

The Regulator May 2010

Council Message

Welcome to the May edition of the Regulator Newsletter. This month features all our standard topics - including licensing and education news, case summaries and legal corner.

In light of the recent Bank of Montreal Mortgage fraud claim, May's Regulator also features our formal position statement and an article on Mortgage Fraud Red Flags.

The BMO Claim has impacted the industry in many ways. In a positive context, it has created a greater awareness of the mortgage fraud issue within our Industry, and at the same time, wakes us up to the need for due diligence as practicing professionals.

RECA has taken a proactive stance in dealing with the Mortgage Fraud issue for the last decade. Most notable was RECA's involvement in developing a mandatory *Mortgage Fraud Awareness* course with the Alberta Real Estate Association in 2003.

Some Industry Members had contacted us to find out specific names of those involved in the BMO case. It's important to remember that these members have been named in the civil claim and that there have been no findings to date.

In closing, I'd like to remind you that the renewal period is fast approaching. Your pre-planning ensures a smooth renewal process for everyone.

I hope you enjoy the May Regulator. As always, we look forward to your feedback, comments and suggestions regarding this publication.

BMO Mortgage Fraud Claim – RECA Formal Position Statement

Due to the recent Bank of Montreal Mortgage Fraud case, RECA is issuing this formal position statement to all Industry Members.

Formal Position Statement

The Real Estate Council of Alberta (RECA) sets and enforces standards of conduct for industry members in the real estate brokerage, mortgage brokerage and real estate appraisal industry.

RECA supports BMO's legal action and the initiation of a criminal investigation by the police. Where it can be established criminal activity has occurred, RECA encourages law enforcement agencies to pursue criminal charges against the perpetrators of mortgage fraud.

We are reviewing the BMO statement of claim as it relates to our industry. While RECA does not regulate criminal matters, we will review the conduct of industry members named in the law

suit as it relates to our own legislation – the *Real Estate Act* of Alberta. RECA will follow due process in carrying out its investigation and enforcement responsibilities.

In light of the scale of this problem across Canada, and to protect consumer interests, RECA encourages all levels of government to provide additional funding to police agencies to facilitate effective mortgage fraud investigations. RECA also encourages financial institutions to institute real estate appraisals conducted by qualified, licenced appraisers, as part of the mortgage transaction.

RECA Strategies to Address the Issue of Mortgage Fraud within the Industry

RECA has been proactive in dealing with this issue for more than a decade. RECA's strategies and initiatives related to the issue of mortgage fraud within the industry include the following:

- In 2000, RECA began an investigative process that brought a number of mortgage fraud schemes to light and identified the involvement by industry members. Data gathered by RECA over a year's time indicated there was a significant problem.
- RECA approached the provincial government in 2001 resulting in the assignment of this issue to the Alberta Government's Law of Property Expert Panel.
- This Panel suggested nine strategies to combat mortgage fraud and these recommendations gave rise to the formation of the Alberta Government's Advisory Committee on Mortgage Fraud.
- In 2002, RECA commenced over 228 investigations. This amount of work facilitated the development of a more comprehensive enforcement strategy within RECA.
- In 2003, RECA worked with the Alberta Real Estate Association (AREA) to develop a mandatory *Mortgage Fraud Awareness* course. Industry members in the real estate brokerage, property management, mortgage brokerage and real estate appraisal sectors received mandatory education in this area.
- In September 2004, the *Real Estate Act* Rules specific to mortgage brokers were changed to require brokerages to disclose to lenders whether the information supplied has been verified.
- RECA published *Mortgage Fraud Red Flags* to assist industry members in the identification of mortgage fraud. This information bulletin outlined indicators often present in fraudulent transactions. It has been distributed at brokerage office meetings and presentations, posted on www.reca.ca, and reinforced in the mandatory course, the compliance audit program, and articles in the *Regulator*.
- In 2005-2007 RECA initiated, coordinated and chaired an Industry Mortgage Fraud Task Group to enhance communication among industry stakeholders and develop strategies to reduce mortgage fraud. This industry group included representatives from industry and professional regulators i.e. RECA and Law Society of Alberta, police, lenders, mortgage brokers, appraisers, Realtors, Teranet and mortgage insurers.
- RECA prepared a *How to Investigate a Mortgage Fraud* seminar that was attended by all Calgary Police Service commercial crime detectives in 2005.
- RECA produced a 3-part article on Mortgage Fraud in a 2005 *Regulator* edition.

- The information gathered by RECA and its experience with the issue was presented to the Alberta Government. This was instrumental in persuading the Alberta Government to make changes to the *Real Estate Act of Alberta* in 2006. The mandate of RECA was amended to include: “to protect against, investigate, detect and suppress mortgage fraud as it relates to the industry’. Other changes to the *Act* improved RECA’s capability to conduct effective investigations and deal with the misconduct of industry members.
- RECA has dedicated investigators and resources to combat mortgage fraud and has developed strategies to accelerate the gathering of information, confront the industry member and involve the broker.
- RECA has notified law enforcement agencies of cases where RECA industry members are involved in mortgage fraud. Copies of the investigation file are available to police to initiate criminal investigations. RECA encourages the police to pursue criminal prosecutions in such cases.
- RECA investigators have met on a regular basis with bank security representatives and law enforcement officials to discuss mortgage fraud and related issues.
- RECA has made presentations on the topic of mortgage fraud to real estate brokerage offices, industry associations, boards and law enforcement officials.
- RECA participates in the ARELLO database to share information about licensees with other regulatory jurisdictions.

