maintain consistency amongst the reviewers. Reviewers should review the issues that commonly arise and the advice given on these issues to ensure that RECA takes a consistent position.

Recommendation #31: We recommend that practice reviewers across the Province meet and address: 1) the typical practice review issues arising from the audits and 2) the advice that should be provided in these circumstances. As additional issues arise in practice reviews, we recommend that the department establish processes to share amongst each other the advice being provided by practice reviewers.

If the review process identifies potential trust shortages, immediate action is taken by RECA.

Each brokerage which has a trust account must complete and submit an Accountant's Report to RECA every year. If this report identifies a trust issue, RECA will take action to schedule and perform a Trust Assurance and Practice Review. Similarly, if a trust issue is reported by another source and the report is deemed credible, RECA will perform a review. These reviews will be performed relatively quickly, regardless of when the brokerage was next scheduled to be reviewed in the 5 year cycle.

If a trust reconciliation issue or a potential trust shortage is identified during the review, immediate steps will be taken by RECA to have the issue addressed. If the issue appears to be a

mistake in the record keeping, RECA will request that the brokerage prepare a reconciliation within three to four weeks and RECA will determine if the brokerage understands how to properly complete the record keeping and if the initial issue was just an accounting error or if there is an actual trust shortage.

If RECA determines there is an actual trust shortage, RECA will demand that the broker fund the shortage and correct the issue. If the broker is not willing or is unable to correct the shortage, RECA will determine if the matter should be referred to the Professional Standards Unit as a complaint of misconduct. RECA will also generally refer the matter to the Professional Standards Unit if the trust shortage is believed to be the result of intentional or reckless conduct.

The final determination of when an issue will be referred to the Professional Standards Unit is made by the Trust Assurance and Practice Review Coordinator. The Coordinator makes the decision even if he did not conduct the review himself. There is no formal policy as to when a matter will be referred to the Professional Standards Unit. Whether or not something will be reviewed is a discretionary decision based on the Coordinator's assessment of the situation.

In the files we reviewed, no trust shortages were identified.

RECA's approach to trust shortages is a targeted approach aimed at addressing serious concerns. It is also flexible in responding to reports of trust shortages. We are satisfied that RECA takes the appropriate action to immediately respond to trust issues.

Information on the Trust Assurance and Practice Review is publicly available.

There is a substantial amount of information available on the RECA website about the Trust Assurance and Practice Review. The RECA website is easily navigable and the layout makes this information easily accessible.

RECA has also published a guide for each license type as to what the objectives of the review are, what can be expected in the review process, what the brokerage should do to prepare for the review, who should be available, and what will be reviewed. The guides also indicate that "serious cases" may be forwarded to Conduct Review upon completion of the review. These guides are available on the website and are also sent to the brokerage prior to a review.

We are satisfied that RECA meets this standard.

If the review process identifies concerns with record keeping or other practices, there is a process to bring those to the attention of the broker or individuals responsible to ensure future compliance.

Upon completion of the Trust Assurance and Practice Review, the reviewer will generally meet with the broker to discuss the findings. The reviewer may also meet with an individual industry

professional if particular concerns are identified in the practice review to identify the problem with the professional or to seek further information.

Shortly after the completion of the review, a letter is sent to the broker containing a summary of the findings and concerns identified in the review. Our file review indicated the timing of this letter can be from less than one week to three weeks after the completion of the review.

The letter identifies the sections of the *Act* and/or Rules for which concerns have been noted and provides suggestions as to how the brokerage can bring itself into compliance. It also requests that the broker respond in writing with the steps it plans to take to rectify the issues identified. RECA seeks to have the brokerage respond to every issue identified in the letter. If a major issue is identified, the letter may also request the broker provide evidence of compliance. For example, this evidence may include copies of new cheques which include the word “trust” on the cheque. Alternatively a follow up review may be scheduled to take place within a year to ensure compliance.

If a broker does not respond to the letter or fails to address the issues, RECA will consider what further action is necessary. Depending on the concerns identified, RECA will either follow up with another letter and ask for proof of action or RECA will conduct a follow up review. If a broker fails to respond or indicates they will not address the concerns identified, RECA will determine if a referral to the Professional Standards Unit is appropriate.

From our review of the files, we are satisfied that the letters sent to brokers contain detailed information on the concerns identified by the reviewer. The letters indicate what the reviewer observed, which Rule or section of the *Act* is being contravened, why the brokerage is in contravention of the legislation and ways that the contravention can be rectified. The demand for a written response and the possibility for a follow-up review generally ensure compliance.

We are satisfied that RECA meets this standard.

9. Other Standards

RECA communicates effectively with licensees, consumers, industry trade associations, government, regulators and other stakeholders.

RECA's website is one of its primary means of communicating with stakeholders. A review of the website indicates that it contains an abundance of information and that it is written in plain language. As discussed elsewhere in this Report, the website is easy to navigate, is effectively organized, and is user-friendly.

The website contains a substantial amount of information which assists in communicating with stakeholders. There are a number of guides, published in a variety of formats, for licensees and consumers. These guides provide information on licensing and authorization, the complaints process, the Hearing and Appeal Panel process, as well as many other areas. We also note that the website has more than 100 Information Bulletins and Practice Tips for industry professionals. As discussed elsewhere in this review, RECA's publication of enforcement actions arising from complaints, the publication of Hearing and Appeal Panel decisions, and its commitment to the publication of registration refusals, are all very good examples of effective communication.

RECA has also produced video resources for consumers, with the videos being available in English, Punjabi, and Mandarin. In addition, RECA produces a number of brochures, sample agreements, sample forms, checklists, and other tips which can all be found on the website.

We have been advised that RECA maintains an ongoing relationship with Service Alberta staff and meets annually with the Minister of Service Alberta.

RECA maintains the "RECABlog" which it uses to post stories that engage licensees and consumers. Topics include educational information, RECA's view on current industry news and events and suggestions from industry professionals. RECA is also active on social media, including Facebook, Twitter, LinkedIn, Google+ and YouTube.

