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A CRITIQUE OF THE BRITISH COLUMBIA RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY'S USE OF DUAL AGENCY

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I. INTRODUCTION

Many of us purchase homes and deal with real estate agents in the process. Furthermore, the purchase of a home is often one of the most substantial investments a person makes. In light of this, real estate agency ought to be of tremendous concern to anyone interested in consumer protection law and reform. Surprisingly, reform in this area appears to have been left largely up to regulators and real estate industry representatives who engage in a private dialogue that tends to be inaccessible to the public. The intention of this article is to expose the public to this dialogue and spur further academic discussion into the workings of this industry.

This article critiques the current practice of dual agency in British Columbia. Dual agency is a subject of considerable controversy in the residential real estate brokerage industry. It is commonly criticized for the inherent conflict of interest it creates when an agent concurrently represents a vendor and purchaser, parties who hold adversarial-like aims in a transaction.

However, this article contends that there are three additional issues with dual agency that tend to be neglected by commentators and that are perhaps of even greater concern. First, in the typical residential real estate transaction, consent to dual agency is, arguably, neither informed nor truly obtained; rather, consent tends to be compulsory due to the workings of the residential real estate brokerage industry whose members routinely enter dual agency relationships with their clients through the use of standardized forms. Second, dual agency suffers from increased risk of a particular form of conflict of interest known as “principal-agent incentive misalignment”¹ where the real estate agent furthers his or her financial interest at the expense of one or both clients. Finally, real estate agents tend to lack the training required to undertake a dual agency role in a competent manner.

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1. The use of this term is adopted from Vrinda Kadiyali, Jeffrey Prince & Daniel Simon, “Is Dual Agency in Real Estate Transactions a Cause for Concern?” (2008) Johnson School Research Paper Series No 08-07.

This article begins with a brief overview of a typical real estate transaction. It next reviews the law of real estate agency as it applies to the creation of a dual agency relationship and potential corresponding fiduciary duties, so that the problems with dual agency may be better understood in their legal context. Some of the many problems associated with dual agency are then identified. The article concludes with a critical evaluation of the real estate industry's proposed solutions to the problems of dual agency. The article also suggests possible additional solutions that directly address the issues of informed consent and principal-agent incentive misalignment.

II. ANATOMY OF A TYPICAL RESIDENTIAL REAL ESTATE TRANSACTION

An individual wishing to sell his or her home with the assistance of a real estate agent² typically enters into a Multiple Listing Service ("MLS") listing agreement. This agreement is a contract between the homeowner (also known as the "vendor") and the real estate agent's brokerage. Among other things, it gives the brokerage the exclusive right to market the property during a defined period, the right to receive a commission upon a successful sale, and the right to advertise the property through the MLS. A separate agreement between the real estate agent and his or her brokerage typically delegates the task of selling the listed property to the real estate agent and gives him or her the right to receive the commission that the vendor pays to the brokerage. Once an MLS contract is signed, the real estate agent responsible for the listing of the property is commonly known as a "listing agent."

The MLS is both a database of information about homes listed for sale by real estate agents and a system of cooperation which allows real estate agents to share information about listings and to assist each other with connecting buyers and vendors. Only real estate agents have direct access to the MLS,³ which is a form of intellectual property. The Canadian Real Estate Association ("CREA"), a membership-based group that represents real estate agents across Canada, holds the MLS trademark, and grants rights of use to provincial real estate associations, real estate boards, and individual real estate agents across Canada.⁴

Pursuant to the MLS system, listing agents may share information about homes they are listing for sale. Real estate agents who represent buyers, known as "buyers' agents" or "cooperating agents," may show their clients properties listed by other real estate agents and may assist clients with preparing offers to purchase. Cooperating agents may have a written agreement with their buyer clients to provide real estate services, but it is still common for no written agreement to exist. In the latter case, an "implied agency" agreement exists between the cooperating agent and his or her client.⁵

Upon a successful sale, the listing agent is required to share a portion of his or her commission with the cooperating agent. The requirement to share a commission is imposed by

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2. It is important to note that use of the term "real estate agent" is not universal. For example, pursuant to British Columbia legislation, "real estate agents" may be known as "representatives," "associate brokers" or "managing brokers." The term "real estate agent" is used throughout this paper as a widely understood generic term.
 3. See Part IV-B, below, for more on this topic.
 4. See The Canadian Real Estate Association, *Who We Are*, online: The Canadian Real Estate Association <http://www.crea.ca/public/crea/who_we_are.htm>. In addition to the term "MLS", the CREA also has trademarked the term "Realtor".
 5. For information about how implied agency relationships are created, see generally William F Foster, *Real Estate Agency Law in Canada*, 2nd ed (Scarborough: Carswell Thomson Professional Publishing, 1994) [Foster, *Real Estate Agency Law*] at 83-85. See also Part IV-C, below, for more on this topic.

the listing agent's real estate board rules of cooperation.⁶ The amount the listing agent must share is specified in the MLS contract.

Dual agency may arise in a variety of situations in the residential real estate industry.⁷ However, the most controversial and common form of dual agency (and the only form discussed in this article) arises where a buyer approaches a listing agent directly without representation by a cooperating agent. In that circumstance, the buyer may proceed without any representation. Alternatively, with the agreement of the agent and both "principals" to the transaction (i.e., the buyer and vendor), the listing agent may represent both the buyer and vendor as a dual agent.⁸ The industry refers to the sale of a property with the involvement of only one real estate agent as "double ending."

The relationship between a real estate agent and his or her client typically gives rise to fiduciary duties on the part of the real estate agent. The following explains how the fiduciary relationship is created and how fiduciary duties may be modified when the real estate agent is acting as a dual agent.

