



REAL ESTATE COUNCIL OF ALBERTA

Regulator – January 2009

Best Practice: Trust Disbursements and Disputes

Every day, deposits and other forms of trust funds are deposited, held and disbursed from trust in relation to real estate purchase contracts, offer to lease agreements, residential tenancy agreements, property management agreements and mortgage administration agreements. In nearly all cases, trust monies are disbursed in accordance with the terms of trust that govern it without any difficulties. Sometimes, though, a conflict will arise over the disbursement of these monies.

The Real Estate Council of Alberta (RECA) receives questions and complaints every year pertaining to the disbursement of trust funds in relation to most industry sectors. Questions and complaints arise when someone questions the entitlement or disbursement of trust funds.

Service agreements used by industry members typically include provisions with respect to the disbursement of trust funds. However, the terms of trust in these contracts may not always be clear and comprehensive to the parties to the contract, and situations may arise where multiple parties to the trade or deal claim entitlement to the trust funds when a trade or deal collapses.

This article attempts to describe the duties of brokers as trustees, suggest processes and strategies to prevent disputes, and provide a methodology on how to deal with trust deposit disputes. These concepts are applicable in the mortgage brokerage, mortgage administration, property management, commercial and residential real estate brokerage sectors.

Broker has a duty to act as a trustee

Section 1 of the *Trustee Act* defines a trustee as someone “whose trust arises by construction or implication of law as well as an express trustee.”

Sections 18 and 25 of the *Real Estate Act* presume the role of the broker to be that of a trustee as it relates to the handling of trust funds. As a trustee brokers normally have at least two duties. These duties are to:

1. Hold the trust monies for the parties to the transaction; and
2. To disburse money in accordance with the terms of trust.

While the brokerage may be representing one of the parties to the trade or deal, as is most often the case, the broker, as trustee, cannot act on behalf of, or in favour either party.

Written terms of trust

Section 18(2) of the *Real Estate Act* prohibits industry members from accepting trust funds without written terms of trust. Section 25(2) of the *Real Estate Act* requires industry members to ensure that terms of trust governing the use of trust monies are in writing and agreed to by the industry member and all other parties to the trade or deal. Usually, the terms of trust are contained in two documents.

1. The service agreement that describes how the trust funds will be disbursed between the brokerage and the client. These service agreements include, but are not limited to, property management agreements, mortgage administration agreements and listing agreements. While these contracts can relate to disbursements made on behalf of the client to other parties, they also often describe how and when the broker will receive remuneration from the client.
2. Contracts between parties to the trade or deal usually set out that the trust funds will be held and disbursed between the parties depending on a certain set of facts (as in the Alberta Real Estate Association's residential purchase contract terms of trust).

Trustees may not deviate from the written terms of trust

Often, one of the parties to a trade or deal will claim the deposit or object to the deposit being disbursed to the other party on the basis that they do not feel the other party undertook reasonable actions to meet the terms of the contract. Brokers acting as trustees cannot take into consideration these arguments. Brokers have a duty to make decisions solely based on the terms of trust. For example, a commercial contract may stipulate trust funds be held in an interest-bearing account at a particular bank. The trustee would not have discretion to place the funds elsewhere, even at a higher return. Trustees must act only within the authority granted to them under the terms of the contract.

Brokers acting as trustees often encounter situations whereby the outcome of disbursing the trust funds in accordance with the terms of trust results in a situation with which parties to the contract disagree. Brokers acting as trustees should recognize that this likely results from terms of trust that appear to favour one party to the transaction, regardless of the terms of trust having been mutually agreed to by all the parties to the transaction.

As previously mentioned, the brokerage holding the trust funds is often representing one of the parties to the transaction. Brokers acting as trustees must not let the fact that they may be representing a party to the transaction influence their decision. Brokers acting as trustees cannot arbitrarily add or impose conditions on the terms of trust without the written consent of all parties for whom the trust funds are being held.

How to prevent disputes

RECA's experience suggests that brokers often have difficulty disbursing trust funds when the terms of trust are ambiguous.

The best way for to prevent trust disputes is to ensure the brokerage has clear policies that require associates to:

1. Clearly explain to their clients the terms of trust as proposed by the other party to the trade or deal and its implications.

For example, an associate representing a vendor may want to explain that “subject to a home inspection satisfactory to the buyer” means that the buyer can choose not to proceed with the transaction if cosmetic defects or imperfections are present. In this situation the vendor may choose to accept the terms of trust as proposed knowing that the buyer can walk away with little reason or may choose to counter with new terms of trust.

2. Advise their clients to use and draft clear, ascertainable and unambiguous conditions. The more precise the condition, the less likely that the broker acting as trustee will have difficulty disbursing the trust funds.
3. Draft dispute resolution processes in case the broker acting as trustee can make no reasonable conclusion in regard to entitlement to trust monies.
4. Advise their clients that they instruct the trustee by the terms stipulated in the contract. The funds deposited are for the benefit of all parties to the contract. The trustee acts for no one but the contract.

