



**Ontario Real Estate
Association**

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99 Duncan Mill Road
Don Mills, Ontario M3B 1Z2
Telephone: 416-445-9910
Fax: 416-445-2644
Toll Free: 1-800-265-OREA (6732)
www.orea.com

Mr. Michael Mitchell; and,
Honourable John C. Murray
Special Advisors for Changing Workplaces Consultations
Changing Workplaces Review, ELCPB
400 University Avenue, 12th Floor
Toronto, Ontario M7A 1T7

RE: Ministry of Labour Review of the *Employment Standards Act, 2000*

Based on a review of relevant Ontario statutes and regulations, the Ontario Real Estate Association (“**OREA**”) respectfully submits that Section 2 of Ontario Regulation 285/1 should be retained to continue the exclusion of salespersons and brokers, as those terms are defined in the *Real Estate and Business Brokers Act, 2002* (Ontario) (“**REBBA**”), from Parts VII to XI of the *Employment Standards Act, 2000* (Ontario) (the “**ESA**”). Retaining this exemption is necessary to continue the treatment the Act duly affords these professionals with their governing regulatory treatment under REBBA. To remove this exemption would cause significant disruption and uncertainty to the real estate industry in Ontario.

About OREA

Representing the 62,000 real estate brokers and salespeople who are members of Ontario’s 40 real estate boards, OREA serves its members through a wide variety of publications, educational programs and special services. The association provides all real estate licensing courses in Ontario.

Founded in 1922 to organize real estate activities across the province, OREA’s goals include promoting higher industry standards, protecting the general public from unscrupulous brokers and salespeople, and advocating on behalf of the real estate industry at Queen’s Park.

OREA continually strives to improve the image of REALTORS® by enhancing educational and professional standards. OREA develops and publishes standard forms, and supports educational and charitable causes through the Ontario REALTORS Care® Foundation.



Legislative Background

Parts VII through XI of the ESA impose obligations on employers, with respect to their employees, to keep certain records, observe certain hours of work, provide rest periods and eating periods, afford prescribed overtime pay and minimum wages, observe public holidays and provide vacations and vacation pay.

Section 2 of Ontario Regulation 285/1 (the “**Regulation**”) sets out exemptions to Parts VII to XI of the ESA. Section 2(1) of the Regulation states that Parts VII, VIII, IX, X and XI of the Act do not apply to a long list of registered and qualified practitioners who are subject to professional or regulatory oversight, including lawyers, professional engineers, chiropractors, optometrists and surveyors. Section 2(1)(g) of the Regulation ensures persons employed as salespersons or brokers, as those terms are defined in REBBA (“**Salespersons**” hereinafter the term Salespersons includes “**Brokers**”), are included in this list of exempt professionals.

OREA’s Submission

OREA respectfully submits that Salespersons should continue to be part of the list of professionals who are excluded from Parts VII to XI of the Act, as they are also highly regulated professionals. REBBA imposes strict controls on Salespersons and the brokerages they work for, including detailed requirements as to their professional practice activities, administration, registration, discipline and professional education. These controls satisfy the public interest in receiving reliable, quality services from Salespersons and brokerages.

The removal of Section 2(1) of the Regulation would cause significant harm to the industry. If real estate Salespersons were treated as employees under the ESA, real estate brokerages would face a significant increase in costs. This would be especially detrimental to small brokerages. Brokerages would be forced to maintain certain hours of work, provide rest periods and eating periods, afford prescribed overtime pay and minimum wages, observe public holidays and provide vacations and vacation pay. These higher costs would force many brokerages out of business, provide consumers with fewer choices and put many hardworking Ontarians out of work.

REBBA and Employees vs. Independent Contractors

According to the Ministry of Government and Consumer Services, REBBA, as amended in 2002, achieves three important objectives with respect to brokers, salespersons and brokerages:

- fairness for consumers;
- the desire to be responsive to the needs of both businesses and consumers; and,
- the desire to create a more flexible regulatory framework that can adapt to future needs in the marketplace.

It makes sense that Salespersons and the brokerages they work for be afforded the flexibility the exemption from Parts VII, VIII, IX, X and XI of the ESA provides. The exemption provided in section 2(1)(g) of the Regulations acknowledges that the proper place for regulation of Salespersons is under REBBA, and that flexibility is required for Salespersons to carry out their business effectively provided they observe and are subject to the requirements and protections in REBBA.

