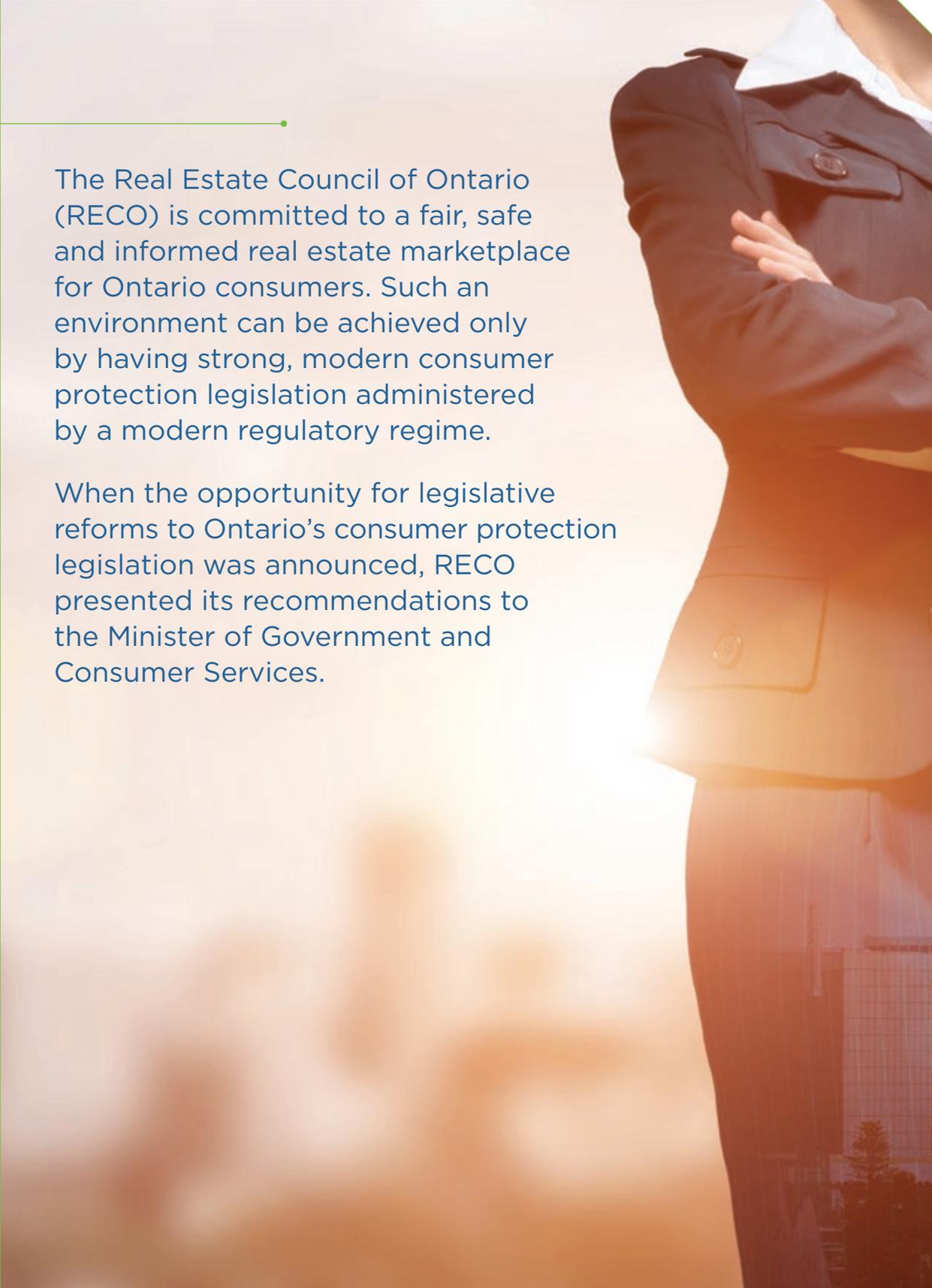


# PROPOSALS FOR REBBA REFORM



Real Estate  
Council of Ontario





The Real Estate Council of Ontario (RECO) is committed to a fair, safe and informed real estate marketplace for Ontario consumers. Such an environment can be achieved only by having strong, modern consumer protection legislation administered by a modern regulatory regime.