In conjunction with Alberta Government Services, RECA has created a Tip Sheet to alert the public to ways they might be inadvertently drawn into mortgage fraud schemes. The publication discusses the role of straw buyers, flipping property, the low down on down payments, and other red flags.

Mortgage Fraud Red Flags

Red flags indicate the possibility of a concern.

The following red flags are indicators often present in fraudulent transactions. The existence of red flags in a transaction does not guarantee a fraud; however, should arouse suspicion.

Many red flags can be reliable indicators of a suspicious transaction.

Red flags should be seriously considered if more than two or three appear in a transaction. For example, you are involved in a transaction where the buyer is a numbered company, the deposit is to be held by the buyer's lawyer, high ratio financing is required and the contract is unconditional. Considered individually, these factors appear innocent. However, when found in correlation they seem suspicious and this transaction may require further scrutiny to determine if it is legitimate.

Red Flags

Red flags associated with the true identity of the parties to the trade:

- client will not provide photo ID, when requested

- transaction involves a relative of the associate
- existence of other offers, subject to financing, that collapsed
- parties "undisclosed," "care of listing brokerage," or "nominee"
- land title records do not match with seller information
- buyer is a numbered company seeking a high ratio mortgage
- corporate search shows the associate or the associate's spouse or family member a director
- buyers or sellers are not personally or professionally related; e.g. "R. Smith and Michael Jones"
- buyers' or sellers' names are only partially indicated; e.g. last name appears without a first name ("Smith"), or the first name is indicated by only an initial ("R. Smith")
- information about buyer's income doesn't match industry standards
- buyer purchases property far from place of employment for no apparent reason
- buyer purchases investment property, yet does not own a principal residence
- buyer is purchasing many properties with high ratio mortgages, using different names or variations of his name
- parties have no formal office; communication is by cell phone, email and fax; meetings are scheduled at restaurants
- source of deposit cheques is other than buyer
- deposit is provided in cash or by money order
- buyer or seller is represented by a person acting on a power of attorney

Red flags associated with the property value:

- no CMA or appraisal available, or if available, does not seem applicable
- VTB and/or other forms of equity arrangements
- sweat equity arrangements as opposed to a reduced price
- vendor take back or sweat equity arrangements not referenced in the purchase contract
- chattels are used as deposit or as partial payment
- renovation value included in the sale price
- property has illegal/nonconforming suites
- property is a combination of residential and commercial components that are not reflected in the financing arrangements
- commercial property has residential type financing or loan-to-values ratios
- listed property is owned by a corporation but has mortgage in excess of 80% of property value
- purchase price is same as, or higher than list price
- property list price or purchase price of property is unusual for the neighbourhood
- appraisals were provided by the parties to the trade

Red flags indicating unusual transactions:

- quick succession of trades on one property
- seller in the "business" of selling real estate and buys and sells many properties
- use of "Seller's Rights Reserved" on listings
- uncommon commission arrangements, unusual adjustment to commissions, flat fees, low fees
- listing associate's instructions refer inquiries to unlicensed person for showings or information
- MLS information is unusual or inconsistent with the transaction; e.g. listing is removed from MLS prior to sale, sale is not reported, listing reappears at higher price, listing associate on MLS is different from the purchase contract, MLS history doesn't support pricing, etc.
- one lawyer represents both parties to the transaction
- condition allowing buyer to show unit to prospective tenants; note: most high ratio mortgages require owner occupancy
- all or many units of building are sold at the same time with coinciding possession dates
- immediate possession dates
- firm transaction with none of the usual conditions; in particular, a transaction requiring high ratio financing, yet is unconditional
- no counter offer
- contract indicates unusual statement; i.e. "this is a private sale"
- names appear to have been added to or deleted from the contract
- not all parties named on the contract have signed it
- purchase contract indicates both parties signed at the same time
- no buyer's or seller's associate information provided for delivery of documents
- schedules or addendums exist but are not indicated in the contract, or, schedules or addendums do not reference the originating contract
- deposits not held at brokerage; particularly applies when brokerage is not even provided with a photocopy of the deposit cheque

Red flags associated with industry member behavior:

- brokerage is in dual agency - either two associates of the brokerage represent each of the parties or more often, one associate represents both
- associate's lifestyle is not consistent with income received through the brokerage
- associate representative section of the contract not filled out
- associate tends to use same lawyer on most transactions
- associate primarily does transactions with only certain other associates
- associate tends always to refer clients to the same mortgage broker
- signatures are witnessed by someone other than the real estate associates
- associate buys and sells his/her own properties regularly
- associate lends down payment to client

- number of listings or sales an associate has posted on the MLS system does not correspond to brokerage records (possible fraudulent broker load situations)
- associate regularly advertises properties as "low down," "assumable," "no down," "no qualifying," "quick possession," etc
- associate holds both real estate and mortgage associate licence

Red flags associated with brokerage operations:

- broker has no fraud prevention or detection policies
- broker does not review transactions
- conveyancing staff not trained to recognize suspicious transactions
- advertisements are not approved prior to publication and/or are not reviewed by broker
- brokerage does not check background of prospective agent employees

Reduced Licensing and Registration Fees

Effective July 1, 2010 through to September 30, 2010 the licensing and registration fee for each class of authorization will be reduced to \$175. The REIX premium, if applicable, will also be reduced to \$100. This fee reduction applies to new applicants and those applicants who have not been registered in the current licensing year. The Assurance Fund levy does not change.