RECA publishes a newsletter, *The Regulator*, four times a year. The newsletter is used to communicate messages from Council, advise of RECA's activities, provide information of RECA's standards and guidance, and assist in maintaining regular communication.

The RECA brand is prominent on the website and in all of the communications published by RECA. RECA is effective in ensuring its identity is found in the publications. This promotes trust in the publication by the reader.

The website also includes a "List of Stakeholder Engagement" activities. RECA updates this list on a weekly basis to ensure transparency with its stakeholders on the ways in which it engages and the groups with which it engages. A review of the activities indicates that RECA has been active in holding meetings and town halls with industry trade associations, as well as meeting

with other regulators. RECA has also attended trade shows, conferences, and other networking events to communicate with consumers, licensees and other stakeholders.

RECA gathers feedback from consumers and licensees by conducting surveys and focus groups. It partners with third party consultants and experts to do so.

RECA has established five industry sector advisory committees. The primary purpose of these committees is to provide a direct line to industry professionals and to maintain cooperation, communication and an exchange of information between RECA and the industry sector. These committees may be asked to explore a specific issue relevant to the specific industry sector and the committee will report its findings to Council. The committees may also identify and advise Council on trends and issues affecting the industry and consumers, within the industry sector. The committees may also make recommendations to Council with respect to its responsibilities under the *Act*.

As commented elsewhere in this Report, the Practice Advisor is a valuable resource in communicating with industry professionals about industry standards and proper practice.

These are just a sample of the communication activities undertaken by RECA. Commenting on everything undertaken by RECA would be beyond the scope of the Report. Having regard for all of the evidence, RECA meets and exceeds this standard.

Public appointees and other public stakeholders are appropriately involved in the work of RECA.

The *Real Estate Act* requires that two of the twelve Council members be members of the public not involved in the real estate, mortgage, or appraisal industry. We note that the current Chair of Council, as chosen by the other Council members, is one of the two public members.

Pursuant to the Bylaws, the Hearing Panel roster contains members of the public and these public members sit on Hearing Panels. Appeal Panels may also include members of the Law Society of Alberta. From our review of appeal decisions, a member of the Law Society almost always joins Council members to form the Appeal Panel. We have also been informed that it is RECA's policy to include a public member on each Hearing Panel.

RECA has established five industry sector advisory committees. Each of these committees includes a member of the public, appointed at the discretion of the Chair of Council.

Public members are integrated into the work of RECA in manner that allows them to be actively involved in decision making. Based on our discussions with various individuals, public members feel that their contributions are valued. No public member felt that their perspective was not respected because of the fact they were not an industry professional. Public members also feel supported in their role by RECA and believe that they have the necessary resources and training to be involved.

As also discussed above, RECA is committed to engaging public stakeholders. It does so when it is considering changes to the Rules or standards of conduct, as well as when there are other significant issues of concern to be addressed in the industry. RECA also engages public stakeholders through its surveys.

We are satisfied that RECA meets this standard.

The roles and decision making powers of the executive director and hearing and appeal panels are clearly defined and support public protection.

RECA defines the roles and powers of the Executive Director and the Hearing and Appeal Panels. It has a number of guides, manuals and information on the role of the Hearing and Appeal Panels and the role of the Executive Director and his delegates. The roles and boundaries of Council, the Panels, and the Executive Director and his delegates are clearly drawn. This information is made available to all Council members, as well as Panel members. RECA also provides annual training to Panel members on their role and the proper exercise of decision making powers.

As with all of RECA's publications and training, there is a strong focus on the protection of the public.

It is evident that the roles and powers are clearly defined and that they support public protection. We are satisfied that RECA has met this standard.

RECA ensures that all licensees remain up to date and fit to practice.

RECA requires that all licensees renew their registration certificate each year on or before September 30. As part of the renewal, RECA re-evaluates the industry professional's ongoing suitability in the industry and has the ability to refuse the registration certificate if it would not be in the public interest, if it would harm the integrity of the industry, or if the person is not of good character and reputation or otherwise unfit to be licensed. If an industry professional's suitability is at issue, RECA may refuse to renew a registration certificate or impose terms and conditions on the certificate.

Failing to be truthful on the renewal application is a serious offence and generally results in disciplinary proceedings by RECA. It may also result in the imposition of terms or conditions, or the suspension or cancellation of the individual's license for failing to be candid.

RECA is active in ensuring that professionals renew their registration each year. RECA sends a number of reminders and correspondence to individuals and posts a number of general reminders on its website. As a result, the number of members who have their registration cancelled for non-renewal each year is small.

RECA also creates courses for a Re-Licensing Education Program (REP) for each industry sector. These courses are introduced whenever deemed necessary. When there is a REP course offered, every industry professional must complete it before they can renew their registration certificate. REP courses focus on the issues that have changed since the last REP course, including legislative amendments, emerging issues affecting the industry and consumers, legal updates, risk reduction techniques, and other compliance and regulatory issues.

If an industry professional does not renew their registration certificate in a given year, their license will remain valid for three years and they can renew their certificate within that time period. However, they will be required to obtain a new Criminal Record Check and to complete any necessary REP introduced while they were away. If the three years lapses, the individual must register as a new member and complete all the licensing requirements as a new licensee would.

Section 40 of the Rules imposes a requirement on industry professionals to notify the executive director when particular events happen. The objective is to provide RECA with information related to issues or circumstances that relate to the protection of the public, the integrity of the profession, and of impact to RECA's governance. After notice is received, RECA will determine whether the information warrants referral to the Professional Standards Unit as a complaint. At the same time, RECA will determine if terms and conditions on the professional's license would be appropriate given the new information. These terms and conditions would not be disciplinary action against the professional but would serve to assist the professional in addressing any potential issue while also addressing potential public interest concerns.

