

The Regulator November 2009

Council Message

With this my first message as the new Council chair, I would like to begin by taking the opportunity to thank Ralph Salomons for his hard work as Chair over the past 12 months. The industry is fortunate that someone with his industry experience has served as RECA's chair for the past year and Ralph remains a valuable member of Council. I would also like to recognize the valuable contributions of Pat Rudiger and Chris Anderson, who both completed their terms as Council members effective October 31, 2009. Pat was a Council member for six years and also served as Chair in 2007-2008. Chris served one three-year term on Council.

Additionally, I would like to welcome the new members to the Council table: Bill Buterman, representing non-AREA industry members; Kevin Clark, appointed by AREA as a residential real estate broker; and, Wendy Robson, appointed by AREA as a small board representative. I would also like to welcome Robert Telford as my vice chair. More information on the new Council member appointments can be found later in the Regulator.

New approach to fees

Council was faced with many tough decisions at its August budget meeting in order to ensure a financially secure future for RECA during uncertain economic times. In addition to cutting costs in a number of areas, Council decided to introduce a new approach wherein the fee now includes both the licence fee and the fee for online RECA mandatory courses.

We are very pleased with industry response to the new approach. The renewal process was the smoothest it has ever been, and we are very pleased with the positive response to the online Re-licensing Education Program course for real estate industry members (for more information on the renewal process and licensing statistics, please see the Renewal Wrap-up article).

Council focus

Over the next year, Council will continue its policy to avoid new legislative initiatives that would directly affect the day-to-day activities of industry members unless changes are absolutely necessary. Council recognizes the amount of legislative change that has taken place within the industry in recent years, and wants to ensure that all industry members have a chance to adjust before contemplating additional changes.

Over the next 12 months, Council will focus on some of its own governance practices, with particular attention being paid to communication issues, notably that of two-way communication

with industry members and consumers. Council held a two-day governance session at the end of October. This gave us an opportunity to take a closer look at the way in which we do things – and to show us there are options available to us. This very productive session has set the stage for continued work on improving our relationships and is leading to a major review of RECA's strategic plan early in the term of the 2010-2011 Council.

The year ahead

Finally, with indications of an improving economic climate and real estate market, I am looking forward to a successful year for RECA and the industry.

As only the second public member of Council to serve as its Chair, I will be looking to the expertise of other Council members and industry professionals to help address the issues of greatest relevance and importance to both industry and the public.

With the support of Council and RECA staff, I look forward to working with all stakeholders in ensuring a healthy real estate, mortgage brokerage and appraisal industry in Alberta.

In conclusion, I want to wish everyone a happy and healthy holiday season.

Renewal Wrap-up

The 2009 renewal, which wrapped up on September 30, 2009 ran very smoothly from the Real Estate Council of Alberta's (RECA) perspective. In the months and weeks leading up to the renewal deadline, a number of new technological initiatives were implemented to ensure an efficient and timely renewal process.

RECA Online was updated with a new server, which was better able to handle the increased volume of users accessing the RECA Online licensing system throughout September.

RECA Online reporting features were also enhanced to identify individual brokerages, appraisers and candidates that had deposited money into their RECA Online account, but had not processed their renewal applications. RECA staff sent emails and made personal phone calls to alert these individuals that they had not completed their renewal applications. In past years, there had been some confusion with respect to the renewal process – with some industry members adding renewal funds to their online account, but not formally processing the renewal forms online – instead, mistakenly believing that adding money to their account was all that needed to be done to renew. The online reporting feature of RECA Online ensured this was not a problem during this year's renewal process.

And, above all of the technological improvements, RECA wishes to thank industry members for their due diligence in processing their renewals on time, and RECA licensing and information services staff for their dedication and hard work.

Statistics

On August 31, 2009, there were 15,226 individual industry members in Alberta, with 11,844 in real estate, 2,599 in the mortgage industry and 783 in real estate appraisal. Real estate had 1,094 brokerages and there were 415 mortgage brokerages.

On October 31, 2009, a month after the renewal deadline, there were 14,727 industry members in Alberta, with 11,617 in real estate, 2,397 in mortgage, and 713 in real estate appraisal. There were 1,070 real estate brokerages and 369 mortgage brokerages.

In the month of October, there were 11 new real estate brokerages, 279 new real estate associates, 15 new mortgage brokerages and 118 new mortgage associates. As such, the true number of industry members that did not renew by September 30 should be adjusted by the number of new industry members in October.

The slight decrease in the overall number of industry members between August and October of this year follows a similar pattern from the past few years, and when compared to 2008 numbers – the decrease this year was actually less.

Between August 31, 2008 and October 31, 2008, there was a decrease of 853 industry members (5.4%). This year, during the same time period, there was only a decrease of 499 industry members (3.3%).