Application fee amounts applicable to licence renewals for the 2010-2011 licensing year are subject to approval by the Real Estate Council of Alberta and will be announced in early August. To view the current Fee Schedule and Payment Form, click [here](#).

Join RECA via Social Media

It's now easier than ever to communicate with your regulator thanks to the launch of RECA Social Media. Follow us on Twitter, Facebook and even subscribe us on YouTube.

Just go to the Industry Members homepage and click on one of the three Social Media icons in the top-right.

REAL ESTATE COUNCIL OF ALBERTA

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The Real Estate Council of Alberta (RECA)

is an independent, non-government agency, responsible for regulating industry professionals in the real estate, mortgage broker, and real estate appraisal industries under Alberta's Real Estate Act.

[Learn more](#)

Featured Resources:

- [Online Licensing](#)
- [Search for an Industry Member](#)
- [Information Bulletins](#)
- [Industry Member Tools](#)

News & Events

Kassem Jarrah - Real Estate Associate Licence Suspended

Posted March 5, 2010

[Learn more](#)

Industry Practice Tip

Disclose Cost of Services: Industry members must disclose to their clients, at the earliest opportunity, how they will be paid for their services.

[Learn more](#)

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RECA communications staff will be tweeting regularly and placing useful links and information on our Facebook page. New videos will be posted on the RECA YouTube channel.

These new tools are meant to be informational and educational, and industry members are encouraged to comment, discuss and ask questions on our social media updates. RECA staff will be moderating the conversation and may be able to answer questions industry members may be raising with their comments.

Better communications between RECA and the industries it regulates leads to greater transparency, greater trust and more effective self-regulation.

So join RECA Social Media today.

Advertising as an Industry Member – Social Media

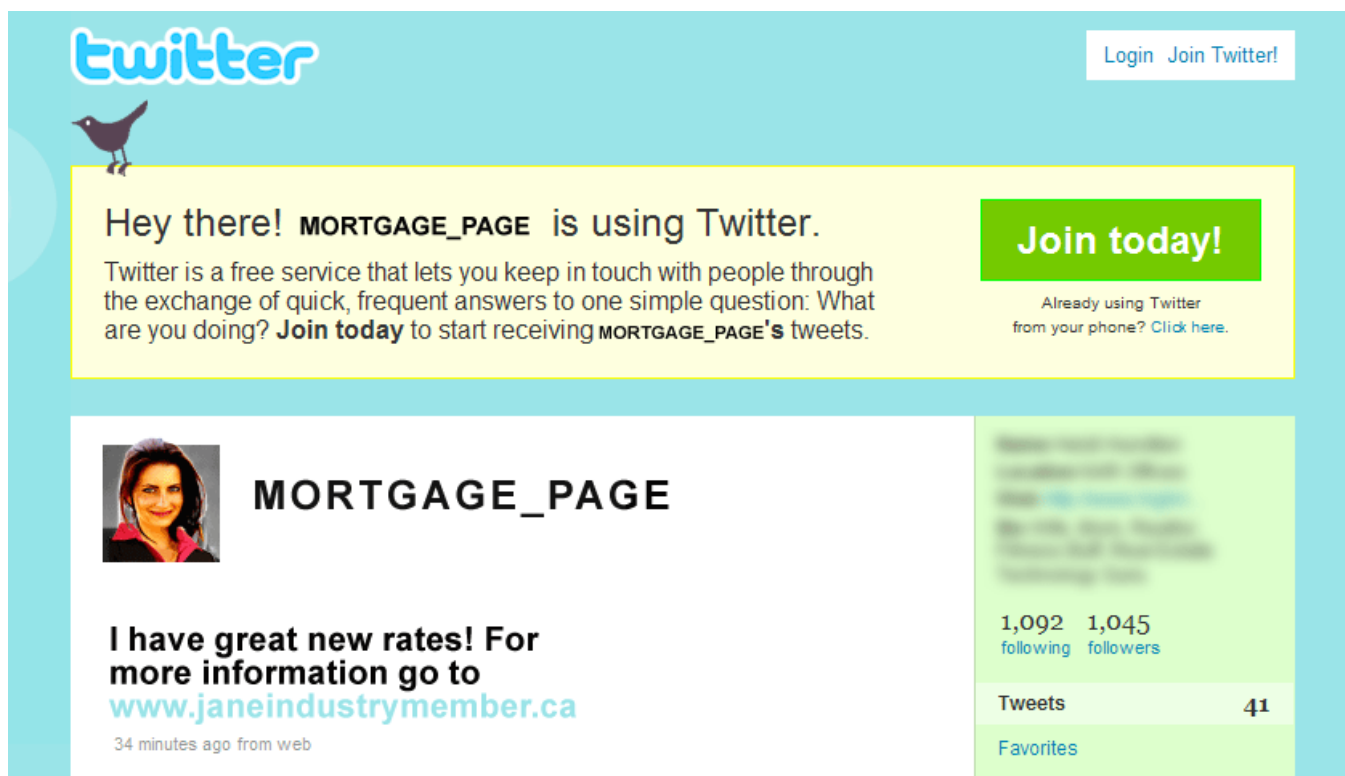
Advertising as an Industry Member is a new feature in the Regulator outlining certain sections of the RECA Advertising Guidelines. Every brokerage in Alberta should have received multiple copies of the Advertising Guidelines in late 2009. The guidelines are also available on the RECA website on the Industry Tools page. In this issue we will focus on social media advertising.

