

The Regulator December 2011

Collaboration at Work: RECA Enters into MOUs

Since approving its 2011-2016 Strategic Plan in July of this year, the Real Estate Council of Alberta has been speaking and writing extensively on the importance of collaboration within Alberta's real estate industry. Now, RECA is pleased to announce three new Memorandums of Understanding – with the Appraisal Institute of Canada (AIC) and AIC-Alberta; the Calgary Real Estate Board (CREB); and, the Medicine Hat Real Estate Board (MHREB). The three MOUs set the scene for greater collaboration and cooperation between RECA and these related industry bodies in terms of investigations and information sharing, while upholding relevant privacy legislation. Though these three MOUs have been in the works for the past year and a half, they fittingly align with RECA's current strategic plan and the desire for greater collaboration.

RECA's MOU with the AIC/AIC-Alberta is particularly noteworthy as it completely removes the duplication between the investigative processes of RECA and AIC/AIC-Alberta. As part of its mandate, AIC ensures compliance with the Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP). Under section 77(2) of the *Real Estate Act* Rules, RECA is also responsible for ensuring real estate appraisers who are AIC members adhere to CUSPAP. Through this MOU, AIC/AIC-Alberta and RECA have decided to altogether eliminate duplication. Except in special circumstances, all complaints alleging a lack of adherence to CUSPAP standards, whether received by the AIC/AIC-Alberta or RECA, will be investigated by RECA as RECA has a legislated obligation to investigate these type of complaints.

In these cases, AIC will appoint a qualified expert to assist RECA investigators. Ultimately, control and direction of the RECA investigation will remain with the RECA investigator assigned to the investigation, but the AIC appointee, after signing a confidentiality agreement, will provide expert advice to RECA and participate in any resulting hearing or appeal proceedings. Conversely, RECA will provide information to AIC on any discipline issued against AIC members. This collaborative approach takes advantage of both RECA's and AIC's self-regulation strengths. This approach has multiple benefits as it reduces duplication and costs and ensures a consistent approach and outcomes.

RECA's MOUs with CREB and MHREB are slightly different in scope than the MOU with AIC/AIC-Alberta, but lead to greater collaboration between industry bodies just the same. The MOUs will facilitate information sharing between RECA and CREB/MHREB to support the organizations' enforcement and investigative activities under their respective mandates. They will also provide for a better system of communication between the organizations to enhance the already-existing cooperation, while accounting for and upholding relevant privacy laws.

There are times when the actions of an industry professional may be of interest to RECA and CREB or MHREB. In some cases, an industry professional's activity may be both "conduct deserving of sanction" and a breach of the Association rules. If it is unclear which body should

commence an investigation, it is recommended that RECA discuss the matter with CREB and MHREB, as the case may be.

Benefits for Industry Professionals

Perhaps the item of most interest to industry professionals within these MOUs is the commitment by AIC-Alberta, CREB and MHREB to provide RECA with copies of discipline they levy against their members. Pursuant to section 40(1)(b) of the *Real Estate Act* Rules, industry professionals are required to notify the Executive Director, in writing, when they are disciplined by any real estate board, real estate association, mortgage broker association, appraiser association or any professional, occupational or regulatory body. As a service to their members, through these MOUs, AIC-Alberta, CREB and MHREB, will notify RECA of all discipline they issue against their members. This will prevent situations where members of these bodies inadvertently forget to comply with section 40(1)(b) of the Rules and will ensure timely disclosure. The Executive Director will consider all section 40(1)(b) notifications provided by AIC/AIC-Alberta, CREB and MHREB to have been made by the industry professional in compliance with section 40 of the *Real Estate Act* Rules.

Despite the differences and nuances from one industry body to the next, what is clear across the board is the importance of continually improving cooperation and collaboration. In doing so, processes can be more effective, more efficient and more cost-conscious. This in turn is better for all industry professionals and related stakeholders.

Going forward, in the interest of continued collaboration, RECA will be working with other associations and Boards on the development of additional MOUs.

Electronic Agreements

Summary: For the purposes of administration of the *Real Estate Act*, Rules, Regulations, and Bylaws, RECA has adopted the position that contracting via electronic agreements is a valid and enforceable method of contracting. RECA's position is subject to judicial consideration of electronic contracting and the development of case law in this area.

