



**REAL ESTATE
COUNCIL
OF ALBERTA**

Regulator – December 2008

Transaction Brokerage Interpretation Guideline

Note: Effective October 1, 2008, transaction brokerage replaced dual agency with limitations in the real estate industry in Alberta. The former *Real Estate Act* Rule 59, dealing with Dual Agency with Limitations, is now replaced with the new Rule 59: Transaction Brokerage for Common Law.

For the purposes of this Interpretation Guideline, only section 59 is included; however, the information provided applies to transaction brokerage when practised by a common law brokerage or a designated agency brokerage.

With the introduction of transaction brokerage comes a departure from traditionally-practised dual agency situations. Transaction brokerage is a model of concurrent representation allowing industry members to work with a seller and buyer in the same transaction. In transaction brokerage, a common law brokerage or designated agent, as the case may be, becomes a facilitator, and treats the seller and buyer in an even-handed, objective and impartial manner.

Conflict of Interest and Disclosure

Generally, where a brokerage represents a seller with whom it has an agency relationship and a buyer with whom it has an agency relationship is interested in purchasing the seller's property, the brokerage is in a legal conflict of interest. The conflict results from the brokerage's obligation to act in the best interests of each client and at the same time each client has a competing interest vis-a-vis each other and the potential sale of the property.

Under common law, this conflict of interest occurs most often when one associate registered with a brokerage represents the seller and a different associate registered with the same brokerage represents the buyer in the same transaction or potential transaction. The conflict can also occur when the same brokerage associate represents both the seller and the buyer in the same transaction or potential transaction.

The industry member's obligation is to disclose the conflict of interest to both clients and discuss options for conflict resolution before proceeding with the transaction.

Transaction brokerage offers an effective means to resolve the conflict of interest arising from concurrent representation. It allows the industry member to facilitate the purchase and sale of a property between the seller and buyer.

Facilitation services may include but are not limited to:

- assisting the buyer and seller in negotiating a mutually acceptable agreement.
- providing real estate statistics and information on property including comparable property information.
- providing agreements of purchase and sale, lease or other relevant documents.
- preparing all necessary documents in accordance with the instructions of the buyer and seller.
- providing the names of real estate appraisers, mortgage brokers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and the like (without recommending any particular professional).
- keeping the buyer and seller fully informed regarding the progress of the transaction.

Before performing any facilitation services, the industry member must enter into a written transaction brokerage agreement, a type of written service agreement, with the clients. By way of this agreement, after the disclosure of the conflict of interest and before the industry member proceeds to act as a transaction facilitator for the clients, both the seller and buyer must provide their informed written consent to the industry member continuing to act in this role.

Transaction Facilitator Must be Neutral

When acting as a transaction facilitator, the overriding obligation is to treat the interests of both the buyer and seller in an even-handed, objective and impartial manner. A transaction facilitator must remain neutral and must not favour one party over the other, while assisting the clients in reaching a mutually acceptable agreement

Using Discretion or Judgment

While a transaction facilitator will be required to use some discretion and judgment in the provision of facilitation services, the main principle is that a transaction facilitator must not use their discretion or judgment to favour one client over the other.

The following list of examples is intended to illustrate situations where a transaction facilitator may properly exercise a degree of discretion or judgment, but it is not intended to be an exhaustive list:

- when a buyer asks for the most recent comparable sales in the neighbourhood for a home they are considering, the industry member will use discretion or judgment in choosing the comparable sales to show the buyer. If requested, the same information should be supplied to the seller.

- when a transaction facilitator is aware the buyer needs to obtain a mortgage, it is appropriate for the transaction facilitator to point out to the buyer that a condition related to financing should maybe be included in the offer.

The following list of examples is intended to illustrate situations where a transaction facilitator should not exercise discretion or judgment in the course of providing facilitation services, but it is not intended to be an exhaustive list:

- providing advice or using negotiation techniques to convince a seller to sell for a lower price or the buyer to pay a higher price.
- arranging for a property inspection without discussing the matter with the buyer.
- the transaction broker is made aware the buyer is unable to secure financing from a particular lender and is making arrangements to obtain financing from another lender, but the transaction broker fails to inform the seller.

Confidentiality of Client Information

Section 44 of the Real Estate Act Rules clearly states the confidentiality obligations of industry members, which apply to all industry members in the course of conducting business.

Additionally, transaction facilitators must not disclose, without the informed written consent of the buyer or seller, as the case may be, the following information:

- that the buyer may be prepared to offer a higher price or terms other than those contained in the offer to purchase or the exclusive buyer brokerage agreement.
- that the seller may be prepared to accept a lower price or terms other than those contained in the offer to purchase or the exclusive seller brokerage agreement.
- the motivation of the buyer or seller for wishing to purchase or sell the property, respectively; and,
- subject to s. 59(4)(e), personal information relating to the buyer or the seller and other information disclosed at any time in confidence by either to the brokerage.

In addition to the Real Estate Act Rules obligations, industry members must be aware of the Personal Information Protection Act of Alberta (PIPA). Under PIPA, an organization acting in a commercial capacity (e.g. real estate brokerage) must not collect, use and disclose personal information without consent.

Examples of personal information subject to PIPA include a client's address, phone number, employer, age, ID numbers, marital status, health, family, occupation, etc.

Publicly available information may be both client information under the Real Estate Act and personal information under PIPA. However, given the public nature of the information, it may be available to industry members at large, such as a property's legal description or tax assessment.

Before making use of information for the purposes of a transaction, industry members are encouraged to ensure the information is either in the public domain or is information the client has given their consent to collect, use and disclose.

Obligation to Disclose Certain information

In addition to the obligations already mentioned, transaction brokers must disclose certain information to their respective clients.