When the opportunity for legislative reforms to Ontario's consumer protection legislation was announced, RECO presented its recommendations to the Minister of Government and Consumer Services.



The objectives of RECO's recommendations are to:

- + **Prevent or prohibit conflicts of interest;**
- + **Eliminate or significantly reduce financial incentives to act unethically;**
- + **Reflect modern regulatory practices;**
- + **Provide consumers with clear, consistent information to make informed decisions, including information regarding the nature of the relationship and services provided; and**
- + **Provide appropriate tools and penalties to respond to harm.**



RECO has made specific recommendations for broad reforms to the *Real Estate and Business Brokers Act, 2002* (REBBA) in five categories:

1. **Consumer Protection;**
2. **Flexible, Responsive Legislation;**
3. **Streamlining Regulatory Processes;**
4. **Mandatory Designated Representation (MDR); and**
5. **Standardized Disclosure and Plain-Language Requirements.**

**Though not exhaustive, these recommendations form a strong foundation for a modern regulatory regime.**

# Consumer Protection

## Redefining Key Terms: “Trade”

The rules governing real estate transactions could be made clearer. The existing definition of “trade” in real estate requires additional clarity. It would be helpful to capture not only what is meant by trade, but also what is not meant.

For example, in Alberta’s legislation, “trade” is defined with some specificity to include any of a long list of services and actions, such as offerings, advertisements, listings and showings of real estate. It also specifies what should not be included in the definition of trade. These include: the provision of information, forms and signs; the creation of a web page to market properties; and the publication of a list of properties for disposition or acquisition.

It is important to review the definitions in REBBA and the regulations to ensure clarity on the meaning of “trade” and “services” and other terms that underpin the legislation.

## Redefining Consumer Relationships for Clarity—“Client” and “Customer”

The terms “client” and “customer” are commonly used interchangeably, but there’s a significant difference between the two as they are defined in the legislation. Real estate brokerages owe their clients a fiduciary duty, but they do not owe such a duty to customers.

Buyers and sellers would be better served by clarifying the distinction between “client” and “customer” and reassessing the need for the distinction as it is currently defined.

In Ontario, “client” and “customer” are defined as follows:

### **“client” means,**

- (a) with respect to a brokerage and a trade in real estate, a person who, in the trade, is represented under a representation agreement by the brokerage, and
- (b) with respect to a broker or salesperson and a trade in real estate, a person who, in the trade, is represented under a representation agreement by the brokerage that employs the broker or salesperson, if the broker or salesperson represents the person pursuant to the agreement; (“client représenté”)

### **“customer” means,**

- (a) with respect to a brokerage and a trade in real estate, a person who, in the trade,
  - (i) has an agreement with the brokerage under which the brokerage provides services to the person, and
  - (ii) is not represented under a representation agreement by the brokerage or any other brokerage, and
- (b) with respect to a broker or salesperson and a trade in real estate, a person who, in the trade, obtains services under an agreement, other than a representation agreement, from the brokerage that employs the broker or salesperson, if the broker or salesperson provides services to the person pursuant to the agreement; (“client non représenté”)

The current definition of “customer” is so similar to that of “client” that it creates ambiguity and unnecessary confusion for consumers and registrants.

The language is much clearer in some other Canadian jurisdictions. For example, in Alberta “client” and “customer” are defined as follows:



*“client” means a person who has entered into a service agreement with an industry member in accordance with these rules, whether or not that service agreement is in writing;*



*“customer” means a person who has contacted, but not engaged or employed, an industry member to provide services;*

Alberta’s definitions provide buyers and sellers with a much clearer understanding of the differences between the two relationships. The ambiguity in Ontario’s legislation doesn’t help consumers. Specifically, it is not clear how a buyer or seller would benefit from being a customer rather than a client, or conversely, how they would be disadvantaged by being a customer and not a client. This is a fundamental element that underpins the consumer protection afforded under REBBA.

