

# 1. Executive Summary

## Third-Party Reviews

RECA is committed to the pursuit of regulatory excellence and continuous performance improvement.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> In Canada, there are also some statutorily mandated reviews such as, for example, the oversight provide by the Fairness Commissioner in some provinces.<sup>4</sup> Finally, there have been a few regulators that have initiated third-party reviews as a performance enhancement tool. For example, the Royal College of

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

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

<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.

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<sup>5</sup> 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.

<sup>6</sup> 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.