It is not uncommon for the number of industry members to decrease slightly right at renewal time and when membership fees are due to real estate boards in the spring. The number of real estate brokerages has consistently decreased at renewal each year. RECA attributes the small decrease to the retirement of brokers, smaller brokerages and mergers of existing brokerages.

RECA's long-term financial planning recognizes that industry numbers are far from static, and each year, its investment and budgeting process takes this into account to ensure a financially-secure organization in the future.

Dealing in Mortgages – Jurisdiction and the *Real Estate Act*

Summary: Individuals who wish to deal in mortgages in Alberta as mortgage brokers are required to obtain an authorization from the Real Estate Council of Alberta. When a deal in mortgages contains components outside of Alberta’s boundaries, application of the Act may become more complicated with respect to whether an authorization as a mortgage broker is required. The *Real Estate Act* will apply to dealing in mortgages by mortgage brokers in usual cases and in cases where a substantial connection to Alberta is present. [See: *Real Estate Act* s.1]

The *Real Estate Act* section 1 defines “business of an industry member” and the meaning of dealing in mortgages as a “mortgage broker.” Apart from statutory exclusions, the Act requires that people who wish to deal in mortgages as mortgage brokers obtain an authorization from the Real Estate Council of Alberta. This requirement applies to all licensing classifications. The facts in any particular case will be determinative of whether or not a person is dealing in mortgages as a mortgage broker pursuant to the Act. RECA, courts and other decision makers are in a position to regularly make this decision.

When there is a question as to whether or not the Act applies, the decision will likely be made on the basis of criteria related to a legal test known as the “real and substantial connection” test. “Substantial connection” is not defined in the Act. The concept is most commonly used when a decision maker is determining which jurisdiction is the most appropriate to deal with a dispute or a legal action. In reviewing the facts, the decision maker considers the connectors present in competing jurisdictions and determines which connectors are the more significant, thus creating the “substantial connection”, as opposed to a more casual or tangential connection.

A deal in mortgages by a mortgage broker authorized under the Act which is wholly completed within the geographic boundaries of Alberta would, in ordinary circumstances, be covered by the Act. When the deal in mortgages contains components in a jurisdiction other than Alberta, application of the Act may become more complicated.

The following are some of the factors which will likely be considered by a decision maker in determining whether there is a substantial connection to a jurisdiction:

- the province in which the mortgage broker holds an authorization to deal in mortgages
- whether or not the authorized mortgage industry member was dealing in mortgages as a mortgage broker as defined in the Act
- the geographic location of the property for which a mortgage is being obtained
- the place where a corporate party was incorporated
- the usual business operations of a corporation in relation to dealing in mortgages
- the place dealing records are held
- the place receipt of deposits into a trust account occurs
- the method and place from which documents, such as disclosure documents and mortgage commitment letters, are sent or provided to parties
- the place where advertisements appear

- the place from which advertisements originate
- the place where money originates and is delivered to conclude a deal in mortgages
- any choice of law clauses adopted by parties in any agreement

Today, the reality is that in addition to more traditional mortgage brokerage practices, dealing activity takes place in an electronic age. Components of mortgage deals may occur in several jurisdictions using internet and faxes. The *Act* will apply to deals in mortgages by mortgage brokers in usual cases and in cases where a substantial connection to Alberta is present.

Trading in Real Estate – Jurisdiction and the *Real Estate Act*

Summary: Individuals who wish to trade in real estate in Alberta as real estate brokers are required to obtain an authorization from the Real Estate Council of Alberta. When a trade in real estate contains components outside of Alberta’s boundaries, application of the Act may become more complicated with respect to whether an authorization as a real estate broker is required. The *Real Estate Act* will apply to trades in real estate by real estate brokers in usual cases and in cases where a substantial connection to Alberta is present. [See: *Real Estate Act* s.1]

The *Real Estate Act* section 1 defines “business of an industry member” and the meaning of “trade” in “real estate” as a “real estate broker”. Apart from statutory exclusions, the Act requires that people who wish to trade in real estate as real estate brokers obtain an authorization from the Real Estate Council of Alberta. This requirement applies to all licensing classifications. The facts in any particular case will be determinative of whether or not a person is trading in real estate as a real estate broker pursuant to the *Act*. RECA, courts and other decision makers are in a position to regularly make this decision.

When there is a question as to whether or not the *Act* applies, the decision will likely be made on the basis of criteria related to a legal test known as the “real and substantial connection” test. “Substantial connection” is not defined in the *Act*. The concept is most commonly used when a decision maker is determining which jurisdiction is the most appropriate to deal with a dispute or a legal action. In reviewing the facts, the decision maker considers the connectors present in competing jurisdictions and determines which connectors are the more significant, thus creating the “substantial connection”, as opposed to a more casual or tangential connection.