Social Media

Social Media sites like Facebook, YouTube and Twitter are becoming increasingly popular advertising tools with industry members. As with industry member websites, all social media profiles and pages used to trade in real estate and deal in mortgages must clearly indicate the industry member's full name and brokerage name.

On Twitter, there are a limited number of characters and few graphics. Still, if an industry member wishes to use Twitter to trade in real estate or deal in mortgages, they must meet advertising standards set out in the *Real Estate Act* Rules. This includes clearly indicating the brokerage name. However, if an industry member uses a Twitter message (a "Tweet") to direct the public to an advertisement located elsewhere clearly indicating brokerage information (full disclosure), then they don't need to include their brokerage information in the Tweet.

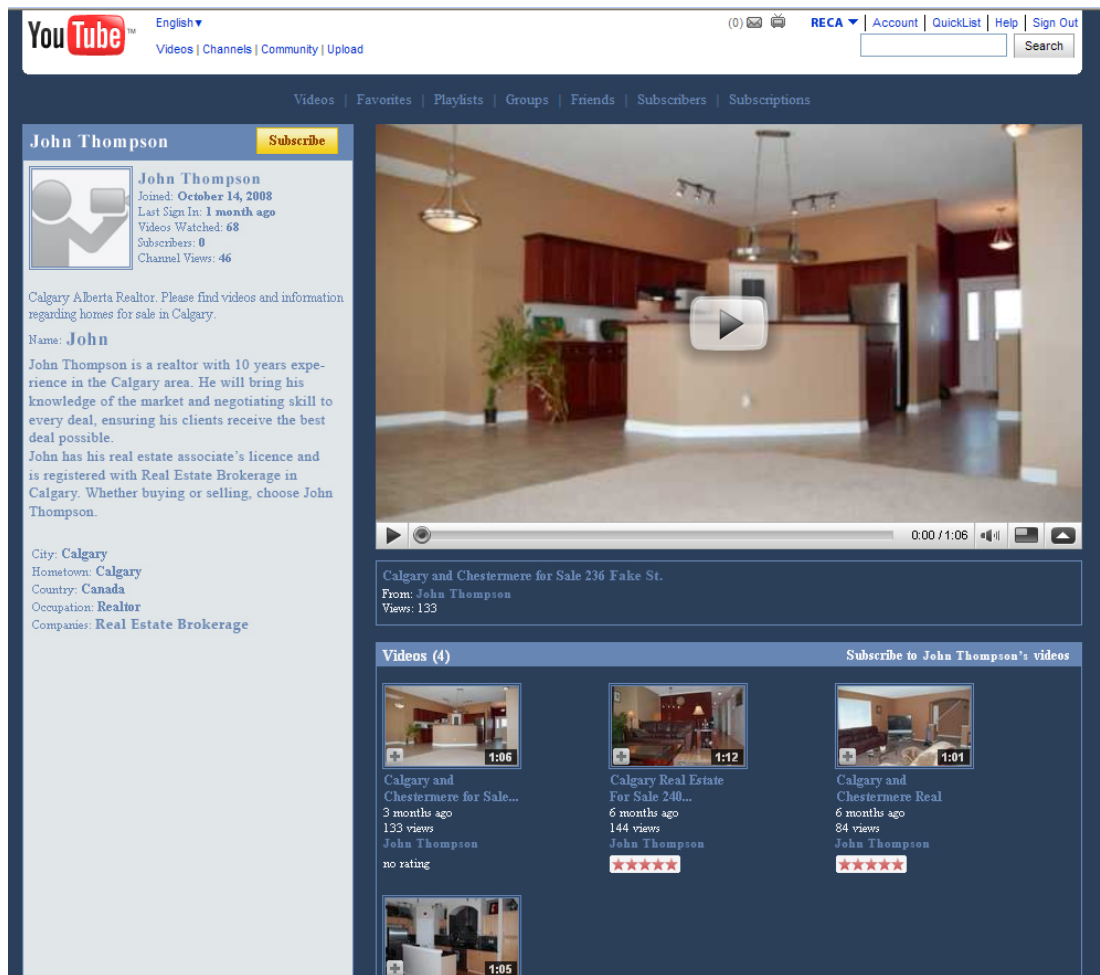
Below is an example of a Tweet that serves only to direct the public:



The image is a screenshot of a Twitter interface. At the top left is the Twitter logo and a small bird icon. At the top right are links for "Login" and "Join Twitter!". Below this is a yellow banner with the text: "Hey there! MORTGAGE_PAGE is using Twitter." followed by a description of Twitter and a "Join today!" button. Below the banner is a tweet from the user "MORTGAGE_PAGE". The tweet includes a profile picture of a woman, the text "I have great new rates! For more information go to www.janeindustry member.ca", and a timestamp "34 minutes ago from web". To the right of the tweet is a sidebar showing the user's statistics: "1,092 following" and "1,045 followers", and a list of "Tweets" with a count of "41".

As long as the webpage www.janeindustrymember.ca contains all of the necessary disclosures, the Tweet itself, in this case, would not require the industry member's brokerage information.

Sites like YouTube have rigid design parameters, and clearly indicating your brokerage can prove difficult. It is recommended that you include your brokerage name in the channel title prominently displayed at the top of the channel page.



This real estate associate created a YouTube channel to display his video listings. Although he identifies himself as a licensed associate registered with Real Estate Brokerage in the description of the channel, it can be easily missed because it is not clearly indicated.

