

# The Regulator July 2010

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## Council Message

Welcome to the summer edition of the Regulator. RECA's 2010-2011 budget was approved by Council in early July. Specific work priorities include focusing resources on eliminating the investigations backlog, along with providing resources to assist Council with strategic planning. In keeping with ever-changing technology demands, this budget also allows for updating and improving RECA's technology infrastructure and business processes. The budget is based upon a prediction of industry member numbers remaining the same through 2010-2011. That means industry member fees will remain at \$425.

In council news Robert Telford and Cindy Dubray were both reappointed to three-year terms beginning November 10, 2010. Robert continues as the council member representing the real estate appraisal industry, while Cindy continues to represent the property management sector. Robert Telford is also the incoming RECA chair for 2010-2011.

This issue features a valuable renewal checklist for Real Estate, Mortgage Brokers and Appraisers. The checklist provides key information for correct form completion and industry member registration renewal which occurs in September.

Articles of interest include Buyer Agency, along with the announcement of new Buyer Agency Agreement Outlines from RECA for both Designated and Common Law Brokerages. As well, there is an article about the new pre-licensing education course for real estate appraisal industry members. In light of recent statements from the Privacy Commissioner on client confidentiality relating to mortgage brokerage record keeping, this edition also features the Mortgage Broker Records information bulletin.

RECA would like to take this opportunity to express our sincere condolences in the passing of Tom Shields this July. Tom was a founding member of the Real Estate Council of Alberta, serving three years on Council from November 1995 to October 1998. He played an important role in establishing RECA and advancing self-regulation in Alberta. Tom Shields was a leader within our industry and was highly respected by his peers and colleagues.

As always, if you have story ideas or feedback, please contact us at [communications@reca.ca](mailto:communications@reca.ca)

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## Renewal Fees Remain the Same this September

The renewal fees for the 2010-2011 licensing year will remain unchanged at:

\$425 for individuals + applicable REIX fee or Assurance Fund Levy

\$200 for brokerages + applicable REIX fee

To view the current fee schedule, click [here](#).

Remember: Real Estate and Mortgage industry members must complete their respective Re-Licensing Education Program (REP) before they can renew. The courses, Real Estate Update 2009-2010 and Mortgage Broker Update 2009-2010, are available online via RECA Education on the RECA website, [www.reca.ca](http://www.reca.ca)

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## Six Steps for Renewal Success

In mid August the license registration renewal packages will be sent via email to real estate and mortgage brokers and appraisers. For real estate and mortgage industry members the renewal process is coordinated by your broker and brokerage staff. Appraisers are individually responsible for license registration renewal. When real estate and mortgage brokers download the renewal package, the package includes pre-populated application forms for the broker, brokerage and all industry members registered with the brokerage. Appraisers receive their own pre-populated application. This pre-population information is taken from RECA's most recent data base information.

The renewal process can be broken into six (6) simple steps that must be precisely followed to ensure success.

**STEP 1:** For real estate and mortgage industry members, the first sections of the application are, Class of License and Individual Information. For appraisers, the first section contains Class of License, Designation, Application Type and Individual Information. Please verify the pre-populated information and make all necessary additions and changes. Because email is RECA's primary method of contact, you must ensure your email address is correct. Real estate and mortgage industry members renewing in 2010 will need to complete the relicensing education program to ensure renewal eligibility.

**STEP 2:** Carefully review the Information Respecting Suitability section and answer all six (6) questions honestly. The questions pertain to your circumstances since the date of your last

application. If you've been licensed and registered with the same brokerage since September 2009, then the answers will be based on the past twelve (12) months since your last renewal. If you're new to your industry and became licensed and registered within the past 12 months and have not changed brokerages, then the answers will be based on the time since you first applied for license and registration. If you've changed brokerages in the past year, then the answers will be based on the time since you most recently changed brokerages. If you are an appraiser that made application to change status during the past year, your answers will pertain to the time since the status was updated.

If you have a "yes" response to any of these questions, then the original application must be forwarded to and processed by RECA. Yes answers require that you send the application to RECA as early as possible. It can take up to three (3) business days for RECA to process an application, particularly during the last two weeks of September. If you've previously reported the situation to RECA you must still answer "yes" to the corresponding question. As an example, if you have been disciplined by a professional body since the date of your last application and immediately reported this discipline to the executive director in accordance with the Real Estate Act Rules section 40, you must still answer "yes" on the application and forward to RECA for processing.

**STEP 3:** The Affidavit section must be filled out in your legal name and signed before an appropriate official. Making a false statement on this affidavit constitutes a criminal offence and is punishable by law. Any affidavit containing false or misleading information may result in the refusal of the application and suspension or cancellation of any authorization issued thereupon. The official, Commissioner of Oaths, Notary Public or Solicitor must be present when you sign and swear your affidavit.

**STEP 4:** In the real estate and mortgage industries, the Broker or Broker Delegate will ensure you understand the consequences of making false or misleading statements on the application; will confirm your photo identification; and will process the application online making necessary changes to the RECA data base. Appraisers will log in to the RECA website and process their own renewal. Online renewals cannot be completed until the application is complete, sworn and received by the brokerage.

**STEP 5:** Real estate and mortgage industry members should be certain to review their license and registration certificate. Appraisers will review their license certificate. When online renewal is complete the RECA system prompts the operator to print the certificate. This should be done and the certificate delivered to the industry member. Doing so provides confirmation of the industry member's authorization to trade in real estate, deal in mortgages or provide appraisal services under the Real Estate Act as the case may be.

**STEP 6:** On Friday, October 1, 2010, prior to undertaking any activity that requires a license to trade in real estate, deal in mortgages or provide appraisal services, you must confirm your authorization. Simply go to RECA online, search for an industry member by typing in your surname in the appropriate box and ensure the light is green. Any other result will prompt an

inquiry to your brokerage or, in the case of appraisers, to RECA Information Services. Do not undertake any activity requiring a license until you have completed this final step and confirmed your green light status.

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## Information Bulletin: Records – Mortgage Brokerage

**Summary: Record keeping requirements for mortgage brokers and mortgage associates are outlined in the *Real Estate Act* and the *Real Estate Act Rules*. [*Real Estate Act*, s.25(9), *Real Estate Act Rules* s.1(1)(aa), s.13(2)(c), s.67(g)(i)(j), s.69(c), s.105(1)(2)]**

*Note: For the purposes of this Information Bulletin, and where the context permits, the term “mortgage broker” includes all industry members authorized to deal in mortgages by the Real Estate Council of Alberta including a brokerage, broker and associate.*

It is important for mortgage brokers to understand what is meant by a “record” and their obligations with respect to keeping records of their mortgage deals and potential deals. Records can be created and stored in electronic format or they can be converted to electronic format for storage purposes.

For the purposes of the *Real Estate Act* and Rules, and this Information Bulletin, “records” include:

- (i) *accounts, books, returns, statements, reports, financial documents or other memoranda of financial or non-financial information, whether in writing or in electronic form or represented or reproduced by other means, and*
- (ii) *the results of the recording of details of electronic data processing systems and programs to illustrate what the systems and programs do and how they operate.*

As indicated, records can be in “electronic format.” In accordance with the *Real Estate Act Rules*, “electronic” includes “created, recorded, transmitted or stored in digital form or in any other tangible form by electronic, magnetic or optical means or by any other means that have similar capabilities for creation, recording, transmission or storage.”

### Purpose for record retention requirements

The *Real Estate Act* sets out comprehensive record retention requirements. There are various reasons for these requirements. Some of the reasons are as follows:

- Enable brokers to provide an adequate level of supervision and ensure that the business of the brokerage is conducted in accordance with the legislative requirements;
- Enable brokers to deal with possible misconduct by associates, associate brokers and unlicensed staff;

- Enable an accountant to review the brokerage's records and provide a report under section 91 of the Rules made pursuant to the *Real Estate Act*;
- Enable RECA to conduct compliance audits under section 74 of the *Real Estate Act*; and,
- Enable RECA to review all relevant information necessary to make proper determination during conduct proceedings under Part 3 of the *Real Estate Act*.

Brokers should have a record management plan to ensure all documents and records are maintained. The *Real Estate Act* and Rules provide brokers with the flexibility to create their own record keeping strategy and record keeping systems based on the brokerage's size, types of business dealings and trade area, provided that all documents and records are maintained in accordance with the legislative requirements.

Brokers have a duty to communicate the brokerage's policies and procedures relating to records retention to associates, associate brokers and unlicensed staff, and to ensure compliance with the brokerage's policies and procedures. For example, many associates administer websites on behalf of the brokerage. The broker should be aware of all associate-administered websites and should ensure electronic records from these websites are maintained by the brokerage in accordance with the brokerage's policies.

