

## **Regulator – May 2009**

### **Transaction Brokerage – Not Always Appropriate**

The following Information Bulletin is printed in its entirety.

*Summary: While transaction brokerage offers a solution to resolving the conflict of interest that occurs when a brokerage finds itself representing a seller and buyer in the same transaction, there may be situations where it is not appropriate for the brokerage to agree to act as a transaction facilitator. [See: Real Estate Act Rules s.41(a)(d)(e)(f), s.43, s.59(3), s.59.1(3)]*

While transaction brokerage offers a solution to resolving the conflict of interest that occurs when a brokerage finds itself representing a seller and buyer in the same transaction, there may be situations where it is not appropriate for the brokerage to act as a transaction facilitator.

Transaction brokerage may not be suitable for clients who may need sole agency representation during the negotiations that often occur. In addition, it may not be appropriate if the industry member's conflict of interest, or perceived conflict of interest, cannot be resolved to the satisfaction of the clients or the brokerage or the industry member in question.

#### **Client May Need Sole Agency Representation:**

Transaction brokerage may not be appropriate for all clients. For example, it may not be appropriate for clients of advanced age or physical limitations. It may not be suitable for a new immigrant who is unfamiliar with the English language, Canadian business practices or private property ownership. Although those individuals have the capacity to enter into a contract, a general level of acquired knowledge may not be present or their ability to access that information on their own may be limited. If the brokerage is of the opinion that sole agency (representation) is in the client's best interests, then transaction brokerage and customer status would not be viable options for such a client.

A client who requires sole agency representation should be referred to another brokerage or, if it is a designated agency brokerage, to another designated agent in the same brokerage.

### **Conflict of Interest and Ethical Issues May Persist**

Transaction brokerage requires the brokerage and industry member to act as a facilitator in the transaction. The transaction facilitator must treat the interests of both the buyer and seller in an even-handed, objective and impartial manner, including but not limited to, that any advice or information given to one party must be disclosed to the other party. The transaction facilitator must not use his or her discretion or judgment in a way that benefits the buyer or seller to the prejudice of the other.

In transaction brokerage, this role of impartiality, objectivity and not advocating for the interests of one party over the other is a significant challenge and true test of professionalism for the brokerage and individual industry member who assumes the role of transaction facilitator.

The reality is that in some situations the industry member will continue to be faced with a real or perceived personal conflict of interest as well as the representational one. For example, one of the parties the industry member is representing may be a family member, a relative, a co-worker, another associate with the brokerage, a close friend, long term client, or business associate. He or she must disclose these conflicts to other clients. Is it realistic to expect the industry member will meet these standards of neutrality under these circumstances? Human nature would suggest it is unrealistic for any person to meet these standards in these situations.

A personal conflict can also arise when industry members are in personal real estate trades. For example, an associate has ownership in a property listed for sale with the brokerage and the buyer client is represented by the same brokerage. Alternatively, the associate wants to buy a property listed by his or her own brokerage. The brokerage, through its industry members, is required to disclose these conflicts to their clients. Again, it would be unrealistic for industry members to remain neutral under these circumstances.

### **Practice Tip**

In addition to the legal and regulatory standards that must be met, these situations may also pose an ethical dilemma for the practitioner. Notwithstanding the fact an industry member has successfully provided professional transaction facilitation services to many clients, is it ethical to proceed in a situation where one's loyalty clearly lies, or is perceived to lie, with one of the parties in the transaction? In addition, one of the clients in the transaction may be prepared to enter into transaction brokerage at the outset but, because of their connection to the industry member, is expecting the industry member to

provide them with advice and promote their interests over the interests of the other party during the process of negotiation.

These are difficult situations and should be discussed fully with the broker in advance of making a decision. It is the broker who will decide the appropriate options to offer such clients. If the decision is to refer the client to another brokerage, the new brokerage (or new designated agent) that ultimately provides representation services to the client should be provided with the reasons the brokerage chose not to engage in a transaction brokerage or customer relationship with the client in question.

The Real Estate Act Rules section 51(f) requires brokerages to have a policy for personal trades by their associates [Real Estate Act Rules s.62]. Brokerage policies must be adhered to by associates and may affect the options they offer their clients. For example, a brokerage may require full representation for clients in a personal trade with their associates. If so, transaction brokerage and customer status may not be suitable options. Common law brokerages might offer to refer the client to another brokerage for this transaction and designated agency brokerages might offer to refer the client to another designated agent or another brokerage.

## Message from Council

Ralph Salomons, Chair

### Financial planning

The renewal deadline for the 2009-2010 licensing period is still four months away, but Council's financial planning for the coming year is well underway. Council takes its financial health and the stability of the industry very seriously and is prepared to deal with any issues that result from the current economic changes.

Current licensing numbers in the real estate sector have decreased slightly since January 1; however, the mortgage and appraisal sectors have increased. As such, there has been a net decrease of only 99 individual industry members since January 1. RECA is monitoring the situation closely to ensure that it continues to have the resources necessary to achieve its mandate and deliver its services. RECA will release details on renewal procedures and fees in August after Council approves RECA's budget for the coming licensing year.

### Agency information

Designated agency was ushered in more than a year ago, and transaction brokerage replaced dual agency with limitations in October, but Council understands that industry

members still have questions. While industry members are always encouraged to discuss these issues with their brokers, RECA also encourages industry members to use the resources available to them on the RECA website.

The RECA website, at [www.reca.ca](http://www.reca.ca), has a link from the homepage to “Industry Member Tools.” These tools include the Agency Relationships Video, the Agency Relationships Guide, a consumer brochure for buyers and one for sellers, copies of residential real estate relationship forms, valuable FAQs on designated agency and transaction brokerage, and a Transaction Brokerage Practice Guide for Industry Members. There is also a corresponding link called “Consumer Tools” that makes similar information available to consumers.