For example, if a professional is convicted of impaired driving, the professional must notify RECA. If this conviction arose while the individual had clients in his car, disciplinary proceedings may be initiated. If the conviction was unrelated to the professional's industry activities, further discipline may not be warranted. However, even if further discipline is not warranted, RECA may impose restrictions of the professional's license which mirror the driving restrictions imposed by the *Criminal Code*. This is not disciplinary action but is a term and condition intended to protect the public.

RECA also makes the Practice Advisor available to address the questions or concerns of industry professionals in a confidential and non-disciplinary manner. The Practice Advisor is able to provide advice and direction to industry professionals on how to be effective and responsible industry professionals and industry professionals are free to discuss any issue without fear of reprisal. Similarly, the Trust Assurance and Practice Review provides another check on the practice of industry professionals.

Again, these are just a sampling of some of the methods that RECA uses to ensure that all licensees remain up to date and fit to practice. There are many more but discussing all of them is beyond the scope of this review. We are satisfied that this standard is being met.

10. General Matters

Council's Confidence in the Licensing and Complaint/Discipline Process

As part of our review process we interviewed a broad cross-section of current and former Council members with experience on Hearing and Appeal Panels. It is clear that some of these individuals lack confidence in RECA's licensing and complaint/discipline process although concerns about licensing seem to focus on good character issues and consistency between the licensing and complaint/discipline processes. It is also clear to that many other current and former Council members have diametrically opposed views and have high levels of confidence in the licensing and complaint/discipline processes.

In our view, that confidence is appropriate given our conclusions after a very in-depth review that RECA is a high performance regulator meeting or exceeding the Assessment Criteria in virtually every case and in all five program areas. Nevertheless, the existence of a lack of confidence in some members of Council or former members of Council is in and of itself a cause for concern. In order to consider how that lack of confidence might be addressed, we must consider what might be at the root of the lack of confidence in certain members. We have the following thoughts on possible causes.

1. The four controversial cases, discussed above, have no doubt contributed to the lack of confidence. There will always be certain cases of a regulator that may be controversial or cases that "could have gone either way." However, it seems that some Council members have taken concerns about certain cases and, unjustifiably in our view, extrapolated this to include concerns about the whole system. We hope that our system-wide review has alleviated some of those more generalized concerns. In addition we have made a number of recommendations that should assist in alleviating concerns arising from the four controversial cases including:
 - a. Increase the information available to applicants about how licensing criteria and requirements are interpreted and applied, particularly in relation to the questions associated with the good character of an applicant and the protection of the integrity and reputation of the industry. Consider preparing a policy document available to applicants explaining how these criteria are typically applied.
 - b. Increase communication and collaboration between the Office of the Registrar and the Professional Standards Unit with respect to issues relating to the character of applicants or industry professionals.
 - c. Provide training to Hearing Panel members on when direct evidence is required and when inferences from evidence may be made.
 - d. Provide training to Hearing Panel members on how to address areas of concern to the Panel when the industry professional is not present or self-represented.

- e. When the *Real Estate Act* is opened, RECA should consider if it is optimal for Council members to sit on Hearing Panels or whether their adjudicative duties should be restricted to hearing appeals.
2. An anxiety about how to ensure that self-represented industry professionals are fairly treated while also ensuring that appropriate regulatory processes are followed. We understand this concern and have made 7 recommendations designed to enhance this objective.
3. We found that the Council and former Council members had a very good understanding of the hearing and appeal processes in which they participate but some did not have a clear understanding of the entire discipline process or the generalized outcomes of the complaint process. In some cases, there are clear misconceptions about how the process actually works. As a result we recommend that a Council educational program be arranged that would provide an overview of the entire discipline process from receipt of complaint to the final potential appeal to the Courts. A “pie chart” showing the relative percentage disposition of cases, including a dismissal of complaint, letter of reprimand, administrative penalty, informal resolution by type, Consent Agreement, and a contested hearing, would be useful. In our experience, Council members derive tremendous benefit from a more in-depth understanding of the full discipline process. These type of pie-charts or other graphics are also very useful in dispelling misconceptions in the general membership about the discipline process and demonstrate that a very small percentage of complaints result in formal discipline hearings.

Recommendation #32: Provide for an education session for Council on the entire discipline process and generalized outcomes of the discipline process.

4. The purposes of Council as set out in s. 5 of the *Real Estate Act* include enforcing standards of conduct to promote the integrity of the industry and protect consumers. The purposes also include providing services to “improve the industry and the business of industry professionals.” In other words, the statutory objectives of RECA have a dual focus. The composition of Council is established by s. 6 of the *Real Estate Act* with a significant number of members being appointed by industry associations. That is an unusual structure for professional regulatory organizations which typically have Council members elected by the full membership. RECA is, and must be, committed to the fair treatment of industry professionals in the regulatory process. However, there is a risk that the statutory factors outlined above could cause some members of Council to go beyond focusing on fair treatment of industry professionals to focusing on membership protection. Under the current structure, RECA has been able to develop and excel as a regulator. However, when the *Real Estate Act* is opened for amendment, the focus will be on whether the structure remains optimal for the future.

Recommendation #33: When the *Real Estate Act* becomes open for amendments, RECA should examine the statutory objectives, the composition of Council, and the appointment process as opposed to an election process, and assess whether this structure remains optimal.

11. Preparing for the Future

During our interviews we asked individuals about their perceptions of trends and changes likely to affect RECA. We also identify on an on-going basis major trends affecting professional regulators across Canada.

From these sources of information, we have identified a number of trends and changes in the regulatory landscape that we consider most likely to affect RECA in the years ahead. Being able to identify key trends and make appropriate preparations is a key part of effective governance of the self-governing professions.

Opening of the *Real Estate Act* for amendments

We understand that the *Real Estate Act* will be opened soon for amendments. If extensive amendments are expected, then RECA will need to undertake an in-depth review of the *Act* and prepare proposals. The scope of our review did not include reviewing the legislation for necessary amendments. However, where our review identified amendments that would be useful, we have identified those amendments in our recommendations.