Personal social media profiles outside of your work as an industry member do not need to contain your brokerage name, as long as you aren't using the site to trade in real estate or deal in mortgages. Remember, any mention of your services as an industry member could be considered a "trade" or a "deal," and that would require full disclosure of your brokerage name.

Appraiser and Property Management Council Member Recommendation Update

RECA would like to thank those industry members who recommended individuals for the real estate appraiser and property management positions on Council.

The recommendation period is now closed, and Council will begin interviewing those individuals who were recommended.

The process for recommending and appointing the real estate appraisal and property management representatives to Council is outlined in Part 3 of the [Ministerial Regulations of the Real Estate Act](#).

The two members chosen will begin their three year term on Council in November 2010.

Licence Suspensions

Brigitte Graf - Real Estate Broker Licence Suspended

On April 19, 2010, as a result of information received, pursuant to section 38(i) and section 35(2)(d) of the Real Estate Act Rules, the Real Estate Council of Alberta suspended the licence of Brigitte Graf as a real estate broker.

Peter Francis Dean Palmiere – Real Estate Associate Licence Suspended

On May 25, 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 Peter Francis Dean Palmiere, real estate associate registered with Calgary Independent Realty Ltd. o/a CIR Realty in Calgary, Alberta. As a result of this suspension, Peter Francis Dean Palmiere may not trade in real estate in Alberta at this time.

Case Summaries

Audit administrative penalties

April 2010

NNP Realty

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. Breach of s.92(1) of the *Real Estate Act* Rules.

\$1,500

Kandola Real Estate Inc

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. Breach of s.92(1) of the *Real Estate Act* Rules.

\$1,500

Centum Sterling Mortgages 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. Breach of s.92(1) of the *Real Estate Act* Rules.

\$1,500

P.C.F. Realty Inc

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. Breach of s.92(1) of the *Real Estate Act* Rules.

\$1,500

All City Realty 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. Breach of s.92(1) of the *Real Estate Act* Rules.

\$1,500

Bedaux Real Estate Inc

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. Breach of s.92(1) of the *Real Estate Act* Rules.

\$1,500

Countryside Realty 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. Breach of s.91(4) of the *Real Estate Act* Rules.

\$1,500

Boxshaw Four Realty Inc o/a Re/Max Boxshaw Four Realty

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. Breach of s.91(4) of the *Real Estate Act* Rules.

\$1,500

MacDonald Realty SW Edmonton

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. Breach of s.91(4) of the *Real Estate Act* Rules.

\$1,500

Administrative Penalties

February 2010

Michael McNeil

Broker with Esquire Realty Inc o/a Esquire Management Group

- Failed to disclose in writing to his clients, at the earliest practical opportunity, how he would be paid for his services [s. 41(c) of the *Real Estate Act* Rules]
- Failure to deliver to the clients a true copy of a service agreement and of any amendment or addition, immediately upon its signature [s.43(3) of the *Real Estate Act* Rules]
- Failure to follow rules of written service agreement [s.43(2) of the *Real Estate Act* Rules]
- Mr. McNeil and clients agreed to a 4% commission. He left the original contract with the sellers and took a copy with him. The copy had the sellers' signatures, but it was not witnessed because of the uncertainty of some issues. The sellers' initials were on the section that indicates they had received a copy of the contract. Mr. McNeil changed the 5% commission to 4% and left the contract at the sellers' apartment when no one was home. Changes to the contract were not initialed. The sellers' indicate they thought the commission was 3% and they did not receive a copy of the contract until after the sale. They requested the original contract during sale negotiations but did not receive one.
- 3 Administrative Penalties at \$1500; \$1000 and \$1000

Thomas W. McNabb, employee and officer of Thomas W. McNabb & Associates (Financial Consultants) Inc.

- Failure to be authorized as a mortgage broker while advertising or in any way holding itself out as a mortgage broker [s.17(d) of the *Real Estate Act*]
- Thomas W. McNabb & Associates (Financial Consultants) Inc. held itself out to be a mortgage broker. In their client agreements Thomas W. McNabb & Associates (Financial Consultants) Inc. is authorized to contact, negotiate and otherwise deal with mortgage lenders on behalf of the client.
- \$5000

April 2010

Jerry Dubuc

- Failure to be authorized as an appraiser [s.17(c) and/or (d) of the *Real Estate Act*]
- Mr. Dubuc was contacted to provide an appraisal on a property. He did a walkthrough of the property and gathered information for the purpose of estimating the defined value of a residential property. Mr. Dubuc accepted payment for the purpose of estimating the defined value of a residential property when he was not authorized to do so.
- \$1,000

May 2010

Randell Wyton

Appraiser with Essex Appraisal Group Ltd.

