

# Practice Entities Task Force Recommendations

February 2014

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## Executive Summary

This report has been prepared by the Practice Entities Task Force (Task Force) as one element of the Alberta Association of Architects' (AAA) review of the *Architects Act* and *General Regulation*.

The Task Force arrived at a crossroads in late 2013. Until that time, the Task Force's deliberations pointed toward the need for fundamental change in the ownership requirements for architecture and interior design practices in the Province of Alberta; in particular a change in what is commonly referred to as the '51% Rule'. However, subsequent consultation with AAA members during the summer and fall of 2013 suggested there was insufficient support for fundamental change of the 51% Rule.

As a result, the Task Force is now recommending a more incremental approach that maintains existing ownership requirements, improves clarity and focus of the current legislation, and sets the stage for more fundamental change in the next round of legislative updates. The Task Force believes this path will help move the profession forward in its service of the public interest while also meeting with member approval.

### Current Legislation

Currently, the *Architects Act* and *General Regulation* require that in order to be registered with the AAA, practice entities must be 51% controlled by registered architects, licensed interior designers, or engineers (depending on the type of business structure). This requirement, as mentioned above, is referred to as the "51% Rule".

Additionally, there is a prohibition against:

- acting as a contractor or otherwise directly engaging in the business of supplying building materials, furnishings, accessories or systems for use in or in association with the project, without the prior written approval of the client;
- receiving a commission, salary, sales or profit in a similar manner if an authorized entity acts as an advisor to a contractor or other individual trading in the building industry; and
- receiving compensation for using a particular contractor, building material, or for contracting work out.

These provisions together constitute the prohibition on "trading in the building industry".

Finally, the current *Act* requires every registered practice entity to use a protected title as part of its legal business name, and prohibits any other individual or entity from using those protected titles.

### Issues

The fundamental issue is whether the current legislation/status quo is adequately protecting the public interest or whether an alternative approach would:

- better protect the public interest;
- provide the AAA with the best tools for enforcing the *Act*, *Regulation* and Bylaws, and to better ensure the practice of architecture and interior design is being performed competently; and
- better fit contemporary/emerging professional practice realities and accommodate future evolution of the professions of architecture and interior design in Alberta.

## Recommendations

1. Clarify the organizational relationship between individuals, practice entities, and the AAA.
  - Clarify who would be required to work through an authorized practice entity. A 'practice entity' would include sole proprietorships, partnerships, and all types of corporations allowed by the *Business Corporations Act*.
  - In order to offer architectural or interior design services to the public:
    - i. The registered/licensed individual must hold a seal and act through an authorized practice entity; and
    - ii. Every practice entity must be registered, and hold a stamp, regardless of business type.
    - iii. All practice entities shall be subject to the same regulations.
  - Clarify and simplify the terminology surrounding certificates, permits and license.
  
2. All registered practice entities meeting the requirements to offer services to the public *may* use the following protected titles below.
  - i. Architect, Architects, Architecture, Architectural
  - ii. Licensed Interior Design, Licensed Interior Designer
  - Practice entity names must comply with criteria set out by the AAA. The AAA can reject names it finds in conflict with these criteria and withhold registration as a result.
  - Individual practitioner titles of "Registered Architect" and Licensed Interior Designer" would remain restricted as they are in the current *Architects Act* and *General Regulation*.

### Rationale

This will provide for greater simplicity and clarity to both members and the public, stronger accountability in that all practice entities will be held to the practice requirements listed in the *Architects Act* and *General Regulation*, and greater business flexibility.

Clarifying terminology surrounding certificates, permits, and licenses will work to create a more unified and coherent system that can easily be understood by members.

This second recommendation continues to restrict use of protected titles without undermining protections currently found in the *Act* – this promotes clarity and instills confidence in the public. Protected titles may be used by practice entities, but they are under no obligation to do so – this promotes flexibility in naming.