Parties to a trade or deal should be encouraged to ensure their interests are properly protected by any contract they sign. Most disputes occur because the parties failed to ensure the contract reflected their intentions and protected them against unforeseen issues.

Brokers are responsible for trust fund disbursements

Brokers are responsible to ensure that trust funds are disbursed in accordance with the terms of trust. Brokers may delegate this duty to associates or associate brokers registered with the brokerage provided that the delegation meets the requirements of sections 52 and 68 of the Rules made pursuant to the *Real Estate Act*. Brokers should require the brokerage’s associates to report any issues associated with the disbursement of trust funds immediately.

While brokers are encouraged to seek information and assistance from their associates, brokers should not let the associates dictate the process for determining the disbursement of the trust funds.

Should RECA receive a complaint regarding a trust disbursement, RECA will only consider the conduct of the broker and his or her delegate as it relates to the disbursement of the trust funds.

Determining entitlement in accordance with the terms of trust

In order for brokers acting as trustees to ensure they disburse trust funds in accordance with the terms of trust, they should:

1. Review and understand the terms of trust.
2. Determine and obtain the information required to make a determination under the terms of trust. For example, if the terms of trust relate to purchase financing, the real estate broker will need to determine whether the buyer sought financing and the outcome of the application process.
3. Review the information. A mortgage broker may want to determine whether the lender provided a written commitment before the borrower backed out of the deal.
4. Make supporting inquiries if the information is unclear.

5. Have the parties to the trade or deal make submissions regarding the terms of trust if the determination is difficult.
6. Obtain legal advice from a lawyer if the broker is still unsure how to proceed. When pursuing this option, RECA recommends, along with the terms of trust and all relevant information, that the lawyer be provided with a copy of this article to ensure that he or she understands the responsibilities that the broker acting as a trustee has under *the Real Estate Act* and the *Trustee Act*.

Even if the circumstances appear to be straightforward, RECA still recommends that independent legal counsel confirm for the parties who is entitled to a disputed deposit.

When no reasonable conclusion can be made

Brokers acting as trustees will find that there will be situations where no reasonable conclusion can be made. In these situations, brokers have the following options:

1. Brokers acting as trustees may exercise dispute resolution options contained in the terms of trust. For example, the Alberta Real Estate Association's (AREA) standard residential purchase contract contains the following clause: *If no reasonable conclusion can be made in regard to #1 above, the brokerage shall notify the parties to the purchase contract in writing and pay the money into a lawyer's trust account.*
2. Negotiate the terms of trust dealing with the process of determining entitlement with all parties to the trade or deal. For example, the parties may agree to have the brokerage or another person hold the funds in trust until the matter can be litigated through the courts.
3. Make an application to the courts requesting the brokerage be relieved of their trustee responsibility. See section 40 of the *Trustee Act* for more information.
4. Consult a master in chambers in accordance with section 43 of the *Trustee Act*.

Brokers acting as trustees must note that the buyer and the seller must be kept advised of what is happening with the disputed funds.

Documenting the disbursement process

Brokers acting as trustees must document the process and information considered when determining entitlement. Brokers acting as trustees are governed specifically by the terms of the trust, and must be able to support any actions they take in accordance with those terms on a factual basis.

Not disbursing the trust funds to their lawful owner

The effect on the public of not dealing with trust funds quickly and properly can be significant. A seller may be entitled to a deposit and really need it. For example, he or she may end up with two homes if the buyer has defaulted on the seller's home but the seller has already purchased a new home. Likewise, a buyer who is entitled to the return of a disputed deposit from a non-completed sale may not be able to come up with other funds to put down as a deposit on the purchase of another property.

Failing to disburse the trust funds in accordance with the terms of trust where a reasonable conclusion can be made is in essence a form of misappropriating the trust funds from its lawful owner.

Just as conveyancing of property relies on the lawyers for the transaction acting in trust, the public must trust that their deposits may be made without fear of loss. All industry

members have a vested interest in ensuring that their actions relating to trust funds are objective, appropriate and transparent.

Acting in a diligent manner

Brokers acting as trustees must diligently follow the process to disburse trust funds in accordance with the terms of trust. RECA understands that due process takes time and that there will be delays in obtaining the information necessary to make a determination under the terms of trust. However, brokers acting as trustees should not be idle or hold a deposit in trust without letting the parties to the trade attempt to resolve the issue. Failure to take reasonable steps to disburse trust funds in accordance with the terms of trust may be considered conduct deserving of sanction.

Brokers acting as trustees must make reasonable efforts to disburse trust funds in accordance with the terms of trust. Brokers acting as trustees must not pay the money into to court or to a lawyers trust account when a reasonable determination can be made.

Courts have been known to assess substantial damages against industry members who abuse trust dispute resolution options.