There is some debate among Council members about what exactly RECA's mandate should be. When the *Real Estate Act* is opened, this may provide opportunities to clarify the statutory mandate and identify the structures best suited to advance that mandate.

"ABC Review"

As RECA is well aware, the Alberta Government is reviewing all agencies, boards and commissions. While the ABC Review is often described as focusing on avoiding duplication and finding cost savings, we suspect that the review may ultimately be broader in nature. RECA should carefully review the results of the "Tier 1" boards review if available since the findings and overall direction by the government for those agencies will likely affect the review of the next set of agencies reviewed. We expect that the work already done by RECA with respect to this Report will be of significant value with respect to the ABC Review.

Expansion of the role of public members

In general, when professional regulatory legislation is opened for amendment, many governments across Canada have been seeking to increase the proportion of public members on governing bodies, discipline committees, and appeal committees. It is likely that during the review of the *Real Estate Act* there will be an examination of the optimal proportion of public members. The current Alberta government is also interested in increasing the diversity of Board appointments so there may also be a focus on this issue.

RECA might consider including the general topic of public members in a future training session:

1. How can Hearing and Appeal Panels derive maximum value from having public members?
2. How can public members most effectively contribute?
3. How do public members best meet the challenges of adjudicating complaints against industry professionals when they do not have in-depth technical knowledge of the industry?

These are some of the types of issues that leading regulators are just now beginning to address.

Increased skepticism of the value of professional self-governance structures

The perceived societal value of professional self-regulation tends to ebb and flow over time. Currently, skepticism about the value of self-regulation is very strong leading in some parts of the world to the loss of self-governance or the imposition of “meta-regulators” which regulate the regulators. Governments and the public are demanding greater transparency and greater accountability by regulators.

In our view, this third-party review process is a clear demonstration of RECA’s commitment to accountability, transparency, and continuous performance improvement. Nonetheless, RECA needs to continue to assess:

1. How do we enhance accountability?
2. How do we enhance transparency?
3. How do we continue to demonstrate our commitment to continuous performance improvement?

Tension Between Transparency and Privacy

Governments and the public are demanding increasing levels of transparency from regulators. At the same time, our society also demands enhanced levels of privacy with government creating complex statutory privacy regimes that apply to regulators. One of the major trends facing regulators is the increasing challenge associated with finding the right balance between transparency and privacy.

Given the privacy review already completed by RECA and our own review, we are satisfied that RECA is very aware of this challenge and taking steps to find the right balance.

Human Rights Litigation

One of the significant trends is the increasing impact of human rights principles on professional regulation and an increase in human rights litigation.

We are satisfied based on our review that RECA is aware of and dealing appropriately with this challenge. Nonetheless, RECA may consider increasing consider training for its staff and Hearing and Appeal Panel members on human rights issues.

Third-Party Reviews of Professional Regulatory Organizations

As noted in the Executive Summary, third-party reviews are a significant trend. While regulator-initiated third-party reviews are still cutting-edge in Canada, we predict that their frequency will increase as regulators realize the value from an external, in-depth review of regulatory activities.

RECA is obviously at the fore-front of this trend.

Policy-maker focus on the effect of professional regulation on competition

In the last 10 years, the Competition Bureau has been active in assessing the impact of self-regulatory structures on competition and has generally taken the position that there is over-regulation in our professions. While we are in general disagreement with this view, the perspective of the Competition Bureau is important to keep in mind. Competition Bureaus in many parts of the world have become very influential in the policy debate about professional regulatory organizations. Further, the Competition Bureau has been actively engaged with real estate industry associations with various competition issues.

We are satisfied that RECA is fully aware of competition issues and is committed to full, appropriate competition in the industry.

On-Line Training Resources for Adjudicators

In-person training is an essential component of an effective training program but there are challenges with this structure including:

1. The changing composition of adjudication rosters means that the same training must be repeated on an ongoing basis.
2. The delay between the training and participating in a hearing.

In order to address these challenges, a few regulators have begun to develop on-line training resources for adjudicators that can be utilized in a “just-in-time” format. Regulators then supplement the on-line resources with regular in-person training.

“Rethinking Regulation”

Increasingly, governments and organizations with public policy influence are “rethinking regulation”⁹ which means challenging conventional wisdom and returning to fundamental precepts. These policy makers ask:

1. How well does the current system really work? How do we know that? Where is the empirical evidence?
2. If we had a “blank piece of paper”, how would we today design the professional regulatory system?

The Professional Standards Authority is very influential in the public policy area of professional regulation. We predict that the “rethinking regulation” movement may begin to increasingly influence policy makers in Canada.

Accordingly, as a strategic response to the “rethinking regulation” framework, RECA should be prepared to address potential questions from policy-makers along the following lines:

1. How well does the current system work for the industry?
2. Where is the empirical evidence to support your answer?

In addition, RECA should be prepared to rethink fundamental processes and conventional wisdom. The “Rethinking Regulation” movement inspires regulators to evolve and innovate to serve the public interest.

“Right-Touch Regulation”

“Right-touch Regulation” is part of the “Rethinking Regulation” movement. Right-touch regulation is the minimum regulatory force to achieve the desired result. The concept of “right-touch regulation” is certainly not new having been pioneered by Great Britain’s Professional Standards Authority in a 2010 paper. However, we address it as a “current trend” because there has been a dramatic increase in Canada of the concept’s influence.

RECA has adopted “right-touch regulation” as part of its regulatory philosophy and we incorporated the principles into the Assessment Criteria.

⁹ See for example, Professional Standards Authority for Health and Social Care, “Rethinking Regulation”, United Kingdom, August 2015.