### **Reminder**

RECA has implemented a new licensing reciprocity policy pursuant to the national Agreement on Internal Trade (AIT) and the Trade, Investment and Labour Mobility Agreement (TILMA) with British Columbia. There are no education requirements for Alberta real estate and mortgage brokerage industry members seeking licensing in British Columbia. Applicants must review the applicable material identified by the respective regulatory organization in British Columbia, and swear an affidavit that they have reviewed the content and that they will comply with B.C. requirements. For further clarification, contact the Real Estate Council of British Columbia or the Financial Institutions Commission.

In addition, RECA has recently posted on its website over 50 Information Bulletins on various topics for all industry sectors. We continue to work on additional Information Bulletins and they will be posted as they are completed. The Information Bulletins may be viewed under the Industry Standards button of the RECA website at: [www.reca.ca](http://www.reca.ca)

### **Rule Changes Affect Candidate-To-Appraiser Licensing Time Limit**

In response to a request by its Real Estate Appraisers’ Advisory Committee, Council recently approved amendments to section 18 of the Real Estate Act Rules eliminating the timeframe from the Rules for a candidate to become an appraiser.

Previously, section 18 of the Rules required real estate appraiser candidates to become licensed as appraisers within five-years of the first date of licensing. The Committee identified that the five-year time limit was impossible for some candidates to meet because the three professional appraisal associations have different requirements. Council’s actions were in response to this issue.

The amendments to section 18 mean that a candidate will have to attain the appraisal status of membership of one of the three professional appraisal associations within the time limits of the respective association of which the candidate is a member.

When RECA assumed responsibility for the regulation of real estate appraiser candidates and appraisers in Alberta on October 1, 2004, the Real Estate Act Rules section 18(5) stated that:

18(5) An individual who receives a candidate licence must complete the educational and examination requirements or other qualifications, if any, prescribed, adopted or approved by the appraiser associations for the appraiser category of licence within five years of the date the candidate licence is first issued by the Council.

The three professional appraisal associations have always been responsible for setting their own minimum standards of education and training required for a candidate to obtain full and active appraiser membership. At the time section 18 was drafted and included in the Rules, the five-year time limit was reasonable based on these educational and examination requirements or other qualifications required.

However, the professional appraisal associations have since changed some of the requirements that need to be met before proceeding from a candidate licence to an appraiser licence. As a result, in some cases, candidates are not able to meet the requirements within the five-year period that was specified in section 18 of the Rules.

### **Amendments**

The three professional appraisal associations were contacted prior to Council considering the amendment and they support the idea of leaving the responsibility of deciding a time limit by which a candidate must become an appraiser to the individual appraisal associations.

Amendments to section 18 of the Rules include the requirement that if a candidate fails to obtain the educational and examination requirements or other qualifications of their professional association in the time specified by their professional association, the candidate must notify the executive director immediately that the candidate failed to obtain those qualifications. In those cases, the candidate's licence shall immediately be cancelled by the executive director.

When a candidate licence has been cancelled pursuant to section 18(6), that individual cannot apply for a new candidate licence for a period of two years following the date of the cancellation of his or her candidate licence. Additionally, there will be no process through which the candidate can make an application to the RECA executive director for a time extension since there is no longer a time limit in the Rules. If a candidate did not

meet the qualifications required by their professional association(s), he or she would have to seek a time extension through their association(s), if desired.

The amended section 18 of the Real Estate Act Rules will read as follows:

*18 (1) An individual who intends to apply for an appraiser or candidate licence shall first meet the educational and examination requirements or other qualifications, if any, prescribed, adopted or approved by the appraiser associations for that class of licence.*

*(2) An individual who intends to apply for an appraiser or candidate licence who has never met the educational and examination requirements outlined in (1) above or, who currently is not a member in good standing of one of the appraiser associations, must first write the examination prescribed, adopted or approved by the executive director for that category of licence and pass that examination with a grade satisfactory to the Council.*

*(3) An individual described in (2) above shall be entitled to one re-write of the appraiser licence examination.*

*(4) An individual described in (2) above who successfully passes the appraiser licence examination must, as a condition of receiving an appraiser licence, become a member in good standing of one of the three appraiser associations prior to the renewal of the appraiser licence for the following licensing year.*

*(5) An individual who receives a candidate licence must complete the educational and examination requirements or other qualifications, if any, prescribed, adopted or approved by the appraiser associations for the appraiser category of licence within the timeframe prescribed by that appraiser association.*

*(6) If a candidate fails to obtain the educational and examination requirements or other qualifications referred to in (1) above, the candidate must notify the executive director immediately that the candidate failed to obtain those qualifications. The candidate's licence shall immediately be cancelled by the executive director.*

*(7) deleted*

*(8) deleted*

*(9) When a candidate licence has been cancelled pursuant to this section, that individual cannot apply for a new candidate licence for a period of two years following the date of the cancellation of his first candidate licence.*

## **Council Approves Recommendation to Continue Regulating Dealing in Syndicated Mortgages**

At its May 6, 2009 meeting, the Real Estate Council of Alberta (RECA) approved a recommendation put forward by its Mortgage Brokers' Advisory Committee (MBAC) that RECA remain the regulator of mortgage brokers who are licensed by RECA pursuant to the Real Estate Act and who deal in traditional syndicated mortgages in Alberta.

“Traditional” syndicated mortgages are arm’s-length transactions where the value of the mortgage does not exceed the market value of the land being secured for mortgage purposes.

Council also approved a recommendation to enhance its regulation of all licensed mortgage brokers that represent lenders.

Currently, the Alberta Securities Commission (ASC) has an exemption in place from its registration and prospectus requirements for individuals dealing in all types of syndicated mortgages who are licensed as mortgage brokers with RECA. ASC has indicated to RECA its intention to remove the exemption in Fall 2009.

RECA received a letter from ASC dated May 5, 2009 indicating the ASC will proceed with its removal of the exemption for mortgage broker industry members dealing in syndicated mortgages, regardless of RECA’s proposal to remain as the sole regulator of mortgage broker industry members who deal in syndicated mortgages. RECA met with ASC representatives and provided the ASC with its proposed regulatory model for syndicated mortgages prior to the May 5, 2009 letter. RECA representatives continue to discuss the issue with the ASC.