### Trust Account Records

When in the course of business a mortgage brokerage receives funds on behalf of clients or investors it is required to open and maintain at least one trust or pooled trust account for the deposit of such funds. The *Real Estate Act* s.25(1) specifies a mortgage brokerage that operates a trust account shall keep complete and accurate financial records in which the mortgage broker must maintain a separate record for each person on whose behalf the mortgage broker is acting of all:

- (i) *money received in trust, accounts, books, returns, statements, reports, financial documents or other memoranda of financial or non-financial information, whether in writing or in electronic form or represented or reproduced by other means;*
- (ii) *money held in trust;*
- (iii) *interest earned on money held in trust; and,*
- (iv) *disbursements made from money received or held in trust.*

### Mortgage Deal Records

The *Real Estate Act* Rules specify the minimum requirements for the retention of all records of a brokerage. Mortgage brokers are encouraged to become familiar with sections 105(1) and (2):

*105(1)A brokerage shall keep separate and have available at its registered business office in Alberta or the City of Lloydminster all records for each trade or potential trade including signed copies of each service agreement, mortgage administration agreement, commitment letters, mortgage applications, credit bureau reports, cost of credit disclosures, investor lender disclosure, banking records, accounts and supporting*

*documentation made in the course of the brokerage's business in relation to a mortgage deal or potential deal in Alberta.*

*(2) The records must identify each mortgage deal by a sequential code and use that code for the corresponding trust ledger if applicable and must contain the following:*

- (a) the nature of the mortgage deal or potential deal;*
- (b) a description of the real estate;*
- (c) the mortgage amount;*
- (d) the names of the lenders and borrowers;*
- (e) the amount of deposit or investment received, if any, and a record of the disbursements;*
- (f) the amount of commission or other remuneration received, if any, and the name of the party paying it; and,*
- (g) the extent of the distribution of the client's information to third parties.*

### **What is a "Record"?**

Records are defined very broadly to include all records created and received during a deal in mortgages. Records includes traditional paper documents, and electronic documents such as faxes, emails, website data and other types of electronic contracts arising out of the use of new technologies. The definition of records also includes records in a potential deal even if it does not result in a service agreement or a deal in mortgages.

Records normally expected to be found in mortgage brokerages include:

- general brokerage advertisements (website information, newspaper ads, flyers, bus benches etc.);
- corporate searches;
- power of attorney;
- land title searches;
- presentations made to prospective clients;
- documents related to the underwriting process;
- copies of any faxes received or sent;
- email communications pertinent to the transaction;
- credit bureau reports;
- borrower and lender disclosure documents;
- copies of all service agreements (Lender and Borrower Brokerage contracts) even though they may not have been accepted by the lender or borrower;
- borrower application forms whether they resulted in deals or not;
- letters of employment, notice of assessment and other documents to support the borrower's application;
- feature sheets, offers to purchase, real estate appraisals and gift letters;
- *Fair Trading Act* cost of credit disclosure documents;
- environmental, engineering and other professional reports;
- progress, building or stage reports;
- commitment letters and rejection communications;
- mortgage administration agreements;
- adding machine tapes, if used;

- any notes made in day timers (electronic or otherwise);
- photocopies of all mortgage payments received;
- trust account and general account information;
- deposit slips, withdrawal slips and records related to internet banking operations;
- reconciliations, trust ledgers and bank statements and
- any computer data files

This list is not exhaustive and is only a sample of the information that is required to be maintained by the broker.

### **Record Retention Period**

The *Real Estate Act* s.25(9) requires mortgage brokers to keep their records of mortgage brokerage activities (mortgage deals and potential deals) and accounting records for a minimum of three years after they came into existence. The three-year period may be extended by the executive director of the Real Estate Council of Alberta in a particular case for the purposes of an investigation or prosecution under the *Real Estate Act*.

Brokers should also take into consideration other legislative requirements such as the *Fair Trading Act* or civil requirements. For example the Canada Revenue Agency and FINTRAC have some retention requirements in relation to certain records that may exceed the retention requirements under the *Real Estate Act*.

Brokers may also choose to retain records for longer periods for other reasons. Mortgage brokerages that have errors and omissions insurance or liability insurance should consult with their insurance broker or insurance provider.

Brokerages should be aware that licensing and registration records maintained by brokerages under a RECA Online Filer Agreement are not subject to the three-year record keeping requirement and must be kept indefinitely.

### **Record Retention Options**

Records may be maintained in paper form or electronic form. However, if the documents are stored in electronic form the following requirements apply:

- the storage location and medium used for storage is reliable and can reasonably be expected to maintain the integrity of the electronic information;
- if the electronic record was sent, received, or converted from paper form, the information that identifies its origin, destination and conversion must be retained;
- the electronic record is maintained in the format that was created, sent, received, or converted or is in a format that does not alter the information in the original record;
- the means to view and reproduce the record are maintained. Often this means that the broker will also need to maintain the applicable computer program and/or equipment to run the program;
- the records are safeguarded by a biometric access (preferred) or by a password or security code controlled by the broker so that the document cannot be deleted or altered other than by the broker or his delegate and only after three years;

- the records are located in a physical premise in Alberta accessible to the broker in Alberta. This includes storing the information in a server located in Alberta (i.e. a Q9 type of system) if the broker has the means to access the information from the server; and,
- the premises where the electronic records are stored are secure and only accessible by the broker and his or her authorized representatives;

### **Conversion of Records for Storage**

Brokerages may convert paper records into electronic form or from one type of electronic form to another to reduce physical space storage requirements or to facilitate the use of other types of information systems. RECA has created a set of conversion requirements to ensure the resulting electronic record is a true copy of the original document and to maintain the integrity of the conversion process.

Brokerages may convert paper or electronic records only under the following conditions:

- the information is maintained in an electronic form that does not materially alter the information contained in the original document; and,
- the identity of the person who made the conversion is embedded in the document without altering the information contained in the original document;

### **Duty to Link Data**

Whether in paper or electronic form, the broker has the duty to ensure that all records related to a deal or potential deal are linked so as to create a complete record of all documents or records relating to the deal or potential deal. For example, emails related to a specific deal in mortgages should be maintained with the deal file or if maintained in a separate system they should be linked to the deal file.

Often brokerages use multiple systems with respect to a specific deal. For example, the property was advertised in a brokerage website administered by an associate, the associate sent and received emails through a stand alone email system, the brokerage maintains a paper file and has an electronic conveyance system. Brokers need to understand the various systems used in the brokerage and to create and enforce policies and procedures to ensure all information is linked.

All deals or potential deals must be identified by a sequential code system.

### **Duty to Maintain Records in Alberta**

Whether the records are stored in paper or electronic form, the brokerage must maintain all records in Alberta. Records may be stored in a secure location accessible to the broker away from the brokerage's registered office. However, the records need to be available at the

brokerage's registered business office if requested by a RECA auditor or investigator in anticipation of an audit or during the course of an investigation. [*Real Estate Act Rules*, s.13(2)(c)]

Records may be maintained in multiple offices if required for the purposes of facilitating deal activities from offices in various geographical locations. The broker must have access to all of these offices or locations.

### **Duty to Maintain Confidentiality**

Brokers have a duty to ensure client and customer information is kept confidential. Information should not be released other than with the consent of the client or customer or as required by law. Brokerages must only use information for the purpose that it was obtained.

Brokerages must also have policies and procedures for the protection of personal and confidential information, and all industry members registered with the brokerage must be aware of and comply with the brokerage's policies.

Alberta-based brokerages must also ensure they comply with need to know principles imposed by the *Personal Information Protection Act of Alberta* (PIPA). For further information on PIPA, visit the Office of the Information Privacy Commissioner for Alberta at [www.oipc.ab.ca](http://www.oipc.ab.ca).

Brokerages conducting business across Canada must also ensure they comply with the principles of the *Personal Information Protection and Electronic Documents Act of Canada* (PIPEDA). For further information on PIPEDA, visit the office of the Privacy Commissioner for Canada at [www.privcom.gc.ca](http://www.privcom.gc.ca).

### **Separation of Business Records**

Some brokerages conduct a variety of business. Some activities may not be related to the deals in mortgages, such as being an Alberta Registries agent. Sometimes the activities will be tangential to the deals in mortgage activities such as administering a mortgage investment corporation. If the brokerage operates another type of business, brokers must ensure all mortgage deal records are kept separate from the other business activity.

### **General Record Keeping Standards to Consider**

While RECA establishes minimum record keeping guidelines, brokerages should also examine the broader concept of records management. Brokerages may want to consider review compliance with DoD [5015.2-STD Records Management Application Design Criteria Standard](#), or the [Model Requirements for the Management of Electronic Records](#).

### **Choosing an Electronic Record Keeping System**

Brokers have a duty to ensure any electronic system complies with legislative requirements. To assist brokers in acquiring a system that complies with all record keeping requirements, RECA has prepared the following list of questions:

### *General Questions*

- Does the electronic records management system track and maintain all of the brokerage's records?
- Does the brokerage obtain and maintain original paper records belonging to one of the parties to the transaction?
- Does the electronic records system allow for original paper documents to be maintained separately?
- Can paper documents that have been converted to electronic form be readily shared with clients or customers and easily accessible through common programs by those clients or customers?
- Does the brokerage have a system of explaining the advantages and disadvantages of paper record conversion to electronic format and to obtain the client's consent for the destruction of paper records after they have been converted to electronic format?

### *Questions for Converting Paper Records to Electronic Format*

- Is the storage location and medium where the electronic records are to be stored reliable and can reasonably be expected to maintain the integrity of the information from the time the electronic record was created?
- Is the identity of the person who made the electronic copy of the written, printed or any paper record and date of the recording into electronic form embedded in the document without altering the information contained in the written, printed or any paper record?
- If the information is maintained in electronic form in a manner that does not materially alter the information originally contained in the written, printed or any paper record?
- Is the record in electronic form safeguarded by password or biometric security codes controlled by the software, brokerage or appraiser so that the record cannot be altered?
- Will the brokerage maintain a copy of the computer program or of any other electronic devices required for the electronic records to be viewed and reproduced in printed form in a timely manner?
- Will the system allow the brokerage to ensure all electronic documents created in respect to a deal or potential deal are stored together or are linked so as to create a complete record of all documents or records relating to the deal or potential deal?