Disputes relating to the brokerage's entitlement

Brokers acting as trustees sometimes need to decide whether they are entitled to receive remuneration from funds held in trust. These situations may relate to service agreement cancellations (i.e. a property management agreement) when improper notice is given or deposits are forfeited and a portion of the deposit is to be used as commissions. Brokers acting as trustees are advised to carefully consider the circumstances and to take proactive steps to discuss and explain the disbursement if any difficulties are anticipated.

Reasonable conduct

RECA recognizes that acting as a trustee can be difficult and fraught with controversy. RECA does not consider it conduct deserving of sanction when a broker, acting as a trustee, follows these guidelines and performs due diligence in making a reasonable decision, even if the courts ultimately do not agree with the broker's decision.

Brokers should also be aware that the *Trustee Act* can provide protection for trustees that acted honestly and reasonably. For more information, see section 41 of the *Trustee Act*. The *Trustee Act* can be viewed in its entirety [here](#).

Obtaining disbursement consent

Written consent from the parties to the transaction will assist a brokerage should legal liability issues arise. While brokerages may request consent from the parties to the trade or deal, brokerages should not demand written consents as this would constitute adding a condition on the written terms of trust.

Message from Council

Ralph Salomons, Chair

Council's Priorities

I would like to use this opportunity to highlight some of Council's current priorities. As always, Council looks forward to continuing the dialogue with industry members on issues of mutual interest and importance.

Education

There has been a trend towards real estate regulators taking a more active role in licensing and re-licensing education across the country and RECA has been proactive in this respect.

As early as the fall of 2006, RECA began to re-focus its attention on education when it made changes to the professional development requirements of industry members, which were implemented in 2007. Council was of the opinion that its role in continuing education should be to focus on the *Real Estate Act*, Rules and related regulatory and consumer protection issues. These are areas where RECA has direct responsibility, experience and expertise.

Courses will be developed and offered when the information is timely and required for each industry sector. For example, in the current licensing year, 2008 to 2009, real estate appraisers are required to complete the Mortgage Fraud Awareness course that was originally developed for the real estate and mortgage broker sectors. There are no requirements in the current licensing year for real estate industry members.

This past August, Council elected to change the name of its continuing professional development program to the Re-licensing Education Program (REP). The new name better reflects and defines RECA's ongoing role in industry member re-licensing education. Any courses that are mandatory for industry members to complete before they can renew their authorizations with RECA will be part of the Re-licensing Education Program. An article on this change can be read, [here](#) (link to REP announcement).

RECA has approved a set of core values for RECA Education initiatives. These core values were developed after substantial work by the Real Estate Education Committee, and after taking into consideration tremendous changes occurring in the areas of adult and workplace learning. An article on these core values can be found, [her](#) (link to previous education corner).

Another important policy decision by Council was that RECA, as part of its core services, would develop and deliver licensing education courses in those areas that RECA has the expertise, such as the Phase 2 of the Real Estate Associates Program (REAP). RECA's target date for developing and delivering Phase 2 of the REAP is January 2011.

In accordance with the recommendation of the Real Estate Education Committee, Council will be conducting a review of Phase 1 of the REAP. Specifically, Council will examine whether it should be mandatory that all individuals complete "Introduction to a Career in Real Estate" before proceeding to Phase 2 and 3 of the Program. I anticipate that review will be initiated later this year.

RECA is currently collaborating with the Alberta Mortgage Brokers Association in the development of a new Mortgage Associate's Program (MAP).

TILMA/AIT

In the coming months, industry members will likely hear increased references to the Trade, Investment and Labour Mobility Agreement (or TILMA) between Alberta and British Columbia, and the national Agreement on Internal Trade (or AIT). April 1, 2009, is the deadline for substantial portions of these groundbreaking agreements.

These agreements share, as a common purpose, the desire to remove artificial barriers to trade and labour mobility between Alberta and B.C. under TILMA, and nationally, under AIT.

RECA is working diligently with government and other regulators to ensure its policies and procedures with respect to licensing reciprocity abide by the provisions of these two agreements. Real estate industry members are captured by both agreements and mortgage industry members are covered by TILMA, but it is anticipated that mortgage industry members will eventually be included in the provisions of AIT.

Under AIT, the April 1 deadline requires that regulatory bodies "mutually recognize" qualified workers without any additional re-training, re-testing or re-assessment. Exceptions to full labour mobility, and therefore licensing reciprocity, will be permissible but must be clearly justified as necessary to achieve a legitimate objective. RECA is already prepared to meet the spirit and the letter of both TILMA and AIT.

Council strongly believes that focusing on the core priorities outlined in its three-year business plan will ensure it fulfills its regulatory mandate. But as much as these priorities are central to the work RECA does, without the cooperation of industry members, none of it would be possible.

Trust Cheque Copies: Front and Back Still Required

Recent changes to federal legislation that governs banking in Canada has resulted in some financial institutions not keeping the paper originals of written, cashed cheques. Additionally, when those banks provide copies of negotiated trust account cheques to the account holder, they are, in some cases, only providing a copy of the front of the cheque.