#### **Attempts to avoid dual regulation**

RECA developed regulatory standards for syndicated mortgages through its MBAC in consultation with industry members that deal in syndicated mortgages. The Committee created a sub-committee of industry members dealing in syndicated mortgages to establish standards that meet appropriate consumer protection levels.

If the ASC proceeds with its proposal, many mortgage brokers licensed by RECA who deal in traditional syndicated mortgages would be subject to regulation by two regulatory bodies with two different pieces of legislation (the Securities Act and the Real Estate Act) for the same business activity. Licensed mortgage brokers who deal in syndicated mortgages have made it clear they are opposed to a regulatory environment in which they are regulated by two different regulatory organizations.

In addition to the confusion that will exist among consumers and industry members, mortgage brokers are concerned with the potential for duplication and overlap as well as the added costs they will incur if ASC becomes involved in regulating their activities. These costs could be significant, particularly for smaller traditional syndicated mortgages.

Council believes 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.

## Legislative changes required

Legislative changes to the Real Estate Act and/or the Real Estate Act Rules will be required regardless of how this matter is resolved. Should RECA remain the regulator of mortgage broker industry members who deal in syndicated mortgages, the definition of mortgage will require an amendment to clarify RECA's jurisdiction.

Alternatively, if the ASC proceeds with its proposal to remove the exemption for mortgage brokers, and if it is determined that RECA will not regulate mortgage brokers when they deal in traditional syndicated mortgages, legislative amendments will be required to specifically exclude all types of syndicated mortgages from the definition of "mortgage" in the Real Estate Act. This would clarify that RECA would not be involved in licensing and regulating the activities of licensed mortgage brokers when they are dealing in syndicated mortgages.

In addition, legislative amendments may be required to clarify that consumers, when investing in syndicated mortgages through mortgage brokers registered with RECA, will not be able to apply to RECA's Assurance Fund for compensation as dealing in syndicated mortgages would no longer fall under the jurisdiction of the Real Estate Act. RECA wants to ensure that if it is not the regulator of dealing in syndicated mortgages, it should not be the body to provide compensation to consumers affected by dealings in syndicated mortgages.

RECA continues to discuss this matter with ASC representatives, and will provide updates to industry members as the situation progresses.

## Mortgage Brokerage – When is a Licence Required?

The following Information Bulletin is printed in its entirety.

*Summary: Real estate industry members representing buyers often want to assist their clients in obtaining a mortgage so that they can proceed with a property purchase. While the real estate industry member's motivation is commendable, real estate industry members must ensure they do not overstep the bounds of their authorization. A real estate broker who carries on the activities of a mortgage broker must obtain the necessary authorization from RECA. The activity of a real estate broker that encourages clients to go to a particular financial institution is considered "soliciting" for the purposes of the Real Estate Act and requires a mortgage broker licence. [See: Real Estate Act, s.1(1)(j)(r)]*

Note: For the purposes of this Information Bulletin, and where the context permits, the term "real estate broker" includes all industry members authorized to trade in real estate

by the Real Estate Council of Alberta including a brokerage, broker, associate broker and associate.

The mortgage brokerage industry in Alberta is regulated by the Real Estate Act. Banks and other financial institutions are exempt from the Real Estate Act. A person holding any class of real estate broker licence is not authorized to deal in mortgages and, therefore, must obtain a mortgage broker licence from the Real Estate Council of Alberta (RECA) to engage in mortgage brokerage activity.

The word mortgage has a broad meaning under the Real Estate Act. Generally, it is an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt. A mortgage secured by the lessee's interest in the leased property is called a leasehold mortgage.

In order to understand what the word "dealing" means, the Real Estate Act references the activities of a mortgage broker [Real Estate Act, s.1(1)(j)(r)]. Thus, "dealing" means the activities of a mortgage broker including:

- the solicitation of people who borrow or lend money which can be secured by a charge on real property;
- the negotiation of mortgage transactions between a borrower and a lender;
- the collection of the mortgage payments and administering of renewals, and repayments as well as any other administrative duties on behalf of lenders;
- buying and selling or exchanging mortgages on the secondary market for mortgagees and mortgagors; and,
- holding oneself out as a person who can do any of the above; see definition of Holding Out.

In the 2002 case of *Toronto Dominion Bank v. Real Estate Council of Alberta* (Alberta Court of Queen's Bench), Madam Justice A.B. Moen reviewed the definition of "mortgage broker" and, in particular, what it means to "solicit" a person to borrow or lend money to be secured by a mortgage. Justice Moen concluded the following five scenarios constituted "soliciting" business for financial institutions and, therefore, constituted a breach of the Real Estate Act respecting mortgage brokers, unless the persons doing the soliciting have the necessary authorization from RECA:

1. A real estate broker refers his client to a specific lender. The real estate broker does not promote that specific financial institution or provide any specific information to the client, but asks the client to advise the lender that he was referred by the real estate associate. The client uses that lender and mentions the name of the real estate broker as requested. A fee is paid to the real estate broker by the lender.

2. The real estate broker refers his client to a specific lender. The real estate broker promotes the lender or encourages the client to use the lender in some manner (e.g. the real estate broker indicates that the lender has quick service, a good mortgage program, competitive rates, etc. or that his former clients have had good dealings with that lender). The real estate broker asks the client to advise the lender that he was referred by the real estate broker. A fee is paid to the real estate broker by the lender.
  
3. The real estate broker refers his client to a specific lender. The real estate broker promotes the lender or encourages the client to use the lender in some manner. The real estate broker may take a mortgage application directly from the client and deliver it to the lender. In some cases, the real estate broker may arrange for a meeting between the client and the loans officer at the lender or attend the mortgage application session with the client. A fee is paid to the real estate broker by the lender.
  
4. An employee of a lender is located on-site at the real estate office. Clients are encouraged to use, are referred to or are “steered” in some manner toward the lender’s on-site employee for pre-approval and/or mortgage financing. A real estate broker actively recommends the on-site lender for various reasons (e.g. they have quick service, a good mortgage program, competitive rates or his former clients have had good dealings with the lender). A fee is paid to the real estate broker by the lender.
  