### Requiring Registrants to Provide Plain-Language RECO Materials to Buyers and Sellers

Real estate transactions involve exchanges of substantial sums of money, so consumer awareness is critical. RECO recommends that buyers and sellers be provided a consumer-focused guide prepared by RECO before they enter a relationship with a brokerage. The guide would serve to enhance consumer understanding by explaining the rules—notably, the consumer’s rights and obligations—when working with a brokerage. Effectively, registrants would provide to buyers and sellers the RECO guide and obtain a signed acknowledgement or electronic confirmation of receipt by the consumer. The publication would include, among other things, plain-language information about the types of relationships and services registrants make available to buyers and sellers.

### Managing Conflicts of Interests in the Public Interest

Buyers and sellers would benefit from clear prohibitions around conflicts of interest encountered by brokerages and salespeople. It is imperative that buyers and sellers have confidence that their interests are protected by their brokerage and salesperson.

Some professional regulatory regimes include a specific prohibition on conflict of interest. For example, the Law Society of Upper Canada’s Rule 3.4-1 states:



*A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.*

Rule 3.4-2 permits a lawyer to act in a conflict only in certain circumstances and then only with consent. It is the client, not the lawyer, who is entitled to decide whether to accept risk of impairment of client representation and loyalty. However, Rule 3.4-2 provides that client consent does not permit a lawyer to act where there would be impairment rather than merely the risk of impairment.

“Conflict of interest” is defined as the existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client or a third person.

RECO supports the addition of a provision to the legislation that defines conflict of interest.

### Curbing Sale Price Underquoting

The issue of underquoting should be discussed and assessed to ensure buyers and sellers are well served by ethical pricing strategies and practices. Underquoting of selling prices is often connected to heated real estate markets and is frequently cited as the root cause of bidding wars. It may be timely to consider whether rules should be introduced for Ontario to bolster the prohibition on false, misleading or deceptive statements in advertising and other publications. This would need to be carefully considered to determine the impact on the marketplace in both seller’s and buyer’s markets and the interests of both buyers and sellers.



# Flexible, Responsive Legislation

## Providing RECO with Rule-Making Authority

Ontario's real estate marketplace is rapidly changing thanks to a number of factors. Rule-making authority would provide RECO with the flexibility to respond to changing circumstances quickly and effectively.

Modern regulators need to be nimble to address and manage emerging trends and issues that compromise consumer protection. RECO supports changes to provide it with an enhanced ability to update rules to reflect, and respond to, the marketplace. REBBA is prescriptive legislation, addressing rules and practice standards by regulation rather than delegating them to the regulator, RECO. To ensure a flexible and responsive regulatory regime, consideration could be given to moving additional authority for the detail of some aspects of regulation to the registrar appointed under REBBA.

Other Canadian jurisdictions provide the regulator with the authority to make specific rules beyond what is set out in statute and regulations to deal with very specific issues.

## Updating Registration Categories and Educational Requirements

Some registrants wish to specialize in their practice areas and to gain certification recognized by the regulator to demonstrate to the public that they have met certain standards. RECO supports a review of registration classes or categories, including titles, to better reflect the needs of the sector.

RECO also recommends providing broader authority to the registrar under REBBA to establish education requirements for various registration classes. The training currently required to become registered as a broker (someone who has the training to manage a brokerage) would be more appropriate as the qualifying criteria to fill the role of broker of record or branch manager. In addition, brokers of record, branch managers and brokers do not have distinct continuing education requirements. They are aligned with the requirements for a salesperson.

Further regulatory requirements to become a branch manager ought to be reflective of the role they play in managing a branch and not the role of salesperson. Salespersons do not have the training to run and manage a brokerage, and it would be more appropriate to require branch managers to be brokers. Providing the registrar with the authority to establish the education requirements for each class would assist in addressing the existing gaps.

