



# Professional REALTORS® Improving our Industry

NLAR Open House Consultations  
January 22 – February 9, 2018

## **Volume I**

# **WHAT WE HEARD**

A Clear Call for Modern Regulation





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## Background

In the Province of Newfoundland and Labrador, the real estate industry is regulated under the *Real Estate Trading Act* (the *Act*), which was initially written and passed in the 1960s with little substantive change since that time. In late 2017 Service NL, the government department that is tasked as the regulatory body under the *Act* launched a public consultation to review the legislation governing the industry.

The Newfoundland and Labrador Association of REALTORS® (NLAR) is an industry association representing 700 licensed real estate brokers and salespeople throughout the province. As an industry association we are a not-for-profit organization governed by a board of directors elected by the membership. Not every real estate licensee is a member of NLAR, though the approximately 95% have chosen to join us.

Modernization of the *Act* has been an advocacy priority for NLAR for quite some time. We feel that the standards that were set in the areas of education, advertising, professionalism and public protection in the 1960s have not kept pace with how the industry has evolved and how the real estate market now operates.

## What has Changed since the 1960s?

Society has come a long way since the *Act* was first passed by the NL Legislature. Public expectations have evolved. Legal standards have changed. Technological change has revolutionized how the marketplace operates. In the 1960s real estate salespeople were the gate keepers of information on properties for sale. They were the first place to which consumers went to learn about what to buy and where. Today's consumer is searching online and looking at homes for weeks or months before they call an agent. According to Canadian Real Estate Association (CREA), 90% of home purchases begin with an online search. There are a variety of services that consumers now use that didn't exist fifty years ago; mortgage brokers, property inspectors, home stagers, title insurance, etc.

So the industry has changed by leaps and bounds. Consumer expectations have increased dramatically. There is growing concern about personal security and privacy protection.

According to research undertaken by CREA in 2016, consumers feel that the home buying experience has gotten more complex. NLAR members feel that it is time that the governing legislation be brought into the new millennium.



## Consultation

In response to the Service NL public engagement, NLAR held a series of consultation meetings with members and the general public in locations throughout the province. A total of sixteen meetings were held in eight locations. In all over 130 people participated in our review consultations.

Between January 22 and February 8, public and member-only meetings were held in St. John's, Bay Roberts, Clarenville, Gander, Grand Falls-Windsor, Corner Brook, Happy Valley-Goose Bay and Labrador City. NLAR's meetings included an overview of the current legislation, an outline of the legislative review landscape across the country and in-depth discussion of many issues related to real estate regulation. Topics presented and discussed included those that Service NL had identified in its online questionnaire and additional issues that NLAR has been raising in its advocacy efforts.



This report represents a summary of what we heard in our travels across the province in response to government's review. At all meetings we heard from licensees and consumers about the clear need to modernize how real estate agents are licensed, trained, and do business. We heard a call for better consumer protection and stronger enforcement tools. We clearly heard that there should be one set of rules that apply to every real estate licensee in the province; a code of conduct, continuous education, and clarity for the consumer.

We also heard that our industry is one that is built on integrity and public trust. If the regulatory system does not have the confidence of the public, our entire industry suffers. It is imperative that as we move forward to improve our regulatory regime that we strengthen public confidence and continue to build professionalism.

The first six topics presented below mirror the topics raised by Service NL in its online questionnaire. These sections are introduced with a quote from the Service NL questionnaire and some of the questions they are asking on that topic. The remaining sections are topics that NLAR introduced at our meetings seeking feedback from members and the public.

We would like to thank all participants that came to our meetings. The discussion we held and the input we gained from those meetings will inform our position put forth in our recommendations.

Below we discuss the issues that were raised by Service NL in their questionnaire and summarize what we heard on each of the issues.

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*“Good on Government for taking on this review. Real estate and owning a home is an important part of everyone's lives. It's good to know they got our back.”*

*Public meeting participant*

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## Issue 1: Disputes over Trust Deposits

On a regular basis, the Superintendent's Office receives enquiries about the release of a deposit where the purchase of a property has fallen through. As an example, a person offers to buy a house and pays a deposit but the offer has a condition: the person has to arrange for a mortgage. If they are unable to get the mortgage and the sale falls through, the deposit is left and may be subject to dispute.