5. A real estate brokerage has an agreement with a specific lender. The lender offers the clients of the real estate brokerage a special mortgage program (e.g. special mortgage rates, or a “cash back” payment after closing). Sometimes an employee of the lender is located on-site at the real estate office. The real estate broker actively refers or “steers” his clients to this lender and the mortgage program negotiated by the real estate brokerage with the lender (e.g. indicating that the lender has a special program for the real estate brokerage’s clients, quick service, competitive rates, etc. or that his former clients have had good dealings with this lender). A fee is paid to the real estate broker by the lender.

Madam Justice Moen concluded her decision with the following comments:

“If real estate brokers wish to encourage their clients to go to a particular financial institution, they may obtain the necessary authorization as mortgage brokers. The Alberta legislature’s policy reason for enacting these provisions is, no doubt, to ensure that the public is aware that a mortgage broker may be receiving a benefit for a referral. Further, it is also clearly the legislature’s intention that the public should be protected by establishing a regulatory scheme in which mortgage brokers are governed by the Act and by the rules established by RECA.”

## Property Management – Are you Authorized?

Real Estate Council of Alberta (RECA) investigators receive inquiries and complaints relating to property management activities. The following are some examples of situations or activities related to property management practice that could result in an investigation of an industry member or a non-industry member for unlicensed activities.

### **Authorized to conduct property management activities**

Being licensed as a real estate industry member does not automatically ensure an individual is authorized to provide all services under the banner of trading in real estate. Real estate industry members who wish to conduct property management activities can only do so if their authorization includes property management activities.

The public search function on the RECA website allows industry members to check the specifics of their authorization. Search results clearly indicate what activities a real estate industry member is authorized to conduct. If the search result indicates “all real estate activities,” the individual in question is authorized to conduct property management activities. If the search results list “commercial, rural and residential real estate activities,” the individual is not authorized to conduct property management activities.

Real Estate Act Rules section 1(1)(w) defines property management to include:

- leasing, negotiating, approving or offering to lease, negotiate or approve a lease or rental of real estate;
- collecting or offering or attempting to collect money payable for the use of real estate;
- holding money received in connection with a lease or rental of real estate; and
- advertising, negotiating, or any other act, directly or indirectly for the purpose of furthering an activity described in sub-clauses (i) to (iii).

If you are unsure whether you are authorized to conduct property management or whether your brokerage allows property management activities, please use the public search function on the RECA website or speak with your broker. If you currently are not authorized to conduct property management activities, but wish to do so and your brokerage allows it, please contact RECA at 403-228-2954 or visit the Education portion of the RECA website at [www.reca.ca](http://www.reca.ca).

### **Conducting property management activities for your brokerage**

All licensed activity conducted by real estate industry members must be carried out through the brokerage with which they are registered. Some brokerages may choose a business model that does not allow for property management activities. If property management activities are not permitted according to the policies of a brokerage, industry members registered with that brokerage cannot conduct those activities. This is the case even though an individual industry member may be permitted to conduct property management activities according to their authorization from RECA.

RECA has investigated occurrences of licensed real estate industry members setting up property management companies through which they trade in real estate conducting property management activities, separate from the real estate activity they conduct through their brokerage. This is not allowed as licensed industry members must only trade in real estate in the name of the brokerage with which they are registered. All trust monies and all activities must occur through the brokerage with which they are registered.

In addition, brokerages that conduct property management activities must ensure that individuals who are representing the brokerage are licensed with RECA if they are providing services that require an authorization with RECA pursuant to the Real Estate Act and the Real Estate Act Rules.

### **Licensed name vs. trade name**

Brokerages and individual industry members can only trade in real estate, including property management activities, in the trade name in which they are authorized.

If a brokerage becomes licensed with RECA in one name and registers a trade name with Alberta Registries, the “trade as” name is the name the brokerage must use for all real estate activities. It is not acceptable to conduct property management activities using the “licensed as” corporate name and sales in the “trade name” (and vice versa).

RECA is working with a number of brokerages on this issue to ensure compliance with the legislation. If you are unsure whether your brokerage is operating within the Rules, please contact RECA directly.

## Industry Members and Hard to Insure Properties

The majority of buyers – especially first-time home buyers – will require a mortgage to purchase a home. Lenders require that buyers obtain homeowner's insurance. When working as a real estate industry member, it is in your clients' best interest to tell them of this requirement and caution them about properties that may be hard-to-insure.

Home insurance is provided by dozens of companies across the province. Competition is strong and rates will vary considerably, so it is a good idea to advise your clients of the possible benefit of obtaining multiple quotes.

In recent years, insurance companies have become less willing to insure some properties for a variety of reasons. Properties that may be hard to insure include properties with issues such as:

- Old wiring (knob and tube, ungrounded, Aluminum wiring)
- A furnace more than 20-years old
- Old plumbing (galvanized steel and cast iron)
- Old roofing
- Old wood-burning stoves and fireplaces
- Swimming pool or hot tub
- Asbestos insulation or siding
- Located in flood zone
- Located on a steep hill with heavy erosion

Any of the above issues could lead an insurer to deny coverage to a homeowner, as the risk of a payout is greatly increased. Even if an insurer agrees to insure a property with one or several of these issues, the premium will likely be much higher than if the property had no such issues. A thorough home inspection will likely identify issues that may be of concern to insurance companies. Insurance companies also need to know if a property is going to be owner-occupied, rented or left vacant.

Insurance companies will also look at a buyer's/homeowner's history. If a homeowner has filed one or more insurance claims in the past, have had a history of payment problems, have had cancelled, declined or lapsed policies, have a poor credit rating, or have been convicted of insurance fraud, the insurance company will take this into account and the premium will likely increase (if the policy is accepted at all).

### **Look into insurance early**

It is important that consumers consider the insurance costs of their potential purchase before signing a purchase contract. As an industry member, it is your responsibility to

remind buyers they will require homeowner's insurance, particularly if they are placing a mortgage on the property, and that the property they wish to purchase may be hard to insure.

It is a good idea to raise the subject of insurance with your clients early in the buying process. A good time could be when you are listing other expenses a buyer will normally encounter when buying a home, such as lawyer's fees and property taxes.