III. FIDUCIARY RELATIONSHIPS AND DUAL AGENCY

A. Real Estate Agency Relationships — Ad Hoc or Per Se Fiduciary?

Canadian common law recognizes two different categories of fiduciary relationships. *Per se* fiduciary relationships consist of certain categories of relationships that have been well-established in case law as fiduciary in nature. Such relationships "have as their essence discretion, influence over interests, and an inherent vulnerability."⁹ A fiduciary relationship is presumed in such cases, although the presumption is rebuttable.¹⁰ An agent-principal relationship falls within this category.¹¹ On the other hand, *ad hoc* fiduciary relationships arise on the specific facts of a situation. A discussion of the elements necessary to establish an *ad hoc* fiduciary relationship is provided below. First, however, it is important to consider the question of whether real estate agency relationships are *per se* or *ad hoc* fiduciary in nature.

Unfortunately, the answer to this question is somewhat elusive, as Canadian case law has been highly inconsistent in this regard. In some cases courts have held that real estate agency relationships are *per se* fiduciary on the basis that they are agent-principal in na-

6. Rules of cooperation are not readily available to the public. However, such rules can be inferred by reference to CREA's "Principles of Competition", by which all CREA members must abide. See The Canadian Real Estate Association, *Code of Ethics*, online: The Canadian Real Estate Association <http://www.crea.ca/public/realtor_codes/code_of_ethics.htm>. Principle 8 states that a real estate board or association may not create a rule prohibiting or discouraging cooperation.

7. For information about other circumstances in which dual agency may arise, see generally Foster, *Real Estate Agency Law*, *supra* note 5 at 53-55.

8. For an explanation of agency intended for laypersons, see generally The British Columbia Real Estate Association, *Working with a Realtor®*, online: The British Columbia Real Estate Association <<http://www.bcrea.bc.ca/buyers/WWAR.pdf>> ["WWAR Brochure"].

9. See e.g. *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161, [1994] SCJ No 84 (QL) [*Hodgkinson* cited to QL] at para 31.

10. *Ibid.*

11. *Ibid.*

ture.¹² In other cases the courts did not reach this conclusion.¹³ In no case examined did the courts expressly consider at length whether the real estate agency relationship is *per se* or *ad hoc* fiduciary. Instead the courts simply chose one or the other with little or no explanation, before proceeding with their analysis on that basis.

Arguably, relationships between real estate agents and their clients are not *per se* fiduciary because they are not primarily principal-agent relationships. In a principal-agent relationship, the agent typically has authority, express or implied, to bind the principal. In real estate agency relationships, real estate agents have authority to perform tasks related to the home selling process such as placing the home on the MLS and showing the home to prospective buyers. However, real estate agents generally have no authority, express or implied, to enter into a contract to purchase or sell real estate on behalf of their clients.¹⁴ The ultimate sale of real estate, naturally, is the primary purpose of retaining a real estate agent. This is reflected by the fact that real estate agents generally are not paid for their services unless a successful sale occurs.

It is possible that courts sometimes find real estate agency relationships to be *per se* fiduciary due to a misunderstanding of the term “real estate agent.” Real estate agents may be known by the public as real estate agents, and the relationships between real estate agents and their clients may be called “agency relationships,” but they are not primarily “agents” of their clients in the traditionally understood legal sense.

A real estate agency relationship is more accurately described as a broker and client relationship than one of principal and agent. Real estate agents are retained primarily to advise their clients about how to sell or purchase property. This entails, for instance, providing advice on what price to list a home for, what price to offer in a contract of purchase and sale, what terms the contract of purchase and sale should contain, how to list a home on the MLS, and so on. According to the Supreme Court of Canada in *Hodgkinson v. Simms* (“*Hodgkinson*”), broker and client relationships are not *per se* fiduciary and one must examine the circumstances to see if the relationship gives rise to such duties.¹⁵

B. Finding an Ad Hoc Fiduciary Relationship (or Rebutting the Presumption of a Per Se Fiduciary Relationship)

In *International Corona Resources Ltd. v. Lac Minerals Ltd.* (“*Lac Minerals*”),¹⁶ the Supreme Court of Canada referred to its earlier decision in *Guerin v. Canada* (“*Guerin*”)¹⁷ and reaffirmed that it is the nature of the relationship, not the special category of the actors involved, which gives rise to a finding of a fiduciary.¹⁸ Also, the court in *Lac Minerals* agreed

12. See e.g. *Alwest Properties Ltd v Roppelt*, 1998 ABQB 1027, 236 AR 201, [1998] AJ No 1401 (QL); *Lee Estate v Royal Pacific Realty Corp*, 2003 BCSC 911, 123 ACWS (3d) 7, [2003] BCJ No 1393 (QL); *DeJesus v Sharif*, 2010 BCCA 121, 284 BCAC 243, [2010] BCJ No 394 (QL) [*DeJesus* cited to QL].

13. See e.g. *RK Holdings Corp v Koyl Commercial Real Estate Services Ltd*, 2000 SKQB 77, 190 Sask R 210, [2000] SJ No 109 (QL); *MacAuley v LeClair*, 61 OTC 344, 79 ACWS (3d) 442, [1998] OJ No 1918 (QL) (Ct J (Gen Div)); *Knoch Estate v Jon Picken Ltd*, 4 OR (3d) 385, 83 DLR (4th) 447, [1991] OJ No 1394 (QL) (CA).

14. For more information on the authority of real estate agents, see generally Foster, *Real Estate Agency Law*, *supra* note 5 at 95-115.

15. *Hodgkinson*, *supra* note 9 at para 44.

16. *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14, [1989] SCJ No 83 (QL) [*Lac Minerals* cited to QL].

17. *Guerin v Canada*, [1984] 2 SCR 335, 13 DLR (4th) 321, 1984 CarswellNat 813 (WL Can) [*Guerin* cited to WL Can] at para 99.