The Act states the agent may pay out that deposit from trust upon: (i) written notice from the vendor and purchaser allowing the return of the deposit to the purchaser; or (ii) a court giving direction as to whom should receive the deposit. In some cases, deposits have been left in agents' trust accounts and never returned to a consumer. Also, agents are sometimes named in civil actions when the cause of the dispute and resolution of the dispute is beyond their control.

**Do you think the Act needs more clarity with respect to trust deposits?**

*Service NL Consultation Questionnaire*

It is common practice for a purchaser to place a deposit on a property when making an offer to purchase. Often the offer includes several conditions which the purchaser must satisfy before the offer becomes firm and binding on both parties. It is commonly understood that if the conditions cannot be met, the deposit is returned to the purchaser. Similarly, it is commonly understood that once conditions are met, if the purchaser fails to complete the transaction, the deposit is forfeited to the seller.

Under the current Act, this is not an automatic process, as it requires that both the seller and purchaser agree to the release of the deposit. In its questionnaire, government notes that this situation often results in disputes about when (or if) the deposit is released from the broker's trust account.

During our meetings we were told by countless licensees of situations where disputes over deposits were never settled, meaning that money has stayed in broker's trust accounts for many years. This leads to dissatisfied clients, added cost for brokers (each such stalled transaction is required to be audited and reported on each year), and tens (likely hundreds) of thousands of dollars held in limbo.

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*"I have deposit funds sitting in my trust account that I know have been there 10, 15 years or more."*

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*Broker Participant*

Several key themes emerged in the dialogue over this issue;

- Whether or not there should be points along the transaction that the **return or forfeiture of the deposit are automatic**;
- Adoption of **an arbitration process or dispute resolution mechanism** within the Superintendent's Office (or another neutral third party) to deal with disputes;
- Changing the Act so that in the case of prolonged disputes, the **deposit funds are transferred** to a government-run trust account for dissolution;

There was overwhelming agreement that the status quo should not continue. Most felt that the deposit should automatically be returned to the buyer if standard conditions of the offer could not be met in good faith (e.g., financing, permits, home inspection, etc.). Once all conditions have been waived or removed, and an offer to purchase becomes a firm sale, there was general agreement that the deposit should be forfeited to the seller, if a buyer fails to proceed.

In instances when a dispute does arise, there needs to a dispute resolution mechanism for the two sides to come to a mutually agreeable path forward.

It was also the opinion of many that disputed funds should not remain in brokers' trust accounts in perpetuity as is the current practice.

At several of our meetings, this discussion led into a broad discussion around issues with **home and property inspection**, as disputes over inspections are commonly the reason purchasers walk away from a transaction. Concerns raised include the lack of consistency among inspectors, the lack of regulation on standards, training, or scope of inspections. Concerns over ethical issues, conflict of interest, and lack of consumer protection were also cited.

## Other Issues with Trust Accounts

In addition to the lack of a mechanism to deal with disputes, we also heard several other concerns about trust deposits and trust account protection.

- **Cheques are on the way out.** Fewer and fewer consumers use cheques as a payment method in today's era of electronic banking. Many real estate licensees shared stories of clients looking for the option of providing a deposit by electronic means. Some brokerages and some financial institutions allow electronic receipt of funds by email, but many do not. It was generally felt that the Act should provide guidance on when this practice is allowable, and that the demand for electronic funds transfers is only going to increase over time.
- **Deposits are generally small.** Deposits on residential sales are typically small amounts (\$500 or \$1000). With the average sale price in the province currently approximately \$247,000, this amounts to a deposit of 0.2 to 0.4% of the sale price. This discussion often led to the following:
  - Questions of whether the deposit should be required to be larger,
  - Questions of whether we need deposits at all,
  - Should there be a standardized approach to deposit amounts (set amount or % of sale price).
- **Trust Accounts need protection.** There was a great deal of discussion at several meetings about the need for a mechanism to protect consumers against trust account mismanagement or fraudulent activity. The recent receivership of 50549 NL Inc (the former Exit Realty on the Rock) was raised on numerous occasions as an example of the need for trust accounts to be monitored more closely and to be "back-stopped" by some mechanism that would protect consumers and licensees in the case of trust funds inappropriately being removed from an account.
- **Timeframe for receipt of deposit funds.** The current Act requires that deposit funds be deposited in the listing broker's trust account within two business days of receipt, however it makes no reference to the timeframe within which the funds must be received by the broker after the offer is accepted. Electronic documents often mean that negotiations occur by distance (not face to face with a client), so getting the deposit funds in hand is often not convenient. We heard of cases where days, weeks or months went by and the deposit was not received – in some

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*"I can pay my bills online. I can renew my car online. I pay my babysitter by email. Why can't I give my agent a deposit electronically when I can sign an offer on my iPad?"*

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*Public meeting participant*

cases right up to the day of closing. Many felt that there should be a mandated period to receive the deposit (after acceptance of an offer), otherwise the contract is vacated.