Section 83 of the *Real Estate Act* Rules states:

A brokerage may receive electronic copies of cheques used to make disbursements from an account in which money is held in trust, only if copies of both the front and the back of the cheque are received and the original cheque is available on request.

The direction in which some financial institutions are moving with regard to copies of trust account cheques does not fulfill the requirements of Rule 83. Industry members must receive a copy of both the front and the back of the cheque, and the original must be available on request from the financial institution.

It is, however, perfectly acceptable for a financial institution to provide an image of the front and back of a trust account cheque on computer CD provided the files cannot be altered in any way.

In some cases, a financial institution may require that an account holder pays a fee to receive an electronic copy of the front and back of a trust fund cheque – and if that is the case, a brokerage that does not wish to change financial institutions will have no choice but to pay the fee.

Should a brokerage encounter a financial institution that does not wish to provide the front and back side of trust cheques under any circumstances or should the financial institution indicate that they are unable to provide the front and back of a trust cheque, that brokerage is encouraged to contact RECA or change financial institutions to one that is willing to provide electronic copies of the front and back of trust fund cheques in order to comply with the *Real Estate Act* Rules.

Changes to Mortgage Insurance Rules

Zero-down, interest-only and longer amortization mortgages were popular over the last few years, partly as a result of dramatically-rising house prices in many parts of Canada. These non-conventional mortgage products became a way in which first-time buyers could get into the market, and real estate industry members capitalized on this by using these mortgage options in their advertising to attract potential buyers. Lenders were able to offer these products because of government-backed mortgage insurance.

However, as of October 15, 2008, significant changes were made to the Mortgage Insurance Guarantee Framework, which establishes a boundary on the risk characteristics of the mortgage and of the borrower that are acceptable when the government guarantees the mortgage insurance policy. Industry members must ensure any mortgage-related advertising or representations they make to potential clients must accurately reflect mortgage options available. In light of the changes to the Mortgage Insurance Guarantee Framework, it may mean making changes to personal websites. Below are some of the key amendments to the Mortgage Insurance Guarantee Framework:

- **Loan-to-Value Ratio**

Loan-to-value ratio is the percentage that results from dividing the dollar value of a mortgage loan into the market value of the property. The percentage determines if mortgage insurance is required. High-ratio mortgages are those where the mortgage amount is more than 80 per cent of the value of the home. High-ratio mortgages require government-backed mortgage insurance.

Previously, purchasers could borrow 100 per cent of the value of a property and have that full amount insured. Government-backed mortgage insurance is still available and required for high-ratio mortgages, but it will only be provided on the portion of the mortgage that is up to 95 of the value of the property.

- **Amortization Period**

Amortization is the period or length of time it will take to pay off the entire mortgage loan. When housing prices began to dramatically rise, lenders introduced 35 and 40-year insured mortgages.

With the recent changes, though, the maximum amortization for mortgages with government backed insurance is now 35 years, which effectively means 40-year mortgages are no longer possible.

- **Interest-Only Mortgages**

Another means by which many first-time buyers were entering the market was through an interest-only mortgage. Interest-only mortgages allow the mortgage holder to begin with “interest-only” periods for a time at the beginning of their mortgage term. This keeps the regular weekly or monthly payment low, but it does little to pay down the mortgage.

Under the revised Mortgage Insurance Guarantee Framework, interest-only mortgages are no longer insurable.

- **Maximum Debt Service Ratio**

Total debt service ratio is the proportion of gross income that is spent on debt service and housing-related fixed or essential payments. The industry standard is that a total debt service ratio of less than 45 per cent is preferable, though in the past, some lenders were willing to stretch a borrower’s total debt service ratio to 50 per cent. The Mortgage Insurance Guarantee Framework now sets the maximum debt service ratio at 45 per cent for the mortgage to be backed by mortgage insurance.

- **Loan Documentation**

The new Mortgage Insurance Guarantee Framework now has minimum loan documentation standards to provide evidence of the borrower’s sources and level of income, and to support the reasonableness of the property’s value.

Brokerages to Benefit from Online Filing of Compliance Audit Forms

RECA is pleased to be introducing online filing for compliance audit forms in 2009. Mortgage brokerages with a fiscal year-end of December or January will be the first to test-drive the new online filing system, and have recently received communication from RECA with all of the details. The first form that it will be possible for brokerages to file online is Form 4, *Declaration of Absence of Trust Transactions*. The ability to file other compliance audit forms online will follow, later in 2009.

The ability to file compliance audit forms online will have many benefits for brokerages. It will:

- Eliminate the chance of a brokerage reporting via an obsolete form.
- Reduce the instances of incomplete forms and/or forms containing errors, as a form will not be accepted by the online filing system if it is not filled out completely or correctly.