With commerce becoming increasingly digitized, electronic agreements and contracts have grown in popularity. In certain circumstances, the legal enforceability of electronic agreements and contracts in Alberta may be at issue. While it appears essential contract requirements will apply to electronic agreements, i.e. parties must be known, terms must be clear and agreed to by the parties, at this time there are no known legal precedents in the province to provide assistance with regard to the enforceability of electronic contracts.

Background

Many in the residential real estate industry have started to use “electronic tablets” (tablets) when conducting trades in real estate. These tablets contain an electronic version of service

agreements and real estate purchase contracts. The signature of a buyer or seller is electronically/digitally captured in the tablet, similar to the process used by couriers when an electronic signature “pad” is signed on receipt of a package. Electronic agreements may be printed or emailed directly from the tablet.

With the increasing use of tablets and other types of electronic agreements and contracts i.e. lease agreements, mortgage service agreements, appraisal engagements and others, the Real Estate Council of Alberta (RECA) reviewed the validity of electronic agreements in relation to Alberta laws and specifically whether the *Statute of Frauds* and the *Electronic Transactions Act* (Alberta) applied.

The issues RECA considered included:

- whether electronically signed service agreements and real estate purchase contracts are valid in law; and,
- how, if at all, does the *Statute of Frauds* or the *Electronic Transactions Act* or other Alberta legislation apply to electronic transactions involving the supply of services or the sale of land.

Statute of Frauds (Alberta)

According to the *Statute of Frauds*, agreements pertaining to interests in land, including the buying and selling of land, must be in writing and signed by the parties to the agreement. It applies to real estate purchase contracts. Whether electronic signatures satisfy the requirements of the *Statute of Frauds* does not appear to have been judicially considered in Alberta. However, the definition of “writing” in the *Interpretation Act* (Alberta) and the *Interpretation Act* (Canada) is helpful as is a court case that decided the definition of “writing” in the *Interpretation Act* (Canada) included “facsimile transmission or electronic mail.”

Although there is no judicial interpretation of whether an electronic agreement or signature satisfies the *Statute of Frauds*, it is RECA’s opinion that they will satisfy the *Statute of Frauds* because the agreement or signature is simply represented or reproduced in visible form through electronic means, much the same as a facsimile transmission or an email.

Electronic Transactions Act (Alberta)

The Alberta *Electronic Transactions Act* was proclaimed in force in 2003 but has yet to be judicially considered. The *Electronic Transactions Act* was created to ensure that electronic records and transactions have the same validity and enforceability as traditional paper-based transactions.

It is RECA’s opinion that the *Electronic Transactions Act* applies to real estate service agreements and real estate purchase agreements. They create rights and obligations and in the case of real estate purchase agreements, equitable interests in land are created. The *Electronic Transactions Act* and its General Regulation provide that the statute does not apply to “records that create or transfer interests in land (interests that require registration to be effective), including interests in mines and minerals.” In the case of service agreements or real estate purchase agreements, neither creates an interest in land requiring registration to be

enforceable against third parties. Both are enforceable without registration and therefore the *Electronic Transactions Act* applies.

The *Electronic Transactions Act* contains conditions that must be satisfied in order for information in electronic form to satisfy the legal requirements of information in writing or other non-electronic form including:

A legal requirement that information be provided to another person in a specified non-electronic form is satisfied if the information is in electronic form, organized in the same or substantially the same manner as the specified non-electronic form, accessible so as to be useable for subsequent reference, and capable of being retained by the other person.

An electronic signature is defined as “electronic information that a person creates or adopts in order to sign a record and that is in, attached to or associated with the record.”

Further, an electronic signature will meet the requirement that a record be signed if the electronic signature is reliable for the purpose of identifying the person and the association of the electronic signature with the record is reliable for the purpose for which the record was created. Electronic signatures do not create a different legal meaning in the electronic world but have the same status as written ones.

In RECA’s view, the *Electronic Transactions Act* applies such that electronic real estate purchase agreements and real estate service agreements with electronic signatures are equivalent to those written on paper. It is important to note that because the Act has yet to be judicially considered, the Courts may decide at a later date that this is not the case.

Further, the *Electronic Transactions Act* will apply to different service agreements and contracts in the real estate, property management, mortgage and appraisal industries.