A trade in real estate by a real estate broker authorized under the *Act* which is wholly completed within the geographic boundaries of Alberta would, in ordinary circumstances, be covered by the *Act*. When the trade contains components in a jurisdiction other than Alberta, application of the *Act* may become more complicated.

The following are some of the factors which will likely be considered by a decision maker in determining whether there is a substantial connection to a jurisdiction:

- the location of the real estate
- the ordinary residence of any individual parties to a trade in real estate
- the province in which the real estate broker holds an authorization to trade in real estate
- the place where advertisements appear
- the place from which advertisements originate
- the method and place documents, such as service agreements and agreements of purchase and sale are executed
- the place receipt of deposits into a trust account occurs
- the method and place from which documents, such as service agreements and agreements of purchase and sale, are sent or provided to parties
- the place where money originates and is delivered to conclude a trade in real estate
- whether or not the authorized real estate industry member was trading in real estate as a real estate broker as defined in the *Act*
- the place where a corporate party was incorporated
- the usual business operations of a corporation in relation to a trade in real estate
- the place trading records are held
- any choice of law clauses adopted by parties in any agreement

Today, the reality is that in addition to more traditional trading practices, trading activity takes place in an electronic age. Components of trades may occur in several jurisdictions using internet and faxes. The *Act* will apply to trades in real estate by real estate brokers in usual cases and in cases where a substantial connection to Alberta is present.

New www.reca.ca Website Launched

On November 3, RECA launched a completely redesigned and restructured RECA website at www.reca.ca.

The launch is the culmination of six months of work designing a website that is easy to use, easy to navigate, looks professional and contemporary, and is full of valuable information for industry members and consumers.

Some key features of the new website include:

- **The use of mega-menus.** Now, by scrolling over a menu, users can see every page available under that menu without having to scroll to submenus.
- **Expanded portal page.** The new portal page at www.reca.ca includes links for Consumers, Industry, RECA Education, How to Become an Industry Member and one

click to Online Licensing. Brokers can now enter RECA Online right from the www.reca.ca portal page.

- **In-depth licensing information.** Industry members now have expanded information on becoming licensed, renewals, changing licence class, opening a brokerage and re-licensing education.
- **Easy to find forms.** Industry members are able to quickly and easily find all forms on www.reca.ca through a Forms tab on the mega-menu.
- **Mobile version of the website.** If users visit www.reca.ca on their mobile device, they will automatically be redirected to a simple text, no graphics mobile version of the website.
- **Professional, contemporary look and feel.** www.reca.ca is designed with contemporary styling and technology, including increased use of Flash.

When you need information about RECA, make www.reca.ca the source for that information. Information is current and new information is added on a regular basis.

RECA welcomes comments about the new website. Any comments or concerns, and all issues with broken links should be sent to communications@reca.ca.

RECA Publishes New Advertising Guidelines

The Real Estate Council of Alberta is pleased to announce the publication of new advertising guidelines for all real estate and mortgage brokerage industry members. The new advertising guidelines are a compilation of current RECA policies with respect to industry member advertising, and they provide industry members with more guidance on electronic advertising, the Internet and social media applications.

In October, RECA, with support from real estate boards across the province, distributed professionally-printed copies of the new guidelines to every real estate and mortgage brokerage in Alberta. Brokerages were to receive enough copies for each industry member registered with the brokerage. Additionally, a PDF of the RECA Advertising Guidelines has been posted on the RECA website on the “Guides” page under the “Publications & Resources” menu tab. Industry members can review and print the PDF from their home computer at any time through the RECA website, free of charge.

As policies and industry practices change, RECA may, from time-to-time, be required to make changes to the Advertising Guidelines. When that occurs, the PDF available on the RECA Website will be updated.

If you have any questions about your personal advertising in light of the RECA Advertising Guidelines, please discuss them with your broker.

Council to Launch Additional Syndicated Mortgage Consultation

Council has accepted a recommendation from the Real Estate Council of Alberta's (RECA) Mortgage Brokers' Advisory Committee that it conduct further consultation with industry members on dual regulation of mortgage brokers who deal in syndicated mortgages, and to explore what other regulatory options might be available. The further consultation will assist Council in its deliberations as to whether it should be involved in any capacity in the regulation of syndicated mortgages.

Notwithstanding efforts by RECA to seek an exemption for its industry members, the Alberta Securities Commission (ASC) has confirmed that Alberta mortgage brokers who deal in syndicated mortgages and are licensed and regulated by RECA are now also subject to the ASC's regulatory requirements with respect to syndicated mortgages. Effective September 29, 2009, the ASC removed the registration and prospectus exemptions that had previously been available to registered mortgage brokers who deal in syndicated mortgages in Alberta

As a result of extensive industry consultation throughout 2008 and 2009, Council continues to believe there should only be one regulatory body involved. Because RECA regulates all other aspects of the business of mortgage brokers, it believes it is in the best position to provide responsible regulation of its industry members who deal in traditional syndicated mortgages.