- Failure to be authorized as an appraiser [s.17(c) of the *Real Estate Act*]
- Mr. Wyton was a licensed real estate appraiser with RECA from Oct. 1, 2004 to Sept. 30, 2006. On Oct.1, 2006 RECA had not received a renewal application from Mr. Wyton. RECA received a renewal application for Mr. Wyton in October 2008 and Mr. Wyton became authorized as an appraiser on October 16, 2008. Between Oct.1, 2006 and Oct 16, 2008 Mr. Wyton acted as a real estate appraiser conducting 254 or more appraisals.
- \$4,000

Kenneth Shebib

Associate Broker, Colliers Macaulay Nicolls Inc. o/a Colliers International

- Industry members must not engage in conduct that undermines public confidence in the industry, harms the integrity of the industry or brings the industry into disrepute [s.42(g) of the *Real Estate Act Rules*]
- Mr. Shebib was in a lease agreement for a business he owned. When he decided to sell his business, he allowed a potential purchaser access to the premises for the purpose of beginning renovations. Mr. Shebib was the listing associate for the listing of his business. Mr. Shebib failed to get written agreement, as per the lease agreement, from the landlord before the renovations began; for the assignment of lease from his business to the potential purchaser and for the improvements, alterations, paint and or decoration of the space that were done by the potential purchaser.
- \$1,500

Letters of Reprimand

April – May 2010

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

- 3 breaches 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*]
- 2 breaches of immediately notifying, in writing, the Executive Director when proceedings pursuant to the criminal code are commenced against the industry member [s.40(1)(g) of the *Real Estate Act Rules*]
- 1 breach of immediately notifying, in writing the Executive Director when the industry member is convicted of any criminal offence or any other offence under the law of any country, province or state, excluding provincial or municipal highway traffic offences resulting in only monetary fines and/or demerit points [s.40(1)(h) of the *Real Estate Act Rules*]
- 7 breaches of providing competent service [s.41(b) of the *Real Estate Act Rules*]
- 1 breach of fulfilling fiduciary obligations to clients [s.41(d) of the *Real Estate Act Rules*]
- 2 breaches 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*]
- 1 breach of industry members must practice in strict accordance with the Act, Regulation, Bylaws and any other laws that govern trading in real estate, mortgage transactions or appraisals in Alberta [s.41(g) of the *Real Estate Act Rules*]
- 4 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 a real estate associate broker and associate must keep the broker informed of the activities being performed by the associate broker or associate on behalf of the brokerage [s.53(d) the *Real Estate Act Rules*]
- 1 breach of a real estate broker, associate broker or associate, as the case may be, must not trade in real estate on behalf of a brokerage other than the brokerage with which he is registered [s.54(1)(a) of the *Real Estate Act Rules*]
- 1 breach of a real estate broker, associate broker or associate, as the case may be, must not accept a commission, referral fee or other remuneration, directly or indirectly, for a trade in real estate except through the brokerage with which he is registered [s.54(1)(c) of the *Real Estate Act Rules*]
- 1 breach of mortgage brokerage must disclose in writing the nature of its relationship with the lender [s.65(c)(ii)]
- 1 breach of a mortgage broker must ensure proper management and control of documents or records related to licensing, registrations and related regulatory requirements [s.67(1)(i) of the *Real Estate Act Rules*]

- 1 breach of a mortgage broker is accountable for the conduct of an associate or employee, as the case may be, if the broker failed to notify the executive director upon becoming aware of misconduct relating to fraud, deception, theft or unlawful activities on the part of the associate or employee [s.67(3)(g) of the *Real Estate Act Rules*]
- 2 breaches of an industry member dealing in mortgages on the industry member's own behalf, either directly or indirectly, must disclose in writing to the borrower, the lender or vendor or purchaser of the mortgage as the case may be any interest, direct or indirect, that the industry member has in the transaction [s.75(a) of the *Real Estate Act Rules*]
- 1 breach of for the purposes of reporting under section 90, a brokerage that has not received or held money on the account of others in the course of its business shall file with the Council a Declaration Respecting Absence of Trust Transactions in a form and containing information required by the executive director not later than 3 months after the end of the brokerage's fiscal year [s.92(1) of the *Real Estate Act Rules*]
- 1 breach of a brokerage's accounting shall be filed with the Council not later than 3 months after the end of the brokerage's fiscal year and shall cover the fiscal year or, where the brokerage did not carry on business for the entire fiscal year, that part of the fiscal year for which the brokerage carried on business[s.91(4) of the *Real Estate Act Rules*]
- 1 breach of any money in a brokerage's trust account which represents a commission or remuneration that has been earned and is no longer required to be held in trust shall be paid in accordance with the following rules: where a client fails to pay a commission or other remuneration in full when due, which is to be shared between two or more brokerages, the amount actually received shall be shared between them as they may agree and, in the absence of an agreement, the brokerage holding the commission may not withdraw any part into its general account until the other brokerage or brokerages have been paid in full [s.97(3)(c) of the *Real Estate Act Rules*]
- 1 breach of trading without appropriate authorization [s.17(d) of the *Real Estate Act*]
- 1 breach of an industry member who is required by the rules to keep and operate a trust account shall disburse money received or held in trust in respect of a dealing or trade in the business of the industry member only in accordance with the rules and with the terms of the trust governing the use of that money [s.25(1)(d) of the *Real Estate Act*]

CONSENT AGREEMENT

Jelle Braaksma

Then real estate broker registered Calgary Independent Realty o/a CIR and currently not registered

Issue:

- Marketing a property without the seller's knowledge or consent [s.4(b) of the Code of Conduct as it then was]

Facts:

- Mr. Braaksma did not verify that a property was taken off the MLS listing service after he had discovered the listing was not accurate and terminated the listing.

Result:

By way of a Consent Agreement that was ratified by a Hearing Panel, Jelle Braaksma paid a fine of \$2,000 and costs of \$500.