REBBA requires persons that trade in real estate to be “employed” by a brokerage, as a broker or salesperson, subject to certain specified exemptions. Brokerages, through their Broker of Record, are required to ensure that the Salespersons they employ carry out their duties in compliance with REBBA. Due to the highly regulated nature of the Salesperson’s profession and the independent nature of their professional activity, the definition of “employ” under section 1(1) of REBBA specifically includes persons working for a brokerage as an independent contractor. As a result, REBBA’s requirements apply equally to Salespersons who work for brokerages as independent contractors, on the one hand, and to Salespersons who are employees of brokerages, on the other hand.

In contrast to REBBA, Parts VII to XI of the ESA apply to “employees” only. In light of REBBA’s consistent treatment of Salespersons who are employees and those who are independent contractors, it is important that the ESA continue to follow suit by ensuring both categories of Salespersons are excluded from Parts VII to XI of the ESA. Absent the exclusion provided in section 2(1)(g) of the Regulation, Salespersons who are employees of brokerages would be subject to Parts VII to XI of the ESA and Salespersons who are independent contractors would not. This would create a serious inconsistency in the treatment of these categories of Salespersons that would be inconsistent with REBBA and the predominant structure of Salespersons’ relationships with brokerages in Ontario.

Salesperson/Broker/Brokerage Relationship

A real estate brokerage’s relationship with a Salesperson is typically governed by an independent contractor service agreement (see attached OREA Form 601). This contract covers things like use of brokerage facilities, expenses and fees or commissions splits paid by the Salesperson. Most notably, Form 601 begins with the following statement which first establishes the independent contractor relationship:

Whereas:

A. The Brokerage is a duly registered real estate brokerage pursuant to the Real Estate and Business Brokers Act, 2002 (Ontario) (the “Act”) and the regulations made pursuant thereto (the “Regulations”) and owns, for the purpose thereof, all facilities and equipment required to conduct a real estate brokerage business.

B. The Salesperson is an independent contractor desiring access to such facilities and equipment for the purpose of conducting there from a real estate business.

Form 601 establishes, among other things, voluntary entry by a real estate Salesperson into an independent contractor relationship with their real estate brokerage. Contrary to other forms of contractor status the ministry’s consultation is reviewing, as this submission will show, the independent contractor status is the desired business model that is well positioned to meet the needs of both their clients and the real estate industry.

The Legal Test – Independent Contractor Status

While Form 601 is important in first establishing the independent contractor relationship between a brokerage and a Salesperson, it only begins to explain the legal rationale for why many real estate Salespersons are considered independent contractors.

What makes an independent contractor different from an employee at law is subject to a number of criteria that have been recognized by the courts. The overwhelming majority of real estate Salespeople **choose** to be independent contractors because it is an efficient way for providing good service to consumers.

The courts will consider the following tests to determine if a worker is an independent contractor and not an employee:

1. The control test, i.e. an independent contractor will more likely be told what to do, and an employee will more likely be told how to do it.
2. Ownership of tools, i.e. an independent contractor more likely owns, provides or pays for the tools necessary to carry out their work.
3. The entrepreneur test, i.e. the independent contractor is more likely to have a chance of profit and bear the risk of loss from the work he or she does or does not do.
4. The integration test, i.e. an employee’s services are more likely to be integral to the business.

Based on these tests and OREA's extensive knowledge of its members' profession, OREA submits that a very significant portion of Ontario's Salespersons work for brokerages as true independent contractors.

The Control Test

Real estate professionals enjoy a high degree of professional autonomy with regard to working conditions (such as hours and location), remuneration and how to run their business. For many Salespersons, this autonomy gives them the flexibility they need to provide good customer service.

Due to the requirements of the marketplace, which typically revolve around the schedules of property buyers and sellers, real estate Salespeople work evenings and weekends meeting with clients, showing properties and managing transactions. The location of their work will depend in large part on their clients.

With respect to remuneration, a brokerage does not pay a Salesperson a salary, rather the Salesperson's revenue is based entirely on sales and a prearranged agreement as to the sharing of commissions and fees between the Salesperson and the brokerage. Remuneration paid to a Salesperson is governed by REBBA. Clients can pay a flat fee, commission or a combination of the two. Although the independent contractor salesperson agreement (OREA form 601) will govern how much remuneration will be paid to the brokerage, it does not govern how or how much a Salesperson will collect from their client. For example, a Salesperson can decide to reduce their fee or commission during the course of a transaction in order to improve the chances of an offer to purchase being accepted.