18. *Lac Minerals*, *supra* note 16 at para 30.

with the observation of Wilson J. in *Frame v. Smith* (“*Frame*”)¹⁹ that the following three general characteristics usually, but not always, exist in a fiduciary relationship:²⁰

- 1.) The fiduciary has scope for the exercise of some discretion or power.
- 2.) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.
- 3.) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.²¹

The Court emphasized that most weight is given to the third factor, describing it as “indispensable to the existence of the (fiduciary) relationship.”²²

In *Hodgkinson*, the Supreme Court of Canada affirmed that the existence of a fiduciary duty also depends on the reasonable expectations of the parties which in turn “depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.”²³ Similarly, the Supreme Court of Canada in *Galambos v. Perez* (“*Galambos*”) recently affirmed that an undertaking, either express or implied, that the fiduciary will act in the best interests of the other party is also fundamental to the existence of an *ad hoc* fiduciary relationship.²⁴ Also, whether the relationship is *ad hoc* or *per se*, it is fundamental that the fiduciary have “a discretionary power to affect the other party’s legal or practical interests.”²⁵

It is the author’s opinion that real estate agency relationships between sellers and listing agents in residential real estate transactions usually are fiduciary in nature whether a court considers them to be *ad hoc* or *per se* fiduciary. This largely stems from the tremendous power imbalance that exists in the typical relationship between a residential real estate agent and his or her client. The real estate agent typically possesses far more knowledge than the client about real estate transactions and is the only one who can directly access the MLS to obtain residential sales information. The client relies upon his or her real estate agent for professional advice, and because the client cannot personally access the MLS, the client has no real choice but to trust the real estate agent. Further, the standards of ethical behaviour imposed by regulatory requirements and by various real estate boards, of which real estate agents are usually members, are fiduciary-like and arguably create a reasonable expectation of a fiduciary relationship.²⁶ Thus, an undertaking to act as a fiduciary may be implied from the real estate agent’s provision of real estate services within the confines of this regulatory/ethical framework.

19. *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81, [1987] SCJ No 49 (QL) [*Frame* cited to QL].

20. *Lac Minerals*, *supra* note 16 at para 33.

21. *Frame*, *supra* note 19 at para 60.

22. *Lac Minerals*, *supra* note 16 at para 34.

23. *Hodgkinson*, *supra* note 9 at para 35.

24. *Galambos v Perez*, 2009 SCC 48 at para 66, [2009] 3 SCR 247, [2009] SCJ No 48 (QL) [*Galambos* cited to QL].

25. *Ibid* at para 83.

26. See *supra* note 6. Some ethical rules imposed upon members of CREA are fiduciary-like. For example, Article 3 states that a realtor’s primary duty is to his or her client, which is similar to the fiduciary duty of loyalty. Ethical rules by which a professional is expected to abide may form evidence as to reasonable standards expected of members of that profession by the community. See e.g. *Norberg v Wynrib*, [1992] 2 SCR 226, [1992] ACS No 60, [1992] SCJ No 60 (QL).

C. Dual Agency and its Effect on Fiduciary Duties that Arise from a Fiduciary Relationship

When a fiduciary relationship is established between a real estate agent and his or her client, a number of fiduciary duties arise. The real estate agent is held to a high standard which requires the real estate agent to subordinate his or her own interests to those of the client because, among other duties, a duty of loyalty is owed to the client.²⁷

However, as explained by Foster, an obvious problem with dual agency is that the dual agent is expected to be loyal to two clients who have conflicting aims — the vendor to maximize the purchase price, and the purchaser to minimize it.²⁸ This seemingly makes it impossible for a real estate agent to comply with his or her fiduciary duties.

In an attempt to reconcile this apparent conflict, real estate agents in British Columbia seek consent to a so-called “limited dual agency” relationship. The dual agency is described as limited because it expressly limits the real estate agent’s duty to disclose everything known about the transaction to the clients so that the real estate agent may represent both parties in the transaction without harming their negotiating positions and without breaching fiduciary duties. Specifically, the agreement requires the real estate agent to act impartially between the vendor and purchaser, not to disclose whether the buyer or seller is willing to pay or sell for a price or agree to terms different than contained in an offer, not to disclose the motivations of either party to the transaction unless authorized in writing, and not to disclose personal information of one party to the other unless authorized in writing.²⁹ Clearly, a limited dual agency agreement substantially changes the nature of the listing agent’s relationship with his or her client.

However, as recently explained in *DeJesus v. Sharif* (“*DeJesus*”), this agreement does not function if the real estate agent acts in a way inconsistent or incompatible with the terms of the agreement.³⁰ In such circumstances, the limitations in the dual agency agreement are inapplicable and are not given effect.³¹

To summarize, real estate agents will typically find themselves in fiduciary relationships with their clients. Representing another client in a transaction will normally result in a breach of fiduciary duty; however, this is not the case if the agent obtains consent to a limited dual agency agreement because this agreement eliminates some fiduciary duties such as the duty not to act for both parties to a transaction, and narrows the scope of other duties, such as the duty of loyalty.

IV. THE PROBLEM WITH DUAL AGENCY

Dual agency has been widely criticized by academic commentators across Canada and the United States for the increased liability it imposes upon agents and the inherent conflict of interest it creates. There are a number of other criticisms relating to informed consent and principal-agent incentive misalignment which are categorized below. One must keep in

27. See generally Foster, *Real Estate Agency Law*, *supra* note 5 at 233-44.

28. William F Foster, “Dual Agency: Its Implications for the Real Estate Brokerage Industry” (1989) Meredith Mem Lect 73 [Foster, “Dual Agency: Its Implications”] at 78.

29. See generally *Summit Staging Ltd v 596373 BC Ltd (cob Re/Max Westcoast)*, 2008 BCSC 198 at para 62, 68 RPR (4th) 280, [2008] BCJ No 262 (QL) [*Summit Staging* cited to QL]. See also *DeJesus*, *supra* note 12 at para 64-65.

30. *Ibid* at para 70-73.

31. *Ibid*.

mind however, that while these problems are categorized for ease of reading, they are interconnected, and it is the aggregate effect which is most harmful to consumers.

A. Lack of Informed Consent

Dual agency substantially alters the nature of the agency relationship. It releases a real estate agent from some of his or her fiduciary duties and it narrows the scope of others. It is not difficult to see why the informed consent of both parties must be obtained beforehand. However, the following suggests that consumers in British Columbia may not be receiving sufficient information about the nature of a dual agency relationship to make an informed decision.