### *Questions Related to the Maintenance of Electronic Records*

- Is the storage location and medium where the electronic records are to be stored reliable and can reasonably be expected to maintain the integrity of the electronic information?
- Does the proposed system require users to identify themselves by username and password or biometric access to identify the brokerages staff who are creating, modifying, sending or receiving electronic records?
- Does the proposed system maintain who created, and modified the electronic record and the date of creation or modification?
- Does the proposed system maintain a copy of the electronic record before modification?
- Does the proposed system maintain who sent or received the electronic record and the date the electronic record was sent or received?

- Is the information in electronic form maintained in the format in which it was created, sent or received, or in a format that does not materially alter the information of the original record in electronic form?
- Does the proposed system maintain a copy of the computer program or of any other electronic devices required for the electronic records to be viewed and be reproduced in printed form in a timely manner?
- Does the proposed system safeguard the document in electronic form by the software, password or security codes controlled by the broker so that the records cannot be altered?
- Are the electronic records located in a physical premise in Alberta?
- Are the electronic records accessible by the broker as required?
- If the electronic data is maintained by a third party supplier, what arrangements have been made to safeguard and transfer the data to the brokerage in the event the third party supplier ceases business?
- Are the premises where the electronic records are to be stored secure and are only accessible by the broker or by persons authorized by the broker?
- Does the system provide the brokerage with the means to ensure all electronic records created in respect to a deal or potential deal are stored together or are linked so as to create a complete record of all documents or records relating to the deal or potential deal?

#### *Questions Related to the Three Year Minimum Record Keeping Requirements*

- Will the system prevent the deletion of deal records within the three years after they were created?
- Will the system allow the broker, or a person authorized by him or her to expand the record retention to exceed the three-year period as may be directed by the Executive Director?
- Can the system generate an audit trail of all records including the records that have been deleted after three years?

#### *Questions to Enable Brokers to Fulfill Broker Responsibilities*

- Will the system ensure that the broker is able to perform timely supervision of associate brokers or associates, as the case may be, within the brokerage and employees who perform duties on behalf of the brokerage?
- Will the system allow the broker to review all applications submissions and deals in a timely manner?
- Will the system allow the broker to delegate supervisory duties to broker delegates?
- Will the system allow associates to provide to the broker in a timely manner all original documentation and copies of original documents provided to the parties or maintained by other brokerages related to a deal in mortgages as required under the Act and these Rules?
- Will the system allow the broker to be informed of the activities being performed by the associate on behalf of the brokerage?
- Will the system have user name and password or biometric access to prevent unauthorized (unlicensed) staff from trading in real estate or dealing in mortgages?

## Access to Records by Clients

Clients may request copies of advertisements, service agreements, applications, documents used for underwriting purposes and other related records created, sent or received to assist the client with the deal or potential deal. Brokerages should provide copies or reasonable access to the clients' records. Brokers should consider disclosing the cost for providing this information. For additional information on this topic, see RECA Information Bulletin: *Records – Release of File to Client*.

## Duty of Associates to Provide Deal Records to the Brokerage

Associates and associate brokers have a duty to provide the brokerage with:

- all original documentation such as application forms, letters of employment, borrower disclosure statements, etc.;
  - copies of all original documents provided to the parties to the deal in mortgages or their representatives; and
  - all records related to a deal or potential deal.
- Associates must provide this information on a timely basis and in accordance with the brokerages policies and procedures related to record retention.

RECA has found that some associates interpret “records” to include only those records that are formal in nature (application forms, letters of employment, CRA Notices of Assessment, etc.) and that relate to completed deals in mortgages. Brokers must ensure that associates and other brokerage staff understand the definition of “records” and their obligation to submit all records to the brokerage whether they result in a mortgage loan or not.

## Brokerage-Broker Agreements

When a broker does not have a controlling interest in the ownership of the brokerage, the broker must have a written agreement with the brokerage. The agreement must give the brokerage the ability to carry out the duties and responsibilities of a broker as it relates to record keeping. For example, a broker who does not have a controlling interest in the brokerage must not allow records to be stored in the personal residence of an owner as he or she may not be able to safeguard the records or to gain access to the records.

The broker must also ensure the agreement survives the brokerage authorization as the broker is responsible to maintain the records for three years following the brokerage's end as a licensed brokerage. Brokers should consider the cost implications when considering these agreements.

## Brokerage Amalgamations

Occasionally a brokerage may purchase or amalgamate with another brokerage. The brokers for these brokerages have a duty to ensure the records are maintained as required either under the amalgamated brokerage or under the control of the former brokerage. (The former broker is able to register under the new brokerage or another brokerage.)

In the case of amalgamation, the broker should contact the applicable privacy officer to determine if the amalgamation affects the terms under which the information was provided and whether isolation of some records is required.

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## **New Appraiser Pre-Licensing and Re-Licensing Education**

The Real Estate Appraisers Advisory Committee (Advisory Committee) and Real estate Council of Alberta's (RECA) administration have worked together to improve the standards for regulation of the industry on a number of fronts. One identified area of concern of the Advisory Committee resulted from conduct deserving of sanction cases with appraisers and candidates and the lack of knowledge by some industry members with respect to the role of RECA and the requirements of the legislation. This includes licensing requirements, notification to executive director, RECA complaint, investigation and hearing/sanction processes and RECA standards of practice for appraisers and candidates. It was determined that RECA had a responsibility to ensure existing and new real estate appraisers were provided with an opportunity to understand these important issues.

To ensure new and existing real estate appraisers are provided with an opportunity to better understand RECA's licensing requirements and regulatory procedures, Council identified in its strategic plan key performance measures to monitor and review licensing education programs in all sectors on an ongoing basis and identify areas of improvement. One of the projects identified in the strategic education plan is to incorporate information in the real estate appraiser and candidate education requirements related to the issues identified by the Advisory Committee. A course is being developed and will include content as identified above.

### **Re-licensing Education Program (REP)**

The Real Estate Appraiser Update 2010-2011 course will serve as the REP requirements for all existing real estate appraisers and candidates for the 2010-2011 licensing cycle. All real estate appraisers and candidates must complete the course prior to renewal of their licence September 30, 2011. There is no examination associated with the REP course. This course will be available online through RECA's education portal at no additional charge.

### **Pre-licensing Education Program**

The Introduction to the Regulation of Real Estate Appraisers in Alberta course, the content of which will be substantially the same as the REP course, will be an education requirement for all new to Alberta real estate appraisers and candidates prior to becoming licensed in Alberta. If real estate appraisers and candidates are being held to the standards in the legislation, it is logical that the education requirements include information on those standards. The pre-licensing course will require the successful completion of an examination on the course content.

To facilitate the new education standards for appraisers and candidates, Council approved an amendment to the *Real Estate Act* Rules, by adding a new subsection 18(1.1) which reads:

18 (1.1) in addition to the requirements in subsection 18(1), an individual who intends to apply for an appraiser or candidate licence must write the licensing examination(s) prescribed, adopted or approved by the Council for that class of licence and pass those examinations with a grade that is satisfactory to the Council.

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## Working with Buyers and Written Service Agreements

The Real Estate Council of Alberta (RECA) recently posted additional resources in the Industry Members Tools section of our website. Look for two new Buyer Brokerage Agreement Outlines with Example Clauses; one for use in common law agency brokerages and one for designated agency brokerages. You'll also find new Information Bulletin that correspond with the Buyer Brokerage Agreement Outlines; Service Agreement – Buyers Working with Common Law Brokerages and Service Agreement – Buyers Working with Designated Brokerages.

Whether you're practicing designated or common law agency, when a buyer and brokerage enter into a service agreement that includes an exclusive right to represent the client, the agreement must be in writing and must include mandatory content.

In designated agency, all service agreements with both sellers and buyers must be in writing - even when they don't include an exclusive right to represent the client. If you practice common law agency, all service agreements should be in writing if they don't include an exclusive right to represent.

Agency is, by definition, a special and serious legal relationship. It is an industry standard best practice to document the nature of the relationship and the agent services to be provided, for the benefit of both the client and the agent.

Written agreements confirm you will provide a professional level of service. They also make certain consumers have a clear understanding of the relationship, what your obligations are to them, what services you will provide and their obligations to you. Written service agreements help reduce uncertainty and disputes, while protecting both parties.

RECA's main objective in developing these new resources was to assist brokerages in preparing non-exclusive written buyer service agreements. These efforts now ensure the minimum requirements for written service agreements are met. They also help industry

members meet their obligations to clients as contained in the *Real Estate Act* Rules.

For example, it's common practice to enter into an exclusive seller brokerage agreement when listing property in Alberta. Among other things, the mandatory content in the exclusive seller brokerage agreement specifically outlines consent to collect and distribute confidential client information, and the circumstances under which the information will or will not be disclosed. When working with buyers in common law agency brokerages, industry members typically enter into a verbal non-exclusive service agreement. The confidentiality disclosure requirements are the same whether working with sellers or buyers.

In the absence of a written service agreement with buyers, are you as clear and complete in meeting the requirements in a verbal non-exclusive relationship, as you are when working exclusively with a seller?

The non-exclusive buyer agreement outlines are not forms. They're a list of applicable sections of the *Real Estate Act* Rules (the Rules). Example clauses have been included, illustrating how these service agreements can meet the minimum requirements of the Rules. Based on the business model, brokerages may add clauses to the minimum requirements and still be in compliance. Additional clauses may pertain to different remuneration models, additional services to be performed and / or anything else pertaining to the particular brokerage business model and the client relationship.