If you feel insurance may be an issue with the property in which your clients are interested, suggest making any offer conditional on the buyer successfully obtaining insurance for the property. This can be written into the purchase contract and can even include a set premium that your client must be approved for in order for the condition to be waived. This condition can also be specific to the problem you have identified with the property, and state that if insurance is denied because of that problem, the problem must be remedied by the seller up to a certain dollar amount.

Insurance should be arranged as early in the process as possible, preferably as soon as the offer to purchase is accepted. This gives the insurance company enough time to review an application. If a buyer waits too long, the closing of the transaction could be put in jeopardy.

Though real estate industry members are not expected or required to become insurance experts, they should be aware of issues that may arise when a buyer is attempting to obtain homeowner's insurance.

## **Education Corner – Education Policy Clarification**

### **Clarification of RECA's Education Policy**

Miscommunication of Real Estate Council of Alberta (RECA) policies by other industry associations continues to be a source of frustration for the Council.

At its August 2008 meeting, Council approved a three-year business plan. With respect to education, Council decided to make e-learning the primary source of delivery for courses that are part of the Re-licensing Education Program (REP). This decision was not taken lightly, and was only decided upon after careful consideration of the benefits of e-learning opportunities.

There appears to be confusion regarding e-learning as a primary delivery method versus exclusive delivery method. By policy, RECA has chosen e-learning as the primary instructional delivery method for its educational offerings. However, RECA has never indicated that e-learning would be the exclusive delivery method.

## **Benefits of online course delivery**

RECA takes the position that accessibility to instruction is paramount, and online learning can make courses more accessible to a greater number of people. Education programs must be provided to potential industry members and current industry members throughout the province on a fair and equitable basis. This means providing options for students that choose an on-line learning experience over a classroom experience because of their location or learning style preference.

Other advantages to online course delivery (“e-learning”) include that it provides consistent messaging to learners. Online course delivery removes differences between delivery methods or between instructor preferences. Each learner will be provided with the same information and interpretation for application in his or her practice.

Additionally, online courseware can be changed quickly to accommodate inevitable updates. Changes can occur simultaneously throughout the province and can be applied immediately. Inconsistent delivery and outdated information have been troublesome in classroom delivery courses and e-learning has the ability to mitigate these issues.

RECA’s core education values are consistent with the provision of learner-centric instructional design and the delivery and support for anytime, anyplace access to industry education. These criteria support current trends in adult education in meeting the needs of today’s adult learners. Although the primary delivery method is online, the option still exists for classroom support and/or delivery.

## **Online and Classroom REP**

RECA is pleased to announce that the Re-licensing Education Program (REP) for real estate and mortgage industry members in the 2009-2010 licensing year will be available online and in classroom, beginning in October 2009.

RECA is committed to providing education courses in an online format. However, if there is demand in the future for a course to be offered in a classroom setting, RECA will facilitate such an offering through its education partners.

RECA takes the position that learners should be the primary focus and recognizes its obligation to provide learning in ways that are most accessible and meaningful to them – be it online or in a classroom setting.

## **Legal Corner**

The plaintiffs purchased an approximately 50-year old home in northwest Calgary in Spring 2007. Within seven days of moving into the home, the plaintiffs (the buyers)

experienced serious flooding in the basement. A year earlier, in June 2006, the defendants (the sellers) experienced similar basement flooding, as a result of which they re-contoured their lot and installed a sump pump.

The buyers incurred costs of more than \$25,000 to clean up after the flood, fix the flood damage and 'waterproof' the house, and sought damages from the sellers on the basis that the sellers failed to disclose a defect that might render the property dangerous or unfit for habitation.

The buyers' offer was subject to a home inspection, but a home inspection was never done and the buyers waived the condition. Instead, the buyers relied on a home inspection report that was completed for the sellers in January 2006. The buyers also requested a list of all work the sellers did to the house since the date of the home inspection. The buyers received that list, but the list did not include installation of a sump pump or re-countering of the lot.

The January 2006 home inspection report indicated the inspector looked for signs of abnormal or harmful water penetration into the building and reported none. The sellers did not experience serious flooding until Spring 2006.

When the buyers did a pre-possession walk-thru of the property in April 2007, they discovered the sump pump under a cabinet. The buyers' representative asked the sellers' representative about it and the buyers were advised that the sellers' neighbour had suggested a sump pump would be good to install. The buyers' representative asked the sellers' representative if there had been a water issue and was told no. The judge accepted the buyers' representative's recollection of this conversation, though the sellers' representative could not recall it.

After the flood in Spring 2007, portions of the drywall were removed and the buyers discovered what was thought to be mold in their insulation and on the back of some of the basement drywall. It was determined that water leaked into the basement between the concrete footing and the concrete basement wall, as well as through fissures created by rusting snap ties in the concrete wall of the house. No one suggested that the sellers knew the snap ties were corroded, and there was no evidence that the sellers knew exactly how water entered their house in the Spring 2006.

At trial, the sellers' counsel argued the principle of "let the buyer beware" and advised on the distinction between latent and patent defects. Counsel argued that the sellers' duty is to disclose only those defects of which he or she is aware and that the buyers' opportunity to have the property inspected prior to purchase is his or her protection. The buyers indicated they relied primarily on the terms stated in the residential purchase contract.

Clause 6.1(h) of the purchase contract stated that the sellers were not aware of any defects that were not visible and that may render the property potentially dangerous or unfit for habitation. The sellers never disclosed the prior flooding. The buyers waived the home inspection condition upon review of the home inspection report from January 2006, provided by the sellers, and a list of subsequent work that was done to the property, which did not include mention of installation of a sump pump or re-contouring of the yard.

The judge found that the issue to be decided upon was whether the prior flood occurrence was a “defect” that was not visible and might render the property potentially dangerous to occupants or unfit for habitation. If so, it would need to be disclosed.

While the property was being fixed following the Spring 2007 flooding, one of the buyers (now an owner) continued to reside in the house, as a sort of live-in renovator and the judge found that notwithstanding the buyer’s presence in the house, it was not fit for habitation at the time. Given the evidence of a defect and the fact that part of the property was not fit for habitation, the judge had to consider whether the sellers’ failure to disclose the defect was actionable.