The Real Estate Council of British Columbia's³² *Professional Standards Manual* ("Professional Standards Manual")³³ states that informed consent is obtained when the proposed agency relationship is accepted after timely disclosure of the following to both parties:

- The nature of the conflict of interest that would arise if the licensee were to represent both parties.
- What is being proposed by the licensee and the implications of [the parties] giving their consent.³⁴

This disclosure must be made before the agent begins to act for both parties and before any potential conflict of interest has arisen.³⁵

The requirement of disclosure is codified in s. 5-10 of the British Columbia *Real Estate Services Act Rules*.³⁶ However, s. 5-10 does not specify how or when disclosure should be made, other than stating that disclosure must be made before real estate services are offered. Thus, despite the significant potential for liability and the need to protect the public interest, the Real Estate Council of British Columbia has afforded the industry significant discretion in developing a means of disclosure. To that end, the British Columbia Real Estate Association³⁷ created a "Working with a Realtor[®]" brochure that provides information about various types of agency relationships consumers may enter into with real estate agents.³⁸ The Real Estate Council has accepted the use of this form. According to the *Professional Standards Manual*, providing the brochure to a purchaser or vendor at "first substantial contact" satisfies the s. 5-10 requirement of disclosure and provides the information needed for informed consent.³⁹

The "Working with a Realtor[®]" brochure does provide important information about how fiduciary duties are limited under a dual agency relationship. However, this information arguably is incomplete. In particular, Foster notes the following omissions:

32. The Real Estate Council of British Columbia is a government agency that regulates real estate licensing and licensee conduct in British Columbia. Membership in a real estate association or board is optional for a real estate agent, but the receipt of a license to engage in real estate sales from this agency is required by statute.

33. *Real Estate Council of British Columbia Professional Standards Manual*, (Vancouver: Real Estate Council of British Columbia, 2010) available online: Real Estate Council of British Columbia <<http://www.recbc.ca/licensee/PSM/PSM.htm>> [*Professional Standards Manual*].

34. *Ibid* at Chapter 2-1.

35. *Ibid*.

36. British Columbia, Real Estate Council of British Columbia, *Real Estate Services Act Rules* [*RESA Rules*] at s 5-10.

37. The British Columbia Real Estate Association is a membership-based organization that represents real estate agents in British Columbia.

38. WWAR Brochure, *supra* note 8.

39. *Professional Standards Manual*, *supra* note 33 at Chapter 2-1.

The advantages and disadvantages of the various [agency] relationships are not clearly indicated, it being left to the parties (who, more often than not, are ignorant of the law of agency, the duties of licensees and the legal and practical ramifications of the various representation relationships) to make the determination themselves on a reading of the forms and the brochures.⁴⁰

Also, important information about remuneration is missing:

Importantly, in this regard, the forms and brochures omit one crucial piece of information — nowhere are the parties advised that a dual agency relationship will result in individual licensees (and/or their brokerages) “double ending;” nowhere is it stated that dual agency is financially beneficial to licensees (and/or their brokerages). The dual agency forms merely provide that any previous agreements that may exist between buyers and seller [*sic*] are modified to the extent provided in the dual agency form, again leaving it to buyers and sellers to work out the full implications of the new arrangement for their existing relationship.⁴¹

The lack of information about vicarious liability is significant as well. Clients can be vicariously liable for the conduct of the real estate agents they employ.⁴² However, no mention of this risk is made in the brochure or in any other standard form document.

Also, the courts have criticized the brochure for containing conflicting information. In *Summit Staging Ltd. v. 596373 B.C. Ltd. (c.o.b. Re/Max Westcoast)* (“*Summit Staging*”), the Court noted that certain obligations of the real estate agent, as suggested by the brochure, (namely, to “obey all lawful instructions of the principal, keep the confidences of the principal, and exercise reasonable skill and care in performing all assigned duties”) are in conflict with the terms of the limited dual agency agreement.⁴³

Furthermore, none of the standard forms used in British Columbia explain that the vendor or purchaser has the option of declining dual agency. In fact, the “Working with a Realtor[®]” brochure may be misleading in this regard. The brochure states: “If you find yourself involved in a dual agency relationship, before making or receiving an offer, both you and the other party will be asked to consent...⁴⁴ This implies that a dual agency relationship may validly arise before consent is obtained. Arguably, this gives the impression that a vendor or purchaser has little choice but to consent to dual agency. It suggests that the consent form is a mere formality because, after all, a dual agency relationship already exists.

If the method of disclosure used by the industry is inadequate, as is suggested above, the consequences could be tremendous. The Minnesota case of *Dismuke v. Edina Realty Inc.* (“*Edina Realty*”)⁴⁵ is illustrative. *Edina Realty* involved a class action by sellers of homes who claimed that the brokerage breached its fiduciary duty to disclose its dual agency status. While the brokerage made disclosure in a way that satisfied statutory requirements, the

40. William F Foster, “Review of Industry Standard Form Representation Agreements” (Paper presented to the Canadian Regulators Group for its “Report of the Agency Task Force,” May 2003) [unpublished, available online: Saskatchewan Real Estate Commission <<http://www.srec.ca/pdf/FosterPaperMay2003.pdf>>] [Foster, “Standard Form Representation Agreements”] at 27.

41. *Ibid.*

42. See e.g. *Betker v Williams*, 86 DLR (4th) 395, 63 BCLR (2d) 14, [1991] BCJ No 3724 (QL) (CA).

43. *Summit Staging*, *supra* note 29 at para 63.

44. WVAR Brochure, *supra* note 8.

45. *Dismuke v Edina Realty Inc.*, 1993 WL 327771 (WL) (Minn Dist Ct) [*Edina Realty* cited to WL].

Court held that this disclosure was inadequate under the common law and that the brokerage breached its fiduciary duty to the sellers.⁴⁶ This left the brokerage vulnerable to a claim for hundreds of millions of dollars in commissions.

Edina Realty is highly relevant because Canadian courts have also recognized that a common law standard of disclosure may differ from statutory requirements in the real estate agency context. For example, in *Stacey v. Sigmund* the Court accepted the defendant agent's means of disclosing his licensed status even though it breached statutory requirements at the time.⁴⁷ Perhaps *Edina Realty* could occur in British Columbia as well.