RECA will launch its next round of industry stakeholder consultations in early 2010. RECA anticipates the consultation will include a discussion paper available from the RECA website and syndicated mortgage discussion seminars in Calgary and Edmonton. Results from the continued consultations will be provided to Council in order for Council to determine how it should proceed with respect to the regulation of mortgage brokers who deal in syndicated mortgages.

In the meantime, RECA recommends any licensed mortgage broker who currently deals in syndicated mortgages, or who plans to deal in syndicated mortgages, familiarize themselves with the information posted on the Alberta Securities website at www.albertasecurities.com with respect to National Instrument 31-103 (Registration Requirement and Exemptions) and National Instrument 45-106 (Prospectus and Registration Exemptions) and related rules and amendments to both of these instruments. If you have any questions regarding how these regulations will affect your business, please contact the ASC or your lawyer.

Lifetime Withdrawals

November 2009

Malik Ashraf (real estate associate)

Threefour Management Ltd. o/a Re/Max Landan Real Estate

On November 4, 2009, Malik Ashraf, real estate associate currently unregistered and most recently registered with Threefour Management Ltd. o/a Re/Max Landan Real Estate, applied to the Real Estate Council of Alberta (RECA) to withdraw from industry membership in accordance with section 54 of the *Real Estate Act* (REA). At the time of his application, Mr. Ashraf was the subject of conduct proceedings to determine if he: acted honestly, fulfilled his fiduciary duties, disclosed any conflict of interest to his clients, practised in strict accordance with the legislation, cooperated fully with a RECA investigator, made representations or carried on conduct that was reckless or intentional and that mislead or deceived any person or was likely to do so, participated in fraudulent or unlawful activities in connection with the provision of services or any dealings, used confidential information for personal gain, provided all documentation to his broker in a timely manner and obeyed all lawful instructions of the seller.

Mr. Ashraf's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership. By virtue of operation of the *Real Estate Act*, Part Three conduct proceedings are discontinued. There has been no disciplinary hearing, admissions or findings of fact in this matter. Mr. Ashraf's withdrawal application does not constitute an admission of misconduct.

Jeff Pluim (real estate broker)

Jeff Pluim o/a Investment Canada Business Brokers

On November 4, 2009, Jeff Pluim, real estate broker currently unregistered and most recently registered with Jeff Pluim o/a Investment Canada Business Brokers, applied to the Real Estate Council of Alberta (RECA) to withdraw from industry membership in accordance with section 54 of the *Real Estate Act*. At the time of his application, Mr. Pluim was the subject of conduct proceedings to determine if he failed to act in a client's best interest.

Mr. Pluim's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership. By virtue of operation of the *Real Estate Act*, Part Three conduct proceedings are discontinued. There has been no disciplinary hearing, admissions or findings of fact in this matter. Mr. Pluim's withdrawal application does not constitute an admission of misconduct.

Melissa Dayle Sterling (real estate associate)

Magnuson Realty Ltd.

On November 4, 2009, Melissa Dayle Sterling, currently unregistered and most recently registered as a real estate associate with Magnuson Realty Ltd., applied to the Real Estate Council of Alberta (RECA) to withdraw from industry membership in accordance with section 54 of the *Real Estate Act* (REA). At the time of her application, Ms Sterling was the subject of

conduct proceedings to determine if she failed to keep proper documentation and obtained dual agency consent after the acceptance of an offer.

Ms Sterling's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership. By virtue of operation of the *Real Estate Act*, Part Three conduct proceedings are discontinued. There has been no disciplinary hearing, admissions or findings of fact in this matter. Ms Sterling's withdrawal application does not constitute an admission of misconduct.

Case Summaries

Audit Administrative Penalties

July 2009 – September 2009

Westhills Mortgage Center Ltd.

The brokerage failed to submit to the Real Estate Council of Alberta the required accounting documents not later than three months after the end of the brokerage's fiscal year. Breach of s.91(4) of the *Real Estate Act* Rules.

\$1,500

Blueprint Properties Inc.

The brokerage failed to submit to the Real Estate Council of Alberta the required accounting documents not later than three months after the end of the brokerage's fiscal year. Breach of s.92(1) of the *Real Estate Act* Rules.

\$1,500

Mortgage Partners Inc.

The brokerage failed to submit to the Real Estate Council of Alberta the required accounting documents not later than three months after the end of the brokerage's fiscal year. Breach of s.92(1) of the *Real Estate Act* Rules.

\$1,500

Gaetz Realty Inc.

As a result of the failure of the brokerage's accountant, the brokerage failed to submit to the Real Estate Council of Alberta the required accounting documents not later than three months after the end of the brokerage's fiscal year. Breach of s.91(4) of the *Real Estate Act* Rules.