Through the purchase contract, the sellers expressly represented and warranted that they were not aware of any defects that were not visible and might render the property unfit for habitation.

Clearly the sellers were aware of prior flooding, but did they have reason to believe the defect had been rectified? The answer is no, as the sellers had been advised by the foundation people who installed the sump pump that the pump might not prevent further flooding and advice was given that weeping tile might be required if further flooding took place. There was no basis for the sellers to believe the defect was completely rectified following the June 2006 flooding.

The sellers’ lawyer argued that the defect was discoverable, and therefore did not need to be disclosed. The judge, however, found that not to be the case. The January 2006 home inspector did not find the defect, the foundation people who installed the sump pump were unable to assure there would be no further flooding and in fact, the defect did not again become clear until it rained. Additionally, it was not until the basement framing and drywall were ripped out that the cause of the flooding was discovered.

The judge also found that the buyers’ failure to secure a home inspection is only fatal to the case if the home inspection would have revealed the problem and there is no reason to believe that it would have.

Silence – that is, knowledge of a defect but failure to disclose that knowledge – may constitute concealment when there is a contractual obligation to disclose. In this case, there was through the contractual warranty or representation in the purchase contract by

the sellers that they were not aware of or knew nothing of any defects, which were not visible and which might render the property unfit for habitation.

The Court found in the buyers' favour on the issue of liability and suggested to the parties that they settle out of court.

(Connie v. Sampson, 2009 ABPC 61)

## Re-Licensing Education Program

### **Real Estate**

There is no REP for real estate industry members to renew their licence on or before September 30, 2009.

There will be REP for real estate industry members for the 2009-2010 licensing year. REP will consist of a single course available online through RECA Education and in the classroom through various providers. This course will be available as of October 1, 2009 and must be completed by all real estate industry members before September 30, 2010.

### **Mortgage**

There is no REP for mortgage industry members to renew their licence on or before September 30, 2009.

There will be REP for mortgage industry members for the 2009-2010 licensing year. REP will consist of a single course available online through RECA Education. This course will be available as of October 1, 2009 and must be completed by all mortgage industry members before September 30, 2010.

### **Appraisers**

Real estate appraisers and candidates must complete the Mortgage Fraud Awareness course before they renew their licence on September 30, 2009. This course qualifies for 3 credits/hours with the professional appraisal associations' continuing professional development programs.

The Mortgage Fraud Awareness course is available online through the Alberta Real Estate Association (AREA). Please contact AREA for more information at <http://www.abrea.ab.ca>.

If, as a result of licensing as a real estate or mortgage industry member, you have, in the past, completed the 6-hour Risk Reduction and Mortgage Fraud Awareness or the 3-hour Mortgage Fraud Awareness course, you are not required to complete the Mortgage Fraud Awareness course again. Please check your education record through RECA Online to confirm whether you have completed the education requirement.

## Review Understanding Designated Agency and Transaction Brokerage Course Materials for Free!

Industry members who have completed the Understanding Designated Agency and Transaction Brokerage course have the option of reviewing course materials – online – for free.

This course was part of the mandatory re-licensing education program for real estate industry members in 2008. For those industry members who have already completed the course, it is available to you free of charge online, as a refresher. To access the course again, go to the RECA website at [www.reca.ca](http://www.reca.ca) and click on 'RECA Education.' To access the course, you will require your RECA ID number, which you can obtain from your broker.

Accessing the course online as a refresher will also give you the ability to download and print a complete copy of the manual that accompanied the course.

## Council Member Opportunity

### **Want to build consumer trust and confidence in the real estate, mortgage and appraisal industries in Alberta?**

The Real Estate Council of Alberta (RECA) is an independent, non-government agency, responsible for regulating more than 15,000 industry professionals in the real estate, mortgage brokerage, and real estate appraisal industries under Alberta's Real Estate Act. Visit [www.reca.ca](http://www.reca.ca) for more information.

RECA is currently seeking a new industry member council member to represent those industry members who do not belong to the Alberta Real Estate Association. This commitment includes:

- serving a three-year term as a council member, beginning November 1, 2009;
- participating in five or more council meetings each year;
- serving on council committees as needed;
- serving on hearing and appeal panels; and,
- representing the Real Estate Council of Alberta at conferences and events.

RECA is looking for a critical thinker with:

- experience in planning and policy making;
- good judgment and outstanding integrity;
- the ability to communicate with tact and diplomacy;
- respect for the democratic process and others' points of view; and,
- a strong desire to build productive relationships and support RECA's regulatory work in a positive way.

If you are a committed leader with enthusiastic support for self-regulation and a genuine interest in RECA's role and the professionals it regulates, please forward a letter of introduction and résumé of related experience by June 22, 2009 to:

Coordinator, Executive and Council Operations  
Real Estate Council of Alberta  
Suite 350, 4954 Richard Rd SW  
Calgary, AB T3E 6L1  
Fax: (403) 228-3065  
E-mail: vhorne@reca.ca

Please note that an expression of interest does not guarantee a position on council.  
Council members receive an honorarium and are reimbursed for expenses.

## Real Estate Licence Suspended

### Jason Batke - Real Estate Associate Licence Suspended

On April 27, 2009, pursuant to Section 38(4.2) of the Real Estate Act, the Real Estate Council of Alberta temporarily suspended the authorization of real estate associate Jason Batke, currently unlicensed, pending the outcome of conduct proceedings under Part 3 of the Real Estate Act.

As a result of this suspension, Jason Batke may not trade in real estate in Alberta at this time.