B. Underrepresentation and Lack of True Consent Due to the Industry's Practice of Using Dual Agency, its Monopoly over the MLS, and its Use of Standard Forms

In theory, vendors and purchasers may choose not to enter a dual agency relationship with an agent. However, according to American author J. Clark Pendergrass, the claim that vendors and purchasers have a choice “ignores the realities of the residential real estate brokerage industry.”⁴⁸ Pendergrass argues that dual agency causes vendors and purchasers to be underrepresented in a transaction.

Pendergrass claims that consumers do not bargain at arm's length with real estate agents in entering agency agreements.⁴⁹ This is because several factors create a power imbalance in favour of agents over their clients:

- 1.) Consumers are dependent upon agents for their expertise. This places real estate agents in a commanding position with respect their clients akin to a solicitor-client relationship.⁵⁰
- 2.) Consumers are further dependent on real estate agents because they have exclusive access to the MLS. In many communities, MLS access plays a key role in ensuring a home is sold for the highest possible price and in the shortest possible time.⁵¹
- 3.) The largest real estate brokerages in the United States, which hold the largest share of the market and the most listings, practice dual agency. Consumers who deal with these firms who decline dual representation are put at a disadvantage — purchasers will have fewer homes to choose from since they cannot view homes listed by the brokerage representing them, and sellers will have limited market exposure because their home cannot be shown to buyers represented by the brokerage. The result is that the purchaser and vendor must settle for divided loyalty and non-exclusive representation.⁵²

The second point deserves further comment because it also supports a claim that the monopolistic power of the real estate industry in British Columbia through the MLS and the

46. *Ibid.*

47. *Stacey v Sigmund*, 5 BCLR (3d) 354, 46 RPR (2d) 278, [1995] BCJ No 721 (QL) (SC) [*Stacey* cited to QL] at para 10-12.

48. J Clark Pendergrass, “The Real Estate Consumer's Agency and Disclosure Act: The Case against Dual Agency” (1996) 48 Ala L Rev 277 at 293.

49. *Ibid.*

50. *Ibid* at 294.

51. *Ibid* at 294-95.

52. *Ibid* at 295.

industry's use of standard forms pursuant to the MLS system imposes dual agency upon vendors and purchasers.

In many regions across Canada, most residential properties sell through the MLS. From 2006 to 2008, for instance, approximately 480,000 homes across Canada sold through the MLS.⁵³ In fact, the MLS is estimated to be involved in nearly ninety percent of residential home sales in Canada.⁵⁴ Given this and the fact that a substantial number of MLS properties sell through the use of cooperating agents, it is quite reasonable to conclude that the MLS is an essential marketing tool for most residential homeowners. Considering that only real estate agents have direct access to the MLS in Canada,⁵⁵ it follows that an agent must likely be retained if a vendor is to maximize the selling price of his or her home and sell within the shortest possible time period.

Furthermore, Foster notes that the standard form agreements prepared by the industry are contracts of adhesion. He suggests that the average buyer or seller may believe they have little option but to sign them without amendment if they wish to be represented by an agent.⁵⁶

The above leaves consumers particularly vulnerable to principal-agent incentive misalignment which reveals itself in various ways. For example, if a vendor is asked to enter a dual agency agreement, the vendor has either the option of consenting to dual agency, or the option of demanding exclusive representation by the listing agent. However, given the previous discussion about the inadequacy of disclosure provided by the standard forms used by agents, it is unlikely that a vendor will even be aware of the latter option in most cases.

If the vendor nonetheless chooses the latter option, the likely result will be that the eventual purchaser will have to proceed without representation. Once an unrepresented purchaser has viewed a property listed on the MLS and has shown interest in presenting an offer, it is unlikely that any other agent would agree to represent the purchaser due to concern about a potential commission dispute. Pursuant to the MLS system, the other agent would have to be remunerated by receiving a share of the listing agent's commission. However, the listing agent likely would not agree to the other agent receiving remuneration at this point on the basis that it was the listing agent, and not the other agent, who introduced the purchaser to the property and who "deserves" the entire commission. The listing agent could possibly even file for arbitration through his or her real estate board in that regard.⁵⁷

In fact, in some jurisdictions it is becoming an increasingly common practice for multiple listings to offer tiered commissions based on the cooperating agent's involvement in the transaction. For example, the listing may state that cooperating agents who do not physically introduce the buyer initially receive a significantly reduced share of the commission. If done without the vendor's informed consent, this practice likely breaches an agent's fi-

53. See Altus Group Economic Consulting, "Economic Impacts of MLS® Home Sales and Purchases in Canada and the Provinces 2006-2008" (Report presented to the Canadian Real Estate Association, 24 April 2009) [unpublished, available online: Canadian Real Estate Association <http://www.crea.ca/public/news_stats/pdfs/clayton2009.pdf>].

54. See Gary Marr, "Competition watchdog says realtor rules limit choice" *Financial Post* (8 February 2010), online: *Financial Post* <<http://www.financialpost.com/story.html?id=2536948>>.

55. See Canadian Real Estate Association, *Realtor® Services*, online: The Canadian Real Estate Association <http://www.crea.ca/public/use_a_realtor/use_a_realtor.htm>. It is worth noting that the "public MLS" available through <http://www.mls.ca> is far less detailed than the database that real estate agents use.

56. Foster, "Standard Form Representation Agreements", *supra* note 40 at 30.

57. See e.g. CREA's ethical rules found *supra* note 6. The basis of such a claim presumably would be that the other agent caused or induced breach of an existing agency relationship, an act that is prohibited by Article 20. Article 23 requires commission disputes to be resolved by arbitration. Whether such a claim would succeed is uncertain. Real estate boards do not publicly release the results of arbitration hearings.

duciary duty of loyalty to his or her client because it reduces the number of prospective buyers who may view the property for the sole purpose of protecting an agent's commission. Essentially, it puts the interest of the listing agent above that of the client. However, it is a common practice nonetheless.⁵⁸ Whether this is being done with the informed consent of vendors is unclear, but in the author's opinion, this is unlikely. After all, why would a vendor agree to something which only functions to protect a real estate agent's commission and to reduce the number of prospective buyers who may view the property?