There is an obligation [Real Estate Act Rules, s. 59(4)(e)] to disclose the following information:
(i) disclose to the buyer all material latent defects affecting the property known to the brokerage
(ii) disclose to the seller all material facts relevant to the buyer's ability to purchase the property known to the brokerage

For more information

For more information on the practice of transaction brokerage, refer to the Transaction Brokerage Practice Guide for Industry Members or the complete transaction brokerage Interpretation Guideline on RECA's website at www.reca.ca.

Message from Council

Ralph Salomons, Chair

Review and Self-Assessment

I'm pleased and honoured to be taking the helm as chair of the Real Estate Council of Alberta. I look forward to working with my Council colleagues and our industry stakeholders as we face the challenges of the coming year.

I'm also delighted that Richard Parker, who is Service Alberta's appointment to Council, will be joining me as vice-chair. Richard has been a dedicated and hard-working member of Council since November 2004. As one of only two public members of Council, Richard brings a well-rounded perspective to the Council table.

The past year has seen the culmination of a number of major Council initiatives. As previously reported, Council's strategic direction for the next three years is to focus on core services, education standards, stakeholder relations and operational efficiency. Council will avoid new initiatives that would directly affect the day-to-day activities of industry members unless absolutely necessary.

Over the past year, RECA has initiated independent reviews of many of its administrative processes to ensure that the delivery of its services is efficient, effective, meets acceptable standards and is transparent. I see this review and self-assessment as an integral step in the maturity of RECA as an organization and essential in the delivery of core services.

This review and self-assessment will continue and focus on many aspects of RECA's operation and administration, including RECA's budget and financial operations, and the current governance model.

Advertising policy change

I am pleased to announce that Council has approved a significant policy change that will allow industry members to use other identifiers in advertising their services and products such as franchise names, a branding name, team name et cetera. Prior to the policy change, industry members could not use other identifiers. Please refer to the article in this Regulator for full details.

Syndicated Mortgages

RECA's Mortgage Brokers Advisory Committee continues to work on the issue of regulation of syndicated mortgages. The Committee reported to Council at its August meeting. Council requested that additional research be undertaken by the Committee, and asked it to report back with a full regulatory plan including the impact on RECA's resources if it were to undertake regulation of syndicated mortgages at the appropriate levels. The Committee is undertaking this challenge and will report to Council in late spring.

Looking ahead

I would be remiss if I didn't use this opportunity to thank Pat Rudiger as the outgoing chair of RECA for his effort and dedication to the work of RECA over the past year. There were very few committee meetings that Pat was not able to attend. Although it was a challenging year, as a result of Pat's leadership and guidance, Council was able to resolve a number of important issues and set a clear direction for the next three years. His commitment to RECA and the respective industries that RECA regulates is commendable and appreciated.

I look forward to the challenges and opportunities over the next year, and encourage industry members to be a positive influence and participate in providing input to Council to move important issues forward.

Council Introduces Advertising Policy Change

The *Real Estate Act* Rules require that industry members trade only in the name that appears on their licence and in the name of the brokerage with which they are registered. Council policy has always been that other identifiers cannot be used in the course of trading in real estate. RECA acknowledges that more and more industry members wish to create a brand for themselves or their team in marketing materials. As a result, RECA has been exploring the possibility of such a policy change in order to provide industry members with greater flexibility in their advertising practices. At the same time, though, the ability of consumers and other industry members to easily identify an industry member's brokerage is too important to consumer protection to completely remove.

After significant discussion and debate over the past year, at its November 5, 2008, meeting, Council approved a motion that will now allow industry members to include other identifiers (i.e. franchise names, team names, a branding name) in their advertisements.

Industry members are cautioned, though, that the industry member's brokerage name must continue to be clearly indicated on all advertisements, and industry members must ensure they are not holding themselves out as a brokerage if they are, in fact, not licensed as such. Industry members cannot leave the impression through their marketing and advertising that they are a brokerage when in fact, they are not authorized as such.

One way industry members can lessen confusion within their marketing materials is by ensuring that the name of the brokerage with which they are registered is clearly indicated in all materials. This is a requirement of the Rules. An additional word of caution, industry members should avoid the use of identifiers in their branding efforts that people typically associate with brokerages, such as realty and real estate.

Stay tuned to the RECA website for a complete interpretation guideline that further explores this policy change and what it means for industry members.

Industry Reminder: Payment of Referral Fees

Attention: Referral fee payments from financial institutions

The Real Estate Council of Alberta (RECA) has been made aware that some financial institutions are offering referral inducements that specifically target real estate associates. The purpose of these referral inducements is to encourage industry members to direct their clients to the financial institution for the client's mortgage needs.

RECA considers points programs and other similar types of incentives to be forms of consideration or compensation. Referring a borrower to obtain a mortgage from a financial institution for compensation or consideration is dealing in mortgages as a mortgage broker and a mortgage broker authorization is required.

In *Toronto Dominion Bank v. Real Estate Council of Alberta* (2002), 316 A.R. 280 (Alta Q.B.), the court upheld that if a real estate broker wishes to refer clients to a specific lending institution, and obtains a fee from the institution for doing so, the real estate broker must obtain the necessary authorization as a mortgage broker because the activity is "soliciting" people to borrow money.

Real estate industry members must not act as a mortgage broker unless they are also authorized as a mortgage brokers. Additionally, any remuneration received must be received by the industry member through his/her mortgage brokerage and not directly from the financial institution.

Real estate industry members are still, however, able to receive referral fees from mortgage brokers that deal with many financial institutions, again, provided that the referral fees are paid through the brokerage.