It's preferable that all service agreements be in writing. This minimizes misunderstandings and disputes, while ensuring you meet your obligations as contained in the Rules. Industry members currently utilizing written service agreements are meeting with greater acceptance. For those of you still considering the service agreement approach, these new tools provide the information you need to contemplate and adopt this best practice approach.

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## **Advertising as an Industry Member – Years of Experience**

Industry members can indicate the number of years of experience they have working in real estate or mortgage brokerage, as the case may be, however, in addition to being true and provable, the number of years stated must only include those years of experience for licensed activity. Five years of experience as a secretary in a real estate office plus five years of experience as a licensed real estate associate does not equal 10 years of experience. Experience stated should only include licensed experience in the applicable industry.

## Combined Years of Experience

Industry members cannot advertise combined years of experience – that is, the total number of years of experience for a group. Experience can only be indicated for an individual because combined experience is a meaningless concept. For example, the following three selling teams each have 46 combined years of experience.

The image shows three real estate business cards for Team X, Team Y, and Team Z. Each card features a large letter (X, Y, or Z) and the text 'Take advantage of our 46 years of experience!'. Below the letter, it says 'ROYAL LEPAGE' and '123 REALTY'. Contact information for the Main Office is provided: P 403-555-5555 and E jthom@rlp.ca.

1. Selling team X is comprised of two real estate associates, each licensed for 23 years.

2. Selling team Y is comprised of six real estate associates, with no person licensed for more than eight years.

3. Selling team Z is comprised of three real estate associates, one with 45 years of experience and two who just became licensed.

While each group can legitimately claim 46 years of combined experience, the groups are vastly different in terms of size, experience and skills.

## Lifetime Withdrawals from Industry

### Amandeep Singh Brar

On July 7, 2010, Amandeep Singh Brar, mortgage associate most recently registered with Ace Capital Inc., and former mortgage associate registered with Mortgage Pro Ltd., applied to the Real Estate Council of Alberta (RECA) to withdraw from industry membership, in accordance with section 54 of the Real Estate Act (REA). At the time of his application, Mr. Brar was the subject of conduct proceedings to determine whether he

- created false and misleading documents in a scheme to facilitate obtaining mortgages by deceit [s.42(b) of the REA Rules]

At the time of the withdrawal application approval, there had been no disciplinary hearing, admissions or findings of fact.

By virtue of operation of the Real Estate Act, Part Three, conduct proceedings are discontinued. Mr. Brar's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership.

### **Eric Cazabon**

On July 7, 2010, Eric Cazabon, former mortgage associate registered with Mortgage Line Corp. and with MortgageBrokers.com Financial Group of Companies Inc. o/a MortgageBrokers.com, applied to the Real Estate Council of Alberta to withdraw from industry membership, in accordance with section 54 of the Real Estate Act (REA). At the time of his application, Mr. Cazabon was the subject of conduct proceedings to determine whether he

- created false and misleading documents in support of a scheme to profit through obtaining mortgages by deceit [s.42(b) of the REA Rules].

At the time of the withdrawal application approval, there had been no disciplinary hearing, admissions or findings of fact.

By virtue of operation of the Real Estate Act, Part Three, conduct proceedings are discontinued. Mr. Cazabon's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership.

### **William Cazabon**

On July 7, 2010, William Cazabon, former mortgage associate registered with Mortgage Line Corp. and with MortgageBrokers.com Financial Group of Companies Inc. o/a MortgageBrokers.com, applied to the Real Estate Council of Alberta to withdraw from industry membership, in accordance with section 54 of the Real Estate Act (REA). At the time of his application, Mr. Cazabon was the subject of conduct proceedings to determine whether he

- participated in the creation of documents he knew to be false or misleading to facilitate the issuance of mortgages through deceit [s.42(b) of the REA Rules]
- encouraged a member of the public to participate in a scheme he knew was

fraudulent or illegal [s.42(b) of the REA Rules]

At the time of the withdrawal application approval, there had been no disciplinary hearing, admissions or findings of fact.

By virtue of operation of the Real Estate Act, Part Three, conduct proceedings are discontinued. Mr. Cazabon's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership.

### **Yadwinder Singh Grewal**

On July 7, 2010, Yadwinder Singh Grewal, real estate associate registered with All City Realty and formerly registered with the Real Estate Company Ltd., applied to the Real Estate Council of Alberta to withdraw from industry membership, in accordance with section 54 of the Real Estate Act (REA). At the time of his application, Mr. Grewal was the subject of conduct proceedings to determine whether he

- created false and misleading documents in support of a scheme to profit through obtaining mortgages by deceit [s.42(b) of the REA Rules].

At the time of the withdrawal application approval, there had been no disciplinary hearing, admissions or findings of fact.

By virtue of operation of the Real Estate Act, Part Three, conduct proceedings are discontinued. Mr. Grewal's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership.

### **Sid John Reisner**

On July 7, 2010, Sid John Reisner, real estate associate, unregistered, applied to the Real Estate Council of Alberta (RECA) to withdraw from industry membership, in accordance with section 54 of the Real Estate Act (REA). At the time of his application, Mr. Reisner was the subject of conduct proceedings to determine whether he

- traded in real estate without proper authorization [s.17(a) of the REA]
- failed to act honestly [s.41(a) of the REA Rules],
- participated in fraudulent or unlawful activities in connection with the provision of a service [s.42(b) of the REA Rules],
- made representations that were reckless or intentional and that mislead or deceived a person or were likely to do so s.42(a) of the REA Rules],
- engaged in conduct that undermined public confidence in the industry, harmed the integrity of the industry or brought the industry into disrepute [s.42(g) of the REA

- Rules],
- failed to cooperate with RECA investigators [s.41(h) of the REA Rules]

At the time of the withdrawal application approval, there had been no disciplinary hearing, admissions or findings of fact. By virtue of operation of the Real Estate Act, Part Three, conduct proceedings are discontinued. Mr. Reisner's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership.

### **Pritpal Kalkat**

On July 7, 2010, Pritpal Kalkat, former associate, Mortgage Alliance Walk In Centre, applied to the Real Estate Council of Alberta (RECA) to withdraw from industry membership, in accordance with section 54 of the Real Estate Act (REA). At the time of his application, Mr. Kalkat was the subject of conduct proceedings to determine whether he

- created false documents for the purpose of obtaining mortgage financing by deceit [s.42(b) of the REA Rules].

At the time of the withdrawal application approval, there had been no disciplinary hearing, admissions or findings of fact. By virtue of operation of the Real Estate Act, Part Three, conduct proceedings are discontinued. Mr. Kalkat's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership.

### **Jonathon Hogg**

On July 7, 2010, Jonathon Hogg, real estate associate, registered to Bow Valley Realty Ltd., applied to the Real Estate Council of Alberta (RECA) to withdraw from industry membership, in accordance with section 54 of the Real Estate Act (REA). At the time of his application, Mr. Hogg was the subject of conduct proceedings to determine whether he:

- failed to act fairly, honestly and with integrity when dealing with non – clients [s.7(b) of the Code of Conduct].

At the time of the withdrawal application approval, there had been no disciplinary hearing, admissions or findings of fact. By virtue of operation of the Real Estate Act, Part Three, conduct proceedings are discontinued. Mr. Hogg's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry

membership.

### **Patrick Borody**

On July 7, 2010, Patrick Borody, associate, Homelife Country Realty applied to the Real Estate Council of Alberta (RECA) to withdraw from industry membership, in accordance with section 54 of the Real Estate Act (REA). At the time of his application, Mr. Borody was the subject of conduct proceedings to determine whether he:

- failed to fulfilled his fiduciary duties [s.2 of the Code of Conduct ]
- failed to be professional in dealing with the public and other industry members [s.7 of the Code of Conduct]
- failed to render competent service [s.6 of the Code of Conduct]
- made representations or carried on conduct what was reckless or intentional and misled or deceived persons or was likely to do so [s.4 of the Code of Conduct]
- participated in fraudulent or unlawful activities in connection with the provision of services or in any dealings [s.7(c) of the Code of Conduct]

At the time of the withdrawal application approval, there had been no disciplinary hearing, admissions or findings of fact. By virtue of operation of the Real Estate Act, Part Three, conduct proceedings are discontinued. Mr. Borody's application to withdraw was approved by RECA and results in a voluntary lifetime prohibition from industry membership.

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## **Licence Suspensions**

### **James Alexander Dallin**

On June 4, 2010, pursuant to section 38 of the Real Estate Act Rules, the executive director of the Real Estate Council of Alberta suspended the licence of James Alexander Dallin, real estate associate registered with Arteam Realty Inc. o/a Royal LePage Arteam Realty of Edmonton, Alberta.

### **Donald Gray**

On June 22, 2010, as a result of information received, pursuant to section 38 of the Real Estate Act Rules, the Real Estate Council of Alberta suspended the licence of Donald Gray as a real estate broker. Mr. Gray failed to comply with a term, condition or restriction previously applied to his licence by the Executive Director of the Real Estate Council of Alberta.

The Real Estate Council of Alberta has also suspended the license of the brokerage of which Donald Gray was the broker: DMG Asset Management and Realty Ltd. o/a DMG Management.

### **Claudia Leung**

On June 24, 2010, pursuant to section 38 of the Real Estate Act Rules, the executive director of the Real Estate Council of Alberta suspended the licence of Claudia Leung, real estate associate registered with Panda Realty Inc. o/a Coldwell Banker/Panda Realty.

Ms. Leung failed to comply with a term, condition or restriction previously applied to her licence by the Executive Director of the Real Estate Council of Alberta.