Generally, it was felt that the terms and conditions of the Purchase and Sale Agreement should determine the amount, timing of receipt and the fate of the deposit should the sale not complete.

## Issue 2: Conflict of Interest

Conflicts of interest in real estate transactions can be difficult for consumers and the real estate industry as a whole. "Dual agency" (salespersons representing both the seller and the buyer of a property) and "exclusive listings" (the salesperson/agency has sole right to sell the property and no other agency will bring potential buyers to the home) may create a conflict of interest. The seller expects the salesperson to obtain the highest price possible whereas the buyer expects the salesperson to get the lowest price possible. This may be further complicated where there are issues regarding financing, inspections or other conditions and the salesperson is representing both parties.

Other potential conflicts of interest include salespersons also acting as mortgage brokers, and salespersons with an interest in either selling or purchasing the property and at the same time representing a consumer on the opposite side of the transaction.

**Do you think consumers are being harmed by these practices?**

**If Yes, In what way?**

*Service NL Consultation Questionnaire*

This topic generated a great deal of discussion at every meeting we held. Key themes which we heard on this topic include:

### **Consumers are generally not being harmed by Dual Agency or Exclusive Listings.**

At each meeting, participants were asked to provide examples of consumers being harmed by dual agency or double-ending a deal, and none were brought forward. Many in attendance agreed that there was **potential for harm** and the current Act provides little protection or need for disclosure. As an association, we have seen complaints from consumers over situations that included the same agent representing both sides of a deal, but it is a rare occurrence. Our MLS® System reports over 4000 transactions each year with over 8000 consumers (each transaction has a buyer and a seller). We average two or three complaints per year over this type of behaviour, so it is clearly not a widespread problem. Many at our meetings felt that with stronger disclosure requirements and better enforcement tools in the Act, the public would be adequately protected.

On the issue of Exclusive Listings, again, no examples of consumer harm were presented. As an association, NLAR encourages competition and adheres to the Canadian Real Estate Association's Pledge of Competition. We would see banning or restricting the use of Exclusive Listings as a requirement by government for licensees to participate in a co-operative selling system such

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*"Sometimes, the vendor wants the exclusive listing. Is it right to take that option away from them?"*

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*Salesperson Participant*



as our MLS® System. There are many instances when an Exclusive Listing is a more appropriate approach, and in the client's best interests.

### **Need to define Dual Agency as being the individual, not brokerage**

In most jurisdictions in Canada "Dual Agency" is defined as a single individual representing both sides of a transaction, as Service NL defined it in their survey question above. However, in our current Act "agency" rests with the brokerage, so as it is defined, it means two licensees in the same company would be in a Dual Agency situation, if each represented one side of the transaction. This definition needs to be clarified so that it mirrors the rest of the country and refers to one individual, not everyone in the brokerage.

It was noted by many that "Dual Agency" and "double-ending" are not defined the same way. Dual Agency involves representation of both clients (with specific fiduciary responsibilities to both). In a double-ending situation, a licensee would represent one side (usually the seller) and provide service to the other, without invoking any fiduciary relationship. Under NLAR's disclosure requirements, this would be treating one party (the seller) as a client and one party (the buyer) as a customer.

### **Dual Agency is more common in Rural/Remote areas**

Many of our meetings were in locations that covered rural and remote regions of the province. We heard many licensees tell us that there is only one or two people covering large rural and remote areas,

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*"If I have to get in my car and drive an hour to show someone a \$15,000 building lot, I need to make the full commission to cover my costs."*

*Salesperson Participant*

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where Dual Agency is a common practice for several reasons. The practicality of a client finding another agent with market knowledge to properly advise them was cited often. We heard that in many rural markets, property values are still relatively low, so the licensee needs to make both ends of the commission to make it worthwhile.

### **Banning Dual Agency means a loss of Consumer Choice**

This theme was quite commonly heard in rural areas of the province, as again, many regions are serviced by only a small number of agents. If the listing agent is banned from selling their own listings, consumers' choice of service providers is reduced or eliminated altogether.