Dealing in mortgages as a mortgage broker without authorization from RECA is conduct deserving of sanction and can be subject to penalties of up to \$25,000.

Greater Efficiency Added to RECA's Investigative Processes

Non-cooperation during an investigation has been a serious issue facing Real Estate Council of Alberta investigators over the past number of years. When an industry member fails to cooperate with a RECA investigation, it takes additional time, money and resources in order to investigate the allegations in question.

Up until now, when an industry member fails to cooperate with an investigation, a second investigation file is opened for the non-cooperation allegation. Upon completion of that investigation, the non-cooperation matter is referred to a Hearing Panel for consideration and should the Hearing Panel make a finding of conduct deserving of sanction on the issue of non-cooperation, it may suspend the industry member's authorization until the time at which the industry member cooperates with the original investigation. The entire process is costly both in terms of time and money.

Individuals who would be subject to a failure to cooperate investigation would have failed to cooperate on numerous occasions. Additionally, the original investigation typically involves serious allegations against the industry member.

Section 38(4.2) of the Act now gives the executive director, by notice in writing, the power to suspend the authorization of an industry member who refuses to co-operate with a person conducting an investigation, until the executive director is satisfied that the industry member has cooperated. The inclusion of this new section of the Act brings about a greater measure of efficiency in the RECA investigation process.

While investigators will take into account serious personal issues when scheduling interviews and setting deadlines for the submission of documents and responses, industry members are required to cooperate with the investigation. Cooperation means providing truthful, complete responses in a prompt and constructive manner. Cooperating with the investigation also means making yourself available to the investigator, returning phone calls, attending interviews, recalling information to the best of your ability and producing documents or other information that the investigator requests.

As stated earlier, there would be multiple instances of non-cooperation by an industry member to order the suspension of an industry member for failure to cooperate. RECA investigators report that in most cases when they encounter an industry member who is not cooperating, it's a pattern of non-cooperation, where the industry member consistently avoids phone calls, will not provide documents, fails to show up at appointments et cetera. These instances of non-cooperation take up more of RECA's valuable resources and cost additional money. Those additional costs are then, indirectly, passed on to the industry through licensing fees.

The addition of section 38(4.2) of the Act is a positive step forward in the industry's self-regulation. It can save time and money in the investigation process, and can lead to greater consumer protection. When industry members do not cooperate with a RECA investigator, the entire system of self-regulation is placed in jeopardy – as is the notion of consumer protection.

Checks and balances

An industry member that is subject to a suspension by the executive director for failure to cooperate may appeal that decision to a Hearing Panel, pursuant to section 40.1 of the Act. Should an industry member wish to appeal such a suspension, they are to, within 30 days of the suspension notice, write to the executive director to appeal the executive director's decision. The matter will then be referred to a Hearing Panel.

When RECA's investigation and hearing process is working effectively, the industry as a whole is made stronger and consumers feel protected. That can only be made possible with cooperation from industry members.

Understanding Designated Agency

Designated Agency became optional on March 1, 2008. To help explain how Designated Agency works, RECA will publish the answers to commonly asked questions and compare answers for both Common Law and Designated Agency in each Regulator.

How are privacy or confidentiality issues different for each model?

Common Law

Alberta privacy legislation (PIPA) and federal privacy legislation (PIPEDA) require the brokerage and all its industry members to keep a clients' personal information confidential. This is similar to the policies to implement information barriers.

Designated Agency

Alberta privacy legislation (PIPA) and federal privacy legislation (PIPEDA) also apply. In designated agency the brokerage must keep information confidential. However, each designated agent must also keep their clients' personal information confidential from other industry members registered with the same brokerage.

What happens to my listing if I change brokerages?

Common Law

The listing agreement is with the brokerage and not with the individual industry member. If the industry member moves to another brokerage, the listing agreement will remain with the current brokerage. Your seller must agree to any change in brokerage.

Designated Agency-

The listing agreement is with the brokerage and not with the individual industry member. If the industry member moves to another brokerage, the listing agreement will remain with the current brokerage. Your seller must agree to any change in brokerage.

If my brokerage becomes a designated agency brokerage can we return to a common law brokerage later?

Yes, a brokerage would have to cancel its designated agency agreements and sign clients to common law agency agreements.

Real Estate Licence Suspensions

Ranchgate Enterprises Inc. and Stephen Archibald Real Estate Licences Suspended

On September 9, 2008, pursuant to section 38(g) and section 38(h) of the *Real Estate Act Rules*, the Real Estate Council of Alberta suspended the licences Ranchgate Enterprises Inc. o/a Ranchgate Realty (Brokerage), and Stephen Archibald, Broker, registered to Ranchgate Enterprises Inc. o/a Ranchgate Realty.

As a result of this suspension, neither Ranchgate Enterprises Inc. o/a Ranchgate Realty nor Stephen Archibald, Broker, registered as Broker to Ranchgate Enterprises Inc. o/a Ranchgate Realty may trade in real estate in Alberta.

Sid John Reisner – Real Estate Associate Licence Suspended

On November 24, 2008, pursuant to Section 53(1)(a) of the Real Estate Act, the Real Estate Council of Alberta temporarily suspended the authorization of real estate associate Sid John Reisner, registered with Nuway Real Estate Ltd., pending the outcome of conduct proceedings under Part 3 of the Real Estate Act.

As a result of this suspension, Sid John Reisner may not trade in real estate in Alberta at this time.

Education Corner – Education Core Values

Education Core Values

With the hiring of an Education Coordinator in May 2007, the Real Estate Council of Alberta launched a new focus on industry member education. The focus has continued to grow with the introduction of the online version of the Real Estate Associates' Program (REAP), and more recently, with the development and launch of Understanding Designated Agency and Transaction Brokerage as a classroom and online course, and the Introduction to a Career in Property Management online course. RECA's delivery of professional licensing (and re-licensing) education programs follows a number of core values. Keeping these core values at the heart of course design and development ensures that RECA offers education from which industry members, and potential industry members, can benefit the most.