Meno Lopes

Then real estate broker registered with Elfa Real Estate Inc. and now real estate associate broker registered with Seventh Level Management Ltd. o/a Keller Williams Realty South

Issue:

- Failed to keep records and books of account of his dealings and trades and accounting records for the required 3 years after they came into existence [s.25(9) of the *Real Estate Act*]
- Failed to ensure that the business of the brokerage was carried out competently [s.21(1)(e) of the *Real Estate Act Rules*]

Facts:

- Mr. Lopes abandoned all the records for his brokerage when he moved into an apartment and left the boxes containing the brokerage records at his estranged wife's house and did not return to retrieve the records after repeated requests from his estranged wife.
- As the broker of Elfa Real Estate, Mr. Lopes did not immediately or otherwise notify the executive director in writing or otherwise that the brokerage, Elfa Real Estate, was ceasing to carry on the business of a brokerage.
- As the broker of Elfa Real Estate, Mr. Lopes did not provide the executive director with an accountant's report on the status of the brokerage's trust account within 30 days of ceasing to carry on business.

Result:

By way of a Consent Agreement that was ratified by a Hearing Panel, Meno Lopes paid fines of \$3,500, costs of \$1000 and as a condition of his authorization to trade in real estate will complete an educational requirement.

Education Corner

Mortgage Associates Program

RECA is pleased to announce the launch of the new Mortgage Associates Program (MAP) on August 1, 2010.

The new MAP is the pre-licensing course for all persons interested in becoming a licenced mortgage associate in Alberta. The program will contain two sections. The first deals with the regulatory aspects of Alberta's mortgage brokerage industry and was developed by RECA. The second focuses on the day-to-day business practices of a working mortgage brokerage, and was developed by the Alberta Mortgage Brokers Association (AMBA).

The course will be available online at www.reca.ca or in a classroom setting.

RECA has been working this past year with AMBA to develop the new MAP course. We would like to thank them for their hard work and expertise. Stay tuned for the official MAP launch announcement.

Taking M-REP Course Earns AMP Credits!

The Canadian Association of Accredited Mortgage Professionals (CAAMP) has awarded five (5) continuing education credits for the Mortgage Broker Update 2009-2010 course. This is great news for those who hold the Accredited Mortgage Professional (AMP) designation.

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 May 26, 2010.

Real Estate Update 2009-2010

- There are 1,760 online completions plus 729 currently enrolled online, totaling 2,489.
- There are 1,853 classroom completions.
- All course completions, plus current online enrollments, total 3,613 industry members.
- This represents approximately 30% of individual real estate industry members.

Mortgage Broker Update 2009-2010

- We have 440 online completions, plus 427 in progress online, for a total of 867.
- This represents approximately 32% 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

Legal Corner

The Plaintiff, Mr. T a licensed mortgage broker with 913031 Alberta Ltd. aka Real Mortgage Solutions initiated proceedings against Defendant sellers, Winalta Inc., for \$25,000 in unpaid commission, unjust enrichment or breach of contract.

The Defendants, Winalta Homes Inc., was selling a land development property in Fort Saskatchewan with Mr. L as the real estate agent representing Winalta Inc in the sale.

During a meeting at Winalta's offices, Mr. T. learns of the intended Fort Saskatchewan sale. He introduces one of his clients to Mr. L, the real estate agent representing Winalta, and his client eventually purchases the property. Shortly after learning of the sale, Mr. T requests commission based on his role in the transaction.

Case Particulars

The Plaintiff, a corporation of which Mr. T was the principal, became involved with Winalta's operations in an undefined role. He had no previous arrangement, but had received some commissions on an ad hoc basis on specific mortgage transactions while operating independently as a mortgage broker. Throughout his evidence, Mr. T did not differentiate between himself personally and the Plaintiff, his corporation; however, it was clear Mr. T was acting solely in his capacity as the agent of the Plaintiff.

At an April 2009 meeting in Winalta's office, in which Mr. T and Mr. L were present, the selling of a 2.2 million dollar partially built development in Fort Saskatchewan was discussed. During this meeting Mr. T mentioned that one of his prime investors, Mr. C, might be interested in the property. It is important to note that Mr. T was not requested by Winalta to locate a purchaser for the Fort Saskatchewan property. Although he had previously acted as a broker for mortgage transactions for Winalta, he had never acted as a broker in connection with real estate sales.

On April 24 Mr. T, along with his prime investor Mr. C and Mr. L met at Humpty's Restaurant to introduce Mr. C and to discuss the Fort Saskatchewan land sale. During this meeting Mr. T explained to Mr. L his arrangement with Winalta regarding a 2% commission fee. Mr. L listened but did not respond to Mr. T regarding the commission matter.

When the sale of the land goes through with Mr. C as the buyer, Mr. T sends Winalta a company invoice for \$33,000.00 (2% of the purchase price) for "locate cash investor" fees. Mr. T's contended that he deserved a commission from Winalta due to the Humpty's Restaurant introduction meeting, and the idea that he would lose a source of investment due to Mr. C's purchase of the Fort Saskatchewan land.

Upon receiving Mr. T's invoice, Winalta's President immediately emailed Mr. T asking for the basis of the invoice. Mr. T explained the invoice represented the deal he had made with Mr. L. Upon further discussion, Mr. T outlined the alleged agreement, while Mr. L denied any agreement ever existed. Winalta then sought legal advice and denied liability.

Judges rationale:

Winalta wanted to sell its land and needed someone willing and able to buy it. Winalta benefited from the introduction of Mr.C and his purchase of the land. Further, it appears clear that the Plaintiff's introduction of Mr.C was an effective cause, or materially contributed to the sale of the Defendant's land. The Plaintiff said he suffered a loss, given he received no compensation for the service provided. This is problematic given that without a contract with the Defendant, the Plaintiff had no entitlement to compensation. The Defendant had done nothing to lead the Plaintiff to believe, or have any reasonable expectation, that the he would receive compensation.