## Moving from a Registration Regime to a Licensing Regime

RECO recommends the sector implement a licensing regime in place of the current registration regime, and to consider making employment a requirement to trade rather than a requirement to maintain registration. This could significantly reduce the administrative burden associated with the termination and transfer of registrations for both RECO and registrants. Moving to a licensing regime would signal to the public that real estate is a profession meeting standards to be eligible to be licensed.

RECO notes the *Condominium Management Services Act, 2015* and the *Home Inspection Act, 2017* have adopted a licensing regime approach rather than a registration approach.



### Reviewing RECO's Group Insurance Program

An analysis of the similarities and differences between RECO's group insurance program and those delivered by similar regulatory bodies should be conducted to ensure that any real or perceived conflicts of interest arising as a result of the legislated requirement for RECO to arrange and administer the group insurance program are identified and appropriately addressed.

### Making It Easier for RECO to Assign Education Courses

The real estate marketplace is continually changing, and it's critical that registrants remain current on the latest rules. RECO needs the flexibility to adapt its educational requirements quickly. RECO recommends that consideration be given to amending the language related to education requirements to make it easier for RECO to assign specific educational courses to registrants.

More specifically, RECO recommends adopting language similar to that in the *Funeral, Burial and Cremation Services Act, 2002* (FBCSA) regarding educational requirements. The language of the FBCSA provides clearer authority for the registrar to "require particular programs of study, training programs, internship programs, apprenticeship programs, courses, seminars, lectures, tutorials or other educational resources, may require that persons take them from particular providers and may require that persons take particular examinations or tests." It would allow RECO to be more nimble in addressing some issues that arise through education and to take advantage of different education tools and approaches not currently afforded under REBBA.

### Removing Business Brokerage from REBBA Oversight

RECO was created to regulate the real estate brokerage industry. RECO believes consideration should be given to removing business brokerage from REBBA regulatory oversight. A business broker is generally defined as a person who assists individuals in selling or buying a business and who may engage in activities that extend well beyond a trade in real estate. RECO notes that other Canadian jurisdictions have removed business brokerage from oversight by the real estate regulator and would be interested in stakeholder views on this matter.

# Streamlining Regulatory Processes

## Provide RECO's Discipline and Appeals Committees the Authority to Hear Appeals of Registrar's Proposals to Refuse, Revoke or Suspend Registration

Under the current rules, RECO's registrar has the power to propose to suspend or revoke a registration, appeals of which are heard by the Licence Appeal Tribunal. RECO recommends giving its Discipline and Appeals Committees the right to hear appeals of proposals made by the registrar.

A panel, such as the Discipline and Appeals Committees, with sector expertise and public representation, may be well positioned to make a determination, or alternatively a recommendation, on an individual's entitlement or suitability to remain registered or have conditions applied to their registration as a result of the conduct that brought the matter to the attention of the Discipline or Appeals Committees. Importantly, however, any changes must not introduce a risk of conflicting decision making or compromise or undermine the authority of the registrar, who has a statutory mandate to carry out a suspension or revocation. And, it is important to note that under section 21 of REBBA, members of the committees are appointed by the Board.

RECO's Disciplinary Committees now have 18 years of experience in adjudicating disciplinary matters. The panels include public members and sector expertise that combine to bring a broad perspective.

## Provide RECO the Ability to Impose Administrative Penalties

The authority to impose administrative penalties without the need to pursue a hearing would enhance compliance and potentially reduce the number of minor infractions or technical breaches. For example, administrative penalties could be used to address matters such as failing to use the proper terminology or to make required disclosures in an advertisement, or failing to complete monthly trust account reconciliations, without going to a hearing. RECO has been actively pursuing this compliance and enforcement measure since 2010 and remains interested in administrative penalties as an efficient and effective enforcement tool. Real estate salespeople and brokers are more likely to perform their necessary due diligence when they know that careless mistakes carry consequences.