### What We Learned

The 51% Rule has existed in Alberta for some time and continues to exist in other jurisdictions. The reliance on this type of ownership provision varies by province and profession. In Alberta, dentists and physicians/surgeons set the ownership bar at 100%, whereas there is no ownership requirement at all in engineering. The relative merits of restricted ownership is highly debatable (and was by the members during the Task Force's consultation process) leading to predictions of future impacts and comparisons of perceived short-term risk in return for perceived potential long-term gain.

In February 2013, the AAA undertook a process of member consultation with respect to the preliminary recommendations arising from the various task forces of the Legislation Committee. The sample size of the membership that responded was relatively small and response to the questions posed by the Task Force was mixed. Whereas a majority of participating members felt that the 51% Rule is required to protect the public interest, many disagreed as to how, or if, the Rule needed to be changed.

The Task Force responded to this ambiguity with a focused communication/consultation effort during the summer and fall of 2013 to better understand where the members stood, in particular with respect to the central issue of the 51% Rule.

The Task Force, with the assistance of the AAA and its communications consultant, held face-to-face town hall meetings in Edmonton and Calgary as well as a province-wide virtual town hall via web conference. In addition to detailed formal presentations, breakout and plenary discussions, the sessions included straw polling to gauge acceptance of the Task Force's initial recommendations. Although informal, this polling provided the Task Force with valuable insight regarding the intensity of attachment to the status quo, appetite for change to a less restrictive legislative regime, and the likelihood of acceptance of the recommendations in a future vote of the members.

With an eye to the protracted length of the legislative review process and awareness of the significance to the profession that a fundamental change in the 51% Rule would entail, the Task Force was looking for an equally significant measure of support from the members in order to proceed with its initial recommendations. Unfortunately this was not forthcoming from the consultation sessions. While there was indeed interest in, and willingness to, consider changes in the 51% Rule, it was neither a significant majority nor a deeply held conviction by those who expressed interest. Conversely, opposition to change was not only a majority, albeit not overwhelming, but also an intensely expressed one.

At the beginning of its deliberations, the Task Force made a commitment that it would not force through a change that did not have strong endorsement from AAA members. Following the consultation process, it was obvious that the Task Force's initial recommendations did not have this level of endorsement and therefore the Task Force has elected to change course. The essence of the change is to maintain the 51% Rule, to recommend other unrelated changes that are long overdue to enhance flexibility and clarity, and to keep the door open for more fundamental change in the future via a framework that enables members to be seen as distinct from the entities through which they practice. This framework will enable the fundamentals of membership privilege and restriction to remain intact while allowing the requirements of practice entities, including the 51% Rule, to evolve over time and in concert with changes to the profession and marketplace. Fundamental change will thus be left to a future legislative review, however should a change be supported by the members of the day, the framework will be in place to readily accommodate it.

## Recommendations

### Issue 1 Business Structure of Practice Entities (Ownership and Related Criteria)

#### 1.1 Current Legislation

The current *Architects Act* and *General Regulation* states that in order for a firm or corporation to obtain a permit to practice, it must meet certain ownership criteria regarding its business structure. The legislation also states that the beneficial ownership of 51% or more of an architectural corporation's voting shares must be vested in a registered architect, an architect-held corporation, or a combination of registered architects and architect-held corporations.

Similarly, the beneficial ownership of 51% or more of an interior design corporation's voting shares must be vested in a registered architect, licensed interior designer, a licensed interior designer-held corporation, or a combination of registered architects, licensed interior designers and licensed interior designer-held corporations. Partnerships to practice architecture or interior design are required to have one or more registered architects or architect corporations or licensed interior designers or licensed interior design corporations hold 51% or more of the partnership interest in the firm. These requirements are referred to as the "51% Rule".

While unstated in the *Architects Act* and *General Regulation*, the primary intent of the 51% Rule appears to be establishment of a business structure in which architects and interior designers will be able, by virtue of their majority ownership, to exercise control over their statutory obligations. Some professional associations in Alberta, such as Association of Professional Engineers and Geoscientists of Alberta (APEGA), do not have a 51% ownership requirement.

In the absence of other tools in the *Architects Act* and *General Regulation*, much is riding on the 51% Rule. The review of practice entities under the current *Act* is largely comprised of ensuring proper share/ownership structure and monitoring and enforcing proper use of business names, letterhead, and business cards. As a result, the AAA has little choice but to assume that practice entities are acting appropriately until they learn otherwise via the complaints or practice review process.