C. Principal-Agent Incentive Misalignment Due to the Process by which Agents Obtain New Clients

According to Foster, agents may face considerable difficulty in ascertaining who their client is (or clients are) in a transaction. This is because agency relationships may arise in ways other than by express agreement. In particular, Foster refers to the circumstance where an agent has entered into an agency agreement with a seller by express agreement and when an unrepresented buyer shows interest in the property: "It must be accepted that when dealing with purchasers, many if not most real estate agents, including listing agents, create the impression by word and deed, that they are representing the purchasers' interests — that is, perhaps unbeknown by agents, they enter into an implied agency relationship with purchasers."⁵⁹

By way of example, Foster suggests that an unrepresented purchaser will "seek the [listing] agent's expert advice as to the value of properties, their physical condition, zoning issues, matters of financing, the neighbourhood, and the like."⁶⁰ The purchaser will "discuss with the [listing] agent his needs and preferences, his likes and dislikes, his interests, the state of his finances, and a host of other personal matters which one normally would disclose only to a trusted advisor."⁶¹ The listing agent will permit the purchaser to disclose confidential information to him because, as Foster puts it, "If the purchaser does not trust the agent, how can the agent hope to sell the purchaser a property?"⁶²

Unfortunately, this sets the stage for vulnerability and reliance by the purchaser on the listing agent and could create an agency relationship by implication with corresponding fiduciary duties. This results in a dual agency relationship that was, of course, created without the informed consent of both parties to the transaction.

One possible cause of the issue identified by Foster is the process by which agents obtain new clients. Listings can be a source of new clients. A prospective purchaser may not be interested in the property listed by the listing agent, but he or she may be interested in a similar property. It may be financially beneficial for the agent to gain the prospective purchaser's trust so that he or she can retain the purchaser as a client. Obtaining new clients this way risks placing the agent in a conflict of interest if the listing agent, intentionally or not, dissuades the buyer from purchasing the listed property for the purpose of gaining a new client. This would clearly not be acting in the best interests of the vendor who expects the listing agent to use all efforts to sell his or her listed property. As a result, this would breach the listing agent's fiduciary duty of loyalty.

58. See e.g. article by 2007-2008 BCREA President describing and supporting the practice, Andrew Peck, "Can a seller refuse to pay the buyer's bona fide agent?", (3 March 2009) online: Andrew R. Peck Blog <<http://www.andrewrpeck.com/Blog.php/23/>>.

59. Foster, "Dual Agency: Its Implications", *supra* note 28 at 84.

60. *Ibid* at 85.

61. *Ibid* at 84.

62. *Ibid*.

D. Principal-Agent Incentive Misalignment Created by the MLS Contract's Terms of Remuneration

Another conflict of interest is created by the typical terms of remuneration found in an MLS contract. The contract will stipulate that the listing agent is required to share his or her commission if a cooperating agent is involved. If there is no cooperating agent involved, the listing agent earns both the listing and cooperating agent portions of the commission.⁶³

The allure of “double ending” a commission could also cause agents to breach their fiduciary duties by, for instance, disclosing confidential information about the seller to the buyer in hopes of encouraging an offer, or as Foster notes, by failing to disclose an agent's dual role in the transaction to avoid raising suspicion by the parties.⁶⁴ In both examples, a dual agency relationship is created without informed consent.

E. Inadequate Training of Agents in Real Estate Agency Law

Real estate agents receive little formal training in real estate agency law. For example, to become licensed as a real estate salesperson, the Real Estate Council of British Columbia requires completion of a pre-licensing course administered through the University of British Columbia and an applied post-licensing course administered through the British Columbia Real Estate Association.⁶⁵ Only one of twenty-six chapters of the pre-licensing course manual is dedicated towards real estate agency.⁶⁶ One of the ten units comprising the post-licensing course is dedicated to real estate agency law, but the post-licensing course is only a week long, with evaluation based solely on participation and attendance.⁶⁷

It could be argued that real estate agents generally do not understand real estate agency law at a level of competence one would reasonably expect. Two examples involving dual agency support this claim.

First, real estate agents lack practical information about when informed consent to a dual agency relationship must be obtained. For example, the *Professional Standards Manual* states that informed consent must be obtained before the licensee begins to act for both parties and before any potential conflict of interest has arisen.⁶⁸ However, when does a licensee begin acting for both parties? Does it begin, for instance, at an open house where a prospective buyer may casually reveal confidential information about his or her motives to purchase, or does it begin only when the prospective purchaser indicates a desire to offer on the property? The *Professional Standards Manual* fails to answer this question.

The *Professional Standards Manual* also states that potential sellers and buyers should be provided with information about a potential agency relationship at “the first reasonable opportunity”. In the following sentence, it states that the “Working with a Realtor[®]” brochure should be provided at “first substantial contact” to discharge the disclosure obli-

63. See generally Foster, “Standard Form Representation Agreements”, *supra* note 40 at 27.

64. Foster, “Dual Agency: Its Implications”, *supra* note 28 at 88.

65. Real Estate Council of British Columbia, *Real Estate Education Guidelines*, online: Real Estate Council of British Columbia <<http://www.recbc.ca/licensee/educationguide.htm>>.

66. UBC Real Estate Division, *Real Estate Trading Services Licensing Course Manual* (Vancouver: UBC Real Estate Division, 2009).

67. British Columbia Real Estate Association, *Real Estate Trading Services Applied Practice Course*, online: British Columbia Real Estate Association <<http://www.bcrea.bc.ca/potential/rescourse.htm>>.

68. *Professional Standards Manual*, *supra* note 33 at Chapter 2-1.

gation.⁶⁹ These instructions are ambiguous because the first reasonable opportunity can differ from first substantial contact. Furthermore, “first substantial contact” and “first reasonable opportunity” are undefined terms.