- Eliminate disputes that arise out of reports that have been lost in transit, or because of the report/declaration delivery date, or in relation to proof of delivery, as the RECA Online system will provide the broker with confirmation of receipt.
- Avoid mail or courier costs.
- Make it easier for brokerages and their accountants to comply with legislated fiscal year-end reports.
- Make it easier for brokers to update trust account reporting requirements.
- Increase the timeliness of year-end reports, by providing multiple email reminders to brokers/brokerages during the 90-day submission period.

Brokerages will use the RECA Online system for filing completed compliance audit forms. The vast majority of brokers are already familiar with the RECA Online system as it is the licensing system brokers use to register, cancel and transfer industry members.

Additional features will be incorporated into the RECA Online system so that it can accept and process compliance audit forms efficiently and effectively. The RECA Online system will:

- Send out automatic email reminders to brokers when their compliance audit reporting is due, this should reduce the number of administrative penalties issued for failing to file compliance audit reports on time.
- Partially pre-populate forms with brokerage details, which will make filling out the form quicker.
- Allow brokerages with trust accounts to add and delete accounts during the year as they occur (this will meet the requirements of notifying the executive director in *Real Estate Act* Rule 32(c)).
- Prompt for completeness issues on forms to reduce the number having to be resubmitted.
- Send confirmation to a brokerage that a filed compliance audit form has been successfully received by RECA.

Additionally, with the online filing system, there will no longer be a requirement to have the *Declaration of Absence of Trust Transactions* form commissioned and real estate brokerages will no longer have to complete the *Declaration of Brokerage Banking Information* form for the Alberta Real Estate Foundation.

Online filing of compliance audit forms is expected to be available – and mandatory – for all brokerages before the end of 2009.

Understanding Transaction Brokerage

Transaction Brokerage came into effect on October 1, 2008. To help explain how Transaction Brokerage works, RECA will publish the answers to commonly asked questions and compare answers for both Common Law and Designated Agency in each Regulator.

In Transaction Brokerage, can I still sell my listings to my buyers (double-end the transaction)?

Common Law

Yes. Transaction brokerage in common law occurs when the same brokerage represents the buyer and seller in the same transaction. Therefore, this would be the

case if the same industry member is working with the seller and the buyer in the same transaction. This option is allowed and is explained in the terms of the Exclusive Seller Agreement or Exclusive Buyer Brokerage Agreement and Common Law Transaction Brokerage Agreement.

Designated Agency

Yes. Transaction Brokerage in designated agency occurs when the same industry member represents both the buyer and seller in the same transaction. This option is allowed and is explained in the terms of the Exclusive Seller Designated Brokerage Agreement or Exclusive Buyer Designated Brokerage Agreement and Designated Agency Transaction Brokerage Agreement.

Further resources are available to you to help better understand transaction brokerage:

[Transaction Brokerage Interpretation Guideline](#)

[Transaction Brokerage Practice Guide](#)

[Residential Relationship Forms](#)

Real Estate Licence Suspensions

Harrison Tse - Real Estate Associate Licence Suspended

Calgary, Alberta – On December 8, 2008, pursuant to Section 38(4) of the *Real Estate Act*, the Real Estate Council of Alberta temporarily suspended the authorization of real estate associate Harrison Tse, currently unlicensed, pending the outcome of conduct proceedings under Part 3 of the *Real Estate Act*.

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

Patricia Frances Roque - Real Estate Associate Licence Suspended

Calgary, Alberta – On December 15, 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 Patricia Frances Roque, pending the outcome of conduct proceedings under Part 3 of the *Real Estate Act*.

As a result of this suspension, Patricia Frances Roque may not trade in real estate in Alberta at this time.

Education Corner – Education Core Values

The Real Estate Council of Alberta is pleased to announce the launch of the *Introduction to a Career in Property Management* course in Phase 3 of the Real Estate Associates' Program. The new property management course is required for those individuals entering the real estate industry who wish to trade in real estate conducting property management activities. Even if you are only considering conducting property management activities, you may wish to take the course to enhance your education. The course is available online through RECA. To enrol in the course, please go to the RECA website at www.reca.ca and click on 'RECA Education.'

Also available online through RECA Education is the *Understanding Designated Agency and Transaction Brokerage* course. 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 now available to you free of charge online, as a refresher. To access the course again, go to the RECA website at 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.

Annual Report Available

The Real Estate Council of Alberta's 2007-2008 Annual Report is now available on the RECA website at www.reca.ca.

Under section 16 of the *Real Estate Act*, RECA is required to compile licensing, administrative and financial information from the previous fiscal year in an annual report, and deliver that report to the Minister of Service Alberta within 120 days of the end of the fiscal year. RECA's fiscal year ends on September 30.

Your feedback on RECA publications is always welcome. Comments on the 2007-2008 Annual Report can be sent to communications@reca.ca.

Re-Licensing Education Program

Current Re-licensing Education Program

Appraisers

Real estate appraisers and candidates must complete the *Mortgage Fraud Awareness* course before they will be able to renew their licence on September 30, 2009. Completion of the *Mortgage Fraud Awareness* course is the current Re-licensing Education Program requirement for all real estate appraisers. This course qualifies for 3 credits/hours with your professional association's continuing professional development programs.