A secondary intent of the *Architects Act* and *General Regulation*, although more likely a result than an original intent, is the protection of the profession by limiting commercial competition from non-members. Although protectionism is rarely found to be in the public interest, it potentially could be if the maintenance of a strong architectural/interior design industry in Alberta was seen to be in the public interest. Should this be the case, it is, nonetheless, still debatable whether the continuation of a professional monopoly promotes a strong vibrant design industry or in fact does the opposite by artificially shielding the industry from the crucible of competition with the result being that, over time, the industry becomes nationally/internationally uncompetitive. Being serviced by an uncompetitive local monopoly would not likely be defined as serving the public interest.

Although these issues are essentially ones of economic theory and outside the expertise of the Task Force, they were nonetheless deliberated from the outset. The Task Force felt strongly that the open competition that would result from removal of the 51% Rule would be in the best long-term interest of the professions and would result, over time, in a stronger more vibrant and more internationally competitive design industry for Alberta. The Task Force also felt there was significant benefit to Alberta to be a Canadian leader in this regard and to an early adopter of a more dynamic competitive posture rather than to arrive late following years of operating under a protected monopoly.

However, as noted in the Executive Summary, the Task Force's opinion wasn't shared by a sufficient majority of members consulted. Given the need for membership confidence and consensus to embrace the one-way decision to eliminate the 51% Rule, the Task Force feels a formal recommendation for this change is unlikely to be supported by the members. Nonetheless, the Task Force's revised recommendations lay the foundation for this eventuality, should the future membership choose to endorse it, by establishing a framework in which the requirements for practice entities are clearly distinguished from those for individual members and therefore can evolve relatively independently and dispassionately, when the time is right.

The current legislation that pertains to practice entities is listed below.<sup>1</sup>

## 1.2 Issue

Key questions that arise from the application of the 51% Rule:

- Is the 51% Rule the best model for protecting the public interest?
- Does it provide the AAA with the best tools for ensuring architecture and interior design are practiced in accordance with the *Architects Act* and *General Regulation*, and *Bylaws*?
- Is it an appropriate model in an increasingly complex and internationalized business world?
- Does it adequately consider the future of the architecture and interior design profession in Alberta?

## 1.3 What We Learned

### Current Trends in Canada and Internationally

Rules requiring control of professional firms and corporations to be held by "professionals"<sup>2</sup> are not uncommon for architectural regulators in Canada. Eight of the eleven regulators in Canada require the majority of principals in a partnership and the majority of shares in a corporation to be held by professionals. However, the remaining three regulators (Prince Edward Island, Newfoundland & Labrador, and the Northwest Territories) take a different approach. They focus on a requirement that the practice of architecture performed by a firm or corporation must be supervised by and under the direct responsibility of a registered architect.

<sup>1</sup> *Architects Act*, R.S.A. 2000 c.A-44, ss.1,25-27. *Architects Act General Regulation*, A.R. 200/2009 ss.1,10-14,25-26.

<sup>2</sup> Professional(s): registered architect(s) and/or licensed interior designer(s).

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Other professions in Alberta take a varied approach to this issue. Some have no requirements for practice entities, although they have requirements for individuals to practice the profession. Others, such as APEGA, regulate practice entities but do not restrict majority ownership to their licensed members.

The Task Force also reviewed the regulations in a number of American jurisdictions as well a sample of those in Australia. What we learned was that the 51% Rule is uncommon in those jurisdictions. Similarly, Queensland, Australia does not have a 51% rule as part of its legislation, and their professions appear robust and successful.

What this tells us is that there is no one model that works to foster successful architectural and interior design professions. While other jurisdictions utilize differing models, the norm in Canada is the 51% Rule and therefore this does not appear to be incompatible with vibrant industries in the country at this time.