### **Simone Rousseau**

On July 2, 2010, Simone Rousseau's authorization to trade in real estate was suspended by an order of a Hearing Panel of the Real Estate Council of Alberta (RECA) for a period of one month. Ms. Rousseau was also ordered to pay a fine in the amount of \$2,500 and costs in the amount of \$1,500, as well as to complete educational requirements.

Ms Rousseau was registered as a real estate associate with 4th Street Holdings Ltd. o/a Re/Max Real Estate (Central) at all times relevant to this disciplinary action.

Ms Rousseau acted contrary to the Real Estate Act Rules when she recklessly made an inaccurate representation which misled a person at RECA. In particular, she supplied a wrong answer to a question regarding the status of a company's receivership in the RECA authorization application form and swore the application form's affidavit to the truthfulness of the wrong answer.

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## **Case Summaries**

### **Letters of Reprimand**

June – July 2010

8 Letters of Reprimand were issued (some with more than one breach):

- 1 breach of when an industry member receives an offer or an acceptance of an offer in writing the industry members shall as soon as possible provide that party with a true copy of that offer or acceptance [s.27 (a) of the Rules]
- 1 breach of when an industry member receives an offer or an acceptance of an offer in writing the industry member shall, as soon as practicable deliver a true copy of that offer or acceptance to the other parties to that trade (s.27(b) of the Rules]
- 1 breach of immediately notifying, in writing, the Executive Director when the industry member is the subject of any bankruptcy proceedings [s.40(1)(e) of the Real Estate Act Rules]

- 4 breaches of providing competent service [s.41(b) of the Real Estate Act Rules]
- 2 breaches of fulfilling fiduciary obligations to clients [s.41(d) of the Real Estate Act Rules]
- 1 breach of industry members must disclose to their clients, at the earliest practical opportunity, any conflict of interest they may have in the course or providing services to, or in their dealings with a client [ s.41(f) of the Real Estate Act Rules]
- 2 breaches of making representations or carrying on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so [s.42(a) of the Real Estate Act Rules]
- 1 breach of industry members must not engage in conduct that undermines public confidence in the industry, harms the industry or brings the industry into disrepute [s.42(g) of the Rules]
- 1 breach of the basic obligations of an industry member who is in sole agency relationship with a buyer is to take reasonable steps to discover relevant facts pertaining to any property for which the buyer is considering making an offer [s.58(i) of the Real Estate Act Rules]

### **Audit administrative penalties**

July 2010

#### **Realty Syndicates Ltd.**

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

\$1,500

#### **Penny Properties**

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

\$1,500

#### **Trikon Group Corporation**

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

\$1,500

#### **Buyer's Net Real Estate Services Ltd.**

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

\$1,500

## **Administrative Penalties**

May 2010

### **Mark Osske**

- Failure to be authorized as an appraiser [s.17(c) of the Real Estate Act]
- Mr. Osske was licensed as a real estate appraiser during the years 2004 – 2008. On October 1, 2008, Mr. Osske did not renew his license with RECA. Mr. Osske became licensed as a real estate appraiser on December 1, 2008. Mr. Osske performed a total of 41 separate and distinct appraisals during this unauthorized period.
- \$2,000

### **Amy Breznik, associate broker, Renter's Choice & Management Ltd.**

- Failure to trade in real estate only in the name that appears on the individual's licence and in the name of the brokerage with which the broker is registered [s.51(1)(b) of Real Estate Act Rules]
- Ms Breznik was the registered broker with 593981 Alberta Ltd. 593981 Alberta Ltd. changed ownership and was bought by a partnership company, RVB Holdings Inc. & Saskatchewan Ltd. o/a Info Market Group GMAC Real Estate. Info Market Group GMAC Real Estate began trading in real estate and took over brokerage activities of 593981 Alberta Ltd., however for a period of time it was not licensed or registered as a real estate brokerage. Ms Breznik listed 49 or more properties for sale under Info Market Group GMAC Real Estate while it was an unauthorized brokerage and while she was still registered with 593981 Alberta Ltd.
- \$1,000

### **Info Market Group & 101050070 Saskatchewan Ltd.**

#### **o/a Market Group GMAC Real Estate**

- Trading in real estate while unauthorized [s.17(a) of the Real Estate Act]
- Effective May 1, 2007 593981 Alberta Ltd. became Info Market Group GMAC Real Estate. The Real Estate Council of Alberta did not receive an application for authorization for Info Market Group GMAC Real Estate until on or about September 29, 2008. Between August 17, 2007 and September 29, 2008, Info Market Group GMAC Real Estate was involved in 195 or more trades in real estate while unauthorized.
- \$5,000

### **Cher Ewing, associate broker, Calgary First Real Estate Inc.**

- Failure to keep in Alberta records and books of account of the industry member's business and accounting records for a period of 3 years after they came into existence [s.25(9)(a) of

the Real Estate Act]

- During an investigation, files relating to trades in real estate that occurred between June 5, 2007 and August 5, 2008 were identified as having been destroyed by Ms Ewing, in or around December 2008, prior to the three years after they came into existence.
- \$1,500

June 2010

**Natasha Stenzel, real estate associate, 771566 Alberta Ltd.**

**o/a Realty Executives – Masters**

- Failure to provide competent service [s.41(b) of the Real Estate Act Rules]
- Ms Stenzel listed a property on MLS with the square footage of 554.35 square feet. She did not verify the square footage of the property on her own. Buyers relied upon the representation of the size of the property to obtain their mortgage as they would not qualify for a mortgage of a property with less than 500 square feet. When the buyers decided to sell the property a year later, it was discovered that the property actually measured 344 square feet.
- \$1,500

**Edward Braun, real estate appraiser, Ed Braun & Associates**

- Failure to be authorized [s.17(c) of the Real Estate Act]
- Mr. Braun was authorized as a real estate appraiser from October 1, 2004 to September 30, 2006. On October 1, 2006 he failed to renew his authorization. Between October 1, 2006 and October 27, 2007, Mr. Braun performed a number of appraisals for which he earned money.
- \$1,000

**Carole Dell, real estate associate, Century 21 Your Realty**

(This Administrative Penalty is currently under appeal)

- Trading in real estate while unauthorized [s.17(a) and (d) of the Real Estate Act]
- Ms Dell completed and had commissioned her application for registration for the 2006/2007 registration year. She requested her broker to complete her registration through the RECA on-line process. A hardcopy of her application was retained by the brokerage, however the on-line renewal process was not correctly completed and no licence and registration certificate was issued to her on or before October 1, 2006. When it was observed that Ms Dell was unauthorized, her broker ensured her authorization. Ms Dell was unauthorized to trade in real estate for approximately 8 months and participated in not less than 12 real estate trades.
- \$2,000

**Gerard Brand, mortgage associate, Sovereign Mortgage Services**

- Failure to provide to the broker in a timely manner all original documentation and copies of original documents provided to the parties or maintained by other brokerages related to dealings in mortgages and required under the Act and the Rules [s.69(c)(i)(ii) of the Real Estate Act]
- \$1,000
- A mortgage broker or associate, as the case may be, must not accept a commission, referral

fee or other remuneration, directly or indirectly, for dealing in a mortgage from any person except the brokerage with which he is registered [s.70(1)(c) of the Real Estate Act Rules]

- \$1,500

- Subject to s. 71(2), a brokerage must not charge, collect or attempt to collect a fee from a person for assisting the person in obtaining a mortgage from a lender until the following conditions are met – the lender has provided a written confirmation to fund the mortgage accepted by the borrower and the commitment has been provided to the borrower or the borrower's associate and the lender or the lender's agent has provided the person with an initial disclosure statement and at least two business days have passed since the initial disclosure statement was received by the person or the person has waived the time period for delivery in accordance with the Fair Trading Act.[s.71(1)(a)(b) of the REA Rules]

- \$1,500

- Mr. Brand prepared a mortgage application that did not complete. The mortgagees attempted a second mortgage application with Mr. Brand which also did not complete. The mortgagees wanted to apply a third time for a mortgage with Mr. Brand. Prior to applying for the third mortgage, Mr. Brand requested a fee for making the application, half of which he asked for up front. The mortgagees paid him \$2,000 which Mr. Brand accepted. Prior to receiving written confirmation from the lender that they would fund the mortgage and prior to the confirmation being accepted by the borrower and provided to the borrower or the borrower's associate, Mr. Brand charged and collected a fee from the mortgagees for assisting them in obtaining a mortgage from a lender.

#### **Shane Herter, real estate associate, Re/Max Medalta Real Estate**

- Failure to provide that every written service agreement shall provide that any amendment or addition to the terms of the agreement be in writing and signed by the relevant parties

- Mr. Herter entered into a listing agreement for the sale of a property. The listing contract stipulated the term of the contract. Mr. Herter prepared a Real Estate Listing Contract Extension/Amendment Agreement for the property. The agreement extended the listing and lowered the listing price. Mr. Herter wrote the name of the seller on the agreement and signed as witness. The seller stated he never agreed to extend the listing nor did he agree to reduce the list price of the property and that Mr. Herter had signed papers without his permission. Mr. Herter failed to prepare an amendment to the written service agreement stating that he had authority to sign on behalf of the seller nor was any such agreement put in writing or signed by any of the relevant parties.

- \$1,000

#### **Lisa Land, real estate appraiser, Perry Appraisal Associates Ltd.**

(This Administrative Penalty is currently under appeal)

- Failure to be authorized as an appraiser [s.17(c) of the Real Estate Act]

- Included with Ms Land's Real Estate Appraiser/Candidate Licence Application form for the 2008/2009 year, was a list of files for which she conducted appraisal work during a period of time when she was not authorized to conduct appraisals. The files provided totaled approximately 275 separate and distinct files.