RECA's core education values include:

Accessibility

RECA Education must be available regardless of the individual's location or ability to attend classes

when scheduled. This “anytime, anyplace” approach to industry education means a strong commitment to e-learning.

Learner focus

RECA Education programs should be appropriate and relevant to the learning objective, with the potential for customization. Additionally, education programs need to recognize that adult learners are a diverse group who bring a wide variety of expectations and experiences to the learning process.

Flexibility

RECA Education courses will be developed with modular content. This ensures they are easy to update and more available for the on-demand learning needs of industry members. In order to best meet the needs of individual learners, courses will also be designed to be self-directed and self-paced.

Instructional media

Today’s instruction goes far beyond classrooms and textbooks. RECA Education will use content-appropriate media, which may include text, audio, video and online instructional methods designed to encourage active learning.

Engagement

Today’s education programs should be designed from a learner-centred perspective. This approach ensures that courses provide a variety of active learning opportunities with application-oriented exercises. Additionally, RECA Education will be designed to facilitate an individual’s understanding through instructional engagements.

Messaging

RECA Education will take into account that today’s learners want to know why they need to know information and how it will relate to their current or future practice as industry members. Instructional design will encourage the development of an individual’s critical thinking and problem-solving skills.

Goal-driven

The goal of today’s instruction goes beyond information-sharing. It now strives to achieve a solid skill set, upon which future programs and education initiatives will continue to build. RECA Education will encourage the learner to take responsibility for their learning, as well as develop an on-going appreciation for continued professional development.

Perspective

Today, learning is accepted as part of life and a requirement for career enhancement and advancement. As a result, learners are taking more responsibility for their learning, while demanding more flexibility and control over their learning. Today learning is focused on training-transfer, ensuring that knowledge and skills gained in the training context are transferrable to the workplace. RECA Education will support this perspective.

As RECA moves forward with further course development, industry members will see these core values reflected in RECA courses and education initiatives. This will help to ensure that industry members have the knowledge and skills necessary to contribute to a strong industry, and to work in partnership with consumers.

Legal Corner

Latent Defects

RECA is pleased to introduce a new feature in the Regulator. Legal Corner will feature recent court cases relevant to industry members in Alberta. Where appropriate, RECA will provide commentary or explanatory notes.

In this first edition of Legal Corner, RECA wants to draw industry members' attention to a recent Alberta court case that touches on the issue of latent defects.

In *Gibb v. Sprague*, 2008 ABQB 298:

- the Buyers purchased a house from the Sellers
- the Buyers' inspection of the property did not reveal any significant and/or material defects in the house
- the Sellers provided them with a home inspection report from two months earlier
- the Buyers took possession of the house on July 15, 2005
- in Fall 2005, the Buyers discovered mould behind the baseboards in the basement bedroom and mould to a height of three feet on the drywall of exterior walls. Additionally, after removing the inside walls of the basement, the Buyers also noticed that the telepost supports were rusted 2 to 3 inches from the floor
- the Buyers' alleged that the basement damage was a latent defect, that the Seller knew about the basement damage and fraudulently misrepresented its existence prior to execution of the Purchase Agreement.

Patent defects are those that can be discovered by conducting a reasonable inspection of the property and making reasonable inquiries into its qualities. In the case of patent defects, the purchaser must rely upon their own personal inspection. However, a latent defect is one that could not have been identified by a purchaser upon a reasonable inspection of the property. Additionally, a latent defect may render a property unfit for habitation. In this case, the presence of mould in the basement made the basement unfit for habitation. Latent defects known to a seller must be disclosed to a buyer.

Through a reasonable visual inspection of the basement, the Buyers could not have discovered the presence of mould in the basement, as such, the mould was a latent defect. The Sellers, during their testimony, admitted that the basement had been flooded by 2 to 3 inches of water in 1998. However, they had the basement professionally cleaned and dried, and thus denied having any clues that would indicate the presence of mould in the basement in present day.

The court found it is reasonable to expect that someone whose basement has flooded in the past would inspect the basement for signs of mould in the future and that it is reasonable to expect such individuals to advise potential buyers of the property's history.

The first time the Buyers visited the property, husband Buyer thought the basement smelled "musty." On a later visit to the property, wife Buyer noticed deodorizers in virtually every outlet in the basement. Wife Seller said they were there to mask the smell of cigarette smoke.

The court found that the Sellers' use of deodorizers was to dispel the Buyers' suspicions of the presence of mould, and was sufficient evidence for the court to find fraudulent misrepresentation. The second part of the fraud allegation relates to a conversation concerning whether the basement of the house had been flooded. Wife Seller said she advised her realtor and a previously interested buyer the basement flooded in the past, because they asked her. But, she says wife Buyer never asked about water in the basement. However, wife Buyer testified that she did ask wife Seller about previous basement flooding and that wife Seller shook her head to indicate a "no" answer.

Because the Sellers' brokerage representative and a previously interested buyer questioned wife Seller about past basement flooding, she knew that a yes answer may adversely affect the sale of the House. It is therefore logical to assume that she would either choose not to disclose to a potential buyer such as the Buyers as to previous water in the basement or deny the fact altogether.

The Sellers included in the Purchase Agreement an exclusionary clause about there being no warranties relating to the property. However, since the Buyers proved that the Sellers were guilty of making a fraudulent misrepresentation relative to the basement damage, the exclusionary clause cannot prevent the Buyers' claim for the costs associated with remedying the basement damage.