The 3-hour *Mortgage Fraud Awareness* course is available online through the Alberta Real Estate Association. 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.

Mortgage Brokers

RECA is currently developing a **REP** course that will focus on the regulatory aspects in the Rules focusing on the most recent changes to the Rules. This course will be offered in the Spring of 2009, and will comprise the **REP** for mortgage industry members, to be completed by September 30, 2010.

Real Estate

There will be no **REP** for real estate industry members in the 2008-2009 licensing year.

Syndicated Mortgage Update

Syndicated Mortgage talks continue

Further to the direction provided by Council at its August 2008 meeting, a subcommittee of mortgage brokers who deal in syndicated mortgages has been struck. The subcommittee began its work shortly before Christmas and had a second meeting on January 20.

As detailed in the September 2008 Regulator, Council has directed RECA administration and the committee to:

- further explore RECA being the regulator of syndicated mortgages in Alberta
- undertake a comprehensive study of all aspects of regulating syndicated mortgages and other issues associated with the regulation of syndicated mortgages and report back to Council at a future date on the findings involved if RECA were to regulate all syndicated mortgages;

Already, the committee has been studying possible legislative wording, though it – and council as a whole – has not made a decision regarding whether RECA will be the regulator of syndicated mortgages in Alberta. It remains entirely possible that the Alberta Securities Commission will fulfill that regulatory responsibility. However, the committee is committed to exploring all aspects of this issue.

It is anticipated that Council will initiate further consultation with industry members and other stakeholders, with the goal that a plan of action is in place by Fall 2009.

Case Summaries

ADMINISTRATIVE PENALTIES

November 1, 2008 – January 16, 2009

- 3 breaches 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*]
- 2 breaches of failing to file brokerage accounting within the allotted time period [s.91(4) of the *Real Estate Act Rules*]
- 1 breach 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 unauthorized activity [s.17 of the *Real Estate Act*]
- 1 breach of failing to notify the Executive Director of discipline by any real estate board, real estate association, mortgage broker association, appraiser association, or an professional, occupational or regulatory body [s.40(1)(b) of the *Real Estate Act Rules*]

Consent agreements

October 2008

Lyle Stewart, real estate broker

Registered with 1071272 Alberta Ltd. o/a Realty 5000, previously known as One percent central realty.

Issues:

- Failure to render competent service [s.6(a) of the *Code of Conduct* as it was then]
- 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 agreements already in place [s.6(c) of the *Code of Conduct*, as it was then]
- Acted outside the scope of authority given by a client [s.2(c) of the *Code of Conduct*, as it was then]
- Failure to deliver a copy of the listing agreement to his client [s.26(1) of the *Real Estate Rules*, as it was then]

Facts:

- On or about October 20, 2004, Mr. Stewart met with Mr. P and signed a listing agreement for a residential property.
- Mr. P informed Mr. Stewart that he was in the midst of separating from his wife, Mrs. P, with whom he jointly owned the property.
- Mr. Stewart informed Mr. P that he would be seeking Mrs. P's consent to the listing.
- During the initial meeting between Mr. Stewart and Mr. P, Mr. P left a voicemail with Mrs. P to the effect that he had listed the property and asked her to contact Mr. Stewart.
- According to Mr. Stewart, he called Mrs. P the next night and left her a voicemail asking her to contact him.
- Subsequently, the Calgary Real Estate Board contacted Mr. Stewart to inform him that Mrs. P had contacted them and was upset that her property had been listed without her authorization.
- According to Mr. Stewart, he immediately called Mrs. P and spoke to her. Mr. Stewart met Mrs. P the following week to sign the listing agreement.
- During that meeting, Mr. Stewart assured Mrs. P that he would be representing her and Mr. P equally on the transaction.
- Mrs. P's initials are missing from several provisions of the listing agreement.
- Mrs. P refused to sign clause 9.4 dealing with knowledge of structural defects as she had not lived in the property for 18 months. According to Mr. Stewart, Mrs. P agreed that should an offer to purchase come in, she would sign a disclosure statement indicating that she had not lived in the property for a considerable time and therefore would not be held responsible in any way for defects, repairs or conditions of the property.
- Mr. Stewart informed Mrs. P at their meeting that he felt the listing price for the property was high, but that Mr. P wanted it that way initially.
- Mr. Stewart advised Mrs. P that he would be dropping the listing price a few weeks after the property was on the market and that if the price dropped, Mrs. P would have to sign an amendment to the listing agreement.
- On or about January 10, 2005, Mr. P asked Mr. Stewart to drop the listing price, which Mr. Stewart did.
- Mr. Stewart did not inform Mrs. P before he dropped the price.