- \$3,000

**Andre Michaud, real estate appraiser, AGM Valuations Group Ltd.**

- Failure to be authorized as an appraiser [s.17(c) of the Real Estate Act]
- Mr. Michaud acted as licensed real estate appraiser for a period of time when he was not authorized to do so. Mr. Michaud provided a list of files for which he conducted appraisal work during this unauthorized period totaling 50 commercial and 17 residential valuations.
- \$4,000

**Brendan Banbury, real estate appraiser candidate, Foothills Real Estate Appraisals**

- Failure to be authorized as an appraiser [s.17(c) of the Real Estate Act]
- Mr. Banbury paid his renewal fee for the 2007/2008 licensing year but failed to renew his registration. Mr. Banbury performed a number of appraisals between October 1, 2007 and June 16, 2008 when he was not authorized to do so.
- \$500

**Daniel Tsui, broker, Dream Home Mortgages Ltd. (DHML)**

- Failure to be authorized as a mortgage broker [s.17(b) of the Real Estate Act]
- Mr. Tsui commenced an on-line application for renewal of DMHL's licence but failed to complete. Monies were paid and a hard copy of the application was executed but the on-line process was not completed nor was the licence printed. Mr. Tsui informed RECA that the licence certificates for himself, the brokerage and his associate were not completed as a result of his failure to conclude the on-line process. Mr. Tsui admitted that he had traded in real estate by soliciting or negotiating 3 mortgages during the time he was unauthorized. Mr. Tsui took corrective action by completing, in paper form, the Brokerage Licence Application for Renewal and Associate/Associate Broker Registration forms for the period 2008/2009
- \$2,500

**Hearthstone Property Management Inc.**

- Trading in real estate while unauthorized [s.17(a) of the Real Estate Act]
- Between October 1, 2008 and October 15, 2008, Hearthstone traded in real estate after failing to renew its authorization as a real estate brokerage by October 1, 2008.
- \$500

**Hearthstone Property Management Inc.**

- An industry member shall, in accordance with the Rules, keep in Alberta, records and books of accounts of the industry member's dealings and trades accounting records, and shall keep those records for a period of 3 years after they came into existence [s.25(9)(a) of the Real Estate Act Rules] When asked for a copy of the brokerage's authorization renewal application form from August 2008, the broker stated she believed the form was shredded in error along with several other important business files.
- \$1,500

**Andrea Hlewka, real estate associate, M& M Real Estate**

- Industry members must not engage in conduct that undermines public confidence in the

industry, harms the industry, or brings the industry into disrepute [s.24(g) of the Real Estate Act Rules]

- Ms Hlewka attended a property for the purpose of doing a through walkthrough of the property. When the code she had for the lockbox did not work, either Ms Hlewka or a person with her gained entry to the property through a basement window and unlocked the door to allow everyone entry into the property. Ms Hlewka attempted to contact a representative of the seller's brokerage after entering the property but did not wait to speak with a representative prior to entering the property.
- Ms Hlewka also permitted a person to accompany her and her buyer clients to the seller's property for the purpose of a walkthrough and permitted him entry to the property for the purpose of providing his opinion on the property against the seller's instructions
- \$1,500

## **CONSENT AGREEMENTS**

May 2010

### **Garey Kirkland, real estate broker, Simco Management (Calgary) Inc.**

Issues:

- Failure to properly and competently supervise the activities of Simco Management [s.21(1)(e) of the Real Estate Act Rules as they were then]
- Designated, requested, directed or allowed an employee, an unlicensed or unregistered assistant to perform task that must only be performed by an industry member [s.6(e) of the Code of Conduct as it was then]

Facts:

- Mr. Kirkland had two employees working for him who were not properly authorized to trade in real estate by RECA but who were performing duties that required an authorization.
- One employee held a licence to trade in real estate however the brokerage failed to ensure she was registered with a brokerage.
- A second employee commenced her employment as an unlicensed assistant and although working to become licensed, performed tasks on behalf of Simco Management prior to her authorization.
- Mr. Kirkland acknowledged during the investigation that both employees were unauthorized for a period of time of their employment with Simco Management and he acknowledged both his and the brokerage's responsibility for this.

Results:

By way of a Consent Agreement that was ratified by a Hearing Panel, Garey Kirkland paid fines totaling \$4,000, costs of \$1,000 and as a condition of his authorization to trade in real estate will complete an educational requirement.

### **Nicholas Lima, real estate associate currently registered with Southstar Realty Inc. o/a Maxwell Southstar Realty**

Issues:

- failure to correctly complete a written service agreement [s.43(2)(b)(iii) and (iv) of the REA Rules]

Facts:

- Mr. Lima drafted a written service agreement without a date upon which the agreement became effective and without indicating the duration of the agreement.

Results:

By way of a Consent Agreement that was ratified by a Hearing Panel, Nichols Lima was ordered to pay fines totaling \$2,000, costs of \$1,000 and as a condition of his authorization to trade in real estate, complete an educational requirement.

**Paul Tat Pui Cheng,**

**Then and currently a real estate associate registered with Century 21 the Professionals Ltd.**

Issues:

- Failure to disclose all relevant facts about a property in that he did not provide a copy of the property disclosure form to the buyer [s.2(e) of the Code of Conduct]

Facts:

- Mr. Cheng was in dual agency with a seller and a buyer.
- Twice before, the sale of this property collapsed due to structural problems which were noted in property inspections.
- A third buyer states that he was not told that two prior deals had collapsed due to property inspections. He had another property inspection done and proceeded to purchase the property.
- The buyer states he was not aware of the original property disclosure report at the time of purchase.

Results:

By way of a Consent Agreement that was ratified by a Hearing Panel, Paul Cheng was ordered to pay a fine of \$1,500 and costs of \$500.

*June 2010*

**Norm Goplin**

**Currently unregistered, formerly real estate broker registered with Norman E. Goplin o/a Norm Goplin Realty**

Issues:

- An industry member must not be party to any agreement or conspiracy to conceal latent

defect or pertinent facts with respect to any property [s.4(c) of the Code of Conduct]

- Failure to cooperate with a RECA investigation and with the RECA investigator [s.41(h) of the Real Estate Act Rules]
- Made representation and/or carried on conduct that was reckless and/or intentional and the misleads or deceives any person or is likely to do so [s.4(d) of the Code of Conduct]

Facts:

- A property occupied by three tenants was listed with Mr. Goplin.
- The owner of the property was aware that she had been told by persons renovating the bathroom that there was black mold in the walls and she was also aware from the tenants in the property that there was a mouse infestation.
- It was not determined definitively during the investigation that at the time Mr. Goplin listed this property that he was aware of the black mold or mouse infestation.
- The property was sold without the buyer being made aware of the black mold or the mouse infestation. The buyer learned about the problems after she purchased the property and met with the tenants.
- The REPC was signed by the seller with Mr. Goplin indicating himself as a witness.
- Mr. Goplin acknowledged that the seller was out of town and that she sent him the signed REPC by fax.
- Mr. Goplin did not provide documents or cell phone records requested of him by RECA during the investigations.

Results:

By way of a Consent Agreement that was ratified by a Hearing Panel, Norm Goplin was ordered to pay a fine of \$10,000, costs of \$1000 and as a condition of his authorization to trade in real estate, complete an educational requirement.

### **Anthony Roberts**

Real estate associate registered with MaxWell Westview Realty

Issues:

- Failure to produce in a timely manner, all documentation or trade records required under the Rules to his broker [s.23(e) of the Real Estate Act Rules]

Facts:

- Mr. Roberts did not provide trade records in a matter to the brokerage contemporaneously with their creation.

Results:

By way of a Consent Agreement that was ratified by a Hearing Panel, Anthony Roberts was ordered to pay a fine of \$1,500, and costs of \$500.

### **Vatanpreet Ghumman**

Real estate associate registered with Re/Max Real Estate Edmonton o/a Re/Max Real

## **Estate**

### Issues:

- Failure to use best efforts to ensure the client had independent advice when a prudent industry member would conclude a client may be in a vulnerable position [s.2(k) of the Code of Conduct]
- Failure to use best efforts to ensure that the role of the industry member in the transaction was clearly understood by all parties to the transaction[s.3(b) of the Code of Conduct]

### Facts:

- Mr. Ghumman failed to direct or advise his buyer client to seek or obtain independent advice prior to waiving an unsatisfied financing condition that, in the circumstances, his client was unable to satisfy.
- Mr. Ghumman failed to adequately assure that his role in the transaction was articulated to the corporate buyer assignee.

### Results:

By way of a Consent Agreement that was ratified by a Hearing Panel, Vatanpreet Ghumman was ordered to pay fines totally \$3,000, costs of \$1000 and as a condition of his authorization to trade in real estate, complete an educational requirement.