The court awarded damages to the Buyers in the sum of \$12,186.45.

Council approves administrative amendments to the Rules

Since the *Real Estate Act* was proclaimed in July and amendments were made to section 59 of the Rules in consultation with AREA, the Real Estate Council of Alberta has gone through the *Real Estate Act* Rules with an eye to ensuring they mesh with the current Act.

As a result, at its November 5 meeting, Council approved changes to the existing Rules. The amendments were administrative in nature and do not create additional changes to the day-to-day business of industry members.

The changes include:

- Deleting the sections of the Rules relating to prospectus filing requirements including the applicable schedules;
- Amending the wording of Rule 1(1)(n.1) and 60(5)(b) to reflect the changes made to section 59 of the Rules dealing with facilitation services;
- Amending the wording of Rule 23(1) and (2) to reflect the change from "professional development" to "re-licensing education program";
- References to Dual Agency with Limitations was removed from section 60.1, the mandatory content section of the residential relationship forms;
- Revising Schedule 2 to reflect the current licensing and other fees structure; and,
- Under General Fees, removing fees that are no longer being charged relating to failure to file application for renewal of license/registration by the specified date (in addition to licence renewal fees); and failure to notify the executive director of the termination of any broker, associate broker or agent within 14 days of termination.

Renewal Wrapup

Renewal process runs smoothly

The 2008 renewal period wrapped up on September 30, 2008, and thanks to the diligence of industry members and the hard work of RECA licensing staff, the process was carried out smoothly and efficiently.

Last year, RECA introduced a dedicated e-mail address, accessible only to brokers, for questions about the licensing process. This e-mail address continues to be a tremendous success, and as a result of limiting access to the address, RECA staff could answer broker questions about licensing and renewals quicker and more efficiently.

On August 31, 2008, there were 15,790 industry members in Alberta, with 12,475 in real estate, 2,496 in the mortgage industry and 819 in real estate appraisal. Real estate had 1,134 brokerages and there were 351 mortgage brokerages.

On October 31, 2008, a month after the renewal deadline, there were 14,937 industry members in Alberta, with 11,839 in real estate, 2,364 in mortgage, and 734 in real estate appraisal. There were 1,076 real estate brokerages and 340 mortgage brokerages.

In the month of October, there were 13 new real estate brokerages, 328 new real estate associates, 11 new mortgage brokerages and 125 new mortgage associates. 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.

Though there was a slight decrease in the overall number of industry members between August and October of this year, it follows a similar pattern from the past few years. 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 decrease to the retirement of brokers, smaller brokerages and mergers of existing brokerages.

However, if current market activity levels continue or decrease further, RECA expects to see a decline in the number of new industry members for each of the industries it regulates.

Case Summaries

ADMINISTRATIVE PENALTIES

July 2008 - October 2008.

- 1 breach of failing to report at the brokerage's fiscal year end with regard to the operation of its accounts in which money was held in trust [s.90 of the Real Estate Act Rules]
- 1 breach of failing to file brokerage accounting within the allotted time period [s.91(4) of the Real Estate Act Rules]
- 4 breaches of failing to file a Declaration Respecting Absence of Trust Transactions within the allotted period of time [s.92(1) of the Real Estate Act Rules]
- 2 breaches of delegation of unauthorized support personnel and assistants [s.46 (2) of the Real Estate Act Rules]
- 1 breach of unauthorized activity [s.17 of the Real Estate Act]
- 1 breach of failing to notify the Executive Director of proceedings pursuant to the Criminal Code commenced against an industry member [s.40(1)(g) of the Real Estate Act Rules]

Consent agreements

August 2008

David Agema, associate broker

FORMERLY REGISTERED WITH RE/MAX REAL ESTATE – LETHBRIDGE AND CURRENTLY REGISTERED WITH TOP 5 REAL ESTATE LETHBRIDGE LTD. O/A PRUDENTIAL TOP 5 REAL ESTATE.

Issues:

- Failure to render competent service by participating in the creation of contracts that he knew or ought to have known were not legally binding, confusing or did not reflect agreements already in place and by failing to provide all documentation or trade records required under the *Real Estate Act* Rules to the brokerage [s.6 of the Code, as it was then]

Facts:

- Mr. Agema acted for Mr. and Mrs. A (the Sellers) in the sale of their property.
- Mrs. A signed her husband's name on the Listing Agreement, with her husband's consent, as he was out of town.
- Mr. Agema witnessed the signature.
- Mr. Agema did not make inquiries about Mrs. A's marital status or her authority to make the signature.
- The graduated commission arrangement agreed to between the parties was not clearly documented in the Listing Agreement.
- Mr. Agema received a written offer from clients of industry member, Mr. S.
- After reviewing the offer, Mrs. A advised Mr. Agema that they wanted more money.
- Mr. Agema made a verbal counteroffer to Mr. S on behalf of the Sellers.
- Mr. S accepted the counteroffer on behalf of his clients.
- In the meantime, Mrs. A received a message from industry member Mr. H that he had clients who would be making a competing offer.
- When advised about the competing offer, Mr. Agema told Mrs. A that Mr. S had accepted Mr. Agema's verbal counteroffer.
- Mr. Agema advised Mrs. A to obtain legal advice about the competing offers.
- Mrs. A's lawyer told Mr. Agema to obtain both offers as signed contracts and to present both to Mrs. A.
- Both offers included items excluded by the Sellers in the Listing Agreement
- According to Mrs. A, Mr. Agema did not discuss such included items with them.
- The Sellers made a counteroffer to Mr. S's clients, which was accepted.