## Case Summaries

### ADMINISTRATIVE PENALTIES

*March 2009 – May 2009*

Two Administrative Penalties with the following breaches:

- 1 breach of failing to act in accordance with a client's lawful instructions [s.2(b) of the Code of Conduct, as it was then]
- 1 breach of failing to act in the client's best interest [s.2(a) of the Code of Conduct, as it was then]
- 1 breach of failing to provide relevant information to the client [s.2(e) of the Code of Conduct, as it then was]
- 1 breach of failing to ensure the business of the brokerage is carried out competently and in accordance with the Act [s.21(1) of the Real Estate Act Rules]

## **CONSENT AGREEMENTS**

*May 2009*

**Lawrence Steinke, Broker**  
**STEINKE & COMPANY REALTY LTD.**

### Issues:

- Participation in the creation of a contract or document that he knew or ought to have known was not legally binding, confusing or did not reflect an agreement already in place [s.6(c) of the Code of Conduct, as it was then]
- Failure to use best efforts to ensure that his role in the real estate transaction was clearly understood by the parties to the transaction [s.3 of the Code of Conduct, as it was then]

### Facts:

- Mr. Steinke assisted in the sale of approximately 102 acres of undeveloped land in October 2004.
- The property was encumbered by a deferred reserve caveat in the name of the County of Parkland.
- Mr. Steinke was aware of interest in the land, and contacted the corporate seller regarding its intention to sell.
- Initial contact between the complainant seller and Mr. Steinke was very brief and focused primarily on the seller's intention to sell and the sale price.
- There was no evidenced discussion regarding the representative capacity of Mr. Steinke in the impugned transaction.
- Mr. Steinke completed an offer to purchase, which correctly identified the legal description of the land, but misstated the area of the land to be conveyed, such as to reduce the stated parcel size by the amount of the deferred reserve caveat.
- While all parties were aware that the entirety of the land would be conveyed, and that the land totaled 102 acres (more or less) the representation in the offer to purchase was not factually correct.
- The seller refused to complete the sale on the original terms, pointing to the inconsistency in the stated area of the land.
- The seller claimed to have been misled as to the area of the property to be conveyed and the resulting value of the parcel.

Results: The Hearing Panel ordered Lawrence Steinke to pay a fine of \$3,500, costs in the amount of \$1,000 and complete an educational requirement.

**Jennifer Harrison, real estate associate**  
**Formerly registered with Arteam realty inc. o/a royal lepage arteam realty.**

Issue:

- Made representations and/or carried on conduct that was reckless and/or intentional and that misleads or deceives any person or is likely to do so [s.42(a) of the Real Estate Act Rules]

Facts:

- Ms Harrison was registered with Arteam Realty Inc. o/a Royal LePage Arteam Realty at all material times.
- Ms Harrison did not renew her authorization for the 2008-2009 licensing year and as such she is not registered to trade in real estate with any brokerage.
- Ms Harrison was representing a buyer who was purchasing two condominiums for investment purposes.
- The buyer's Offers to Purchase were subject to conditions.
- When Ms Harrison prepared the condition removal documents for the two properties, she initially only included one of the conditions that was to be removed.
- After she received the signed condition removal documents from the buyer, she noticed that she forgot to include both conditions on the document.
- Ms Harrison maintains she contacted the buyer to advise him of the error and of the need to send the documents back to him as she needed to add the missed condition onto the documents and get his signature again.
- Ms Harrison claims the buyer's response was that he asked her to add the missed condition to the document herself without his need to sign again as he was out working in the field.
- The buyer told a RECA investigator that he did not recall telling Ms Harrison that she could add the financing condition onto the document herself.
- Ms Harrison added the financing conditions onto the condition removal documents without having the buyer sign the documents acknowledging the change.
- The condition removal documents for both properties had the appearance that the buyer signed the documents reflecting removal of the financing condition when in actuality, at the time he signed the documents, this condition did not appear on either of the documents.
- Ms Harrison listed herself and signed as a witness on the condition removal documents for both properties when in fact she did not witness the buyer's signature on either document.

Results: The Hearing Panel ordered Jennifer Harrison to pay a fine of \$2,000 and costs of \$500.

## **DISCIPLINARY ACTION**

April 2009

### **Lindsay Wayne Read, Appraiser Centract Settlement Services.**

Issue:

- Acting as a real estate appraiser without proper authorization, contrary to s.17 of the Real Estate Act (the "Act")

Facts:

- From October 1, 2004 to September 30, 2005, Mr. Read was authorized as an appraiser by the Real Estate Council of Alberta ("RECA").
- On September 30, 2005, Mr. Read did not renew his licence through RECA and did not become authorized again through RECA until July 9, 2008.
- Between October 1, 2005 and July 9, 2008 inclusive, Mr. Read completed over 900 appraisals of residential property.
- Between October 1, 2005 and July 9, 2008 inclusive, Mr. Read received a salary and bonus in consideration for completing these appraisals

Results: The Hearing Panel accepted Mr. Read's Admission of Conduct Deserving of Sanction with regards to a breach of s.17 of the Act. The Hearing Panel ordered that Mr. Read pay a fine in the amount of \$11,000 and costs in the amount of \$2,646.58.

### **Harrison Tse, Former Real Estate Associate**

Issue:

- Failure to cooperate with an investigator with the Real Estate Council of Alberta who was conducting an investigation [s.38(4) of the Real Estate Act]

Facts:

- Between January 2006 and May 2008, RECA investigators made repeated requests to Mr. Tse for information. In spite of several phone conversations and letters and communication with Mr. Tse's lawyers, Mr. Tse provided no information.
- Without the information, RECA could not move forward on an investigation of the allegations in question, although several contraventions were noted in the transactions.
- Because of the lack of information and co-operation from Mr. Tse, a file was opened regarding his non-co-operation

Results: The Hearing Panel found Harrison Tse's conduct deserving of sanction and ordered him to pay a fine of \$10,000 and costs in the amount of \$3,974.22.

The Hearing Panel also ordered that the Executive Director not approve any future application from Harrison Tse for an authorization to trade in real estate until he has cooperated with the investigation by the Real Estate Council of Alberta to the satisfaction of the Executive Director.

## **LIFETIME WITHDRAWALS**

May 2009

### **Suresh Agarwal, Mortgage Associate The Professionals Group Inc.**

On May 6, 2008, Suresh Agarwal, former mortgage agent most recently registered to The Professionals Group Inc. in Edmonton, 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 withdrawal application, Mr. Agarwal was the subject of conduct proceedings to determine whether or not he was involved in fraudulent mortgage transactions.