Mr. L testified he had taken a real estate course five years prior and understood that on a sale of land no commission should be paid except to a licensed real estate broker. He further stated that in April 2009, he didn't know whether Mr. T, who he knew was not a licensed real estate broker, was an employee of Winalta. Mr. C, testifying as a witness for Mr. T, also stated he knew nothing of any commission arrangement between the Plaintiff and Winalta.

During testimony, Mr. T frequently referred to the sale of the Fort Saskatchewan lands as the "divesting" of an "investment" by Winalta, and an "investment" by Mr. C, although the evidence was clear that it was simply a sale.

Court Findings

Where evidence differed between Mr. T and Mr. L the judge accepted Mr. L's evidence. It was noted that Mr. T demonstrated a preparedness to tailor his evidence to his advantage and frequently sought to categorize the purchase of land as an investment, rather than a purchase. The subject transaction was an investment in the sense that the acquisition of any asset may be an investment, but it was a purchase not a loan on the security of land.

On the basis of Mr. L's evidence, either there was a misunderstanding or Mr. T's evidence must be rejected; in either event, there was no contract, express or implied, between the Plaintiff and Winalta for a commission or fee of any kind in connection with the subject sale. Mr. L's silence was not, and could not reasonably be construed to be, an affirmation by Mr. L or vicariously by Winalta, of a fee agreement with Winalta.

The judge also found it improbable that an experienced mortgage broker would fail to bring an amount of this size to the attention of the person out of whose pocket he expected his fee to be paid. The Plaintiff knew and had ready contact with the president and other senior people in Winalta. It would have been a simple thing for Mr. T to ensure his arrangement was acceptable to both parties. Further, any person experienced in the real estate industry, including the brokering of mortgage loans, would not likely rely on word of mouth arrangements.

The judge found the Plaintiff's claim for commission failed by virtue of the provisions of the *Act*. However, before considering the effect of the *Act*, the judge considered whether the Plaintiff's claim would succeed in absence of the *Act*.

The Judges rationale under contract law was that Winalta wanted to sell its land and needed someone willing and able to buy it. Winalta benefited from the introduction of Mr. C and his purchase of the land. It was clear that the Plaintiff's introduction of Mr. C was an effective cause,

or materially contributed to the sale of the defendant's land. The plaintiff claimed it suffered a loss as it had received no compensation for the service it provided. The judge saw this as problematic given that the Plaintiff had no entitlement to compensation. They had no contract with the Defendant nor had the Defendants done anything to lead the Plaintiff to believe, or have any reasonable expectation, that the Plaintiff would receive compensation.

The Judge's decision stated that in the absence of a claim under contract or for unjust enrichment, the Plaintiff's claim must fail. He went on to explain that there is another basis in which he would be obliged to dismiss this action in any event. The *Act* itself prevents a claim for commission by a person not authorized under the *Act*. Under the *Act* the "real estate broker industry" and the "mortgage broker industry" are clearly separate and distinct designations, and the Plaintiff did not, and does not, have appropriate authorization to trade in real estate as a real estate broker (section 17), or to bring any action (section 21.1), for a commission or for other remuneration for services rendered in connection with a transaction, in the business of a real estate broker.

In a later written submission filed after the hearing, the Plaintiff took the position that the *Act* didn't apply to his claim under the exemption in section 2(1)(c)(iii) of the *Act*, as he was acting as an employee for Winalta at the time they were selling the Fort Saskatchewan land. Exemption 2(1)(c)(iii) states that owners of, or owners of substantial interests in real estate and the officials and employees of such owners are not in contravention of the *Act* by "trading" in their own, or their employer's, property. The judge stated it was clear Mr. T was an independent mortgage broker corporation, not an employee of Winalta (in the traditional master-servant sense, in section 2) at the time of selling of the land, therefore he dismissed the exemption claim.

In the same post-hearing submission, the Plaintiff also declared that the sale of the Winalta land was not a "trade" under the *Act*, suggesting it was "more so factually similar to a Mortgage Transaction". The judge said this argument was "a specious bit of utter nonsense", as a sale of real estate is clearly a "trade" under the *Act*.

In closing, the judge stated that under the *Act*, a contract for a commission or the earning of a commission by an unlicensed person was expressly prohibited. The plain words of the Real Estate *Act* expressly and clearly prohibit the charging or collecting or the bringing of an action "for a commission or for other remuneration for services rendered in connection with a transaction" are, of themselves, sufficiently wide enough to prohibit not only a contractual claim, but also a claim based on restitution for unjust enrichment.

The Real Estate *Act* establishes the Real Estate Council of Alberta, whose purpose is to set and enforce standards of conduct... to promote the integrity of the industry... to protect against, investigate, detect and suppress mortgage fraud, and to protect consumers. The *Act* defines the businesses to which it applies and defines the roles of "mortgage broker", "real estate appraiser" and "real estate broker" and empowers the Council to make bylaws (section 11) and rules (section 12) for the regulation of those businesses.

Persons performing functions when unauthorized under the *Act* would undermine one of the primary objectives of the statute, which is to create the designated occupations, or professions of

real estate broker, mortgage broker and real estate appraiser and to limit the performance of the functions designated by the *Act* to each of those occupations to person authorized by the Council. The fulfillment of the purpose of the legislation must prevail over the common law policy of preventing unjust enrichment.

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

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