## **Gerritt Michael Willebrands Yuin**

**Real estate associate currently registered with Impact Real Estate Group Ltd. o/a Residential One Real Estate, and formerly registered with The Real Estate Company Ltd. o/a The Real Estate Company**

### Issues:

- Failed to keep broker informed of activities being performed on behalf of the brokerage [s.23(f) of the Real Estate Act Rules]
- Participating in the creation of a contract or form of communication that the member knows is false and misleading [s.4(d) of the Code of Conduct]
- Failed to cooperate fully with, and provide information requested to a person appointed under s. 38(1) of the Real Estate Act to conduct an investigation [s.7(d) of the Code of Conduct]

### Facts:

- While Mr. Yuin was registered with The Real Estate Company, he became employed by a development company to document sales of new properties to buyers.
- One unit was sold by the development company to a contractor and so was not owned by the development company when being sold to a buyer.
- In spite of this Mr. Yuin prepared the purchase agreement.
- On the purchase contract he identified the development company for whom he was selling the residential properties as his “brokerage”.
- Mr. Yuin did not advise his broker at The Real Estate Company of this transaction which he

was required to do because the property was not owned by his employer, the development company.

- During the investigation, Mr. Yuin failed to provide documents as requested by a RECA investigator and refused to speak with the investigator about providing the documents.

#### Results:

By way of a Consent Agreement that was ratified by a Hearing Panel Gerritt M. Willebrands Yuin was ordered to pay fines totaling \$8,000, costs of \$1,000 and as a condition of his authorization to trade in real estate, complete an educational requirement.

Colliers Macaulay Nicolls Inc. o/a Colliers International

#### Issue:

- Employed a person to perform property management while not licensed to trade in real estate [s.20(f) of the Real Estate Act Rules]
- Failed to act fair, honestly and with integrity with a non client [s.7(b) of the Code of Conduct]

#### Facts:

- Colliers International hired an unlicensed individual to perform activities that are restricted to industry

members under the Real Estate Act. It is apparent from the facts that this individual misled

Colliers

international brokers over a period from 2001 to 2006 that she was in fact licensed.

- The failure of Colliers International was to confirm licensing with RECA directly.
- In addition, this unlicensed employee was dealing with a lease renewal for a Tenant of a Colliers International client.
- The unlicensed employee failed to confirm with the tenant that the landlord had not accepted the renewal and amendment of the existing lease.
- The result was that the Tenant believed there was a new lease in place and that arrears from the prior lease were being paid by cheques he provided when in fact the cheques were not being cashed and arrears were continuing to accrue to the detriment of the Tenant.

#### Result:

By way of a Consent Agreement that was ratified by a Hearing Panel, Colliers International paid fines totaling \$19,500 and costs of \$1,000.

## Hearing Panel Decision

**Simone Rousseau**

**Real estate associate with 4th Street Holdings Ltd, o/a Re/max Real Estate (Central)**

Issue:

- Acted recklessly in making a representation which was inaccurate and which misled a person at RECA contrary to s.42(a) of the Real Estate Act Rules.

Facts:

- Ms Rousseau provided an inaccurate answer concerning a company she was a director and shareholding of in her application for authorization.
- Ms Rousseau then swore an Affidavit that her answer concerning her company was true.
- RECA relied on this answer and the Affidavit to issue authorization to Ms Rousseau.

Results:

A Hearing Panel accepted an Admission of Conduct Deserving of Sanction from Ms Rousseau and ordered that Ms Rousseau be suspended for 1 month, pay a fine of \$2,500, costs in the amount of \$1,500 and that she complete an education requirement

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## Education Corner

### Phase 1 Course to Remain a Mandatory Component of REAP

The Real Estate Council of Alberta (RECA), through the Real Estate Education Committee (Committee), has finished its review to determine whether or not the Introduction to a Career in Real Estate course, Phase 1 of the Real Estate Associates Program (REAP), should remain a mandatory component of REAP. Council's decision was to retain the Introduction to a Career in Real Estate course as a mandatory component of the REAP with a number of modifications.

RECA's Real Estate Education Committee (Committee) undertook consultation with industry stakeholders, including but not limited to, previous REAP Phase 1 students, real estate brokers, REAP Phase 1 education delivery institutions and professional real estate associations identified in the Real Estate Act. RECA would like to thank those individuals that provided input on this matter. The Committee conducted two surveys: one for brokers and one for real estate industry members who became licensed after June 1, 2007, and had therefore previously taken REAP. RECA received almost 700 responses to the surveys. The survey results were clear on a number of issues including:

- 70% of new industry member respondents indicated the course material did not influence their decision to enter the industry
- 90% of new industry member respondents indicated the decision to enter the industry was made prior to taking the course
- 69% of new industry members indicated that the material was relevant based on their experience in the industry
- 60% of brokers and new real estate industry members indicated that the examination was

not relevant and that the examination should be discontinued

General comments from respondents also included a need to update the course material information, easier accessibility to the course material and no charge for the course.

The other modifications to REAP Phase 1 made by Council are:

- The exam component will be eliminated immediately
- The current Phase 1 course, An Introduction to a Career in Real Estate, will be updated, correcting errors in the current course
- RECA will develop a new industry overview module to replace the current Phase 1 course
- The new module will be available online and free-of-charge and be a pre-requisite for REAP Phase 2
- The new module will contain an interactive self-assessment component instead of an examination. RECA will track those individuals who complete the self-assessment and will therefore be eligible to move-on to Phase II of REAP
- The new module has a target completion date of early 2011

Re-licensing Education (REP) update

The following statistics provide a snapshot of the Real Estate Update 2009-2010 or Mortgage Broker Update 2009-2010 course enrollments and completions as of July 19, 2010.

Real Estate Update 2009-2010

- All course completions, plus current online enrollments, total 5,766 industry members.
- This represents approximately 48% of individual real estate industry members.

Mortgage Broker Update 2009-2010

- We have 714 online completions, plus 526 in progress online, for a total of 1,240.
- This represents approximately 49% of individual mortgage broker industry members.

To fulfill licence renewal education requirements, your respective REP course must be completed prior to October 1, 2010. Both online courses can be taken at your convenience through the RECA website [www.reca.ca](http://www.reca.ca).

### **How to enroll in your REP Course**

- Obtain your RW- number (for real estate) or MW- number (for mortgage brokerages) from your broker.
- Go to RECA Education at [www.reca.ca](http://www.reca.ca)
- Click on the appropriate course (Real Estate Update 2009-2010 for real estate industry members, Mortgage Broker Update 2009-2010 for mortgage industry members)
- Read the Privacy Policy then proceed to the enrollment page. Fill in the information and login to begin
- Once you begin you can log off at any time and the course will remember your progress. When you log back in you will begin where you left off.

## Legal Corner

The following case is an appeal and cross appeal from a previous judgment. The appeal determined whether the trial judges understanding of fiduciary duty and dual agency was correct under law, and whether application of the facts to this specific case was exact. This case speaks to a number of important issues including:

- industry members selling **their own** property
- industry members involved in **financing their client** transactions
- that industry members **must prove** an agency relationship **did not exist** when a consumer believed they were a fiduciary
- that including addendums **after agreement acceptance** are meaningless
- client wrongdoings **do not relieve** an industry member of fiduciary and legal obligations.

### Introduction:

The trial judge found a Mr. S breached his fiduciary obligations when selling his own property and working as dual agent both for himself and for a Ms. D – the buyer. Mr. S failed to disclose material information, in particular the original purchase price from May 2005, as well as the property's fair market value.

Mr. S appealed an August 14, 2008 judgment to pay damages of \$135,000 dollars. The appeal was based on the notion that the judge failed to apply the correct test in determining whether Mr. S owed Ms. D a fiduciary duty.

Ms. D then cross-appealed on the issue of damages, submitting that the trial judge erred in not finding that the property would be sold for less-than-fair market value (\$760,000). As well, she believed the trial judge erred in law by not ordering Mr. S to give back his entire profit of \$438,000.

### Summary of Facts

In 2006, Ms. D purchased a house (the 16<sup>th</sup> Avenue property) for \$445,000. This property purchase closed with \$90,000 in secondary mortgage financing provided jointly by the vendor and Mr. S as mortgagees. Mr. S was the agent on the transaction and Ms. D held Mr. S in high regard, having facilitated the acquisition of the property. The trial judge stated that Ms. D regarded the mortgage arrangement as “near magical.” Based on this positive experience, Ms. D became interested in making money in real estate, and subsequently struck up a real estate referral business relationship with Mr. S.

Shortly after the 16<sup>th</sup> Avenue purchase, Ms. D became aware of Mr. S' 16-bedroom duplex property on Victoria Drive. She initially thought the property was in poor condition, but once viewed, changed her mind. Ms. D testified that Mr. S. convinced her that the property would be perfect as a care facility, given that she was a registered nurse and wanted to own her own business. She alleged Mr. S convinced her she could finance and afford the property by selling

the 16<sup>th</sup> Avenue property, and then reinvesting the proceeds and “commissions” she had earned. Ms. D said Mr. S again offered assistance in financing.

Mr. S testified he had no intention of selling the Victoria Drive property and that Ms. D persuaded him to sell it to her. The trial judge found that the defendant did encourage Ms. D to purchase the Victoria Drive property, however he also stated that he was not suggesting Ms. D wasn't actively interested in acquiring the Victoria Drive property and talked to the defendant about selling it to her. The judge then held that Ms. D was aggressive and persistent in her wish to acquire the property and improve her position in the rental real estate market.

Following her decision to purchase the Victoria Drive property, Ms. D requested the defendant act as agent for both parties. In preparation for the purchase of the Victoria Drive property, Ms. D. arranged to sell the 16<sup>th</sup> Avenue property for \$520,000, using Mr. S to facilitate the documentation of the sale and close the transaction, as he had in the previous buying and selling of the 16<sup>th</sup> Avenue property.