This uncertainty is troublesome given how agency relationships can arise through implication. Arguably, because real estate agents lack practical information about when to seek informed consent to dual agency, they risk obtaining it at inappropriate times, such as when an offer to purchase has already been drafted. By that point, an unauthorized dual agency relationship likely has already been created by implication.

Second, real estate agents also appear to lack clear understanding of when it is appropriate to enter a dual agency relationship. In British Columbia, this is evidenced by reviewing disciplinary decisions rendered by the Real Estate Council of British Columbia. A search using CanLII reveals 51 reported Council decisions that involved a finding of wrongdoing related to a dual agency relationship from 2005 to April 1, 2010. Of those 51 decisions, 26 involve an agent entering a limited dual agency agreement when the agent was either a principal to the transaction or closely related to one of the principals (for example, the vendor or purchaser may have been a family member or a corporation of which the agent owned some or all of the shares).⁷⁰

The Real Estate Council of British Columbia considers entering a limited dual agency agreement in such circumstances to be a breach of s. 3-3(1)(i) (this section requires an agent to take reasonable steps to avoid a conflict of interest) of the *Real Estate Services Act Rules*⁷¹ because it is believed that agents in such circumstances cannot remain impartial to the interests of both parties.⁷² Notably, agents are warned against such conduct in the *Professional Standards Manual*.⁷³

The fact that a significant number of agents appear to enter such agreements anyway is puzzling. This trend is arguably at least partly due to inadequate training. It is possibly also due to the mistaken belief that a real estate agent must enter a limited dual agency agreement to “double end” a listing. While the *Professional Standards Manual* explains that dual agency is unnecessary to “double end” a listing,⁷⁴ this appears to be an ongoing issue nonetheless, as evidenced by recent articles in industry newsletters.⁷⁵ This is a serious problem because this mistaken belief could result in agents pressuring their unsophisticated clients into dual agency agreements out of fear that a commission could be lost if consent is not obtained.

69. *Ibid* at Chapter 2-1.

70. The following search criteria were used to obtain these numbers: First, a search was conducted in CanLII using the EXACT(BC R.E.C.) parameter (“BC R.E.C.” is part of the citation used by CanLII for Real Estate Council of British Columbia disciplinary decisions). Next, a search for the term “dual agency” was made within those results. This revealed 75 decisions. Each of the 75 decisions was examined to determine whether or not the decision regarded a finding of wrongdoing related to the dual agency relationship.

71. *RESA Rules*, *supra* note 36 at 3-3(1)(i).

72. See e.g. *Re Robin Julieana Smith*, 2008 CanLII 75198 (CanLII) (BC REC).

73. *Professional Standards Manual*, *supra* note 33 at Chapter 2-1.

74. *Ibid* at Chapter 2-1.

75. Real Estate Council of British Columbia, “Acting as a Limited Dual Agent” *Report from Council* 40:4 (February 2005) 1 online: Real Estate Council of British Columbia <<http://www.recbc.ca/pdf/RFC/2005/RFCFebruary2005.pdf>>; See also Brian Taylor, “Limited Dual Agency or No Agency?” *Legally Speaking* No. 419 (May 2008) 1 online: British Columbia Real Estate Association <http://www.bcrea.bc.ca/publications/legally_speaking419.htm>.

V. SOME POTENTIAL SOLUTIONS TO DUAL AGENCY'S MANY PROBLEMS

A. Industry Proposed Solutions

In June 2004 the Canadian Regulators Group, an association of senior staff members representing various real estate regulatory bodies across Canada and industry groups such as the Canadian Real Estate Association and the Real Estate Institute of Canada, released the "Report of the Agency Task Force" (the "ATF Report").⁷⁶ The ATF Report was intended to address some of the problems associated with agency and dual agency and made a series of recommendations. The following describes three of the most relevant recommendations and provides additional comments about their potential merit. Notably, one province so far has adopted the ATF Report's recommendations: Alberta substantially adopted the recommendations pursuant to the ATF Report effective March 1, 2008.⁷⁷

First, the ATF Report recommended that some of the uncertainty associated with disclosure obligations be remedied through statutory reform. Broadly speaking, the ATF Report suggested that statute should require agents to disclose information about a potential agency relationship before eliciting or as soon as practicable upon receiving confidential information or before entering into a service agreement. Further disclosure would also be required if, subsequent to the initial disclosure, there was any material change to the facts disclosed.⁷⁸

The Report also laid out a series of exceptions to the disclosure requirement. The duty to disclose would not be triggered by a "bona fide 'open house' showing", by "preliminary conversations or 'small talk' concerning price range, location and property styles", or by "responding to general factual questions from a potential buyer or seller."⁷⁹

This recommendation appears to address the aforementioned problem of agents lacking practical information about when informed consent to a dual agency relationship must be obtained. It also appears to conform to common law requirements. As noted earlier, reliance that results in a fiduciary relationship depends on the reasonable expectations of the parties. It is difficult to imagine that "small talk", "preliminary discussions" and conversations at open houses would create reasonable reliance and a vulnerability resulting in a fiduciary relationship.

However, the issue of when to obtain consent remains uncertain. Should consent to an agency relationship be requested at the time of disclosure of the possible agency relationship? Or is it acceptable to obtain consent later in the transaction, and if so, how much later?

Second, the ATF Report recommended that a standard course for use across Canada be developed on agency as it applies in the real estate industry.⁸⁰ Given the limited training agents presently receive, an additional course focused on real estate agency law could be invaluable if updated regularly and with mandatory attendance requirements. Presumably, this course could address the problem of agents entering agency relationships with consumers when it is inappropriate or needless to do so in the circumstances. However, it

76. "Report of the Agency Task Force" (Paper presented to the Canadian Regulators Group, June 2004) [unpublished, available online: Saskatchewan Real Estate Commission <<http://www.srec.ca/pdf/ATFReport.pdf>>] ["ATF Report"].

77. Alberta, Real Estate Council of Alberta, *Real Estate Act Rules*, at ss 55, 58.1, 59-59.1.

78. ATF Report, *supra* note 76 at 21.

79. *Ibid* at 21.