Risk Management for Regulators

Risk management is a prominent tool in the business world to identify, assess and treat risk. The trend is the realization that the application of risk management principles can be valuable for professional regulators.¹⁰ The risk management process cycle is:

1. Identify the risk: Consider from whose perspective the risk is identified. The regulator's perspective? The public's perspective? Consider multiple perspectives.
2. Assess the risk: Consider frequency and severity.
3. Treat the risk: Avoid, modify, transfer, retain or exploit.
4. Monitor and review.

RECA may wish to review some of the risk management literature in the context of professional regulators and assess whether this methodology would be a useful tool.

“Single Level Licensing”

While this cannot be described as a trend, several of those we interviewed queried the future role of brokers in the regulatory structure. Some questioned whether the future of regulation of the industry might involve direct licensing of industry professionals without the necessity of the industry professional being registered with a brokerage.

We would note that the legal profession has traditionally regulated individual lawyers and generally not the law firm where they work. However, there is recognition of the short-comings of this approach and within the legal profession there is a strong movement to include “entity regulation” as part of the system in addition to regulating individual lawyers.

The Impact of a Prolonged Recession in Alberta

Given that the recession in Alberta is likely to continue for 2016, RECA should consider what impact a prolonged economic downturn will have on the industry and where regulatory focus may be necessary. For example:

1. Will a prolonged economic downturn mean an increased risk in unauthorized practice as consumers feel pressure from declining home prices and seek assistance from those operating in the “grey zones”?

¹⁰ See for example, Richard Steinecke, “Applying Risk Management Principles to the Complaints System of Regulators”, Health Law in Canada, Volume 35, Number 4, May 2015.

2. Will a sustained economic downturn potentially result in the failure of more brokerages?
3. Will it cause increased risk to trust funds?

RECA should examine the impact of the last recessions on its regulatory activities and address potential areas of required focus on a proactive basis.

12. Conclusion

We trust that the Real Estate Council of Alberta will find our analysis, our 33 recommendations, and our identification of key trends and changes valuable in its continuing pursuit of regulatory excellence.

Appendix A: Summary of Recommendations

Guidance and Standards

Recommendation #1: In the interest of transparency and to assist consumers in understanding the standards of conduct expected of industry professionals, consider including a link under the “Consumers” portal to “Standards of Conduct” that includes a summary of the Rules and other material relevant to the standards of conduct expected of industry professionals.

Recommendation #2: Develop a “plain-language” summary of the Rules for reference by consumers.

Authorizations: Licensing and Registration

Recommendation #3: Increase the information available to applicants about how licensing criteria and requirements are interpreted and applied, particularly in relation to the questions associated with the good character of an applicant and the protection of the integrity and reputation of the industry. Consider preparing a policy document available to applicants explaining how these criteria are typically applied.

Recommendation #4: We recommend increased communication and collaboration between the Office of the Registrar and the Professional Standards Unit with respect to issues relating to the character of applicants or industry professionals. In order to enhance organization-wide consistency, we recommend that the two departments hold a joint training session to discuss how the two departments address “character issues” with the objective of developing an internal policy document providing guidance to both departments. The joint training session should also address when an issue will be addressed in the registration/renewal process and when it will be addressed as a discipline issue.

Recommendation #5: RECA should seek a change to its *Act* broadening the publication power so that conditions, restrictions and limitations on an industry professional’s registration can be included in the Public License Search. In the Public License Search, RECA should consider providing more specific information on the reason for an individual not being authorized and information on any findings of conduct deserving of sanction with a link to the specific decisions.

Recommendation #6: RECA may wish to consider increasing the information provided to the public as to the importance of using the Public License Search when forming a relationship with an industry professional.

Managing and Processing Complaints

Recommendation #7: RECA should avoid a blanket policy concerning complaints by “strangers” to the transaction. Instead, RECA should consider accepting a complaint from any individual or organization, regardless of their relationship with the industry professional, so long as it is in writing and provides “reasonable particulars”.

Recommendation #8: When the *Real Estate Act* is open for revision, RECA should seek amendments expressly authorizing the informal resolution processes it uses.

Recommendation #9: RECA may wish to consider changing its practice to generally provide a short time-frame to industry professionals to make written submissions prior to imposing interim suspensions. Where public protection requires an immediate interim suspension without waiting for submissions, RECA might consider adopting a practice of providing industry professionals with an opportunity to make written submissions asking for the Chair of Council to reconsider and change his or her decision imposing an interim suspension.

Recommendation #10: RECA should assess the reason it is facing challenges in meeting the performance objective for the time taken to resolve Level 2 and Level 3 complaints. RECA will need to consider whether it is devoting sufficient resources to meet the performance objectives in this area.

Recommendation #11: RECA may wish to establish a performance objective for the assignment of a Professional Conduct Review Officer to Level 2 complaints.

Recommendation #12: RECA may wish to consider implementing a non-binding guideline or policy to assist staff in determining how all types of complaints should be resolved, i.e. with an advisory note, letter of reprimand, administrative penalty (where authorized) or referral to hearing.

Recommendation #13: RECA may wish revise its template letter of reprimand and administrative penalty to state that the Executive Director has determined that there is sufficient evidence that the industry professional contravened a section(s) of the *Act* and that this is conduct deserving of sanction.

Recommendation #14: RECA may wish to undertake a review of the administrative penalty amounts prescribed in its Bylaws to determine if the amounts are still considered to be at an appropriate level.

Recommendation #15: RECA may wish to consider providing a greater detail of information to industry professionals and complainants when a complaint is resolved, in particular, RECA may wish to consider why other outcomes were inappropriate.

Hearings Administration

Recommendation #16: RECA should consider implementing a process where Hearing Panels that are ratifying Consent Agreements provide reasons for their finding that the industry professional has engaged in unprofessional conduct as well as reasons for why the sanctions being imposed are appropriate orders for penalty given the conduct at issue. Given that the matter is proceeding by consent, the reasons provided by the Hearing Panels could be much shorter than a contested hearing but some reasons should be provided.