### **Strengthened disclosure requirements and real enforcement tools will better protect consumers.**

We often heard the need for more discussion and research on various models of client representation. Various provinces allow differing models of buyer representation, designated representation, and others. We heard from many that they would like to see more in-depth research on best practices and models in other jurisdictions. The virtual ban on Dual Agency that is forthcoming in British Columbia was generally not seen as being needed, or appropriate, in Newfoundland and Labrador given the nature of our population distribution around the province, and the lack of evidence of consumers genuinely being harmed by the practice. A reach out to other provinces, such as New Brunswick, Nova Scotia and Ontario was suggested by many, to see what protections they currently have in terms of licensee disclosure requirements and tools to enforce them.

## **Licenses with Other Professional Activities in a Conflict**

The Service NL questionnaire made reference to holding a real estate license and mortgage broker's licence concurrently, but in many of our meetings this discussion quickly expanded to include other professions related to the real estate industry, including; property inspectors, appraisers and possibly others such as home stagers, professional photographers, etc.

There were generally two viewpoints on this type of conflict: One commonly-held view was those conflicts could be largely avoided by prohibiting licensees from doing other related work in the industry. In other words, a real estate licensee would be prohibited from being a mortgage broker, home inspector, appraiser, etc.

The second viewpoint was that co-licensing should be allowed, but with certain consumer-protection restrictions in place. So a real estate agent, who was also a mortgage broker for example, would be not be able to both sell a property and provide the financing for it.

## **Property Inspection Industry Needs Regulation**

While not specifically a topic of the Service NL questionnaire, the lack of regulation of home and property inspectors was raised as a red flag in virtually every meeting we held. We heard of inspections by unqualified individuals or untrained relatives being conducted for clients. We heard of frustrated sales because of sub-standard inspections.

There was widespread acknowledgement that there are many highly qualified professional individuals in the industry, especially in larger centres where competition exists. But we also heard from many about the lack of training, lack of insurance, and lack of a standard approach to property inspection.

## **Issue 3. Code of Ethics**

The Act does not contain a Code of Ethics; most jurisdictions have one, which licensees are required to follow in order to maintain their licence. Some of the items covered in a Code of Ethics include: duty to the client, service agreements, advertising, and discrimination.

**A Code of Ethics should be adopted as the measure of suitability for a person to remain in the real estate industry.**

Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree

*Service NL Consultation Questionnaire*

There was virtually unanimous agreement in all sixteen of our meetings that all licensees should be held to the same standard of conduct. Most licensees in the province are members of NLAR and the Canadian Real Estate Association and as such are held to the REALTOR® Code of Ethics and Standards of Business Practice. This was generally the first place in many of our meetings that concept of making every licensee be required to be a member of NLAR arose. This was a concept that came up repeatedly at several of our meetings and is addressed further below in this report.

While there is widespread support for the notion of a common Code of Ethics for all, there was also some concern about creating a professional discipline process within the regulator to deal with complaints and to enforce professional behaviour. Many felt that professionalism is the purview of those in the industry and cannot be enforced by anyone other than their peers. At several meetings the notion (and cost to the taxpayer) of government having to create a code of conduct and a discipline process for the 5% of licensees who are not REALTORS® was raised. Several times it was suggested the “easiest” thing to do would be to require every licensee to become a member of NLAR and be subject to the REALTOR® Code. There was widespread agreement that there needs to be clearer rules on professionalism, integrity and conduct within the industry for all licensees, not just those who’ve chosen to join NLAR.

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*“Most people don’t distinguish between what the REALTOR®s have in place as what the government does not have in place... they think NLAR’s code applies to all licensed salespeople.”*

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*Salesperson Participant*

## **Issue 4: Educational Requirements and Licensing**

Individuals entering into the real estate industry are currently required to complete a pre-licensing course and write an exam achieving at least 70 per cent. Once signed on with an agency and licensed they are able to practice in all areas of real estate with no restrictions and no further requirements.