## Prohibit Registrants from Paying Complainants to Withdraw Complaints

Members of the public must be able to trust the work of real estate salespeople and brokers, and must have confidence in RECO's ability to hold registrants accountable for their actions. For that reason, RECO supports prohibiting a registrant from making a payment to a complainant in exchange for the withdrawal of a complaint.

The College of Physicians and Surgeons of Ontario does not allow a member of the College to make payments to a complainant in exchange for the withdrawal of a complaint. Similarly, the Association of Professional Engineers and Geoscientists of British Columbia (APEGBC) considers such a payment or proposed payment to be unprofessional conduct and contrary to its Code of Ethics.

## Allow Registrants to Voluntarily Withdraw Their Registration as an Alternative to Disciplinary Proceedings

Disciplinary proceedings cost time and money. That's true for RECO, and it's true for our registrants. In the interest of saving valuable resources, and protecting the public by quickly removing problematic registrants from the business, RECO supports amending REBBA to allow the registrar to accept permanent voluntary withdrawals from registration as an outcome of potential disciplinary action and perhaps, more importantly, to require the publication of such a withdrawal to better inform the public.

In a number of Canadian jurisdictions, the equivalent to the registrar has the ability to accept a permanent voluntary withdrawal from registration from a registrant as an outcome of potential disciplinary action. The desired outcome—removing the registrant from the industry to protect consumers—is still achieved. In Alberta, for example, these withdrawals are a matter of public record.

## Mandatory Designated Representation (MDR)

When a single real estate salesperson or broker represents more than one party in a real estate transaction—sometimes both the buyer and the seller—it's an inherent conflict of interest. In Ontario, multiple representation is prohibited except where the parties provide their written consent. That's a broad exception that needs to be narrowed.

As an alternative to multiple representation, RECO supports the introduction of a Mandatory Designated Representation (MDR) regime, with limited and specific exceptions. RECO supports consumer and industry consultations on the final design details.

Designated representation permits a brokerage to have multiple clients in a single transaction, but each must be represented by a different salesperson or broker ("designated representatives"). The brokerage is obliged to have processes in place to ensure that client information is not exchanged between designated representatives. Designated representatives provide services exclusively to one client in a transaction. The representatives within the brokerage are effectively to be treated the same as representatives from other brokerages. This assists in addressing conflicts of interest.

Agreements are with brokerages and not individual registrants. Multiple representation is currently prohibited unless the parties agree the brokerage, through one or more individual registrants, can enter into a multiple representation situation. Given the structure of the real estate marketplace, consumers and registrants would not necessarily benefit from a ban on multiple representation at the brokerage level. It is when an individual represents more than one party to the same transaction that conflicts of interest are most pronounced and present the greatest risk of consumer harm.

While designated representation would apply to most multiple representation scenarios, there may be necessary exceptions. In most commercial transactions, the parties are sophisticated and are supported not only by a real estate brokerage, but also by lawyers and accountants, who greatly assist in managing the conflict of interest. There are also situations, such as in some remote communities with a limited number of registrants, where there may be few options to address conflicts of interest. Regulations could address such situations as exceptions.

## **Standardized Disclosures and Plain-Language Requirements**

Navigating your way through a real estate transaction can be tricky—and that’s especially true for first-time home buyers and sellers. It doesn’t help when different brokerages use different forms, and they’re written in difficult-to-understand “legalese” with a significant focus on registrant protection.

RECO supports amending REBBA to require the use of specific representation disclosure language through the implementation of specific standard written disclosures.

The use of standardized disclosure language increases the likelihood that a consumer’s understanding of representation obligations and services is complete, and there is informed consent to an MDR arrangement, for example, on the part of a potential buyer or seller should that situation arise. Standardized disclosure language can help consumers appreciate the limitations of representation that may result even in an MDR situation and can support information that gives a consumer clear evidence on the benefits of individual representation.



Having standardized, plain language that is set or approved by the regulator can ensure that the emphasis is on consumer protection and the public interest.