Mr. Agarwal'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, conduct proceedings are discontinued. There has been no hearing and no finding of facts in this matter. Mr. Agarwal's withdrawal application does not constitute an admission of misconduct.

### **Ronald Dobbin, Real Estate Associate 1173471 Alberta Ltd. o/a Sutton Central.**

On May 6, 2008, Ronald Dobbin, former associate registered with 1173471 Alberta Ltd. o/a Sutton Central in Calgary, 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 withdrawal application, Mr. Dobbin was the subject of conduct proceedings to determine whether or not he had falsified signatures on a document.

Mr. Dobbin'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, conduct proceedings are discontinued. There has been no hearing and no finding of facts in this matter. Mr. Dobbin's withdrawal application does not constitute an admission of misconduct.

### **Barbara Hong, Real Estate Associate Polaris Realty (1995) Ltd. o/a Realty Executives Polaris.**

On May 6, 2008, Barbara Hong, former real estate associate registered with Polaris Realty (1995) Ltd. o/a Realty Executives Polaris in Edmonton, 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 her withdrawal application, Ms Hong

was the subject of conduct proceedings to determine whether or not she failed to explain her role in a dual agency situation, participated in the creation of false documents, knowingly or recklessly misrepresented the potential market value of a property, allowed a non industry member to perform tasks that only a licensed person should perform and failed to act in a client's best interest.

Ms Hong'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, conduct proceedings are discontinued. There has been no hearing and no finding of facts in this matter. Ms Hong's withdrawal application does not constitute an admission of misconduct.

**James Leahy, Real Estate Broker  
Protec Property Management Realty Ltd.**

On May 6, 2009, Mr. James Leahy, former broker registered with Protec Property Management 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. At the time of his application, Mr. Leahy was the subject of conduct proceedings to determine whether or not he allowed negative trust balances on client ledgers, failed to notify RECA of fund trust shortages, and charged administration fees as a hidden amount on invoices.

Mr. Leahy'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, conduct proceedings are discontinued. There has been no hearing and no finding of facts in this matter. Mr. Leahy's withdrawal application does not constitute an admission of misconduct.

**Hai Quang Nguyen, Real Estate Associate  
Impact Real Estate Group Ltd. o/a Residential One Real Estate.**

On May 6, 2008, Hai Quang Nguyen, real estate associate formerly registered with Impact Real Estate Group Ltd. o/a Residential One Real Estate and most recently registered to Unison Realty Group Ltd. in Calgary, 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 withdrawal application, Mr. Nguyen was the subject of conduct proceedings to examine whether or not Mr. Nguyen misrepresented the terms of a mortgage assumption, acted fairly and with integrity when dealing with non-clients, proceeded to act in a transaction knowing his role was unclear to the parties, failed to advise his broker that he was facilitating a transaction outside his brokerage and failed to provide trade documents to his broker.

Mr. Nguyen'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, conduct proceedings are discontinued. There has been no hearing and no finding of facts in this matter. Mr. Nguyen's withdrawal application does not constitute an admission of misconduct.

**Patricia Roque, Real Estate Associate**

### **Polaris Realty (1995) Ltd. o/a Realty Executives Polaris**

On May 6, 2008, Patricia Roque, former real estate associate registered with Polaris Realty (1995) Ltd. o/a Realty Executives Polaris in Edmonton, 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 her withdrawal application, Ms Roque was the subject of conduct proceedings to determine whether or not she failed to fulfill her fiduciary duty, participated in illegal activity, drafted false documents, failed to cooperate with investigations and traded in real estate without a licence.

Ms Roque'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, conduct proceedings are discontinued. There has been no hearing and no finding of facts in this matter. Ms Roque's withdrawal application does not constitute an admission of misconduct.

February 2009

### **Giampiero Sartori, Real Estate Associate Comox Realty Group**

On February 4, 2009, Giampiero Sartori, a former real estate associate registered with Comox Realty Group in Calgary, 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 withdrawal application, Mr. Sartori was the subject of an ongoing RECA conduct proceeding. The conduct issues related to a failure to cooperate with a serious RECA investigation.

Mr. Sartori'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, conduct proceedings are discontinued. Mr. Sartori's withdrawal application does not constitute an admission of misconduct.

### **Gregory Delaine, Real Estate Associate D.J. Hay Enterprises Ltd.**

On February 4, 2009, Gregory Delaine, a former real estate associate most recently registered with D.J. Hay Enterprises Ltd. in Calgary, 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 withdrawal application, Mr. Delaine was the subject of an ongoing RECA conduct proceeding. The conduct issues related to the following:

- his provision of property management services without a licence
- his use of misleading property management agreements

- his mismanagement of trust money
- his potential receipt of commission or other remuneration other than through the brokerage

Mr. Delaine'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, conduct proceedings are discontinued. Mr. Delaine's withdrawal application does not constitute an admission of misconduct.

## Council Members

**Ralph Salomons** (*chair*)

Real estate brokers trading in commercial real estate

**Richard Parker** (*vice chair*)

Public member appointed by the minister of Service Alberta

**Pat Rudiger** (*past chair*)

Real estate brokers trading in residential real estate

**Gary Siegle**

Alberta Mortgage Brokers Association

**Chris Anderson**

Industry members who are not members of the Alberta Real Estate Association

**Cheryl Schindel**

Real estate boards outside of Edmonton and Calgary

**Sheldon Johnston**

Edmonton Real Estate Board

**Les Higa**

Real estate boards outside of Edmonton and Calgary

**Connie Leclair**

Public member appointed by members of Council

**Cindy Dubray**

Property management Sector

**Wayne McAlister**

Calgary Real Estate Board

**Robert Telford**

Real estate appraisers

## Contact RECA

The Regulator is published by the Real Estate Council of Alberta. Please forward your comments and suggestions to [communications@reca.ca](mailto:communications@reca.ca).

Executive Director - Bob Myroniuk

Director of Audit and Investigations - Joseph Fernandez

Director of Corporate Services – Dale Cawsey

Director of Industry Standards - Kirk Bacon