**Does the pre-licensing course and/or the exam require changes?**

**Should there be restrictions placed on new licensees?**

**Should a new licensee be required to be under the supervision of an experienced salesperson for a period of time so as to receive mentoring on how best to conduct their real estate activities while gaining experience in the industry?**

**Should there be different types of licences such as residential or commercial?**

**Should all licensees be required to complete ongoing continuing education?**

**What factors should be considered to maintain a licence in the real estate profession?**

*Service NL Consultation Questionnaire*

This topic led to considerable discussion at most meetings. Education, training and licencing are seen as complex topics with many elements woven through:

### **Does the pre-licensing course and/or the exam require changes?**

Please note that our comments and discussion below refer to the salesperson pre-license training, not the broker program. Several Key Themes arose repeatedly particularly in the member meetings on the issue of pre-license education:

Many members expressed the view that the current course **does not adequately prepare** new entrants to the industry for what they are expected to know and be responsible for. It was felt by many

that it is too easy to get into the industry and that the training materials should do a better job at weeding out those who are just “kicking the tires”. Many participants felt that the training materials need to be more in-depth and do a better job of creating awareness of what the day-to-day demands of the job really are. The pre-license material should cover more in terms of ethical behaviour, contract writing, risk management and other topics generally covered by post-license training.

There is too **much reliance on self-study** by new agents. Many felt that the program needed to be expanded to include some form of formal education – either in-class or online instructor-led sessions.

The mode of delivery (paper-based binders mailed to registrants) was seen by many to **be out-dated and in need of modernization**. Material should be available online or at least electronically by downloadable pdfs.

The exams are paper-based and require the registrant to travel to one of four campuses of the College of the North Atlantic to be written, on a schedule determined by CNA. We heard of individuals who had to wait weeks, or months and travel hundreds of kilometres (e.g. from Labrador City to Goose Bay) to write the exam. There was some opinion that the exams could be delivered electronically – like the system used in Saskatchewan’s pre-license program.

There was concern that the exam being all multiple choice questions does not include any real practical demonstration of the application of skills and knowledge required to adequately function in the industry. It was widely acknowledged that brokers have a role to play in training and supporting new licensees, but brokers vary greatly in how much support they provide. Some are quite supportive and foster strong agents, others were seen to “Throw them to the wolves”.

### **Should there be restrictions placed on new licensees?**

Most agreed that new licensees should have some restrictions on their activities until they have had some level of mentoring or training by the industry, and that the province should consider some sort of graduated licence. Using the analogy of our current graduated driver’s licence program it was suggested by many that a new licensee have a “restricted” licence for a period of time, valid for residential sales only under the supervision of a broker/manager/experienced salesperson. After meeting a threshold of some kind, a full licence would be granted. Specialty endorsements, such as condominiums, commercial, industrial, etc., could be earned based on additional courses or experience over time.

### **Should a new licensee be required to be under the supervision of an experienced salesperson?**

Overwhelmingly this question was answered with a “yes”. It was felt by many that question shouldn’t be “Should they?” but “For how long should?” There was general agreement that some sort of mentoring or apprenticeship phase would result in better trained, more professional licensees, better prepared to represent their clients.

There were concerns expressed though in how this type of idea could roll out.

- Harder to do in rural areas where the number of potential mentors is lower.
- There is a cost in terms of time and foregone sales by the mentor which needs to be considered in design of any mentorship program.
- Setting standards as to who can be a mentor and what qualifications they have or training they get needs a lot of thought.

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*“The NLAR orientation courses should be in the trading act, beef up the content of the education material.”*

*Broker Participant*

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- Don't need to build a "whole lot of bureaucracy" to administer what should be an industry-led initiative in compliance and monitoring.

Many felt that the mentoring phase should include successful practical demonstrations of the skills needed to do common tasks – how to list a property, how to measure a house, how to complete an offer, how to negotiate a sale, etc.,

There are many existing models and best practices in the real estate industry across Canada and in other industries within the province that we could look at, such as the Nova Scotia Association of REALTORS®.

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*“Mentoring is a very important part of the education and licensing. Getting under the wing of a good broker can make the world of difference to a new licensee.”*

*Salesperson Participant*

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It was pointed out that in some professions that require mentoring (social work or the legal profession), mentors can receive professional development credits toward their annual requirements in recognition of their time and effort.

### **Should there be different types of licences such as residential or commercial?**

We heard broad support for some sort of differential licencing, especially in the condo and commercial market segments as they require specialized knowledge.

A concern in some regions was that there is not enough business in those niche segments to justify a special licence; one licence should be sufficient.

It was suggested that a third type of licence be created for managers or team leaders – something that is “in between” a broker licence and a salesperson licence. This is discussed further below in the section on Salespeople.

We heard a number of licensees suggest that government should create a process whereby a salesperson could “transfer” a licence from one broker to another, instead of the current practice of termination of the old licence and issuing a new licence. The current practice often leaves salespeople in limbo for days or weeks and prohibits them from having any real estate activity during the transition.