- There were multiple versions of purchase contracts between the Sellers and Mr. S's clients, not all of which were turned into Mr. Agema's brokerage.
- Because of the numerous contract copies and errors in completing same, it was necessary for the Sellers' legal counsel to create a new purchase contract.
- Errors relating to the multiple contract copies included:
 - Improper signatures
 - Absence of initials for amendments
 - Inaccurate times/dates
 - Witness signatures obtained before party signatures
 - Lack of clarity as to when clauses/conditions were inserted
- Mr. Agema reimbursed the Sellers for their losses, including legal expenses.

Results: The Hearing Panel found Mr. Agema's conduct deserving of sanction and ordered him to pay a fine of \$5,000; costs of \$2,000 and complete an educational requirement.

William (Bill) Haldane, real estate appraiser

HALDANE APPRAISALS LTD.

Issues:

- Failure to adhere to the Canadian Uniform Standards of Professional Appraisal Practice[s.34.1(6) of the *Real Estate Act*]

Facts:

- In September 2004, Bill Haldane, licensed appraiser, was contacted by Mr. A of Calgary. Mr. A indicated that he was interested in purchasing units in an apartment complex in Red Deer, Alberta. He requested appraisals on about 15 units. Mr. A also gave Mr. Haldane a package of offers to purchase for the units.
- Mr. Haldane inspected the units in the last week of September.
- Second appraisals on some of the units were carried out in November, after some renovations had been done.
- Appraisal reports for the units were issued from September to November.
- In the appraisal reports, Mr. Haldane used comparables from the same building.
- He listed the offers to purchase as sales, even though they were not, and based value on these sale prices.
- Mr. Haldane did not check expired listings on the MLS system or exposure times on the market.

Results: The Hearing panel found Bill Haldane's conduct to be deserving of sanction and ordered him to pay a fine of \$5,000; costs of \$1,000 and complete an educational requirement.

September 2008

Gordon Sieb, real estate broker,

626456 ALBERTA LTD. O/A DIVERSIFIED MANAGEMENT SOUTHERN, FORMERLY A PARTNERSHIP O/A DIVERSIFIED MANAGEMENT SOUTHERN.

Issues:

- Failure to disperse money received and held in trust [s.25(1)(d) of the *Real Estate Act*]
- Failure to fulfill a fiduciary duty to a client [s.2(b) of the Code of Conduct, as it was then]

Facts:

- In or around November 2001, Mr. Sieb was the registered broker for a partnership operating under the trade name Diversified Management Southern (Diversified).
- On or about November 15, 2001, Diversified entered into a contract as the manager with the owners of a condominium corporation for the management of some condominium units.
- Under the contract all money collected by Diversified on behalf of the condominium corporation was to be held in trust.
- The terms of termination of the contract included a clause that within 60 days, the manager should give a final accounting to the corporation and pay any balance in the trust account to the corporation less any amounts owing on commitments made by the manager prior to termination.

- The terms also stated that within 60 days, the manger should turn over all contact, files, records and other documents or information to the condo corporation.
- On or about June 10, 2003, Mr. Sieb sent notice of termination to the condominium corporation stating the termination would occur 30 days from the notice.
- On or before June 27, 2003, the condominium corporation hired another property management company to assume the management being performed by Diversified.
- In a letter dated June 30, 2003, the manager of the new company wrote to Mr. Sieb requesting all documentation related to the condominium corporation
- On or about June 30, 2003, Diversified made a partial payment to the condominium corporation from the monies held in trust.
- On or about October 3, 2003, the new management company demanded that Diversified provide it with 'final accounting' documentation and balances on or before October 6, 2003.
- On or about October 6, 2003, Diversified made the management and accounting documents and a further payment available for pick up.
- The documents were received by the new company on or about October 8, 2003.
- In or around February or March 2004, Diversified received a cheque payable to the condominium corporation for a cancelled insurance contract.
- This cheque was deposited into the condominium corporation account still maintained by Diversified on or about March 8, 2004.
- As of May 31, 2004, the separate trust account maintained by Diversified for the benefit of the condominium corporation held money including the amount deposited to the account on March 8, 2004.
- In or around June 2004, Diversified withdrew the remaining amount in trust via three transactions:
 - A cheque dated May 14, 2002.
 - A cheque dated June 11, 2002.
 - A bank draft dated June 25 was issued to the credit of the condo corporation in closing the account.
- On or about August 3, 2004, Diversified forwarded the bank draft for the remaining money to the new management corporation along with the bank statement dated June 30, 2004.

Results: The Hearing Panel found that Mr. Sieb's conduct was deserving of sanction and ordered him to pay a fine of \$2,000; costs of \$700 and the broker will complete the Real Estate Brokerage Course of the Real Estate Broker's Program.

October 2008

Robert Maskell, associate broker

ROYAL LEPAGE ARTEAM REALTY

Issues:

- Failure to ensure the role of the industry member was clear to the parties affected [s.3(a) of the *Code of Conduct*, as it was then]
- Failure to render competent service by participating in the creation of a contract that the member knows or ought to know is not legally binding confusing or does not reflect any agreement already in place[s.6(c) of the *Code of Conduct*, as it was then]

Facts:

- Mr. Maskell entered into a Residential Real Estate Listing Contract with Ms. A (the Seller) who was assisted by her son.
- When the property did not sell, Mr. Maskell and the Seller entered into another listing contract.
- Mr. and Mrs. C (the Purchasers) contacted Mr. Maskell with interest to buy Ms. A's property.
- Mr. Maskell explained Dual Agency and the Purchasers executed an Agency Explanation and Acknowledgement form.
- Mr. Maskell wrote an Offer to Purchase (the First Offer) as instructed by the Purchasers using the standard Residential Real Estate Purchase Contract.
- A condition listed in article 8 included: 'subject to sale of buyers' home by January 31, 2006 with 24-hour clause.'
- There was no schedule attached explaining the 24-hour clause.
- There was no expiry date included in article 13 of the offer.
- Mr. Maskell presented the first offer verbally and the Seller's son confirmed he would 'sit' on the offer.
- The Purchasers increased their offer (the Second Offer), which was presented to the Seller verbally.
- No written Offer to Purchase was prepared for the Second Offer.
- The date of the Second Offer is uncertain as there is not documentation.