Mr. S priced the Victoria Drive property at \$900,000. Ms. D considered the price too high and negotiated it down to \$895,000. It is important to note that in both prior instances the defendant acted as agent to the buyer and the seller, signing a Dual Agency Agreement to record relationship consent. Of course, in the Victoria Drive property sale, the fact Mr. S was the property owner as well as agent for the purchaser and himself as the vendor was an additional consideration.

The Victoria Drive Purchase & Sale contract included consent to dual agency and a property disclosure statement. It was dated November 9, 2005 at a price of \$895,000 with a \$15,000 deposit, and then changed to 10,000 at a later date. Two days later on November 11 an addendum was signed that included:

- advice to hire her own realtor
- advice to obtain independent legal advice – including advice on the second mortgage to the defendant
- information regarding conditions on the house
- information regarding sump pump and moisture problems in basement
- advice to seek independent advice from inspectors, builders, and the City regarding market value and non-conforming property use
- information regarding zoning and set-back by-laws.

During the trial, the plaintiff alleged the addendum was a forgery and denied the addendum items were discussed, agreed to, or put in writing. She also testified the defendant asked her to sign a number of blank, printed forms. Mr. S stated he spoke with Ms. D about everything in the addendum, and that his wife signed and witnessed all the signatures. His wife also denied the documents were blank, saying all documents were completed prior to her witnessing the parties sign.

Ms. D stated she never received copies of any documents they signed – including the Property Disclosure statement. The defendant testified his wife photocopied the documents, giving

copies to the plaintiff, as was his usual practice. The trial judge said he believed she received copies and that she wasn't that naïve. Ms. D arranged a property inspection and went over the report with the inspector.

Ms D alleged that the defendant arranged for a mortgage broker to obtain financing and that he contacted her the day after the contract was signed. Mr. S did the 2<sup>nd</sup> mortgage on Victoria Drive property, giving Ms. D advice on when to register the 2<sup>nd</sup> mortgage. As in the previous transaction, she relied on his mortgage advice.

The plaintiff then took possession of the property. She encountered problems with non-conforming use and building problems – roof leaks, drainage and moisture in the basement, but lacked money to make the necessary repairs. In 2006, she obtained a property appraisal estimate valuing the property at \$760,000. Because Ms. D was making interest-only payments, and did not repay the principal when due to Mr. S, he commenced foreclosure. In June 2007, she sold the property for \$1,040,000.

### **Trial Judge's Findings**

The judge found that the high degree of proof required for fraud or forgery regarding the Addendum was not met. Further, the judge held that Ms. D's assertion the Addendum was "forged" by using pre-signed blank form documents was meant to mislead the court. He preferred the defendant's evidence of document completion prior to being signed by the parties and witnessed.

As well, Ms. D's credibility was in question regarding the legitimacy of a "Gift Letter" on the first mortgage. Upon examination, Ms. D maintained the name and address of the gift giver was fictitious. When she became aware the gift giver was to give evidence at trial, her story changed. The gift giver turned out to be her cousin, whose later testimony revealed she had made no gift, had no resources to make a gift and that the signature on the letter was not her own.

The trial judge stated Ms. D blatantly lied regarding the Gift Letter she signed and supplied to the mortgage broker. He went on to say that, "Ms. D is not the naïve person she tries to portray." She knew the Gift Letter information was false and that it would mislead the mortgage lender and influence the amount of mortgage allowed. When confronted with this, she deliberately lied under oath.

It was also found that the Victoria Drive MLS listing in 2007 contained false and misleading data regarding rental revenue that must have come from the plaintiff. In the listing, potential income information was made to appear as actual income. Although Ms. D knew of this untrue representation, she sought to blame the realtor.

The action of lying under oath and the deliberated misrepresentation of facts, spoke to Ms. D's credibility and clean hands.

## **Reasons for Judgment**

In setting out the law, the trial judge noted the duty of an agent to make full disclosure and that there is inherent conflict in an agent selling his property to his principal. He also spoke to the base issue of whether a fiduciary relationship existed in the present circumstances. He also noted that trust, confidence and reliance are the hallmarks of a relationship that is fiduciary in nature.

He concluded that Mr. S. was a fiduciary and went on to say, “The defendant was well aware Ms. D reposed trust in him to provide good advice and information to her in regard to real estate with rental income potential: feeling confident that he would not take advantage of her and that she relied heavily on his knowledge of real estate, values, income potential and financing. The defendant knew Ms. D’s financial means and the needs of the plaintiffs to rely on him for financing, and the plaintiffs were thereby vulnerable.”

He then turned to the issue of the Limited Dual Agency Agreement and Addendum and whether they limited Mr. Sharif’s obligations. The controversial November 11, 2005 Addendum contained direction to obtain valuation advice, but only after the price had been negotiated and the contract to purchase drawn. The trial judge questioned whether the concept of a Dual Agency agreement was ever intended to have application where the agent is also the vendor. “Where the agent is the vendor, he is not protecting himself from conflict; he is simply protecting his self interest. How can he possibly not pass information learned from the purchaser or acting for purchaser to himself as the other principal?”

Having found that Mr. S breached his fiduciary obligations, the trial judge concluded that the appropriate quantum of damages was \$135,000. This was the difference between the property’s fair market value of \$769,000, and the price paid by the plaintiff, \$895,000.

## **Appeal Issues and Parties Positions**

Mr. S raised four issues on appeal:

1. that the trial judge erred in law by failing to apply the correct test to determine fiduciary duty.
2. that there was no evidence to conclude Ms. D ever reposed trust in Mr. S and that the evidence only supports a finding that Ms. D relied on her own skill and judgement.
3. that the trial judge erred in his treatment of the Limited Dual Agency Agreement, and that the November 11, 2005 Addendum is one of a series of explicit waivers by the Respondents to independent advice and representation.
4. that Ms. D was not entitled to equitable relief because she came to court with “unclean hands”.

**Ms. D raises two issues on cross-appeal:**

1. that there was uncontested evidence she was led to believe she was buying the property at below market value.

2. that the trial judge erred in law by not ordering Mr. S to disgorge the entirety of his \$438,000 profit.

### **Correct Legal Test**

The trial judge cited *Baillie v. Charman* for the proposition that “it is not the calling that is determinative but rather whether the beneficiary or principal relies on or reposes trust or confidence in a person who assumes the responsibility to act in the other’s best interest.” While it is the nature of the relationship that is important, there are certain relationships and specific categories of actors that are presumed by law to be of a fiduciary nature. When this presumption arises, the onus is on the defendants to rebut that presumption.

The judge recognized there is a presumption in law that a real estate agent is a fiduciary, and that the onus is on the defendant to rebut that presumption. In order to do this, the defendant must demonstrate that the relationship was not one of reliance, trust, and confidence. Based on this, it was found that the trial judge applied the correct test.

### **Evidence of Fiduciary Relationship**

Having determined the trial judge correct in finding Mr. S breached his fiduciary obligations to Ms. D, the next issue was whether the trial judge erred in his treatment of the Limited Dual Agency Agreement.

Were there limitations imposed on Mr. S’s fiduciary obligations by either the terms of the Limited Dual Agency Agreement or the Addendum?

As fiduciary, Mr. S owed Ms. D certain obligations – one being duty of disclosure. In this case, Mr. S obligations were compounded by the fact he was selling his own property to his principal. As a vendor and agent, Mr. S was obliged to meet additional requirements to avoid a conflict of interest and breach of duty. Rather than an agent owing duties to two agents, this case involves an agent owing obligations to Ms. D and to himself. In the trial judge’s view, a limited dual agency agreement was inconsistent and incompatible with the circumstances of the case. He went on to question whether dual agency agreements were possible in these types of cases.

Given that the agent must act impartially between the two principals, then impartiality is possible in the usual situation involving three individuals. However, the appeal judge could not see how an agent who is himself the Seller/Landlord could truly act impartially between himself and the Buyer/Tenant. The opinion is that where the agent is also a principal, the limitations in the dual agency agreement are applicable and cannot be given effect.

It was concluded that the limitations on fiduciary duty imposed by the dual agency agreement did not absolve Mr. S of liability in the circumstances of the case. While the agreement limits the duty of disclosure, it does not limit the duty to disclose the property’s fair market value which is not excluded from disclosure by the dual agency agreement.

Mr. S owed fiduciary obligations in relation to the negotiations and events leading up to the November 9<sup>th</sup> sale and purchase contract. He breached these obligations. An addendum signed

two days after the breach of fiduciary duty cannot serve as a contractual limitation. Although the trial judge held that the document was not a forgery, as the plaintiff alleged, he concluded the Addendum was entered into **after** the breach of fiduciary obligation. While Mr. S's conduct could be limited by contract, he conducted himself in breach of his fiduciary obligations at a time when there was no contract in existence limiting his obligations. Based on this, the appeal judge did not interfere with the trial judge's conclusion on the issue.

### **Application of Clean Hands Doctrine**

In this case, the plaintiff's claim to equitable relief was established without reliance on her misconduct. The claim against Mr. S for breach of fiduciary duty was not connected to Ms. D's forgery and falsehoods concerning the Gift Letter or her use of false information in the MLS property listing. All of Ms. D's misconduct was outside of their fiduciary relationship at issue in the appeal.

Mr. S' breach of fiduciary duty enabled him to obtain more than fair market value from Ms. D. Damages reflected the difference between the sale price and the fair market value. The trial judge's conclusion was not found in error. The cross appeal was dismissed.

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First term 11/01/09 - 10/31/12

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First term 11/01/07 - 10/31/10

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First term 11/01/06 - 10/31/09 Second term 11/01/09 - 10/31/12

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First term 11/01/07 - 10/31/10

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## Contact RECA

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