Recommendation #17: RECA should consider adopting a process whereby the effect of a Hearing Panel's rejection of a Consent Agreement is made clear. Hearing Panels should specify when they are rejecting a Consent Agreement that they are not making a finding that the industry professional has not engaged in conduct deserving of sanction and that the Hearing Panel is simply requesting further information before making a determination as to whether or not to accept the Consent Agreement. RECA may wish to consider revising its Consent Agreement templates so that the Hearing Panel may specify why it has rejected the Consent Agreement.

Recommendation #18: RECA should ensure that members of the Hearing Panels are aware of the process for seeking further information from either the Case Presenter or the industry professional during the course of a Consent Agreement hearing or should consider amending the Consent Agreement process to allow for in-person attendance of the parties to present the Consent Agreement.

Recommendation #19: RECA may wish to develop additional measures to assist self-represented industry professionals in the hearing process. Examples of additional possible measures include:

- The publication for self-represented industry professionals should explicitly state that they are strongly encouraged to have legal representation. The publication could explicitly state that due to the legalistic nature of the hearing process, most industry professionals who do not have legal representation find the process very difficult. The objective is to ensure that the industry professionals clearly understand the challenges of proceeding without legal counsel.
- We heard many concerns that some industry professionals do not understand until the hearing starts how formal the process will be. Some industry professionals may think that this was simply going to be a meeting among colleagues. There is no good reason for this misconception since RECA's publications clearly describe the formality of the hearing processes. However, sometimes industry professionals have a "head in the sand" approach ignoring the reality of the impending process. To help industry professionals clearly understand the formality of the process and the set-up of the hearing room, RECA could develop a

short video made available to self-represented industry professionals showing a demonstration of a mock hearing process.

- Develop checklists for industry professionals that they can use and follow to guide themselves through the hearing process. While the current resources available to self-represented members are excellent, a short check-list that is followed by all participants during the hearing process could significantly assist in keeping hearings on track.
- Develop a system where industry professionals have the same access to the previous Hearing Panel decisions as the Case Presenters.
- Regularly assess the need for training of Hearing Panel and Appeal Panel members on how to effectively deal with self-represented industry professionals. (Note as a result of the input we received during this review on the challenges of dealing with self-represented industry professionals, we recommended and developed a training session on this topic that we presented to Hearing and Appeal Panel members in March 2016).
- Develop a list of experienced defence counsel who are prepared to act on behalf of industry professionals in RECA conduct proceedings. Advise industry professionals that they can obtain the list from the Practice Advisor.
- Enhance the role of the Practice Advisor in providing procedural advice and direction to industry professionals by making industry professionals aware, through the formal correspondence exchanged during the hearing process, of their ability to contact the Practice Advisor and discuss the hearing process in a confidential manner. The Practice Advisor will need to ensure that he does not provide substantive advice on defending the allegations or on the best course of action to be taken by the industry professionals but can properly provide advice on standard procedures and options available.

Recommendation #20: When the *Real Estate Act* is opened for revisions, RECA should recommend amendments that provide clear direction on the processes to be followed in appeals by complainants of dismissals of complaints.

Recommendation #21: RECA should review its current process for s. 40 appeals by complainants and consider whether any steps need to be taken to restructure the current process, taking into account the requirements for procedural fairness and statutory compliance.

Recommendation #22: While unanimity in decision-making should be encouraged and efforts made to build consensus among panel members, RECA may want to consider a process where Hearing or Appeal Panel members who do not agree with the majority decision are not required to sign the decision in a manner which indicates agreement. A process could be adopted where the decision is simply issued by the "Hearing Panel" or

the “Appeal Panel” and signed by the Chair on behalf of the Panel rather than its individual members. If the decision is only signed by the Chair, it is still essential that all Panel members review and provide input on the drafts. Panel members must still indicate they are satisfied with the decision before it is issued even if it is only signed by the Chair.

Recommendation #23: RECA may want to consider “just-in-time” training initiatives for Hearing and Appeal Panel members so that members have ready access to training at any point where members feel that they need to be refreshed on the hearing process. An example of such types of training includes webinars that could be accessed by Panel members on demand. This type of webinar would address the fundamentals of the hearing process that could be reviewed in advance of a hearing. The fundamentals webinar would be supplemented by annual in person training addressing more complex issues.

Recommendation #24: Enhance opportunities for Panel members to serve as “shadow Panel members” where they attend hearings but are not a formal member of the Panel. The “shadow Panel member” would sit with the Panel during the hearing but would not ask questions. The “shadow Panel member” would caucus with the Panel but could not participate in discussions or the decision-making. RECA would need to develop a formal policy on the parameters of this process and ensure that participants in a hearing did not have any objections to the process.

Recommendation #25: Consider creating an “adjudicative sub-set” of Council that would sit on Hearing and Appeal Panels.

Recommendation #26: RECA should consider preparing a glossary of the types of industry professionals regulated by RECA. The glossary should be provided to public members on Hearing Panels who do not have real estate backgrounds.

Recommendation #27: RECA should consider establishing a system of retaining independent legal counsel from outside RECA to attend hearings and appeals to provide advice to Panels on legal and procedural issues and provide advice and recommendations on Panels’ draft decisions.

Recommendation #28: We have the following recommendations arising from our review of the █████ decision which was controversial with some Council or former Council members:

- Provide training to Panel members on when direct evidence is required and when inferences from evidence may be made.
- Provide training to Panel members on how to address areas of concern to the Panel when the industry professional is not present or self-represented.

- When the *Real Estate Act* is opened, RECA should consider if it is optimal for Council members to sit on Hearing Panels or whether their adjudicative duties should be restricted to hearing appeals.

Trust Assurance and Practice Review

Recommendation #29: RECA may wish to consider including the reason for the performance review in the letter sent to the brokerage advising that a review will take place in the near future.

Recommendation #30: RECA may wish to formally establish the minimum time between the initial notice and request for information and the performance of the review. The minimum amount provided should provide sufficient time for brokers to gather the necessary information.