Conclusion

For the purposes of administration of the *Real Estate Act*, Regulations, Rules and Bylaws, RECA has adopted the position that contracting via electronic agreements with electronic signatures is a legally valid method of contracting. Although not tested in the Alberta courts, it appears real estate service agreements and real estate purchase contracts in electronic form will satisfy the requirements of the *Statute of Frauds* and are by with the *Electronic Transactions Act*.

RECA supports industry professionals adopting new technologies to advance industry efficiency and improve the quality of service to consumers. RECA is prepared to research the application of emerging technologies to the industry and identify potential regulatory issues. Where it is appropriate to do so, it has amended and will continue to amend the *Real Estate Act* Rules to respond to new technologies and business models.

As indicated, RECA has developed its position on the use of tablets and electronic agreements for the purposes of administering the legislation. This Information Bulletin should not be construed as legal advice or advice to industry members to incorporate this technology into their

business practices. It is important to reinforce that RECA's position is subject to judicial consideration of the *Electronic Transactions Act* and the development of case law in this area. Industry members who have incorporated this technology into their business practices are encouraged to monitor this issue as well.

The Continued Evolution of RECA's Audit Program

As in many self-regulating professional bodies, the Real Estate Council of Alberta (RECA) has a comprehensive audit program. As part of this program, RECA auditors visit brokerages across the province and thoroughly review, among other things, trust accounts and brokerage accounting practices, licensing records, trade records, mortgage disclosure documents and agency disclosure forms.

Prior to 2004, RECA's audit program had three primary objectives:

- promote compliance with the *Real Estate Act* and the Rules (the legislation);
- safeguard the integrity of the licensing system; and,
- reduce the number of claims against the Assurance Fund.

Under this regulatory framework, auditors were assertive and often referred matters for investigation. Of course, the predictable result from that were brokers who dreaded an auditor's phone call. Many brokers told RECA they were very stressed from the time of the auditor's first call until the conclusion of the audit.

In late 2004, RECA made the decision to add a fourth objective and to make this fourth objective the primary one for RECA's audit program. This new objective was to be of service to brokers. Going forward, auditors were expected to work constructively with brokers to develop sound business and accounting practices that would promote compliance with the legislation.

Under this regulatory framework, RECA believes the audit program should provide positive and constructive assistance to brokers to identify and resolve potential problems, and develop effective record keeping and administrative procedures that foster and ensure compliance with the legislation.

To ensure that RECA's audit program has been meeting this objective, RECA conducts surveys of all the brokers it audits shortly after the completion of the audit. Here are some highlights from the audit surveys conducted during the 2010-2011 fiscal year:

- 97.6% of brokers indicated that RECA auditors provided reasonable notice when scheduling an audit.
- 98.8% of brokers indicated that RECA auditors were flexible when scheduling the audit.
- 98.0% of brokers indicated that RECA's audit guides and pre-audit publications were helpful to prepare for and understand the audit process.

- 77.4% of brokers did not find the audit disruptive to their brokerage operations. Of the 22.6% of brokers who found the audit disruptive to their brokerage operations, 80.9% acknowledged that the disruption caused by the audit could not be reduced or avoided.
- 97.3% of brokers reported the auditors provided clear and constructive explanations at the end of the audit.
- 94.6% of broker stated the auditors provided positive recommendations or strategies to prevent future problems.
- 91.0% of brokers stated the audit helped them identify and resolve potential problems.
- 85.5% of brokers stated the audit helped them develop more effective record keeping and administrative procedures.
- 95.9% of brokers indicated they received closing correspondence on a timely basis that summarized the results of the audit and future expectations for the brokerage.
- 97.2% of brokers found the closing correspondence was accurate.
- 99.6% of brokers stated RECA's auditors were courteous
- 99.2% of brokers stated RECA's auditors were professional
- 99.2% of brokers stated RECA's auditors were approachable
- 97.6% found the overall audit process to be helpful.

While RECA is very pleased with the results of the audit program survey, RECA will continue to fine-tune and improve its processes, and would like to thank brokers for their insight and suggestions as to how RECA can improve its audit program.

When RECA does receive suggestions for improvement, it takes them to heart. One recently implemented suggestion was additional ability for brokers and their accountants to file web-based accounting reports using the RECA Online system.