- According to Mr. Stewart, he acted solely on Mr. P's authority to reduce the listing price based on information given to him at the beginning of the listing by Mr. P regarding the terms of separation between Mr. and Mrs. P.
- Mr. Stewart failed to obtain written amendments to the listing agreement from either Mr. or Mrs. P in order to document the reduction in the listing price.
- Mr. Stewart did not remove the sign from the property until two weeks after the listing terminated on or about February 28, 2005.
- Mr. Stewart did not provide Mr. P with a copy of the listing agreement until after Mr. P called Mr. Stewart to request a copy (and after the listing agreement had expired).

Results: The Hearing Panel found that Mr. Stewart's conduct was deserving of sanction and ordered him to pay a fine of \$4,000, costs of \$2,000 and complete educational requirements.

December 2008

Douglas Hay, Real estate broker

D.J. Hay enterprises ltd.

Issues:

- Employment of a person to trade in real estate during a period when she or was not licensed by Council for that purpose [s.20(f) of the *Real Estate Act* Rules, as it was then]
- Failure to keep monies received in trust in the name of the industry member and designated as trust monies [s.25(1)(b) of the *Real Estate Act*, as it was then]
- Failure to ensure that the terms of trust governing the use of the money were in writing [s.25(2) of the *Real Estate Act*, as it was then]
- Failure to be actively engaged in the management of the brokerage [s.21(1)(b) of the *Real Estate Act* Rules, as it was then]
- Failure to assure that the name of the brokerage was clearly indicated in the course of trading [s.20(c) of the *Real Estate Act* Rules, as it was then]
- Failure to assure that the business of the brokerage was conducted in compliance with the *Real Estate Act*, and the associated rules [s.21(1)(e) of the *Real Estate Act* Rules]
- Payment of a commission or other remuneration, either directly or indirectly, in connection with a trade or dealing in real estate to an individual(s), who was/were not authorized to receive such remuneration, [s.20(g) of the *Real Estate Act* Rules, as it was then]
- Failure to ensure proper management and control of documents or records related to licensing, registrations, and related regulatory requirements [s.21(1)(h) of the *Real Estate Act* Rules, as it was then]
- Failure to ensure an adequate level of supervision of associates and other individuals providing services on his behalf [s.21(1)(f) of the *Real Estate Act* Rules, as it was then]

Facts:

- Mr. Hay repeatedly failed to rectify certain practices of which he had been previously warned and failed to bring his practices into compliance with the *Real Estate Act*.
- Of particular note is that Mr. Hay engaged the services of two associates to provide property management services, notwithstanding that during the stated

period neither individual was authorized by council to provide such services. This occurred notwithstanding an undertaking provided by Mr. Hay on February 23, 1999, wherein he agreed to no longer engage in such behaviour.

- Mr. Hay also failed to correct errors in his trust accounting policies, wherein monies were held in accounts which did not accurately articulate the name of his brokerage.
- Additionally, and despite past sanction for similar behaviour, Mr. Hay failed to assure that the terms of trust governing the use of money were in writing.
- Mr. Hay also failed to maintain an adequate level of involvement in the management of the brokerage, supervision of associates, and management and control of documents.

Results: The Hearing Panel found that Mr. Hay's conduct was deserving of sanction and ordered that his authorization to trade in real estate as a broker be suspended for a period of five years, he pay a fine of \$8,500 and costs of \$1,000, and that he complete an educational requirement.

Mr. Hay's authorization to trade in real estate as an associate will continue once he has completed the educational requirement and register with a properly licensed brokerage in Alberta other than D.J. Hay Enterprises Ltd.

Ellen McNeill, real estate associate

Former associate registered with Zaytsoff Realty (Strathmore) Ltd. o/a RE/Max Realty Horizon, Discover Real Estate Ltd., and Impact Real Estate Group o/a One Real Estate at various and all material times, and currently unlicensed.

Issues:

- Failure to notify the Executive Director of a criminal conviction [s.15 of the Real Estate Rules (2004) and s.40(1)(h) of the Real Estate Rules (2006)]
- Participation in the creation of a contract and/or document(s) that she knew or ought to have known was false or misleading [s.4(d) of the Real Estate Code of Conduct, as it was then]

Facts:

- Ms McNeill was, at all relevant times, registered with and licensed by the Real Estate Council of Alberta.
- During the relevant periods she was registered with three different brokerages
- On August 25, 1999, Ms McNeill was found guilty of a criminal offence, paid a fine of \$300 and a conviction was entered into her record.
- In 2002, when completing an application for registration as an associate or associate broker, Ms McNeill answered 'No' to question 5 when asked whether or not she had been convicted of any offence in the past five years.
- In a subsequent renewal, Ms McNeill agreed in the Part 3 Declaration to comply with all *Real Estate Act*, Rules and Code of Conduct and laws that apply to all industry members trading in Alberta.
- In 2004, Ms McNeill answered 'No' to question 5 on a new application for registration with a new brokerage.
- In 2007, Ms McNeill answered 'No' to question 20 which asks whether or not she had ever been found 'guilty or convicted of any criminal offence or other offence under any law, province or state, excluding offences for which a pardon has been granted or provincial or municipal highway traffic offences resulting in monetary fines only.'