### **Should all licensees be required to complete ongoing continuing education?**

We heard widespread support for continuing professional development being required for all licensees in the province as a condition of keeping their licence active. There was concern that if the regulator was going to make this a requirement, it has to be available to all licensees through the province.

CPD courses should be focussed on meaningful quality-oriented topics aimed at improving the knowledge base and professionalism of licensees, but not overly onerous on licensees.

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*“Every other profession out there requires continuous PD. With everything that is going on and the changes that happen so quickly, we need professional development to keep up and to provide better service.”*

*Salesperson Participant*

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There was a general concern that a government required CDP program could duplicate the newly launched NLAR REALTOR® Professional Development Program. Care should be taken to see that the programs align, to reduce duplication for NLAR members.

There was widespread support for the notion that NLAR should be the delivery agent for CPD, as opposed to another public agency (CNA or Service

NL). We heard that courses should be affordable – it should not be a money grab for either the regulator or the program delivery agent.

Many felt that a combination of online and in-class delivery offers the best results but recognize that in-class is difficult to achieve in rural areas with few licensees. “Train-the-trainer” models could work in rural areas to allow the in-class portion.

As discussed above, it was also felt that if a mentoring phase was introduced for new licensees, those who volunteer as mentors could possibly receive CPD credit for a portion of that time.

## Issue 5. Bonding and Insurance

Currently, agents and salespersons must be bonded. The amounts of the bonds are \$15,000 and \$5,000 respectively. The bond is intended to protect consumers from financial loss in cases where the agent or salesperson is convicted of an offence, a civil judgment arising out of a trade in real estate made against the agent or salesperson, or the agent or salesperson goes bankrupt. The regulatory experience in this area is that these bonds have been called upon very infrequently and in a couple of instances were insufficient to cover the financial losses.

Real estate agents or salespersons are not currently required to purchase an insurance policy that will respond to a claim from a consumer who incurred a financial loss due to (i) a negligent act or an error being made by the industry participant or the industry participant omitting to do something or (ii) a fraudulent act pertaining to the licensed activity.

In addition, an agency is not required under the Act to carry insurance coverage against losses arising from dishonesty of employees, a proprietor, partners, directors, officers or shareholders.

*Service NL Consultation Questionnaire*

Licensees don't really understand bonding and how it works. It is not clear to licensees or the public how a \$5000/\$15,000 bond protects them adequately. The mechanics of how and why a bond would be called are not clear to anyone.

We heard widespread support for all licensees being required to carry Errors and Omissions insurance and for there to be some form of protection for licensees and consumers against fraudulent activity or other negligence.

Clearly the existing bond amounts are insufficient, however there was significant resistance among licensees to increasing the amounts, as it would likely result in higher bonding fees.

There was support at several meetings for some sort of self-funded or self-insured system, whereby the fees currently paid out for bonds (estimated to be \$150,000 year) could be paid into an industry-managed recovery fund. Over time this fund could grow to become a self-sustaining recovery fund, with the objective of reducing costs and improving protection for consumers and licensees.

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*“Is bonding really appropriate today? Where does bonding stop and E&O Start? Shouldn't everyone have E&O to protect themselves and the public?”*

*Salesperson Participant*

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## Issue 6. Salespeople

The current legislation refers to an employer – employee relationship. This relationship includes the agent, as employer, being responsible for the actions of their employees, the salespersons. The industry has evolved to incorporate salespeople that view themselves as independent contractors and salespeople that have formed teams consisting of one or more salespeople using licensed and unlicensed assistants.

**What changes, if any, are needed to the current legislation to allow for and provide more clarity to the various roles that have evolved in the industry?**

*Service NL Consultation Questionnaire*

The reference to an employer-employee relationship needs to be removed from the wording of the Act. Salespeople are clearly self-employed independent contractors. The Canada Revenue Agency views them as such, as does the Employment Insurance System, the Canada Pension Program and, Workplace NL. Many felt that salespeople should be able to form personal corporations (as they can in six other provinces in Canada). We heard many members express frustration that they are self-employed but cannot take advantage of any of the protections afforded by self incorporation which many other

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*“There should be more clarity for the public on teams. It’s currently confusing – they look like their own real estate company.”*

*Public participant*

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professionals can. They get none of the benefits of an employer-employee relationship (EI, CPP, Worker’s Comp, vacation pay), yet cannot take advantage of the protections and benefits that incorporation can provide.