Another suggestion in development right now is a "RECA Certified Technology Program." Once this program is in effect, brokers will be able to quickly and easily determine whether proposed technologies meet legislative requirements.

As a result of Council's strategic direction to promote effective self-regulation, RECA's audit program is going to be re-branded and further expanded. Effective December 1, 2011, the audit program will be rebranded as the Trust Assurance & Practice Review Program, within the Professional Standards department. And, in the months and years ahead, RECA's Trust Assurance and Practice Review program will also help brokers with:

- the development and maintenance of brokerage policies and procedures;
- the review and development of reasonable and effective supervisory processes;
- how to investigate and deal with potential misconduct within the brokerage;

- the development of proper broker delegation agreements and supervision of broker delegates; and,
- reviewing and discussing the various representational and agency models and processes for ensuring adherence to the brokerage's chosen model or models.

RECA is also close to completing the development of a real estate appraiser audit program and training auditors to complete these audits.

Do you have any suggestions on how RECA's Trust Assurance and Practice Review Program can be further

NEWS BYTES

RECA Holiday Hours

The Real Estate Council of Alberta office in Calgary will be closed for the Christmas Day and Boxing Day statutory holidays on Monday, December 26 and Tuesday, December 27, 2011. Regular office hours, 8:30-5 p.m., will be in place Wednesday, December 28 through to Friday, December 30, 2011. The RECA office will be closed for the New Year's Day statutory holiday on Monday, January 2, 2012. Regular office hours will resume on Tuesday, January 3, 2012. Council and the RECA staff want to wish all our industry professionals and their families a safe and happy holiday season!

Self-Regulation Consultation Continues

The Real Estate Council of Alberta continues to travel around the province, meeting with industry professionals from all sectors to discuss self-regulation and what it means for Alberta's real estate industry. With eight of a planned 21 self-regulation town hall presentations behind it, RECA has received extensive feedback – and support – from industry professionals that this is the way in which they want Alberta's real estate industry, and RECA, to evolve.

Have you had your say? For a complete listing of Town Hall meetings being held around the province, visit <http://www.reca.ca/industry/content/about-reca/self-regulation.html#haveyoursay>.

If you are not able to attend a RECA Self-Regulation Town Hall meeting or you simply want to make sure RECA receives your feedback in writing, we encourage you to complete RECA's [online survey](#) about self-regulation and right touch regulation. Thank you for taking the time to become involved in this important project.

RECABlog – Check it Out!

Have you visited the [RECABlog](#) lately? If not, these are some of the posts you've missed (www.recablog.ca) :

Self-Regulation: A Call to Arms

Whenever You Advertise, the Rules Stay the Same
The Principles of Sanction
CAAMP 2011: The Relationship Revolution
Drastic Times Call for Drastic Measures?

The RECABlog, launched in February 2011, has been slow to develop readership and comments, but the content continues to grow and develop. What was first launched as a once-a-week communication initiative from RECA has grown to an average of two posts each week. In each case, RECA encourages industry professionals to get involved and join the discussion. The RECABlog is one of the primary means through which RECA can communicate on the issues and topics that matter most to industry professionals. It's also an opportunity for RECA to provide regular updates on both internal and external initiatives. Make the blog a regular part of your Internet surfing.

Council Members 2011-2012

BILL BUTERMAN, Chair Elect
Appointed from non-AREA industry members

KEVIN CLARK
Appointed from residential real estate industry members

CINDY DUBRAY
Appointed from the property management sector

GORDON GRAYDON
Appointed from the public

CONNIE LECLAIR
Appointed from the public

WAYNE MCALISTER, Chair
Appointed from the Calgary Real Estate Board

KEN MCCOY
Appointed from the Edmonton Real Estate Board

WENDY ROBSON
Appointed from boards outside of Calgary and Edmonton

RALPH SALOMONS
Appointed from commercial real estate sector

CHERYL SCHINDEL

Appointed from boards outside of Calgary and Edmonton

GARY SIEGLE

Appointed from the mortgage brokerage sector

ROBERT TELFORD, Past Chair

Appointed from the real estate appraisal sector

Contact RECA

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

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Registrar - Joseph Fernandez

Director of Professional Standards – Charles Stevenson

General Counsel - Jean Flanagan