- The Seller's son once again said he would not accept nor reject the offer but 'sit' on it.
- The Purchasers asked Mr. Maskell to determine the Seller's bottom line.
- Mr. Maskell asked the Seller what her bottom line would be and after receiving permission to tell the Purchasers, communicated same to them.
- The Purchasers instructed Mr. Maskell to make an offer in the amount of the "bottom line" price.
- Mr. Maskell subsequently completed another written offer on behalf of the Purchasers (the Third Offer).
- A separate Offer to Purchase was not completed. Instead, the First Offer was amended to reflect the new proposed purchase price and thus became the Third Offer.
- The date the Third Offer was signed is unclear as it was not noted on the offer.
- Prior to presenting the Third Offer, a home inspection was performed at the request of the Purchasers with the consent of the Seller.
- The inspection took place even though the Seller had not signed the Offer and no agreement was in place.
- As a result of several deficiencies, the Purchasers informed Mr. Maskell they wished to reduce their Third Offer.
- The Fourth Offer for a lesser amount was presented to the Seller verbally.
- The date it was presented is uncertain as it was not recorded.
- Mr. Maskell then presented a counter-offer on behalf of the Seller.
- The counter-offer included the following condition: 'subject to sale of buyers' home by February 28 2006 with 24-hour clause.'
- There is no schedule attached explaining the 24-hour clause.
- There is no expiry date included in article 13 of the counter offer.
- The Purchasers rejected the counter-offer but there was no indication they were no longer interested in the property.
- Mr. Maskell was approached by Mr. and Mrs. D who indicated they were interested in the property.
- Mr. Maskell explained that he was acting for the Seller and explained Dual Agency.
- Mr. and Mrs. D executed the Agency Explanation and Acknowledgement Form.
- Mr. Maskell did not advise Mr. and Mrs. D that he was acting on behalf of another purchaser interested in the same property.
- Sometime thereafter, Mr. Maskell called the Purchasers to advise them that another offer was on the table.
- Mr. Maskell did not advise them that he was acting for the other interested party.
- The Purchasers instructed Mr. Maskell to make another offer, however he cannot recall for what amount (the Fifth Offer) as the offer was not reduced to writing.
- Mr. and Mrs. D eventually made an offer accepted by the Seller.

Results: The Hearing Panel found that Mr. Maskell's conduct was deserving of sanction and ordered him to pay a fine of \$3,000; costs of \$500 and complete an educational requirement.

Disciplinary Action

September 2008

Giampiero Sartori, associate

FORMER ASSOCIATE REGISTERED WITH COMOX REALTY GROUP

Issues:

- Failure to fulfill fiduciary duty to client [s.2(a), (b), (e), (m) of the *Code of Conduct*, as it was then]
- Conduct that is reckless or intentional and that misleads or deceives [s.4(a), (d) of the *Code of Conduct*, as it was then]
- Failure to render competent service [s.6(c) of the *Code of Conduct*, as it was then]
- Failure to enter into a guaranteed sales agreement when representations were made to pay to the seller a fixed or determined amount of money within a fixed or determined amount of time [s.20 of the *Real Estate Act*, as it was then]

Facts:

- At all material times hereto, Mr. Sartori was authorized as a real estate broker by the Real Estate Council of Alberta.
- Mr. Sartori was an agent for the seller of Property A.
- In marketing Property A, Mr. Sartori posted a sign which read "For Sale G. Sartori 374-1506" and included the statement "BUY THIS HOUSE and we'll BUY YOURS FOR CASH."
- On or about November 1, 2004, Mr. and Mrs. W (the "Ws") saw the above sign at Property A and contacted Mr. Sartori concerning the purchase of Property A and the sale of their home, Property B, in reliance upon the representation on the sign at Property A.
- Mr. Sartori informed the Ws that his company, 1024703 Alberta Corporation, was interested in buying their property.
- Mr. Sartori led the Ws to believe that he had signing authority for 1024703 Alberta Corporation.
- 1024703 Alberta Corporation was incorporated January 3, 2003 and was closely held by three shareholders none of which were Mr. Sartori.
- Mr. Sartori was, at all material times, a director of 1097812 Alberta Inc. but not a shareholder.
- On or about November 13, 2004, Mr. Sartori provided advice and direction to the Ws in the execution and completion of both of the purchase contracts as well as other documents associated with both contracts.
- Mr. Sartori did not disclose information that was relevant to the Ws about the ability of 1024703 Alberta Corporation to qualify to assume the W's mortgage.
- On or about November 19, 2004, Mr. Sartori prepared and obtained the signature of the Ws on a waiver of all conditions on the purchase Property A, having assured them that the sale of Property B to 1024703 Alberta Corporation would proceed.
- On or about January 13, 2005, Mr. Sartori learned that the numbered company was required to qualify for assumption of the mortgage on the W's home.
- Mr. Sartori immediately advised the Ws the numbered company would not proceed to purchase their home but that they must proceed with the purchase of Property A or face a lawsuit by the seller of that property.
- The Ws were forced to find a last minute buyer for their home or risk breaching the unconditional contract they were in.
- The Ws lost all equity in their existing home, which was eventually sold as a mortgage assumption only.