We also heard confusion about the rules relating to licencing and branding of teams. Consumers and members alike expressed concern and frustration that teams can appear to be independent companies, not licenced sales people within a brokerage. We heard calls for a different licencing arrangement for team leaders, recognizing the supervisory and

management roles that they play. One team leader called for an “associate broker” licence or status that would come with some (but not all) of the rights and responsibilities of a broker’s licence.

## Issue 7. Public Protection

The current Act contains little in the way of public protection. The bonding requirement is the only financial protection for consumers and licensees. There is no mechanism to protect the integrity of broker’s trust accounts in case of fraudulent or other criminal activity. There is nothing in the Act that specifies how or why an applicant could be refused a license or under what terms a license can be restricted or revoked.

We heard clearly in several meetings that public trust and confidence underlie our industry. Protection of that public trust is paramount in all our dealings and in the rules and regulations that govern real estate in the province.

We heard from members and consumers that fines need to be increased, and the regulator needs other tools to deal with infractions. Trust accounts need better protection – perhaps by the regulator or through an industry-run recovery fund.

It is inconceivable that licensees are not subjected to criminal background checks, or that individuals with a criminal record are permitted to hold a real estate licence. There was widespread support for mandatory background checks, certificates of conduct, etc., provided the necessary checks and balances are in place to allow the Superintendent of Real Estate some discretion in granting licenses.

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*“I don’t want someone with a criminal record in my house!! How can that happen in this day and age?”*

*Public Participant*

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In several meetings the receivership of 50549 NL Inc, the Myles-Leger and Nolan Hall cases, and the recent shuttering of Skymark Homes were raised as examples of why public protection needs to be improved. It is clear amongst NLAR members that the regulator and the industry together need to do a better job of protecting consumers and licensees.

## **Issue 8. Modernization and Clarity in the Information Age**

**Digital Revolution.** The evolution of the online marketplace and development of alternative business models has led to a proliferation of real estate services, websites, data capture sites, lead generation tools, social media portals and other online points of presence. The industry has evolved to the point where paperless agents and paperless offices are common. Advertising has moved from largely a print environment in the 1960s to the digital age with its virtual tours, Facebook Live open houses, Instagram photo sharing and FSBOs on YouTube.

The communications and marketing tools in our industry have become incredibly complex, powerful and driven by technology. At the same time, the evolution of a “Do-it-Yourself” culture enabled by Google and YouTube means consumers are less likely now than ever before to seek out professional guidance and advice from a licensee.

The downside of all this technological advancement is a lack of clarity for consumers. We heard from

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*“There are too many ads online promoting real estate services from companies that are not licenced to trade. I’m in the business and if I can’t figure out who is who, how can we expect the average consumer to be able to?”*

*Broker Participant*

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consumers about confusion they have when looking at listings on line. Unlicensed marketing firms are confused with licenced full-service real estate brokerages. Data scraping aggregator sites are stealing proprietary data from our MLS® System and related brokerage sites and using it to drive traffic to their unlicensed portals.

We heard complaints about automated tools posting agent listing data on Facebook and other sites, but not meeting the advertising requirements of the Act. And we certainly heard frustration from licensees about what the rules of

the game are, in trying to fit their social media marketing activities into print advertising rules written in the 1960s.



**Trading.** We heard from members about the need to have a clearer definition of “trading in real estate” and clearer rules for determining when unlicensed firms have “crossed the line” into licensed activities.

**Future Facing.** We also heard that we need a regulatory regime that not only deals with the challenges of today’s digital world but is also positioned to deal with what will be coming over the next decade or two, until the Act is again updated.

**An Inclusive Regime.** The Act currently has no provision for a licensee to “park” a license for a period of time. If a licensee terminates their licence for a period beyond two years, they are treated as a new licensee and must start from the beginning again, registering for the pre-license program (currently \$1500) and writing the entrance exam again. Several people pointed out the implications this has for young women who may elect to place their careers on hold to start a family, or for licensees who become seriously ill or injured, or need to care for an elderly family member. As self-employed individuals, they are not entitled to receive maternity leave benefits, sick leave or family leave, but they shouldn’t be faced with having to restart their careers from the very beginning again.

The pre-license training program is delivered as a text-based self-study program with multiple choice exams written at four locations of the College of the North Atlantic. NLAR and Service NL currently offer little in the way of accommodations for students who require them as a result of learning disabilities or other challenging needs, or those who do not want to travel great distances to write an exam (Labrador City to Goose Bay, for example).