\$1,500

11567377 Alberta Ltd. o/a Realty Executives North

The brokerage failed to submit to the Real Estate Council of Alberta the required accounting documents not later than three months after the end of the brokerage's fiscal year. Breach of s.91(4) of the *Real Estate Act* Rules.

\$1,500

Consent Agreements

September 2009

ALTAF HASSANALI KASSAM, REAL ESTATE ASSOCIATE CALGARY INDEPENDENT REALTY o/a CIR

Issues:

- Made representations that were reckless and that misled or deceived any person or were likely to do so [s.42(a) of the *Real Estate Act* Rules]

Facts:

- Mr. Kassam advertised the square footage of a property on MLS when he had not measured the property himself.
- Mr. Kassam relied on the accuracy of a listing of another property that he thought was a similarity-built home.
- The square footage of the property Mr. Kassam advertised on MLS was not accurate.

Results: By way of a Consent Agreement, which was ratified by a RECA Hearing Panel, Mr. Kassam was ordered to pay a fine of \$2,000 and costs of \$250, and must complete an educational requirement.

October 2009

RICHARD GARRY OAKES, ASSOCIATE BROKER R&D REALTY INC. o/a MAXWELL CANYON CREEK

Issues:

- Failed to deal with trust monies according to the terms of trust [s.25(1)(d) of the *Real Estate Act*]
- Failed to ensure that the business of the brokerage, as the trustee of deposit monies, was carried out competently [s.51(1)(d) of the *Real Estate Act* Rules]

Facts:

- A real estate associate with Mr. Oakes' brokerage was selling his personal residence through the brokerage. The associate entered into a Real Estate Purchase Contract with the Buyers.
- After entering into the REPC, the associate kept requesting extensions to the possession date because his wife would not release her dower interest in the property.
- The Buyers decided to not proceed further with the REPC after extensions were made to the possession date on two occasions.
- The Buyers and the seller reached an agreement whereby if the seller could not give possession by a certain date, the Buyers would be entitled to an immediate return of the deposit and they would be entitled to not proceed with the purchase.
- When the Buyers sought a return of the deposit from Mr. Oakes, the associate advised Mr. Oakes that they were not entitled to the deposit and he failed to make Mr. Oakes aware of the agreement.
- Had Mr. Oakes properly reviewed the circumstances, he could have made a reasonable determination that the Buyers were entitled to the deposit.
- Mr. Oakes kept the deposit monies in the brokerage's trust account when the real estate purchase contract required the monies to be paid into a lawyer's trust account in the event of a dispute.
- Mr. Oakes failed to obtain an express authorization from the Buyers and/or their representative consenting to the deposit monies remaining in the brokerage's trust account given the dispute.
- Mr. Oakes released the monies to the real estate associate and failed to advise the Buyers that the deposit monies were released to the seller.
- When Mr. Oakes was made aware of the agreement by a RECA investigator, Mr. Oakes did return the deposit monies to the Buyers.

Results: By way of a Consent Agreement, which was ratified by a RECA Hearing Panel, Mr. Oakes was ordered to pay a fine of \$3,500 and costs of \$500, and must complete an educational requirement.

Disciplinary Action

September 2009

LUIS BENAVIDES, ASSOCIATE
CALGARY INDEPENDENT REALTY o/a CIR

Issues:

- Failed to cooperate fully with and provide all information requested by any representative of the Real Estate Council of Alberta [s.7(d) of the Code of Conduct (as it was then)]
- Failed to provide all documentation or trade records [s.23(e) of the *Real Estate Act* Rules]

- Failed to act in the best interests of a client [s.2(a) of the Code of Conduct (as it was then)]
- Revealed a client's confidential information without the consent of the client [s.2(d) of the Code of Conduct (as it was then)]
- Failed to use best efforts to ensure that a client had independent advice when a prudent industry member would have concluded that the client was in a vulnerable position [s.2(k) of the Code of Conduct (as it was then)]
- Participated in fraudulent or unlawful activities in connections with real estate or mortgage transactions [s.7(c) of the Code of Conduct (as it was then)]

Facts:

- Mr. Benavides made contradictory statements to RECA investigators with regards to a \$3,000 payment from Mr. C for commissions stating he never received money from Mr. C for commissions and regarding a loan of \$3,000 Mr. Benavides provided to the Buyers to complete the transaction
- Mr. Benavides did not have records to show the payment of \$3,000 from Mr. C or the loan of \$3,000 to the buyers
- Mr. Benavides did not inform his broker or brokerage of the \$3,000 he received nor of the \$3,000 he loaned the Buyers.
- Mr. Benavides failed to negotiate an appropriate tenancy at will agreement for the Buyers for the period between possession of the property and the transfer of property into their names.
- Mr. Benavides provided the Buyers with information about the Seller that was not authorized by the Seller and was not true.
- Mr. Benavides did not suggest that the Buyers get independent legal counsel or that they had the right to a property inspection on the property before they bought it, even though he knew they were new to Canada and unfamiliar with the business etiquette of the country.
- Mr. Benavides signed the purchase contract in Mr. C's name and using Mr. C's initials without Mr. C's permission or knowledge.
- Mr. Benavides knew or should have known that Mr. C did not intend to live on the property but had received a high-ratio mortgage.
- Mr. Benavides directed Mr. C to a specific mortgage associate and was in communication with the mortgage associate regarding the transaction.