Recommendation #31: We recommend that practice reviewers across the Province meet and address: 1) the typical practice review issues arising from the audits and 2) the advice that should be provided in these circumstances. As additional issues arise in practice reviews, we recommend that the department establish processes to share amongst each other the advice being provided by practice reviewers.

Other Standards

No specific recommendations

General Matters

Recommendation #32: Provide for an education session for Council on the entire discipline process and generalized outcomes of the discipline process.

Recommendation #33: When the *Real Estate Act* becomes open for amendments, RECA should examine the statutory objectives, the composition of Council, and the appointment process as opposed to an election process, and assess whether this structure remains optimal.

Appendix B: Assessment Criteria

I. *Standards of Good Regulation as Adapted for RECA*

Guidance and standards

- Standards of competence and conduct reflect up to date practice and legislation. They prioritize public protection.
- Additional guidance helps licensees to apply RECA's standards of competence and conduct to specialist or specific issues including addressing diverse needs arising from public protection.
- In development and revision of guidance and standards, RECA takes account of stakeholders' views and experiences, external events and developments, international regulation and best practice, and learning from other areas of its work.
- The standards and guidance are published in accessible formats. Licensees, potential licensees, consumers and members of the public are able to find the standards and guidance published by RECA and can find out about the action that can be taken if the standards and guidance are not followed.

Authorizations: Licensing & Registration

- Only those who meet the relevant requirements are licensed.
- The licensing process, including the management of appeals, is fair, based on RECA's standards, efficient, timely, transparent, secure, and continuously improving.
- Through RECA's register, everyone can easily access information about licensees, except in relation to their health, including whether there are restrictions on their practice.
- Consumers, service users and members of the public can find and check a licensee's licensing, and are aware of the importance of doing so.
- Risk of harm to the public and of damage to public confidence in the profession related to unlicensed practice and non-licensees undertaking a protected act is managed in a proportionate and risk based manner.

Managing and Processing Complaints

- Anybody can make a complaint about a licensee.
- Where necessary the executive director (or delegate) can initiate an investigation without relying on the receipt of a complaint.
- Information about complaints is shared with other organizations within the relevant legal frameworks.

- RECA will investigate a complaint, determine if there is a case to answer and take appropriate action including the imposition of sanctions.
- All complaints are reviewed on receipt and serious cases are prioritized and where appropriate considered for an interim suspension.
- The complaints process is transparent, fair, timely, proportionate and focused on public protection.
- Complaints are dealt with as quickly as possible taking into account the complexity and type of case and the conduct of both sides. Delays do not result in harm or potential harm to consumers and service users. Where necessary RECA protects the public by means of interim suspension.
- All parties to a complaint are kept updated on the progress of their case and supported to participate effectively in the process.
- All decisions, at every stage of the process, are well reasoned, consistent, protect the public and maintain confidence in the profession.
- All final decisions, apart from matters relating to the health of a professional, are published and communicated to relevant stakeholders.
- Information about complaints is securely retained.

Hearings Administration

- Where appropriate, alternative methods that are proportionate are used to resolve a complaint prior to a hearing.
- Hearings are held as quickly as possible taking into account the complexity and type of case and the conduct of both sides. Delays do not result in harm or potential harm to consumers and service users.
- The hearings process is transparent, fair, timely, proportionate and focused on public protection.
- Decisions and sanctions are well reasoned, consistent, protect the public and maintain confidence in the profession.
- Decisions are published and communicated to relevant stakeholders.
- Documentation relating to the hearings process is sufficient and retained.

Trust Assurance and Practice Review

- Documentation relating to the selection process for licensees subject to an assessment is sufficient and retained.
- Formal evaluation criteria exist for the selection of a practice reviewer.

- Practice review files contain sufficient information which supports the activities and goals of the Trust Assurance and Practice Review.
- The process for Trust Assurance and Practice Review is proportionate, timely and is focused on ensuring licensees meet RECA's standards.
- If the review process identifies potential trust shortages, immediate action is taken by RECA.
- Information on the Trust Assurance and Practice Review is publicly available.
- If the review process identifies concerns with record keeping or other practices, there is a process to bring those to the attention of the broker or individuals responsible to ensure future compliance.

Other Standards

- RECA communicates effectively with licensees, consumers, industry trade associations, government, regulators and other stakeholders.
- Public appointees and other public stakeholders are appropriately involved in the work of RECA.
- The roles and decision making powers of the executive director and hearing and appeal panels are clearly defined and support public protection.
- RECA ensures that all licensees remain up to date and fit to practice.

II. Regulatory Principles

- **Statutory compliance:** RECA complies with all relevant and applicable legislation, regulations, Rules and Bylaws.
- **Transparency:** RECA's processes are conducted in such a way that it is easy to see what actions are being taken to complete the process, why these actions are taken and what results from these actions.

Transparency encompasses the following:

- **Openness:** RECA has measures and structures in place that make it easy to see how the process operates.
- **Access:** RECA makes information easily available.
- **Clarity:** RECA ensures that information used to communicate is complete, accurate and easy to understand.

- **Objectivity:** RECA’s process and decisions are based on formal systems such as criteria, tools and procedures that have been repeatedly tested during their development, administration and review and have been found to be valid and reliable.

Objectivity of systems encompasses the following:

- Reliability: RECA ensures that the criteria, training, tools and procedures deliver consistent decision outcomes regardless of who makes the decision, when the decision is made and in whatever context the decision is made.
 - Validity: RECA ensures that the criteria, training, tools and procedures measure what they intend to.
- **Impartiality:** The position from which RECA undertakes processes and decisions is neutral. Neutrality occurs when actions or behaviours that may result in subjective assessments or decisions are mitigated. Impartiality may be achieved by ensuring that all sources of bias are identified and that steps are taken to address those biases.