Individual real estate Salespersons also enjoy a great deal of control over their business. Salespeople set their own market budgets, purchase their own equipment, determine their trading area, produce their own marketing materials, maintain their own business hours and chose their clients. Many Salespersons also remit their own taxes (HST).. As an independent contractor, a Salesperson will register with the Canada Revenue Agency for a GST/HST number after they reach a \$30,000 income threshold and are responsible for paying their own taxes. This classification also makes Salespersons ineligible for employment insurance when they do not receive commission. In short, real estate Salespeople exercise a great deal of autonomy over their business. This autonomy not only helps Salespeople to do more business it also provides a better customer service experience for clients.

The Tool Test

Real estate Salespeople use a number of tools to conduct their business. Most will either lease or purchase a car to attend appointments, show homes and visit with clients. Most Salespeople will also purchase a cell phone, home computer, home fax, and maintain a home office. In most cases, the brokerage does not reimburse these costs.

Most real estate professionals pay their membership fees to their own local real estate board, and provincial and federal associations. A local board membership grants Salespeople access to the local Multiple Listing Service® (MLS®). A real estate Salesperson may purchase multiple memberships in order to broaden their sales territory.

The Entrepreneur Test

Real estate is an entrepreneur driven business. Real estate professionals' earnings depend on individual sales. If a Salesperson does not sell, he or she will not get paid. The Salesperson is not reimbursed for any expenses and is free to accept or decline listings.

Furthermore, Salespeople must carry, and typically pay for, their own errors and omissions Insurance provided through the Real Estate Council of Ontario (RECO) to cover their professional activity and are responsible for claims and deductibles.

The real estate business is a highly individualistic, innovative, free-enterprise business which rewards success. The independent contractor status is chosen by Salespeople because it is a relationship which supports individuals who are self-reliant, confident, competitive, aggressive and enterprising. Most importantly, this ability to focus on productivity and success, reflected in a commission-based compensation system, has resulted in greater efficiency and enhanced consumer service.

The Integration Test

The integration test refers to whether a person is employed as part of the business and his or her work is done as an integral part of that business, compared to an independent contractor whose work is done incidentally but not integrally to the business. Some of the following factors may be determinative of an employee relationship: (i) occupying a permanent or full time position within the organization; (ii) working at times directed by the organization; (iii) using the organization's tools or equipment to perform the services; (iv) receiving a fixed amount of remuneration; and (v) assuming no financial risk in performing the services.

A Salesperson will often determine his or her own hours of work and vacation schedule. In most cases, there is no fixed schedule by the brokerage or requirement to work a certain number of hours. A real estate professional's work week and hours are dictated by his or her desire to work. As a result, a Salesperson will not receive a fixed amount of remuneration or overtime pay but rather is paid episodically for completed transactions on a commissions based model. In completing real estate transactions, a Salesperson often assumes the financial risk in performing the services as he or she financially invests in his or her own equipment and tools necessary for completing real estate transactions. Further, real estate professionals enjoy a high level of independence from their brokerage and their independent contractor arrangements can generally be terminated on short notice.

Conclusion

In light of the fact that Salespersons overwhelmingly practice their profession as independent contractors and satisfy the legal tests to be an independent contractor described above, OREA submits that Salespersons should be subject to a uniform set of rules that apply to independent contractors. As noted above, REBBA reflects this by ensuring that Salespersons who work as employees and those that work as independent contractors are given equal treatment.

If section 2(1)(g) of the Regulation was to be removed, significant differences in brokerages' obligations to workers in these two categories would result, causing serious uncertainties and change in the industry and a significant reduction of flexibility for Ontario's brokerages, Salespersons.

If the current exemption under the ESA for real estate Salespeople were removed it would cause significant harm to the industry, costing real estate brokerages significant costs where the ESA applies, forcing many Salespeople out of the real estate business. In doing so, the removal of the exemption would hurt consumers since brokerages and Salespeople would have less flexibility to meet client needs.

Therefore, OREA respectfully submits that Salespersons should continue to be part of the list of professionals who are excluded from Parts VII to XI of the ESA, as they are also highly regulated professionals. REBBA imposes strict controls on Salespersons and the brokerages they work for, including detailed requirements as to their professional practice activities and administration, registration, discipline and professional education. These controls satisfy the public interest in receiving reliable, quality services from Salespersons and brokerages.

Respectfully submitted,

Patricia Verge

Patricia Verge, President
Ontario Real Estate Association

Cc: Honourable Kevin Flynn
Minister of Labour

Marcelle Crouse
Assistant Deputy Minister

Roy Bornmann
Senior Policy Advisor

Melissa Faber
Manager, Employment Rights & Responsibilities

Kate Murray, CEO
Real Estate Council of Ontario

Joseph Richer, Registrar
Real Estate Council of Ontario