Results: The Hearing Panel accepted Mr. Benavides' Admission of Conduct Deserving of Sanction and ordered that his authorization to trade in real estate as a real estate associate be suspended for a period of four months. He was also ordered to pay fines totaling \$18,500, costs in the amount of \$7,500, and complete educational requirements.

October 2009

KATHRYN SALAZAR, ASSOCIATE
769115 ALBERTA LTD. o/a ROYAL LEPAGE FOOTHILLS

Issues:

- Participating in the creation of a contract or document that she knew or ought to have known was not legally binding, confusing or did not reflect any agreements already in place [s.6(c) of the Code of Conduct (as it was then)]
- Failure to ensure a client has independent legal advice when a prudent industry member would conclude a client may be in a vulnerable position [s.2(k) of the Code of Conduct (as it was then)]

Facts:

- Ms Salazar failed to have a listing contract properly executed when the parties were intent on entering into a contract.
- Ms Salazar made a representation to the Sellers that in the event of multiple offers, clause 10.1(b) of the listing contract would not apply though she failed to reduce this to writing either as a clause on the listing contract or as an amendment. Without an express term reflecting this representation, it was not binding as agreed by the parties.
- Ms Salazar made a representation on the MLS listing information to the effect that clause 10.1(b) of the listing contract between Foothills and the Sellers would not apply in the case of multiple offers though this did not reflect the express terms of the Listing Contract.
- Ms Salazar advised the Sellers that they were at risk of being sued if they did not accept the offer presented by the Buyers' agent.
- As the representative of Foothills, Ms Salazar was in a conflict of interest with respect to the obligation of the Sellers under the Listing Contract to pay commission and she was not a source of independent advice.
- The Sellers were vulnerable having relied on Ms Salazar as a source of advice for the sale of their property and being unaware of the conflict of interest.
- Ms Salazar failed to communicate to the Sellers, sufficiently or at all, that a conflict of interest existed and that they should obtain advice from an independent source concerning their rights and obligations under the Listing Contract.

Result: The Hearing Panel accepted Ms Salazar's Admission of Conduct Deserving of Sanction and ordered her to pay fines totaling \$1,000, costs in the amount of \$750, and complete educational requirements. The Hearing Panel also issued a reprimand to Ms Salazar for contravention of s.2(k) of the Code of Conduct (as it was then).

New Council Members

Bill Buterman

Bill Buterman is a mortgage broker who has been appointed by members of Council (excluding the member appointed by the Minister of Service Alberta) as a representative of industry members who are not a member of the Alberta Real Estate Association (AREA). Bill the CEO of Access Capital Partners, a group engaged in private mortgage banking.

Bill has created finance and real estate finance courses and lectured at various Universities and financial institutions. He has an MBA in Mathematics of Finance and is pursuing a doctorate at Northwestern University.

Kevin Clark

Kevin Clark has been appointed to Council by the Alberta Real Estate Association (AREA) as a representative of industry members trading in residential real estate. Kevin has sold real estate in Calgary since 1976 and is currently a Sales Associate with RE/MAX House of Real Estate. He has owned and managed real estate offices and is a Past President of the Calgary Real Estate Board.

Throughout his career Kevin has served on numerous Board committees; instructed licensing and continuing education courses, and has always taken an interest in the advancement of the real estate industry.

Wendy Robson

Wendy Robson has been appointed to Council by the Alberta Real Estate Association (AREA) as a representative of real estate boards outside of Calgary and Edmonton. Wendy has been active listing and selling real estate in Hinton, Alberta for the past 27 years; 26 of those years with Andre Kopp and Associates currently under the Royal LePage Franchise.

Wendy serves as the president of a local condominium board, and in her spare time enjoys golfing, curling, weight lifting and travelling.

Education Corner

Successful launch of Real Estate Re-licensing Education Program

The Real Estate Council of Alberta (RECA) is extremely pleased with the number of early enrolments and the positive feedback it has received from industry members to the new online

Real Estate Update 2009-2010 course. This is the mandatory course for the Re-licensing Education Program and fulfills the education requirement for licence renewal up to September 30, 2010.

More than 200 real estate industry members have completed the course since it launched at the beginning of October, and another 200 are currently in the process of completing it. Industry members who have completed the course have given it an overall approval rating of 95 per cent.

The following comments are some of the feedback RECA has received:

"I thought that this was an excellent experience. It gave me learner a chance to hear and read the information at my own pace."