## **Member Consultations**

In February 2013, the AAA undertook a process of Member consultation with respect to the preliminary recommendations arising from the various task forces of the Legislation Committee. The sample size was relatively small and the results were somewhat ambiguous, perhaps not surprising given the complexity of the issues. The Task Force surveyed the members as to how adequately they felt the current Rule protected the public; 56% of participating members felt that the Rule is required to protect the public interest, and did an adequate job of doing so. The Task Force also asked whether adopting a new ownership system without the 51% requirement would be an attractive option, and if doing so would protect the public interest. While many were open to the idea of a new system, members could not agree on what that system would look like, and 54% of them felt that the Rule should remain in order to facilitate the public interest.

Due to the relatively small sample size in the February session, the Task Force conducted two more member consultations – in the summer and fall of 2013. Given that the original question posed to the Member (“Is the 51% Rule required to protect the public interest?”) may have been somewhat confusing or leading, in these consultations the Task Force elected to re-phrase the question. Instead, they simply asked if the profession should move beyond the current 51% Rule approach. In the summer session, 60% of the members agreed that the profession should move beyond the current approach, while 40% disagreed. The results were the same in the fall session. While it seemed clear that members were interested in a new approach to ownership requirements, there was vehement disagreement over what the new approach should look like.

The results of these consultations lead the Task Force to conclude that while a new ownership system may, one day, be a viable alternative to the 51% Rule, the current system appears to be working for the members.

## **1.4 Options**

### **1.4.1 Status Quo: Maintain the 51% Rule**

#### **Overview**

Maintaining the status quo is an obvious first option and an arguably viable one given that the perceived need for change has not arisen from the membership at large or from the Government of Alberta. A case could therefore be made to leave well enough alone.



### Pros

- Feedback from the February 2013 consultation process indicated that 56% of members agreed that the 51% Rule is required to protect the public interest, and therefore maintaining this system would continue to promote that interest.
- A majority of architectural associations in Canada require 51% ownership by architects; therefore we would continue to align ourselves with the national norm.
- Little controversy is likely to ensue from maintaining the status quo.

### Cons

- Reduces mobility for corporations and firms across Canada and therefore presents an interprovincial barrier to trade.
- Prevents members from engaging in certain types of business arrangements they may find desirable, such as in-house practice, and as a result limits growth, innovation, and dynamism of the profession.

## 1.4.2 Replace 51% Rule with all new criteria

### Overview

This option would see the AAA remove the 51% Rule and replace it with a new set of ownership criteria that did not require majority ownership by professionals.

### Pros

- This alternative option is innovative, moving further than most other regulators across Canada in removing artificial barriers to the practice of architecture and interior design.
- Increases labour mobility for members and practice entities.
- Allows the AAA more control/oversight of practice entities that do not currently fall under the regulation of the AAA (e.g. in-house architects/interior designers).

### Cons

- This proposal was met with vehement disagreement during the summer and fall 2013 member consultation sessions.
- By moving towards a less restrictive set of ownership requirements the profession will be more dependent on the integrity and ethics of practicing members to resist inappropriate pressures that may arise from non-traditional ownership models. This may not be the best method to ensure the protection of the public and upholding the public interest.
- If a stronger alignment to the United States is created, some members may be concerned about the volume of foreign practice entities entering the Alberta market – this could have a negative impact on the vibrancy of the industries in the province.

### 1.4.3 Maintain current 51% Rule but provide clarification and flexibility

#### Overview

This option would see the 51% Rule maintained, but would add in a clarifying framework which would more clearly separate individuals and entities, and clarify who is required to work through an authorized practice entity. In this option, a seal would be required for individuals, and a permit to practice and stamp would be required for entities. Only entities, holding a permit to practice, would be allowed to engage in the practice of architecture and interior design. Therefore, an individual itself can never be an entity.

A benefit of this model is that ‘entities’ can be defined as widely as practical – promoting flexibility in both business models and employment opportunities. Whatever form the entity takes, it will need to demonstrate that the majority controlling ownership is with registered architects and/or licensed interior designers.

This separation, while similar to what the *Architects Act* and *General Regulations* already contemplates, makes sense should the recommendations for professional liability insurance be implemented. The draft recommendation is that practice entities, and not individuals, be required to hold professional liability insurance. The two will work to reinforce each other, and further enhance and protect the public interest.