Results: The Hearing Panel found Mr. Sartori's conduct deserving of sanction and ordered that he pay a fine of \$10,000; costs of \$14,000; that he successfully complete the Real Estate Associates' Program prior to re-licensing in Alberta; and that he may not be authorized as a broker in Alberta unless and until he has been registered as an associate with a brokerage other than any one he may have any financial ownership in for a period of 3 years.

Admission of conduct deserving of sanction (s.46)

October 2008

Michael Cain, broker

RE/MAX HOUSE OF REAL ESTATE

Issues:

- Failure to keep complete and accurate financial records of money received in trust [s.25(1)(a) of the *Real Estate Act* Rules]
- Failure to ensure brokerage name clearly indicated in the trading of real estate [s.51(1)(c) of the *Real Estate Act* Rules]
- Failure to review monthly reconciliation and failure to acknowledge review [s.38(3) of the *Real Estate Act* Rules]
- Failure to act in the best interest of the client [s.2(a) of the *Code of Conduct*, as it was then]

Facts:

- In October 2005, two Calgary real estate brokerages, Re/Max House of Real Estate and Re/Max Classic, amalgamated under the Re/Max House name.
- This meant transferring all the associates to Re/Max House as well as getting amendments to all listing contracts.
- The long-time administrator of Calgary Classic was away on an extended personal leave when it was discovered in mid-October that there had been a break-in at the offices and that three computer towers were stolen.

- The brokerage attempted to resurrect files through computer back-ups.
- The administrator was assisting the computer software people over the phone.
- At the beginning of November, the administrator tendered her resignation and indicated that she was suing the brokerage.
- At the same time it was discovered that there was about \$700,000 missing from the Re/Max Classic trust accounts.
- The theft was eventually traced to the administrator and the police were notified.
- A judgment was received against the administrator and about \$360,000 was recovered.
- The brokerage replaced the missing trust funds from the general accounts.
- The reconstruction of the accounting information took place over several months as data, for a 60-day period, had to be entered from hard copy.
- In January 2006, as data for transactions was entered, it was discovered that there had been six NSF cheques on transactions in October.
- The money to cover the trust deficits was taken from general accounts for five of the transactions.
- In the sixth transaction, the NSF cheque was noted and corrected before monies were paid out from the trust account.
- In all but one case, the monies were eventually recovered.
- RECA had been notified of the accounting problems.
- The buyer in one NSF transaction complained to RECA regarding the conduct of the selling agent.
- In investigating this complaint the issues regarding the other NSF transactions were brought forward, resulting in this investigation.

Results: The Hearing Panel accepted Mr. Cain's Admission of Conduct Deserving of Sanction and ordered that he pay a fine of \$4,000 and costs of \$1,000, with no educational requirement.

Voluntary Withdrawals from industry (s.54)

November 2008

RAHIMA ATHARI, MORTGAGE ASSOCIATE CENTUM MICASA MORTGAGE CORP

On November 5, 2008, Rahima Athari, former mortgage associate most recently registered with Centum Micasa Mortgage Corp., 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, a RECA investigation was ongoing to determine whether Ms. Athari was involved in fraudulent or unlawful activities including whether she was completing mortgage financing applications on behalf of buyers whose mortgages she or her associates later assumed.

Ms. Athari'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. Ms. Athari's withdrawal application does not constitute an admission of misconduct.

SOHAIL IQBAL, ASSOCIATE IMPACT REAL ESTATE GROUP LTD. O/A RESIDENTIAL ONE REAL ESTATE

On November 5, 2008, Sohail Iqbal, former associate most recently registered with Impact Real Estate Group Ltd. o/a Residential One Real Estate 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, a RECA investigation was ongoing to determine whether Mr. Iqbal was participating in the creation of false and misleading documents for the purpose of obtaining fraudulent mortgages including creating false T-4 slips, pay stubs, bank statements and employment verification letters as well as whether he was using straw buyers in trades.

Mr. Iqbal'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. Iqbal's withdrawal application does not constitute an admission of misconduct.

HECTOR CORTEZ, ASSOCIATE

4TH STREET HOLDINGS LTD. O/A RE/MAX REAL ESTATE (CENTRAL)

On November 5, 2008, Hector Cortez, former associate most recently registered with 4th Street Holdings Ltd. o/a Re/Max Real Estate (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, a RECA investigation was ongoing to determine whether he failed to provide relevant information to a listing agent and purchaser. As well, it was alleged that Mr. Cortez failed to provide a \$5,000 trust deposit to the brokerage and instead converted the monies to his own use.

Mr. Cortez'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. Cortez's withdrawal application does not constitute an admission of misconduct.

STANLEY PENCHUK, CANDIDATE APPRAISER

ATKINSON AND ASSOCIATES

On November 5, 2008 Stanley Penchuk, who was last licensed as a candidate appraiser with Atkinson and Associates 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*. A period of unlicensed activity occurred and Mr. Penchuk indicated no intention of continuing in the industry. Mr. Penchuk's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership. The withdrawal does not constitute an admission of misconduct.

WARREN BURNETT, ASSOCIATE BROKER

PACE PROPERTIES LTD. (FORMERLY BUTTCO PROPERTIES LTD.)

On November 5, 2008, Warren Burnett, associate broker registered with Pace Properties Ltd. (formerly Buttco Properties 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, there was an ongoing RECA conduct investigation. The allegations of misconduct included failure to act in the best interests of a client when he preferred the interests of others in a rental pool, failure to act in accordance with a client's lawful instructions by refusing to provide a 24 hour notice to tenants for property entry and failure to provide all relevant information the client might use to facilitate the selling of his units.

Mr. Burnett'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. Burnett'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

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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.

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