Impartiality encompasses the following:

- Identification: RECA has systems to identify potential sources of bias in the assessment or decision-making process (for example, sources of conflict of interest, preconceived notions and lack of understanding of issues related to diversity).
 - Strategies: RECA has systems to address bias and enable neutrality during the assessment and decision-making process (for example, training policies that address conflict of interest, procedures to follow if bias is identified and using group deliberation and consensus strategies to come to decisions).
- **Fairness:** RECA demonstrates the following:
 - Substantive fairness: RECA ensures the fairness of the decision itself. The decision itself must be fair, and to be fair it must meet pre-determined and defensible criteria. The decision must be reasonable and the reasoning behind the decision must be understandable to the people affected.
 - Procedural fairness: RECA ensures the fairness of the decision-making process. There is a structure in place to ensure that fairness is embedded in the steps to be followed before, during and after decisions are made. This structure ensures that the process is timely and that individuals have equal opportunity to participate in the process.
 - Relational fairness: RECA ensures that people are treated fairly during the decision-making process by considering and addressing their perception about the process and decision.

- **Principles of “Right-Touch Regulation”:** RECA asks what risk it is trying to address, is proportionate and targeted in regulating that risk or finds ways other than regulation to address the risk. RECA uses the minimum regulatory force required to achieve the desired result. More specifically:
 - **Proportionality:** RECA only intervenes when necessary or required. Remedies are appropriate to the risk posed and costs are identified and minimized.
 - **Consistency:** RECA’s rules and standards are characterized by coordination and coherence of thought, are integrated and are implemented fairly.
 - **Targeted approach:** RECA’s remedies are focused on an identified problem and minimize side effects.
 - **Transparency:** RECA is open and keeps regulations simple and user friendly.
 - **Accountability:** RECA is able to justify its decisions and capable of being subject to public scrutiny.
 - **Agility:** RECA looks forward and is able to adapt to anticipated change. RECA foresees changes that are going to occur in the industry, anticipates the risks that will arise as a result of those changes and takes timely action to mitigate those risks.
- **Organizational capacity:** RECA has the resources - human, material, financial, information, and intellectual - to carry out its role and functions.

Appendix C: People We Interviewed

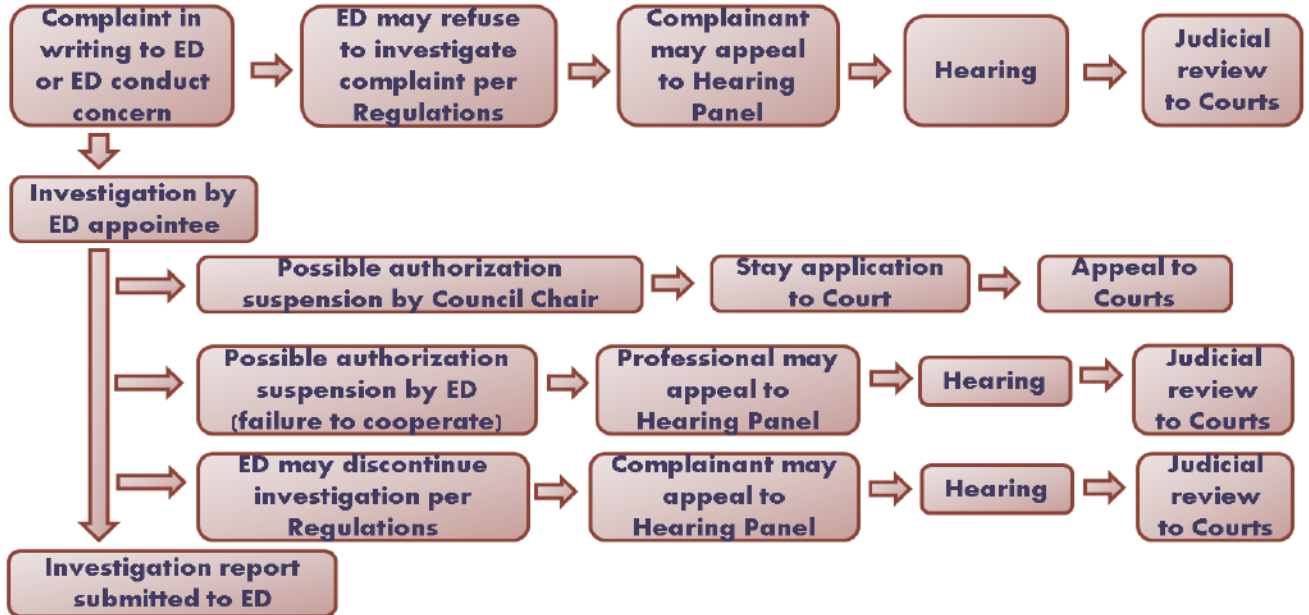
- RECA Executive Director
- RECA Deputy Executive Director
- RECA General Counsel
- RECA Director of the Office of the Registrar
- RECA Director of Professional Standards and Conduct Proceedings
- Manager - Trust Assurance and Practice Review, RECA
- Professional Conduct Proceedings Manager, RECA
- RECA Acting Consumer and Industry Services Manager
- Real Estate Practice Advisor, RECA
- 8 former Council members
- 4 current Council members
- 1 current public member of Council
- 1 former public member of Council
- 1 public member on Appeal Panel Roster
- 1 industry professional on Hearing Panel Roster
- 2 public members on Hearing Panel Roster
- Executive Director of Consumer Services, Service Alberta
- Manager of Marketing and Industry Services, Service Alberta

Appendix D: Reports and Surveys Reviewed

- Trust Assurance and Practice Review Sample Survey, October 2014 – September 2015
- Professional Standards CBS Survey Results, Fiscal 2014 – 2015
- Professional Standards CBS Survey Results, Operational Questions, Fiscal 2014 – 2015
- Annual Report, October 1, 2014 to September 30, 2015
- 2015 Dashboard Report

Appendix E: Flow Charts

The Investigation Process



The Disciplinary Process