Certain individuals, such as government employees, would necessarily have to be exempt from the seal and entity rule given that they practice their profession, but are not permitted to seal drawings.

A practice management plan will not be proposed to enforce this option. Instead, the AAA will be able to request evidence, as necessary, to demonstrate the practice entity’s compliance with the legislation. Permits to practice will, however, still have to be reviewed on an annual basis or whatever frequency is deemed to be appropriate and cost effective by the AAA.

This option also purports to clarify potentially confusing terminology in the *Architects Act* regarding evidence of registration. The *Act* utilizes a variety of terms such as “certificate”, “license”, and “permit<sup>3</sup>”. This terminology is inherently confusing as it assigns different terms to different entities; as a result, these terms are often used interchangeably, and therefore, incorrectly. Additionally, the *Act* does not mandate that firms hold any similar kind of evidence of registration.

To promote unity and clarity, all practice entities should be required to hold a permit to practice.

#### Pros

- Incorporates member consultation feedback into recommendations.
- Allows for a variety of employment situations to occur, thereby promoting flexibility and considering the practicalities of today’s business market.
- Creates unity and clarity in the *Act*, by amending confusing terminology.

#### Cons

- Fear that members could take on projects to which they have not been exposed.
- Reviewing out-of-province practices may present an administrative and financial challenge to the AAA.
- Reviewing permits to practice may result in an administrative burden to the AAA.

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<sup>3</sup> s.20.

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- Potential issues with transparency and fairness if rules regarding production of evidence regarding compliance are not made known clear enough to the members.

### 1.5 Recommendation

After considering the merits of the above noted options, the Task Force recommends option 1.4.3: that the 51% Rule is maintained, but greater clarity and business flexibility be added into the current framework.

The specific recommendations of the Task Force are as follows:

1. Individuals must hold a seal and all practice entities must hold a permit to practice and stamp to engage in the practice of architecture, both must be satisfied.
2. All practice entities regulated by the *Architects Act* and *General Regulation*, including restricted practitioners, will be subject to the same general framework.
3. The practice entity can take any form that is listed in Alberta's *Business Corporations Act*.
4. Clarification of terminology regarding evidence of registration.
- 5.

### 1.6 Rationale

The Task Force believes that the 51% Rule exists because it was deemed to be in the public interest that entities practicing architecture and interior design be controlled in the majority by registered architects and/or licensed interior designers.

The Task Force originally presented an option that sought to change the 51% Rule, and do away with the ownership requirements. However, this proposed model was not endorsed by the membership. The Task Force acknowledged members' feedback, and chose to move in a direction that was more aligned with these sentiments.

The rationale for the proposed option 1.4.3 is straightforward – the Task Force seeks to achieve a legislative framework that provides for greater clarity and business flexibility and respects the opinions of the membership. Additionally, the recommendation allows for the AAA to regulate all practice entities holding a permit to practice, which invariably increases the organization's accountability to the public all while promoting the public interest and public safety.

## Issue 2 Practice Entities Business Names

### 2.1.1 Current Legislation

The *Architects Act* and *General Regulation* requires that all architecture firm names include the word "Architect", "Architects", "Architectural", or "Architecture", and that all interior design firm names include the words "Licensed Interior Design" or "Licensed Interior Designer".<sup>4</sup>

The current legislation that pertains to business names has been included below.<sup>5</sup>

<sup>4</sup> *General Regulation*, s.27(1)(b); s.28(1)(b).

<sup>5</sup> *Architects Act General Regulation*, A.R. 200/2009 s.27-31.

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## 2.2 Issue

There are several questions this Task Force has posed related to the current legislation.

1. Who should be permitted to use the protected titles “Architect”, “Architects”, “Architectural”, “Architecture”, “Licensed Interior Design” or “Licensed Interior Designer”?
2. Is it relevant to the public interest to permit firms that are not controlled by architects or licensed interior designers to use these titles?
3. Should the use of these titles be permissive or prescriptive?