- Routine follow-up by RECA licensing staff revealed that she had a criminal record and that it appeared she had sworn a false affidavit.
- This information was passed on to RECA Audit and Investigations on or about April 11, 2008.
- Ms McNeill terminated her real estate registration on or about April 11, 2008 and has not traded in real estate since.
- Ms McNeill indicates she wishes to return to the real estate industry.

Results: The Hearing Panel found that Ellen McNeill's conduct was deserving of sanction and ordered that she pay a fine of \$2,500, costs of \$500 and complete educational requirements.

John Oliverio, Real estate associate

4TH Street Holdings Ltd. o/a Re/Max Real Estate (Central)

Issues:

- Participation in the creation of a form of communication that the member knew or should have known was false [s. 4(d) of the *Code of Conduct*, as it was then]
- Participation in the creation of a document that he knew or should have known was not legally binding and was confusing [s. 6(c) of the *Code of Conduct*, as it was then]

Facts:

- In or around January 2006, Mr. A, an individual, consulted Mr. Oliverio, an associate with Re/Max, about the sale of two apartment buildings.
- Also in or around January 2006, Mr. B, also an associate with Re/Max, was aware of the apartment buildings being offered for sale and identified a possible buyer.
- On or about January 17, 2006, Mr. Oliverio prepared a commission agreement between 12345 Alberta Ltd., the corporate owner of the two properties, which was represented by Mr. A (the seller's director and shareholder), and Re/Max.
- In this executed contract, the seller, 12345 Alberta Ltd., acknowledged that it was acting on its own behalf and that the brokerage was acting only for the buyer and owed the seller no fiduciary duties.
- On or about January 20, 2006, Mr. Oliverio prepared two purchase contracts for the sale of the two apartment buildings.
- In completing both contracts, Mr. Oliverio identified Ms S and himself, along with the brokerage (Re/Max), as representing the seller, 12345 Alberta Ltd.
- On or about January 21, 2006, Mr. Oliverio prepared and obtained the signature of Mr. A on a Dual Agency Consent Acknowledgement form wherein Mr. A acknowledged that a dual agency was in place between Re/Max, the Seller and the Buyer.
- On or about February 20, 2006, the closing date in the aforesaid purchase contracts, a dispute arose over who within the brokerage would receive a share of the commission.
- During the course of this dispute, Mr. Oliverio gave a verbal unqualified assurance to Mr. A that none of the commission would be received by Mr. B.
- Mr. A relied on this assurance and waived conditions to make the purchase contracts binding.
- Further on or about February 20, 2006, on removal of the conditions, Mr. Oliverio obtained the execution by the seller of a further commission agreement that amended the commission to Re/Max.

- This commission agreement also stated that the brokerage was acting only for the buyer and owed the seller no fiduciary duties.
- At this time, Mr. Oliverio was aware that Mr. B was insisting on receiving a portion of the commission and that this was expected to occur.
- Following this date, Mr. B received part of the commission with Mr. Oliverio's knowledge and contrary to the assurance Mr. Oliverio gave to Mr. A.
- At no time did Mr. Oliverio disclose to Mr. A that this may happen nor did he disclose to Mr. A that Mr. B received part of the commission.

Results: The Hearing Panel found that Mr. Oliverio's conduct was deserving of sanction and ordered him to pay a fine of \$4,500, costs of \$500 and complete educational requirements.

Appeals *November 2008*

Rose marie cheveldave

Issues:

- On February 28, 2008, an administrative penalty was issued to Rose Marie Cheveldave for unlicensed activity. Pursuant to the RECA Bylaws, Ms Cheveldave appealed the administrative penalty on the basis that the unlicensed activity was not intentional and due to clerical errors on the part of RECA.

Facts:

- On February 28, 2008, Ms. Cheveldave was issued an Administrative Penalty in the amount of \$5,000 for breach of s.17(c) of the *Real Estate Act*.
- On March 26, 2008, Ms Cheveldave appealed the administrative penalty in writing.
- Ms Cheveldave did not provide the \$1,000 security for costs along with her written appeal notice before the appeal period expired or any time thereafter.
- A hearing was held on November 12, 2008, at which the Executive Director made an Application to Dismiss the appeal on the grounds that the requirements for appeals of administrative penalties as laid out in the Real Estate Council Bylaws, s.33(4) (formerly s.35(4)), were not met (the security for costs did not accompany the written notice of appeal) and therefore there was no jurisdiction to hear an appeal.

Results: The Hearing Panel granted the Executive Director's application to dismiss Ms Cheveldave's appeal. As a result, the original administrative penalty of \$5,000 stands. Further, the Panel ordered Ms Cheveldave to pay costs in the amount of \$3,125.66.

Council Members

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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

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Alberta Mortgage Brokers Association

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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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