## **Common Themes Arising**

As we discussed each of the topics and questions above in our meetings, there were certain common threads or themes that ran through many of our meetings.

**Government should “Make” Everyone join NLAR.** This was suggested at member meetings and public meetings alike. It was suggested that since NLAR members are bound by a Code of Ethics, require continuous PD and carry Errors & Omissions insurance, government could meet the public policy objective of having all licensees meet the same standard by requiring membership in NLAR. This would avoid the regulator having to create a Code and a discipline process, and an education program and additional insurance requirements for the 5% of licensees who are currently not members of NLAR.

This would be similar to the co-regulated system in place in New Brunswick, where the government still controls licensing, but forces all licensees to join NB Real Estate Association who is a co-regulator who controls Discipline, Education and public protection.

This would be a significant change for the industry and the association and would require careful thought and deliberation before any such direction could be considered.

**It should be more onerous to get into (and stay in) the business.** As we seek to improve professionalism and public protection, we clearly heard that the “height bar” is too low. New entrants to the industry need more rigorous education. New licensees need mentoring and restrictions on their activities. Every licensee should have to participate in professional development and adhere to a standard of conduct or code of ethics. Criminal background checks should be conducted on any one

looking to be in a position of public trust. The ability to be bonded should no longer be the lowest common denominator.

### **Property Inspectors need Regulation**

While home and property inspectors are not the focus of the current consultation, it was clearly heard in all meetings that there are issues with property inspections all across the province. It is not commonly understood by consumers that the sector is unregulated. Consumers have no way of knowing if an inspector is qualified or experienced. There is no standard “home inspection”. Each inspector has their own protocol. There is no required training to be an inspector.

To be fair there are some highly qualified, highly reputable inspectors. There are many who are members of one of the property inspection associations who adhere to a code of ethics, professional standards, and meet strict industry registration guidelines. But there are those that do not, and we heard stories from several regions of the province of unqualified or unethical inspectors not adequately serving or protecting their clients.

NLAR is currently leading an initiative with other Atlantic provinces real estate associations and several of the home and property inspection associations to develop a position paper on regulation of this sector to present to government.

**Public Protection and Self Insurance.** Across several discussions the idea of the industry self-insuring to provide better public protection emerged as a theme. Trust account integrity, insurance against fraudulent activity, liability insurance and more, were discussed as areas where a “recovery fund” could provide better protection for licensees and the public than is currently provided for under the Act.

### **There is a lot of detail in any legislative change.**

Any significant modernization or changes to the current Act will be monumental in terms of the level of detail that needs to be thought through. Adding a Code of Ethics to the Act or Regulations, for example, precipitates a series of questions and decision points that need to be considered. What is covered by the Code? Who administers it? How does it relate to the REALTOR® Code for the 95% of licensees who are members of organized real estate? What is the discipline process? Who investigates complaints? What are the potential sanctions? How are they enforced?

The same kinds of detailed discussion would need to be held in relation to any other significant changes to the legislation.

### **Location, Location, Location**

We were reminded in many discussions that the dynamic of the industry in rural and remote parts of the province is very different from the Northeast Avalon in many ways; number of brokerages, number of licensees, volume of transactions, reliance on distance technology, cost of business, in some cases average property values, and more.

We heard repeatedly that measures proposed to be taken in the new legislation need to work for the entire province, not just the St. John's area (where the bulk of the licensees operate). A government-mandated CPD program has to be equally available in Labrador West as it is in Stephenville or St. John's. Restrictions on dual agency or double-ending will have greater repercussions in rural and remote areas than they will in larger town and cities.

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*“Government has to remember that the province doesn't stop at the overpass. Just because it works in the City, doesn't mean it will work out here.”*

*Salesperson Participant*

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## **Conclusion**

Throughout our consultations we heard a consistent call for clearer, modern regulation that reflects how the industry operates in the digital age. NLAR members and consumers want a real estate industry in which they can have confidence and that they know offers them reasonable protection.

Education is seen as a cornerstone on which the industry is built. Better pre-licensing training and mandatory professional development will mean more professional, more competent licensees. One Code of Ethics should cover all licensees in the province.

We need to clean-up and fine tune some of the language in the existing Act; define dual agency as it should be (one individual not all licensees in a brokerage); refer to brokers (not agents) and salespeople, etc.

We encourage government to move forward with these much-needed updates to the Real Estate Trading Act and we look forward to providing them with specific recommendations as we work together on these issues.







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