"Thank you to all that made this an outstanding learning environment. Very professionally presented. Enjoyed all aspects from commentary, video feed, quizzes and thought provoking information."

"This was great because it was very thorough and I could go back and check on the stuff I didn't fully understand."

"I enjoyed taking the course this way as it allowed me to take it when I had time and return to where I left off, should I have to leave during the course."

"The case studies, questions, and text were well laid out and the material was communicated in a quality manner. I enjoyed being able to learn on my computer."

"The manner it was presented and my ability to leave and return at my convenience was most appreciated. Also being able to go back and review a previously completed slide or portion is very helpful."

"This was very clear, and easy to follow, I really enjoyed the course. Thanks"

"I will strongly encourage everyone to take this as soon as possible."

"Best course ever for presentation and learning."

Learner feedback from the course indicates how much industry members like the ability to take the course at a time and place of their convenience, to be able to start and stop the course as time allows, and to be able to return to the course where they left off.

Industry members are encouraged to complete *Real Estate Update 2009-2010* well in advance of next year's renewal deadline. RECA would like to remind licensed industry members that the course is free and can be accessed through www.reca.ca by clicking on "RECA Education."

For those industry members who would prefer to complete a classroom version of the course, RECA has posted a list of approved course providers/instructors on its website at <http://www.reca.ca/industry/content/licensing-renewals/re-licensing-education-program-approved-providers.html>.

Legal Corner

The plaintiff, a licensed mortgage brokerage in Alberta, initiated court proceedings against the defendant, Ms H, for breach of contract. The plaintiff alleged that it is entitled to \$18,000 in commissions earned for services rendered to Ms H as a result of securing a financing commitment for Ms H's purchase of agricultural land. Ms H denied the claim that commissions were owed because the commitment secured by the plaintiff from the third party lender was never honoured by the lender. Ms H did not back out of the commitment, but rather the lender failed to advance the funds in a timely fashion resulting in the commitment for financing not being honoured.

Ms H's position is that because the commitment was not honoured, the plaintiff failed to complete its contract with Ms H and therefore, is not entitled to any commissions.

Ms H entered into a purchase contract on February 9, 2007 to purchase agricultural land. The purchase price was \$800,000 and Ms H paid a \$30,000 deposit. The closing date was to be March 15, 2007. A copy of the purchase contract was provided to the plaintiff on February 16, 2007. Ms H had retained the plaintiff on previous occasions to arrange mortgage financing for other transactions.

On February 20, 2007, Ms H signed a commercial mortgage application with the plaintiff and that same day, the plaintiff delivered the purchase contract to a lender.

The plaintiff approved Ms H's commercial mortgage application on February 22, 2007 and the plaintiff and Ms H entered into an Engagement Agreement of Financial Services ("Engagement Agreement") wherein Ms H authorized the plaintiff to introduce debt and/or equity financing sources that would provide financial commitments to Ms H.

On February 26, 2007, Ms H entered into an agreement with the lender (arranged by the plaintiff) whereby the lender agreed to loan Ms H \$646,700. Ms H was to pay the plaintiff brokerage \$18,000 and the fees payable to the lender were \$28,700.

On March 13, 2007, the vendor agreed to extend the closing date to April 16, 2007 in exchange for an additional \$30,000 deposit from Ms H.

On April 2, 2007, legal counsel for the lender wrote to Ms H's lawyer asking for particulars with respect to the purchase contract. Ms H's lawyer replied with the request particulars, including the new closing date, on April 3, 2007. Ms H's lawyer advised the lender's lawyer that funds would be required the morning of April 16, 2007.

On April 12, 2007, the lender advised Ms H that it would not have funds available to provide to Ms H until April 30, 2007. The next day, Ms H advised the vendor's lawyer that financing may not be available on April 16, 2007; but that it was likely the financing would be available on April 30, 2007.

On April 16, 2007, Ms H signed all documents required by the lender in order to advance the mortgage funds. Later that day, the lender's lawyer advised Ms H's lawyer that mortgage funds

would not be available until April 30, 2007, and that it was the lender's understanding Ms H obtained an extension from the vendor.

On April 17, 2007, Ms H's lawyer advised the lender's lawyer that the vendor would not agree to extend the closing date beyond April 16, 2007. Ms H had not obtained an additional extension on the closing date.

Ms H and the vendor mutually agreed to terminate the purchase contract in accordance with an Option Agreement entered into by the parties on April 16, 2007.

On April 18, 2007, Ms H's lawyer advised the lender that the purchase contract had been terminated and the mortgage funds were no longer required. The lender did not loan any funds to Ms H, it has not been paid nor has it claimed from Ms H the fees pursuant to its agreement with Ms H. Ms H has also not paid any fees claimed by the plaintiff under the Engagement Agreement.