The Task Force discussed what the public perception might be when a practice entity uses the words “Architect”, “Architecture”, “Licensed Interior Designer” or “Licensed Interior Design” in their business name. The Task Force considered the impact of removing the current mandatory naming requirements in incorporating the words “Architect”, “Architects”, “Architectural”, “Architecture”, “Licensed Interior Design”, or “Licensed Interior Designer,” and making that optional so long as the firm or corporation is given a permit to practice by the AAA.

If the current mandatory naming requirements were removed, traditional private practices could still use these words, but would not be requirement to use them. The Task Force considered whether there would be confusion for the public if this change in our legislation occurred. Do all traditional private practice firms need to use words in their business name to indicate they are professionals, in order for the public to be protected?

## 2.3 What We Learned

### Member Consultation

Feedback from the February AAA member consultation process was strongly in favour of restricting the use of these terms. 74% of respondents favoured linking the use of the terms to the 51% Rule.

### Current Trends in Canada

Notwithstanding the perspective of the respondents, it appears that other jurisdictions, such as Ontario, are beginning to get out of the “name game”. These associations are permitting practice entities to choose names fairly and freely so long as they meet pre-determined criteria such as being accurate, not self-laudatory, and not bringing disrepute to the profession.

## 2.4 Options

2.4.1 Option 1: All registered practice entities must use the protected titles, and unregistered entities may not use protected titles.

### Pros

- Commensurate with February consultation process feedback.
- Reinforces the 51% Rule.
- Provides clarity of nomenclature with respect to ownership.

### Cons

- Is overly restrictive in today’s business environment where many firms seek to use unconventional names for business purposes.
- Keeps the AAA in the “name game” wherein resources must be allocated to check and approve names.

2.4.2 Option Two: All registered practice entities meeting the requirements to offer services to the public *may* use the protected titles; titles remain protected.

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## Pros

- Maintains clarity regarding which companies can and cannot offer architectural and interior design services to the public (e.g. those that have a permit to practice can and those that do not, cannot).
- Maintains the public's expectation that a business that uses a protected title is authorized to offer services to the public.
- Clear, simple and internally consistent.
- Compatible with the Task Force's other recommendations.
- Likely defensible to challenges.
- Maintains restrictions on individual use of protected titles.
- Gets the AAA out of the "name game".
- Reinforces the flexible business model suggested in Option 1.4.3.

## Cons

- Not requiring all practice entities to use the protected title might make it confusing to the public regarding who is or is not qualified to offer professional services.
- Removing the letterhead and business card evaluation mandates some other form of evaluation that holds entities to practice. A new administrative process will have to be developed.

## 2.5 Recommendation

The Task Force recommends Option 2.4.2- that all registered practice entities meeting the requirements to offer services to the public *may* use the protected titles. Individual practitioner titles of "Registered Architect" and "Licensed Interior Designer" would remain restricted as they are in the current *Architects Act* and *General Regulation*.

The Task Force also recommends, in order to remove the current focus on the 'name game', that the AAA adopts criteria that all practice entity names must comply with, and retains the right to reject names it finds in conflict with these criteria.

Additionally, the name of the practice entity would still have to be approved by the AAA, but the requirement that letterhead and business cards be approved is removed.

In sum, the requirement that the terms 'Architect', 'Interior Design', etc. must be used will be removed from our legislation. The practice entity may use these terms, but they are under no obligation to do so.

## 2.6 Rationale

The key rationale behind this recommendation is to arrive at an approach that is simple and clear for the public, while being fair to authorized practice entities and internally consistent with the Task Force's other recommendations. In this option the public can assume that any firm using a restricted title has been authorized to provide services to the public (i.e. holds a permit to practice).

And while it might be clearer to assign a label (i.e. a restricted title) to every practice entity holding a permit to practice, this seems to be an unnecessary restriction in today's business world.

Notwithstanding this flexibility, one could assume that using the title, if even in a legal as opposed to trade name, attributes status to an entity. Thus many practice entities will likely choose to use a restricted name in some fashion. However, what is critical is that all duly authorized firms have access to the restricted names, not just a subset of them.

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