80. *Ibid* at 37.

would be ideal if courses in agency law were offered on a regular basis with strict annual attendance requirements.

The ATF Report's third recommendation was to adopt transaction brokerage as a standard practice in Canada and to replace dual agency.⁸¹ Transaction brokerage is used in situations where one real estate agent represents both the vendor and purchaser in the same transaction.

This agreement would essentially set out the ideal practices associated with what is currently called dual agency, but the use of another title would assist consumers and industry members in recognizing that the industry member will not be serving as an advocate for either party.⁸²

The ATF Report includes a sample "Transaction Brokerage Agreement."⁸³ As the ATF Report suggests, the effect of the agreement is similar to the limited dual agency agreement used at present, except that it expands greatly upon the meaning of impartiality by reference to specific acts the real estate agent, now known as a "Transaction Facilitator," will or will not undertake. This includes a statement that the transaction facilitator will not do anything requiring the exercise of discretion or judgment, the giving of confidential information, or advocate on behalf of the vendor or purchaser.

This form could offer risk reduction for individual agents, as it clarifies what a transaction facilitator can or cannot do in the transaction. This clarification could also serve to better inform vendors and purchasers about the potential new agency relationship as well. However, it is worth reminding the reader at this point that real estate agents who act inconsistently with written service agreements containing limitations on fiduciary duties may find the agreements to be of no effect.⁸⁴ It follows that, given the present inadequate training real estate agents receive in agency law, the transaction brokerage agreement alone will do little to assist real estate agents in reducing their liability unless this problem is also rectified.

B. Other Possible Solutions

While the recommendations of the "Report of the Agency Task Force" center upon reducing the liability of agents who find themselves in dual agency situations, the ATF Report fails to address issues surrounding informed consent and principal-agent incentive misalignment. Without addressing these issues as well, dual agency likely will remain controversial and problematic.

It is in the best interests of the real estate industry to ensure that consumers make informed decisions about entering into agency relationships if only to avoid a class action lawsuit resembling *Edina Realty*. Real estate agents presently do not provide consumers with enough information to make an informed decision. For example, information about the advantages and disadvantages of various agency relationships, remuneration and vicarious liability is either inadequate or entirely absent from the British Columbian "Working with a Realtor[®]" brochure. The fact the brochure is described as a "brochure" downplays the importance of the disclosure. Real estate agents should be required to provide much more detailed information that addresses all of these issues.

81. *Ibid* at 31.

82. *Ibid* at 34.

83. *Ibid* at Appendix H.

84. See Part III-C, above, for more on this topic.

Also, it should be made clear to consumers through the information disclosure that they should seek independent advice if they remain uncertain about their options. In fact, given the significant amount of money involved in the typical home sale and the fact that consumers tend to be unknowledgeable about real estate transactions, it is reasonable to require consumers to either seek independent legal advice or to sign a separate form waiving their right to seek independent legal advice before entering an agency relationship.

All efforts should be made by the real estate industry to prevent consumers from being drawn into commission disputes between agents. For example, the practice of offering tiered commissions to cooperating agents based on whether or not they physically introduced the buyer should be prohibited. Subject to any agency agreement entered into by a vendor or purchaser that has a fixed term, a purchaser or vendor should feel free to retain their own exclusive representation at any time in a transaction and to replace their existing representation without fear that they will be unable to do so because of a potential commission dispute.

Also, the MLS contract needs to expand upon how remuneration is paid. Not only should the contract address the total commission paid and the portion that is paid to cooperating agents, but it should also explicitly address what the total commission is when the listing agent “double ends.” By having this fee confirmed through the listing contract, the vendor is free to negotiate a “double end” commission without the added pressure of dealing with an impending offer. Presumably, vendors in most cases will negotiate payment of a commission that is less than what is paid if two agents are involved, but also allow the listing agent to receive more than if the commission had to be shared with a cooperating agent.

The above could be mutually beneficial for real estate agents and vendors. While the total amount is reduced if the listing agent double ends, the listing agent still receives a larger commission than if a cooperating agent was involved. The vendor retains the option of declining to enter a dual agency agreement. In return, the vendor pays more since the buyer may retain a buyer’s agent, but it is the vendor’s choice to let that occur.

Simply put, the net result of the above is a substantial improvement in obtaining informed consent with a reduction in the effect of principal-agent incentive misalignment.

VI. CONCLUSION

Even if all of the aforementioned recommendations were implemented, problems with dual agency would linger. For example, the fact that listings are a source of new clients for agents and that implied agency relationships may inadvertently develop through an agent’s attempt to recruit a client through an existing listing remains an issue. Also, there exists the question of whether agents are capable of the impartiality required in a dual agency or transaction brokerage relationship when the agent is remunerated only upon the successful sale of the property. Arguably, impartiality cannot be achieved in such circumstances.

Rooted in these issues is the pervasive problem of principal-agent incentive misalignment which appears particularly difficult to solve. This may be due to the fact that agents are primarily remunerated by commission, and that, without successful sales, agents receive nothing for their efforts. Considering how entrenched commission-based remuneration is in the industry, this is unlikely to change in the short-term.

Given the wide range of problems and the difficulties involved in devising solutions, it is not surprising to see some commentators call for a complete prohibition of dual agency as

it applies to the practice of a single brokerage representing a vendor and purchaser in the same transaction.⁸⁵ However, dual agency may not be intrinsically harmful. The idea that an agent may act for parties with competing interests in a real estate transaction with their informed consent is reasonable in theory. It upholds the principle of party autonomy and protects the freedom that competent individuals should have to fashion a bargain as they please. Ideally, it could reduce transaction costs as well by precluding the need of bringing another agent (who would require remuneration) into a transaction when their presence may be needless in the circumstances.

In that regard, dual agency's problems are possibly best resolved issue-by-issue. Issues surrounding conflict of interest and increased agent liability must be addressed, but in order to achieve lasting success, a multi-pronged approach that also resolves issues surrounding informed consent, principal-agent incentive misalignment, and real estate agent training must be adopted as well.

85. See e.g. Pendergrass, *supra* note 48 at 299.