Pursuant to an agreement dated May 25, 2007, Ms H assigned her interest in the Option Agreement to a third party in exchange for \$293,000 plus GST. The third party ultimately purchased the land pursuant to the Option Agreement, and that transaction closed on July 31, 2007. The plaintiff arranged the mortgage financing on behalf of the third party and the third party paid the plaintiff \$15,000 for arranging the financing.

The plaintiff's lawyer submitted Ms H owed commissions to the plaintiff upon signing the mortgage commitment. Counsel for Ms H submitted the plaintiff did not complete its obligations under the Engagement Agreement.

Clause 11.1 of the purchase contract indicated that "... all time periods, deadlines and dates in this contract shall be strictly followed and enforced. All times will be Alberta time unless otherwise stated." Both the plaintiff and the lender were aware that timelines were fundamental to closing of the transaction.

The original closing date of March 15, 2007 was later extended to April 16, 2007. In order to achieve the extension, Ms H was required to provide an additional \$30,000, which meant that she would likely forfeit \$60,000 in the event she failed to close the real estate transaction on or before April 16, 2007.

The Mortgage Commitment contained a condition that read: "*funding of this loan is subject to the availability of funds. ...*". The judge found that the Mortgage Commitment created a unilateral condition precedent for the benefit of the lender. While Ms H was bound to the Mortgage Commitment, the lender had an "out." Had funds not been available, as they were not available, on April 16, 2007, there was no legal obligation for the lender to fund the transaction. The lender could walk away from the Mortgage Commitment, at no consequence to itself.

Ms H accepted the terms of the commitment letter on February 26, 2007. On or about March 15, 2007, when the closing date was extended to April 16, 2007, Ms H put herself at risk of forfeiting her \$60,000 deposit.

Well in advance of April 16, 2007, the lender was aware Ms H's purchase contract was one in which *time was of the essence*.

Once Ms H signed the Mortgage Commitment, she became bound to complete the transaction. The wording in clause 2.2 of the Engagement Agreement is directed at crystallizing the right of the plaintiff to collect commissions in the event Ms H decided to shop the mortgage financing for a better deal elsewhere. Had this been the case, Ms H would have been liable to the plaintiff for payment of the \$18,000 commission. But, the judge did not agree with the allegation that Ms H walked away from the Mortgage Commitment, instead, finding the lender failed to fund the transaction in a timely manner.

The commitment secured by the plaintiff from the lender, and accepted by Ms H, was a conditional agreement at best. Where *time was clearly of the essence* to the closing of Ms H's transaction, and where the unilateral condition precedent in favour of the lender was not waived, the commitment was not crystalized on April 16, 2007 when the funds were required for closing Ms H's purchase.

The judge was satisfied that the Engagement Agreement between the plaintiff and Ms H was entered into in relation to a purchase contract that clearly stipulated a specified closing date with a *time is of the essence* clause. The plaintiff and the lender were fully aware of the terms of the purchase contract and the fact that *time was of the essence*. The lender and the plaintiff were fully aware Ms H was at risk of forfeiting \$60,000 in the event the closing was not funded by the lender on before April 16, 2007. The commitment secured by the plaintiff in favour of Ms H was a conditional commitment at best and until the condition precedent: "subject to availability of funds" was waived by the lender, the plaintiff failed to secure the commitment for which it is seeking recovery of commissions.

The judge was not satisfied that the plaintiff fulfilled the terms of the Engagement Agreement so as to entitle it to any commissions, nor was the judge satisfied that Ms H breached the terms of the Engagement Agreement so as to entitle the plaintiff to any damages. The plaintiff's claim was dismissed.

If you are interested in the case reference, please contact RECA communications at: communications@reca.ca.

Re-Licensing Education Program

Real Estate Industry Members

Real estate industry members must complete the course ***Real Estate Update 2009-2010*** prior to **September 30, 2010** in order to renew their registration.

The course is currently available online via [RECA Education](#), and is free of charge for all real estate industry members. The course is interactive and can be completed in multiple sessions, if desired.

RECA will also facilitate a classroom version of the course through approved course providers and instructors. RECA anticipates that it will launch in mid-November. Delivery details, such as class scheduling, will be at the discretion of course providers.

Mortgage Brokerage Industry Members

Mortgage brokerage industry members must complete the course ***Mortgage Broker Update 2009-2010*** prior to **September 30, 2010** in order to renew their registration.

Development of the *Mortgage Broker Update 2009-2010* is nearing completion and will soon be available online via [RECA Education](#). The course will be free of charge for all mortgage brokerage industry members. The course will be interactive and can be completed in multiple sessions, if desired.

Real Estate Appraisal Industry Members

There is no REP for real estate appraisers and candidates for the 2009-2010 licensing year.

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The Regulator is published by the Real Estate Council of Alberta. Please forward your comments and suggestions to communications@reca.ca.

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